

A. I. R. PUBLICATION

**THE A. I. R. MANUAL**  
**UNREPEALED CENTRAL ACTS**  
( CIVIL AND CRIMINAL )

BY

V. V. CHITALEY, B.A., LL. B.,  
*Senior Advocate ( Federal Court ), Bombay*

AND

S. APPU RAO, B.A., B.L.  
*Advocate, High Court, Madras, Chief Editor, ' The All India Reporter*

*Authors of the Commentaries on the Court-fees and the  
Suits Valuation Acts, and the Indian Stamp Act  
and the Indian Digest, 1931-1946.)*

**VOLUME III**

**COURT-FEES ACT TO CRIMINAL P. C., S. 490.**



**PUBLISHERS**  
**THE ALL INDIA REPORTER LTD.**  
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Law stated in this Volume is as on 1st June 1947.

TO THE LEGAL PROFESSION  
IN GRATEFUL RECOGNITION OF  
THEIR WARM APPRECIATION AND SUPPORT

Printed by D. G. Ranade  
at the All India Reporter Press  
Nagpur.

## PREFACE TO THE THIRD VOLUME

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The object, plan and special features of this publication have been fully explained in the Preface to the first volume. As we think that it will be useful to reproduce here portions of the Preface dealing with these matters we make no apology for giving such portions again below :

“The aim of the present publication is to make available to the Bench and the Bar in a set of convenient volumes practically the entire statute law passed by the Central Legislature which is of general application to the whole of India. The acts are given in the alphabetical order of their titles. This has the advantage of enabling an Act to be referred to without having to remember the year and number of the Act — which is the difficulty one feels when referring to the volumes of the Government publication, ‘Unrepealed Central Acts’ in which the arrangement is according to the year and number of the Act. We also have not made any division into civil and criminal Acts as is sometimes done, as we felt that such a division is on the whole an inconvenience rather than an advantage to the profession. In numerous instances, sections of a penal nature are found in enactments which are mainly of a civil nature, e. g., the Stamp Act, Income-tax Act, Cantonments Act, etc. In such cases it will be highly inconvenient to omit, in the portion that may be allotted to the civil section, the sections of a penal nature and print them in the criminal section. If such a course is adopted, it will detract from the utility of both the portions of the publication. Again, there are Acts like the Evidence Act which will have to appear in both sections. It was, therefore, considered, on the whole, to be the better course to just give all the Acts in their alphabetical order without labelling them as civil or criminal Acts.

Care has been taken to incorporate all the amendments in the various Acts up to date. Even provincial amendments have been given as completely as possible. In the case of the Civil Procedure Code, local amendments by the various High Courts are given. Letters Patent of the different High Courts are also given and also the rules of the Federal Court and the Judicial Committee of the Privy Council.

Besides the above, we have also given the more important of the Acts of the British Parliament applicable to India, such as the Government of India Act, 1935.

We need hardly say that all the Acts have been carefully edited and annotated. Not only have all the amendments been incorporated but also notes have been added giving particulars as to the date and other matters relating to the amendments. Full and copious extracts from Select

Committee Reports, Statements of Objects and Reasons and Notes on Clauses have been given in appropriate places under each Act. Besides the above, each Act is preceded by a statement as to how the Act has been affected by subsequent legislation. Further, cognate Acts and provisions have been indicated under the respective enactments.

In addition to the above features, the case-law bearing on the different enactments has been given in the foot-notes under each section. We have taken care to see that the notes are full and it is hoped that the bulk of the relevant Indian case-law would be found summarised in the foot-notes. The notes have been divided into convenient headings of which a synopsis is given for each section. The matter under each heading is presented in a manner which is well adapted for easy and quick reference. It may also be mentioned that what may be treated as a special feature of A. I. R. publications, viz., the giving of the particular page of the report where the point occurs is also present in this publication.

There will be a consolidated subject index at the end of the last volume. This will practically be something more than a general subject index for the whole of the statute law which is of general application to India and the advantages of such an index to the profession are too obvious to require mention. It is also intended to give in the last volume the rules relating to interpretation of statutes."

V. V. C.

S. A. R.

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Pat. H. C. C. ... Patna High Court Cases.	Rang. L. R. ... Rangoon Law Reports.
Pat. L. Jour. ... Patna Law Journal.	R. R. ... Revised Reports (England).
Pat. L. Tim. ... Patna Law Times.	Sind L. R. ... Sind Law Reporter.
Pat. L. R. ... Patna Law Reporter.	Suth. W. R. ... Sutherland's Weekly Reporter.
Pat. L. W. ... Patna Law Weekly.	Times L. R. ... Times Law Reports (England).
Pat. W. N. ... Patna Weekly Notes.	U. P. L. R. ... United Provinces Law Reports.
Pun. L. R. ... Punjab Law Reporter.	Upp. Bur. Rul. ... Upper Burma Rulings.
Pun. Ro. ... Punjab Records.	Weir. ... Weir's Criminal Rulings.
Pun. W. R. ... Punjab Weekly Reporter.	W. R. (Eng.) ... Weekly Reporter (England).
Q. B. ... Law Reports, Queen's Bench (England).	
Rang. ... Indian Law Reports, Rangoon Series.	

*Other Abbreviations.*

Art. ... Article.	O. ... Order.
B. R. ... Board of Revenue.	P. ... Page.
Civ. ... Civil.	P. C. ... Privy Council.
C. A. ... Court of Appeal.	Pre. ... Preamble.
Cf. ... Compare.	Rev. ... Revenue.
Cl. ... Clause.	R. ... Rule.
Cr. ... Criminal.	R. S. C. ... Rules of Supreme Court.
D. B. ... Division Bench.	S. ... Section.
F. B. ... Full Bench.	S. B. ... Special Bench.
F. C. ... Federal Court.	S. C. R. ... Select Committee Report.
F. N. ... Foot-Note.	S. O. R. ... Statement of Objects and Reasons.
Jour. ... Journal.	U.P.B.R. ... United Provinces Board of Revenue.
L. P. ... Letters Patent.	
N. ... Note.	

*Note* :— The mark \* indicates that citation of a different case begins.





# A. I. R. MANUAL

## Unrepealed Central Acts

(Civil & Criminal)

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### Volume III

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(Act VII of 1870)

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## STATEMENT OF OBJECTS AND REASONS.

"The rates of Stamp fees leviable in Court and offices established beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, and in proceedings on the appellate side of such High Courts, were, as fixed by Act XXVI of 1867, to a great extent tentative.

The experience gained of their working during the two years in which they have been in force, seems to be conclusive as to their repressive effect on the general litigation of the country.

It is, therefore, thought expedient to make a general reduction in the rates now chargeable on the institution of civil suits, and to revert to the principle of maximum fee which obtained under the former law.

It is proposed also to reduce the valuation fixed by the existing law for the computation of the fee leviable on suits relating to land under temporary settlement or land exempt from the payment of revenue to the Government which is believed to be, at least relatively, excessive, as compared with the valuation of permanently settled land; and to provide for the valuation of suits relating to mere parcels of land, which, though forming part of estates under settlement, bear no specific allotment of any portion of the assessment of Government revenue on such estates, at the estimated selling price of such land, as was the rule in those cases under Act X of 1862.

The want of some fixed valuation applicable to certain classes of suits as for example, suits instituted between landlord and tenant to recover a right of occupancy or enforce ejectment, or suits for maintenance or for an annuity, the subject-matter of which, though not absolutely indeterminable, is certainly not susceptible of ready determination, has given rise to much uncertainty and variety in the procedure adopted by the several Courts in such cases; and the amendment of the existing law in this respect is felt to be urgently called for.

In deference to the strong objections entertained by the local authorities in certain Provinces to the retention of the fee imposed on the presentation of certain petitions in the Criminal Courts, it is proposed to reduce the amount of such fee from one rupee to eight annas.

The uniform exaction of a fee of eight annas in the case of all petitions addressed to a Revenue Officer or a Magistrate, works harshly in its application to such communications when presented by persons having dealings or transactions with the Government in relation to such transactions. Equitable considerations require that petitions of this kind should be excepted from the operation of the general rule, and the Bill makes suitable provision for such cases.

The *ad valorem* fee now chargeable on summary suits instituted under Act XVI of 1838 and the Bombay Act (V of 1864) is represented as working unsatisfactorily, and the substitution of a fixed rate is recommended.

It is to be observed that an award in such cases is liable to be set aside by a judgment passed in regard to the same matter in a regular suit; hence it appears more equitable to treat these summary suits as miscellaneous applications and to subject them to a similar fixed institution-fee.

As the bill provides for a considerable reduction of the fees heretofore chargeable on civil suits of small amount, it seems unnecessary to maintain the present distinction between the Courts of Cantonment Joint Magistrates and other Civil Courts in respect of the amount of fee leviable on the institution of such suits.

It is proposed also to exempt suits instituted in a Military Court of Requests from the payment of any fee. The constitution of such Courts is peculiar; they form no part of the regular machinery employed in the general administration of justice, the present measure therefore is inapplicable to them. Moreover, the suitor in such Courts is placed at this disadvantage as compared with suitors in the ordinary Civil Courts that, although he may gain his case, he is unable to recover the costs which he has incurred in prosecuting his claim; hence the incidence of the taxation imposed by the levy of an institution fee in such cases is inequitable.

Suits for the restitution of wives, which are of common occurrence in the Punjab, are held to be somewhat excessively taxed under the present law, which prescribes that in suits the money value of the subject-matter of which cannot be estimated, a fixed fee of Rs. 10 shall be levied; the Bill substitutes for that rate in such cases a special fee of Rs. 5.

The clause in Act XXVI of 1867, exempting Advocates of a High Court from the obligation of presenting to any Court a written authority empowering them to act in any case pending in such Court, is excluded from the Bill. Such a provision appears to be beyond the scope of an enactment for regulating the levy of court-fees. It is, moreover, open to the objection that it conflicts with section 18 of the Civil Procedure Code, and consequently creates some doubt as to the intention of the Legislature.

As some measures of compensation for the loss of revenue which is expected to result from the general reduction of fees, it is proposed to discontinue the refund of any portion of the amount levied on the first institution of suits, and also to raise the fees heretofore chargeable on probates and letters of administration granted under the Indian Succession Act, and on certificates issued under Act XXVII of 1860, to the *ad valorem* rates leviable under the English law in like cases.

The abolition of refunds is justified by the consideration that for all practical purposes in the majority of cases, the plaintiff, whose suit has not gone beyond the stage at which under the present law he is entitled to recover a moiety of the institution-fee, has gained as much through the Court's agency as the suitor whose case has proceeded to a decision, and that, therefore on the principle on which all court-fees are adjusted, the former should contribute in equal proportion with the latter to the maintenance of the Courts from whose action both derive an equal benefit.

In lieu of the existing rates of process-fees, which vary according to the distance of the Court by which the processes are issued from the place where they are to be served or executed, it is proposed to levy, by means of stamps, a uniform rate in all cases. All suitors will thus be required to contribute in equal proportion to the maintenance of the establishment employed in the serving of processes, without reference to the length of time occupied in each service and the consequent amount of work rendered on behalf of each person at whose instance any process is served or executed.

Such a provision is in accordance with the modern system under which the charges in the Postal and Electric and Telegraph Departments are regulated, and is also more equitable to the general community.

The incorporation of the High Court Fees Act (XV of 1868) with, and the transfer of so much of the provisions of the Parsi Marriage and Divorce Act, 1865, the Native Converts' Marriage Dissolution Act, 1866, the Punjab Tenancy Act, 1868, the Indian Divorce Act, and the Indian Income-tax Act, as relate to the levy of stamp fees in judicial proceedings, to the present Bill appear to be conducive to public convenience, as the whole of the existing law relative to fees leviable in all Courts of justice will thus be contained in one enactment.

With the same object this Bill purports to effect a complete re-arrangement of the provisions of the existing law on this subject, a similar classification of instruments chargeable with court-fees to that which obtains in the General Stamp Act having been adopted, and the rules for determining the value of the subject-matter of certain suits being transferred from the Schedule where they are to be found in Act XXVI of 1867, to the body of the proposed Act.

Lastly, that for the future there may be no confusion between stamp-revenue proper and the revenue derived from what have heretofore been termed 'judicial stamps' the proceeds of the proposed enactment are to be designated court-fees, and the Bill is entitled accordingly."

—Gazette of India, 1869. Part V, page 57.

#### ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION.

Year.	Number of Act.	Short title of Act.	Particulars.
1870	Act VII Act XIV Act XX	Court-fees Act, 1870 Repealing Act, 1870 Court-fees Act (1870) Amendment Act, 1870.	Repealed by Act XII of 1873. Repealed by Act I of 1938.
1871	Act VIII	Indian Registration Act, 1871	Repealed by Act III of 1877.
1872	Act XV	Indian Christian Marriage Act, 1872	
1875	Act XIII	Probate and Administration Act, 1875	Repealed by Act I of 1938.
1884	Act XVIII	Punjab Courts Act, 1884	Repealed in Punjab by Punjab Act VI of 1918.
1887	Act XVII	Punjab Land Revenue Act, 1887	
1889	Act VI Act VII Act XIII	Probate and Administration Act, 1889 Succession Certificate Act, 1889 Cantonments Act, 1889	Repealed by Act XXXIX of 1925. Repealed by Act I of 1938. Repealed by Act XV of 1910.
1890	Act VIII	Guardians and Wards Act, 1890	
1891	Act XII	Amending Act, 1891	Repealed by Act I of 1938.
1899	Act XI Act XXV	Court-fees Amendment Act, 1899 Punjab Courts Act, 1899	Do. Repealed by Punjab Act VI of 1918.
1901	Act X N. W. F. P. Reg. VII.	Court-fees (Amendment) Act, 1901 North-West Frontier Province Law and Justice Regulation 1901.	Repealed by Act I of 1938.
1905	Act VI	Court-fees (Amendment) Act, 1905	Repealed by Act I of 1938.
1908	Act V	Code of Civil Procedure, 1908	
1910	Act VII	Court-fees (Amendment) Act, 1910	Repealed by Act I of 1938.
1911	Act XIV Punjab	Court-fees (Amendment) Act, 1911	Do.
1912	Act I	Punjab Courts (Amendment) Act, 1912	Repealed by Punjab Act VI of 1918.
1914	Act XVII Punjab Act III	Second Repealing and Amending Act, 1914 Punjab Courts Act, 1914	Repealed by Act I of 1938. Repealed by Punjab Act VI of 1938.
1917	Act XXIV Punjab	Repealing and Amending Act, 1917	Repealed by Act I of 1938.
1918	Act VI	Punjab Courts Act, 1918	
1919	Act XVIII	Repealing and Amending Act, 1919	Repealed by Act I of 1938.
1920	Act XXXVIII	Devolution Act, 1920	Do.
1922	Act XIX Assam Act II Assam Act IV	Court-fees (Amendment) Act, 1922 Assam Court-fees (Amendment) Act, 1922). Assam Court-fees (Amendment No. II) Act, 1922.	Do. Do. Came into force on 3-5-1922.

Year.	Number of Act.	Short title of Act.	Particulars.
	Bengal Act IV	.. Bengal Court-fees (Amendment) Act, 1922.	Came into force on 29-3-1922.
	Bengal Act VI	.. Bengal Court-fees (Amendment No. II) Act, 1922.	Came into force on 26-7-1922.
	Bihar and Orissa Act II	.. Bihar and Orissa Court-fees (Amendment) Act, 1922.	Came into force on 21-8-1922.
	Bombay Act I	.. Court-fees (Bombay Amendment) Act, 1922.	Spent.
	Madras Act V	.. Madras Court-fees (Amendment) Act, 1922.	Came into force on 30-3-1922 and 17-4-1922.
	Punjab Act VII	.. Court-fees (Punjab Amendment) Act, 1922.	Came into force on 23-11-1922.
1923	U. P. Act XII	.. U. P. Board of Revenue Act, 1922	
	Act XI	.. Repealing and Amending Act, 1923	
	Act XVIII	.. Code of Criminal Procedure (Amendment) Act, 1923.	Repealed by Act I of 1938. Do.
1926	Bombay Act III	.. Court-fees (Bombay Amendment) Act, 1926.	Spent,
	Punjab Act I	.. Punjab Court-fees (Amendment) Act, 1926.	
	Punjab Act VI	.. Punjab Court-fees (Second Amendment) Act, 1926.	
1930	Act XXXI	.. Ajmer-Merwara Court-fees (Amendment) Act, 1930.	Came into force on 25-7-1930.
1931	Bombay Act I	.. Court-fees (Bombay Amendment) Act, 1931.	Spent.
1932	Assam Act III	.. Assam Court-fees (Amendment) Act, 1932.	
	Bombay Act II	.. Bombay Finance Act, 1932	Came into force on 30-3-1932.
	U.P. Act III	.. U.P. Court-fees (Amendment) Act, 1932	Spent.
1933	U.P. Act III	.. U.P. Court-fees (Amendment) Act, 1933	
1934	U.P. Act X	.. U.P. Court-fees (Amendment) Act, 1934	
1935	Bengal Act VII	.. Court-fees (Bengal Amendment) Act, 1935.	Came into force on 2-5-1935.
	Bengal Act XI	.. Court-fees (Bengal Second Amendment) Act, 1935.	Repealed in Part by Bengal Act VI of 1938.
	C.P. and Berar Act XVI	.. Court-fees (C.P. and Berar Amendment) Act, 1935.	Came into force on 21-5-1935.
1936	Assam Act XIV	.. Assam Court-fees (Amendment) Act, 1936.	Came into force on 1-1-1937.
	Bengal Act I	.. Court-fees (Bengal) Third (Amendment) Act, 1935.	
	U.P. Act II	.. U.P. Court-fees (Amendment) Act, 1936	Came into force on 2-4-1936.
1937	A.O. ....	Government of India (Adaptation of Indian Laws) Order.	
1938	C. P. and Berar Act IX	.. C.P. and Berar Court-fees (Amendment) Act, 1938.	Came into force on 17-4-1938.
	Sind Act I	.. Bombay Finance (Sind Amendment) Act, 1938.	Came into force on 31-3-1938.
	U.P. Act XIX	.. U.P. Court-fees (Amendment) Act, 1938	Came into force on 9-1-1939.

Year.	Number of Act,	Short title of Act.	Particulars.
1939	Bihar Act XVII	.. Bihar Court-fees (Amendment) Act, 1939 ..	
	Orissa Act V	.. .. .	Came into force on 31-10-1939.
	Punjab Act IV	.. Court-fees (Punjab Amendment) Act, 1939.	
	Sind Act X	.. Court-fees (Sind Amendment) Act, 1939 ..	Came into force on 18-5-1939.
1940	C.P. and Berar Act XVI	.. C.P. and Berar Court-fees (Amendment) Act, 1940.	Came into force on 6-12-1940.
1941	Bengal Act III	.. Bengal Local Self-Government (Amendment) Act, 1941.	Came into force on 15-5-1941.
	C.P. and Berar Act IX	.. C.P. and Berar Court-fees (Amendment) Act, 1941.	Came into force on 9-5-1941.
	U.P. Act IX	.. Court-fees (U.P. Amendment) Act, 1941 ..	Came into force on 19-6-1941.
1942	N.W.F.P. Act VIII	.. Court-fees (N.W.F.P. Amendment) Act, 1942.	Came into force on 27-11-1942.
1942	Punjab Act I	.. Court-fees (Punjab Amendment) Act, 1942.	
	U.P. Act XIV	.. Court-fees (U.P. Amendment) Act, 1942 ..	Came into force on 16-7-1942.
1943	Bihar Act IX	.. Bihar Court-fees (War Surcharge Amendment) Act, 1943.	Came into force on 11-11-1943.
	Bombay Act XV	.. Bombay Increase of Court-fees Act, 1943 ..	Came into force on 29-12-1943.
	U.P. Act III	.. Court-fees (U.P. Amendment) Act, 1943 ..	Came into force on 1-9-1943.
	U.P. Act VIII	.. Court-fees (U.P. Second Amendment) Act, 1943.	Came into force on 1-8-1943.
1944	U.P. Act V	.. Court-fees (U.P. Amendment) Act, 1944 ..	Came into force on 7-10-1944.
1945	Madras Act XVII	.. Court-fees (Madras Amendment) Act, 1945.	Came into force on 1-9-1945.
	Orissa Act IV	.. Orissa Court-fees (Surcharge Amendment) Act, 1945.	Came into force on 7-9-1945.
1946	C.P. and Berar Act III	.. C.P. and Berar Finance (Annual) Act, 1946.	Came into force on 27-3-1946 and 1-4-1946.
1947	N.W.F.P. Act I	.. Court-fees (N.W.F.P. Amendment) Act 1946.	Came into force on 17-1-1947.

## THE COURT-FEES ACT, 1870.

(Act VII of 1870) \*

[11th March, 1870.]

CHAPTER I  
PRELIMINARY.

- Short title. 1. This Act may be called the Court fees Act, 1870.
- Extent of Act. It extends to the whole of British India ;
- Commencement of Act. And it shall come into force on the first day of April, 1870.

[a] For the Statement of Objects and Reasons, see Gazette of India, 1869, Pt. V. p. 57 ; for Proceedings in Council, see *ibid*, 1869, Supplement, pp. 1179 and 1452 ; *ibid*, 1870, Supplement, pp. 52, 378, 421, 427 and 434.

## SECTION 1—SYNOPSIS.

1. Validity of local amendments.
2. Rules by High Court.

3. Scope and object of the Act.
4. Defects of drafting in the Act.
5. Interpretation of fiscal statutes—General.

The Act has been locally amended in several Provinces. For a list of the amending enactments, see the Chronological Tables of the Indian Statutes, Vol. I.

(In this edition of the Act, the Provincial amendments have been given in their appropriate places along with the provisions of the main Act.)

It has been declared to be in force in—

Santhal Parganas, by the Santhal Parganas Settlement Regulation (III of 1872), Section 3;  
British Baluchistan, by the British Baluchistan Laws Regulation, 1913 (II of 1913), Section 3;

Panth Pipoda, by the Panth Pipoda Laws Regulation, 1929 (I of 1929), Section 2; and  
Angul District, by the Angul Laws Regulation, 1936 (V of 1936), Section 3 and Schedule.

It has also been declared to be in force in the Chittagong Hill-tracts by notification under Section 4 (2) of the Chittagong Hill-tracts Regulation, 1900 (I of 1900): see notification No. 5702-Ex., dated the 11th April 1927. Calcutta Gazette, 1927, Pt. I, p. 844.

It has further been declared, by notification under the Scheduled Districts Act, 1874 [14 (XIV) of 1874], s. 3 (a) to be in force in the following Scheduled Districts, namely:—

the District of Hazaribagh, see Gazette of India, 1881, Pt. I, p. 507;

the District of Lohardaga (now called the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 14; the District of Lohardaga then included the present District of Palamau, separated in 1894), see Gazette of India, 1881, Pt. I, p. 508;

the District of Manbhum, see Gazette of India, 1881, Pt. I, p. 509;

the Pargana Dhalbhum in the District of Singbhum, see Gazette of India, 1881, Pt. I, p. 510;

the Scheduled Districts in Ganjam and Vizagapatam, see Gazette of India, 1898, Pt. I, p. 869;

the Tanai of the Province of Agra, see Gazette of India, 1876, Pt. I, p. 505.

It has been extended by notification under Section 5 of the same Act to the Kolhan in the District of Singbhum, see Gazette of India, 1907, Pt. I, p. 655, and under Sections 5 and 5A of that Act with certain modifications to the District of the Khasi and Jaintia Hills, the Garo Hills, the Lushai Hills and the Naga Hills and the North Kachhar Sub-division of the Kachhar Districts, the Mikir Hill-tracts, in the Sibsagar and Nowgong Districts and the Lakhimpur frontier-tract. see notification No. 1541-F (a), dated the 10th April 1930, Assam Gazette, 1930, Pt. II, p. 700.

It has been declared *inapplicable* to proceedings before officers making a settlement, and in certain other cases under the Santhal Parganas Settlement Regulation (3 of 1872), Section 8, as amended by the Santhal Parganas Justice and Laws Regulation, 1899 (3 of 1899).

## Section 1 (contd.)

### 6. Interpretation of the Act.

### 7. Retrospective effect of provisions as to Court-fees.

### 8. Escape and evasion.

### 9. "British India."

### 10. "Commencement."

1. Validity of local amendments.—[1] Amendment by a Provincial Legislature is not *ultra vires*. (Vol. 11) 1924 Cal 115 (116): 50 Cal 597.

2. Rules by High Court.—[1] Provisions like S. 122, Civil P. C., which empower Courts to make rules to regulate procedure, enable them to levy Court-fees, as the power to regulate procedure includes the power to impose fees in Courts. (Vol. 9) 1922 Mad 421 (422): 45 Mad 849 (Vol. 22) 1935 Rang 460 (463): 13 Rang 156.

3. Scope and object of the Act.—[1] The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. (Vol. 5) 1918 P C 188: 43 Bom 507: 46 Ind App. 24 (PC).

[2] Court-fee is a crown debt. (Vol. 12) 1925 Mad 433 (433) \* (Vol. 23) 1936 Mad 602 (603): 59 Mad 872 \* (1908) 33 Cal 1040 (1045).

[3] The Government has to pay Court-fees as much as any other party. (1902) 25 Mad 457 (467) (DB).

[4] No court-fee is payable on an appeal to the Government which is referred by the Government to the High Court for disposal. (199) 23 Mad 182 (183). (Where an appeal was preferred to the Government under R. 22 of the Agency Rules framed under Act XXIV of 1839 against the decision of the Agent to the Governor at Vizagapatam and the appeal was referred by the Government to the High Court for disposal, court-fee was not chargeable on the appeal).

[5] The Act has nothing to do with the question in what Court a proceeding should be instituted. (Vol. 19) 1932 All 413 (414) (DB).

4. Defects of drafting in the Act.—[1] The Act is notorious for its bad drafting. (Vol. 24) 1937 Mad 46 (48): 1 L R (1937) Mad 284 (DB) \* (Vol. 12) 1925 All 787 (788): 47 All 756 (DB) \* (Vol. 12) 1925 Pat 392 (394, 396): 4 Pat 336 (FB) \* (190) 12 All 128 (165, 166) (FB).

### Section 1 (contd.)

[2] Where no meaning can be given to certain words of a statute without rejecting some of those used in it, or where the statute would become a nullity were all the words retained, the Court has power to read a section as though the words which make it meaningless or nullify it, were not there. (1909) 2 K B 24 (27, 28) : 78 L J K B 479.

**5. Interpretation of fiscal statutes—General.**—[1] When two constructions are equally possible, that construction which is favourable to the subject must be adopted. (Vol. 26) 1939 All 466 (471) : I L R 1939 All 770 (FB) \* (Vol. 33) 1946 Cal 524 (525) \* (Vol. 33) 1946 Pat 401 (402) : 25 Pat 194 \* (Vol. 22) 1935 Bom 256 (257) : 59 Bom 469 (SB) \* (Vol. 21) 1934 Lah 530 : 15 Lah 501 (SB) \* (Vol. 16) 1929 Mad 60 (63) : 52 Mad 194 (FB) \* (Vol. 18) 1931 Nag 156 (158) : 26 Nag L R 175 (SB) \* (Vol. 33) 1946 Nag 30 (35) : I L R (1945) Nag 975 (DB) \* (Vol. 18) 1931 Oudh 99 (103) : 6 Luck 601 (SB) \* (Vol. 24) 1937 Pat 550 (553) : 16 Pat 600 (SB) \* (Vol. 8) 1921 P C 184 (186, 187) (PC).

[2] To ascertain whether two constructions are equally possible the ordinary rules of construction of statutes are to be applied. (Vol. 11) 1924 Mad 420 (430) : 47 Mad 262 (FB).

[3] The maxim that clear words are necessary in order to tax a subject does not mean that words are to be unduly restricted against the taxing authority. It simply means that in taxing Act one has to look merely at what is clearly said. (Vol. 11) 1924 Mad 420 (430) : 47 Mad 262 (FB).

[4] It is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or business convenience or the like. (Vol. 11) 1924 Mad 420 (430) : 47 Mad 262 (FB).

[5] In construing fiscal enactments, the letter of the law is of paramount importance and not the spirit of the Act or the intention of the law. (Vol. 16) 1929 Mad 769 (772) (FB) \* (Vol. 21) 1934 Pat 178 (180) : 13 Pat 336 (SB) \* (Vol. 27) 1940 P C 183 (185) : I L R (1940) Kar (PC) 371 : 67 Ind App 394 : I L R (1941) Mad 89 (PC) \* (1899) 4 H L C 100 (122) : 38 L J Ex 205 : 21 L T 370 \* (Vol. 33) 1946 Oudh 61 (62) : 21 Luck 245 (DB) \* (Vol. 17) 1930 All 49 (52, 53) (FB) \* (Vol. 18) 1931 Cal 193 (196, 201) : 58 Cal 33 (FB) \* (Vol. 16) 1929 Lah 609 (612) : 10 Lah 657 (FB).

[6] A subject is entitled, if he can, in any legal manner, to circumvent the incidence of a taxing Act. (Vol. 15) 1928 Mad 929 (930) (DB) \* (Vol. 15) 1928 Mad 543 (544) : 51 Mad 455 (FB).

[But see (Vol. 30) 1943 Mad 146 (148) : I L R (1943) Mad 819.]

**6. Interpretation of the Act.**—[1] The Act must not be construed so as to furnish a chance of escape and evasion by placing any unduly strained construction on its language. (Vol. 25) 1938 Oudh 1 (6) : 13 Luck 628 (FB).

[2] The Act must be strictly construed and unless the liability for a fee is clear from the language of the Act it must be held that such liability does not exist \* (1909) 22 All 19 (24) (FB) \* (Vol. 15) 1928 Nag 316 (318) : 24 Nag L R 142 \* (Vol. 20) 1933 All 488 (490) : 55 All 791 (FB) \* (Vol. 1) 1914 Low Bur 247 (248) : 7 Low Bur Rul 559 (DB) \* (Vol. 28) 1938 Mad 498 (499) : I L R (1938) Mad 981 (DB) \* (Vol. 25) 1938 Oudh 1 (6) : 13 Luck 628 (FB) \* (Vol. 21) 1934 Pat 571 (572) :

14 Pat 4 (SB) \* (Vol. 15) 1928 Lah 118 (114) : 8 Lah 780 (DB) \* (Vol. 14) 1927 Bom 643 (643) : 52 Bom 61 (DB) \* (Vol. 11) 1924 Cal 881 (884) (DB) \* (Vol. 11) 1924 Cal 953 (955) (DB). (86) 9 Mad 146 (148) (FB) \* (Vol. 25) 1938 Cal 785 (788) : 1 L R (1939) 1 Cal 152 (DB) \* (Vol. 9) 1922 Upp Bar 14 (15) : 4 Upp Bar Rul 72 \* (Vol. 12) 1925 Pat 392 (400) : 4 Pat 336 (FB).

[3] In Court-fee matters there is no power to apply analogies. (186-43) 1936-43 Tax Dec 103 (106) (Nag).

[4] The Act is to be construed and applied as it is without any regard to considerations of hardship or inconvenience or reasonableness of the provisions. (186-43) 1936-43 Tax Dec 100 (101) (Nag) \* (Vol. 21) 1934 Lah 958 (960) : 15 Lah 893 (DB) \* (190) 12 All 129 (137) (FB) \* (Vol. 28) 1941 All 357 (358) : I L R (1941) All 469 \* (Vol. 16) 1929 Pat 731 (732) : 8 Pat 906 (DB) \* (Vol. 1) 1914 Lah 214 (217) : 1913 Pun Re No. 111 (FB). (History of the Act cannot be considered when meaning is clear) \* (Vol. 17) 1930 Nag 73 (76, 77) (DB) : (91) 14 Mad 480 (483) (DB).

[5] The language of the Act must be construed in its popular sense. (Vol. 7) 1920 Pat 593 (594) : 4 Pat L Jour 700 (DB) \* (1847) 16 M and W 307 (308, 309) : 16 L J Ex 85 : 153 E R 1206.

[6] Where any provision is ambiguous, an interpretation which has been uniformly followed for a long time is to be applied (1907) 34 Cal 954 (969) (FB) \* (182) 8 Cal 593 (597) (FL) \* (1909) 1 Ind Cas 670 (673) (DB) (Cal), (but not so when a construction is clearly wrong).

[7] Mere long practice which is clearly against the law cannot be treated as valid and binding in the application of the law of court-fees. (190) 12 All 129 (135) (FB).

[8] A special provision in the Act is to be regarded as the one applicable to a case rather than one which is of more general nature. (Vol. 19) 1932 Mad 605 (608) : 53 Mad 212 (DB) \* (198) 21 Mad 269 (269, 270) (DB).

[9] Headings of chapters and schedules are only guides for the construction and cannot override the express provisions under those headings. (Vol. 12) 1925 All 787 (789) : 47 All 756 (DB) \* (Vol. 13) 1925 Cal 638 (639) \* (Vol. 19) 1932 Cal 346 (348) : 59 Cal 528.

[10] The schedules to the Act neither impose nor confer any power to impose court-fees. (Vol. 28) 1941 Nag 129 (131) \* (Vol. 10) 1923 Pat 187 (138) : 2 Pat 198 (DB) \* (110) 6 Nag L R 164 (166).

[But see (Vol. 18) 1931 All 351 (352) : 52 All 1029. (Sch. 1 Art. 1 is a substantive provision of law).]

[11] The Act has no preamble and it is for the Judges to decide what its objects were from the enacting clauses (190) 12 All 129 (164) (FB).

[12] General Clauses Act X of 1897, only applies to construction of Acts of Governor-General in Council and the regulations made pursuant to those Acts and it is not applicable to rules that may be framed. (Vol. 11) 1924 Mad 257 (260) : 46 Mad 685 (SB).

### 7. Retrospective effect of provisions as to Court-fees.

—[1] The court-fee payable on a plaint is to be determined with reference to the law in force at the time of the institution of the suit although the law in force at the time of the accrual of the cause of action might have been different. (1913) 25 Mad L Jour 205 (216) (DB).

a 1A. In this Act "the Appropriate Government" means, in relation to fees or stamps relating to documents presented or to be presented before any officer serving under the Central Government, that Government, and in relation to any other fees or stamps, the Provincial Government.]

a Inserted by A. O. The expression "Appropriate Government" occurs in Sections 26, 27, 34 and 35.

#### PROVINCIAL AMENDMENT.

#### CENTRAL PROVINCES.

Definition of "memorandum of cross-objection." 1B. In this Act, unless there is anything repugnant in the subject or context "memorandum of appeal" shall include "memorandum of cross-objection."

—C. P. & Berar Act (IX of 1941.)

#### a 2. ["Chief Controlling Revenue-authority" defined.] Repealed by A.O.]

\* The original Section 2 relating to repeal of enactments was repealed by the Repealing Act, 1870, 14 [XIV] of 1870). A section defining "Chief Controlling Revenue-authority" was added by the Court-fees (Amendment) Act, 1901 (10 [X] of 1901), s. 2, and was slightly amended by the Repealing and Amending Act, 1917 (24 [XXIV] of 1917).

#### S. 1 (contd.)

[2] A change in the law as to Court-fees subsequent to the institution of the suit and before its disposal cannot affect the court fees payable on the plaint in the suit (Vol. 20) 1933 Sind 354 (354): 27 Sind L R 210 (DB) \* (Vol. 13) 1926 Nag 71 (72) (DB) \* (Vol. 11) 1924 Cal 731 (733): 51 Cal 216 (DB).

[3] The rules stated above apply also to other proceedings. ('36-43) 1936-43 Tax Loo 100 (101) (Nag). (Cross-objections) \* ('78) 3 Cal 733 (735). (Testator dying before Court-fees Act—Application for probate afterwards—Court-fee must be paid) \* (Vol. 13) 1926 Mad 159 (159). (Application for leave to sue as pauper) \* (Vol. 28) 1941 All 298 (300): 1 L R (1941) All 558 (DB). (Law changed after appeal was preferred—The court-fee is not affected).

[4] Where court-fee has been paid according to a certain practice which is subsequently authoritatively declared to be erroneous, during the pendency of the suit, the Court will be entitled to levy additional court-fee that would be due under the new ruling. (Vol. 7) 1920 Pat 592 (593) (DB).

[5] Court-fee for appeal made to depend on the value of the plaint—Change in the law of court-fee subsequent to the institution of the suit, and before the appeal filed—The value of the plaint must be fixed with reference to the law at the time of the institution of the suit and not the filing of the appeal. (Vol. 20) 1933 All 20 (21): 54 All 1092. (Application for review) \* (Vol. 11) 1924 Cal 881 (884) (DB) (Review) \* (Vol. 28) 1941 All 134 (135): 1 L R (1940) All 793.

[6] When a change in the law takes place pending a proceeding things to be done in future in such proceeding will be affected by the change. ('86) 1886 Bom P J 25 (DB) \* ('70) 14 Suth W R 167 (167).

[7] A change in the law of court-fee pending an application for probate will affect the court-fee payable on a probate. (Vol. 14) 1927 Bom 643 (643): 52 Bom 61 (DB) \* (1900) 1900 Pan Re No. 26 p. 91 (91) (DB).

[8] Plaint or memorandum of appeal returned for some fundamental defect and afterwards re-presented. Change in the law as to court-fees in the interval will not affect the court-fee payable ('67) 7 Suth W R 461 (462) (Appeal) \* (Vol. 10) 1923 Pat 150 (151, 152): 2

Pat 264 (Appeal) \* (Vol. 13) 1926 Cal 355 (356) (DB) (Plaint).

[But see (1871) 16 Suth W R 47 (48) (DB) ]

[9] Where after a right of appeal has arisen, there is a change in the law of court-fees which would have the effect of taking away the right of appeal to the particular tribunal, such change will not deprive the appellant of the right of appeal to that tribunal. (Vol. 14) 1927 Mad 977 (979): 50 Mad 857 (FB).

[10] Where a subsequent enactment confers upon a party a right of appeal against an order relating to court-fee which he had not under the previous law, he can exercise the right of appeal even if his suit was filed before the enactment. (Vol. 28) 1941 All 298 (300): 1 L R (1941) All 558 (DB).

8. *Escape and evasion.*—[1] A party is entitled if he can in a legal manner to circumvent the provisions of this Act. (Vol. 18) 1931 Lah 633 (633, 634) \* ('04) 28 Bom 567 (572) (DB).

[2] A court cannot sanction any irregularity, the effect of which would be to perpetrate a fraud on the Government revenue and to deprive the State of what is legitimately its due. (Vol. 21) 1934 Lah 235 (236) (DB) \* (Vol. 4) 1917 Oudh 182 (185) (DB).

9. *"British India"*—[1] The definition of the term "British India" in the General Clauses Act, S. 3 of (7), applies to this Act.

[2] The following classes of territories do not fall within the definition of "British India".

(a) Native States in India. ('05) 33 Cal 219 (253): 33 Ind App 1 (PC) (Kathiawar) \* ('02) 29 Cal 400 (401, 402) (DB) (Tributary Mahals of Orissa).

(b) Lands ceded by the Native Princes to the British Government for limited purposes. ('93) 25 Cal 20 (31): 24 Ind App 137: 1897 Pan Re. No. 6 Cr. (PC). (Land ceded for railway administration) \* ('13): 13 Cr. L J 790 (791): 37 Bom 152 (Wadhawan) (9 Bom 244 dissented from) \* ('98) 21 Cal 177 (179). (Secunderabad) \* ('86) 10 Bom 186 (188) (Rajkot Civil Station).

10. *"Commencement."*—[1] A provision as to court-fees expressed to come into force from a certain day will apply to all proceedings instituted on and after such day. (Vol. 11) 1924 Mad 257 (258, 259): 46 Mad 635 (SB). (Gazette received after office hours—Held enhanced fees applied to suit already filed on that day.)



For the definition of the 'Chief Controlling Revenue-authority' see now the General Clauses Act, 1897 10 [X] of 1897), Section 3 (9a).

The A. O. repealed Section 2 as in force elsewhere than in Bengal.

### PROVINCIAL AMENDMENTS.

#### BENGAL

2. In this Act, unless there is anything repugnant in the subject or context,—

- (1) 'appeal' includes a cross-objection;
- (2) 'Chief Controlling Revenue Authority' means the Board of Revenue;
- (3) 'Collector' includes any officer not below the rank of Sub-Deputy Collector appointed by the Collector to perform the functions of a Collector under this Act;
- (4) 'Suit' includes an appeal from a decree except in section 8A.

— *Court-Fees (Bengal Amendment) Act, 1935 (VII of 1935) s. 3.*

#### MADRAS

In Madras the Court-fees Act, 1870, has been amended by the Madras Court-fees (Amendment) Act, V of, 1922, Section 2 of this Madras Act is as follows:—

"2. (1) In this Act "the principal Act" shall mean "the Court fees Act, 1870."

(2) In this Act and in the principal Act, unless there is anything repugnant in the subject or context "Memorandum of appeal" shall include memorandum of cross objection."

#### ORISSA

For S. 2 the following section was substituted, viz:—

"2. In this Act unless there is anything repugnant in the subject or context,

- (1) "Appeal" includes a cross-objection;
- (2) "Suit" includes an appeal from a decree except in section 8A"

— *Orissa Act V of 1939. [30-10-1939]*

#### UNITED PROVINCES

##### Definitions.

2. In this Act unless there is anything repugnant in the subject or context:—

- (i) "Appeal" includes a cross-objection;
- (ii) "Collector" includes any officer, not below the rank of a Deputy Collector, appointed by the Collector, with the previous sanction of the Chief Controlling Revenue Authority, to perform the functions of a Collector under this Act;
- (iii) "Revenue" means land revenue, as recorded in the Collector's register, and does not include cesses of any kind;
- (iv) "Suit" includes a first or second appeal from a decree in a suit and also a Letters Patent Appeal.

— *U.P. Act XIX of 1938 as amended by U.P. Act IX of 1941.*

### CHAPTER II.

#### FEES IN THE HIGH COURTS AND IN THE COURTS OF SMALL CAUSES AT THE PRESIDENCY-TOWNS.

3. The fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Courts established by Letters Patent, by virtue of the power conferred by [section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915,] <sup>b</sup>[or section 229 of the Government of India Act, 1935];

Levy of fees in High Courts on their original sides.

#### SECTION 3—SYNOPSIS.

1. Scope of the section.
2. Court-fees on the Original Side of Chartered High Courts
3. Court-fees in appeals from the Original Side of Chartered High Courts.
4. "Fees payable to clerks and officers of the High Courts."
5. "By virtue of the power conferred by....."
6. Fees payable under the Presidency-Towns Insolvency Act.
7. Clause (2).
8. Fees chargeable in Presidency Small Cause Courts —Clause (3).

1. Scope of the Section.—[1] The language of the section does not purport to prescribe the court-fee to be paid in any Court. It only purports to lay down the mode of collecting court-fees. But the second clause of

the section impliedly prescribes the court-fees to be paid in certain cases in Chartered High Courts. (Vol. 18) 1931 Mad 457 (459).

[2] The effect of sections 3 and 4 is that in certain cases coming before the Chartered High Court, the Court-fees Act itself prescribes the fee leviable (S. 4 and cl. (2) of s. 3). In all other cases coming before that Court the Court-fees Act lays down only the mode of collecting the Court fee (S. 3, cl. 1). In the case of the Presidency Small Cause Courts also, it merely prescribes the mode of collecting the fee (S. 3, cl. 3). (Vol. 18) 1931 Mad 457 (458, 459) \* (Vol. 12) 1925 Pat 392 (398) : 4 Pat 336 (FB).

2. Court-fees on the Original Side of Chartered High Courts.—[1] In regard to the ordinary original jurisdiction of a Chartered High Court the fees prescribed by this Act are not applicable except in certain specified cases, (Vol. 22) 1935 Rang 460 (461): 13 Rang 156 \* (Vol. 9) 1922 Mad 421 (421, 422) : 45 Mad 849.

or chargeable in each of such Courts under No. 11 of the first, and Nos. 7, 12, 14, c[\*] 20 and 21 of the second schedule to this Act annexed ;

Levy of fees in                      and the fees for the time being chargeable in the Courts of Small Causes  
Presidency Small      at the " Presidency-towns, and their several offices, shall be collected in manner  
Cause Courts.                      hereinafter appearing.

a. *Substituted* by the Repealing and Amending Act, 1917 (24 [XXIV] of 1917) s. 2 and Sch. I, for " Statute 24 & 25 Victoria, Chapter 104, Section 15."

b. *Inserted* by A.O.

c. The number " 16 " was *repealed* by the Amending Act of 1891 (12 [XII] of 1891).

d. *See* the Presidency Small Cause Courts Act, 1882 (15 [XV] of 1882), Chapter X.

#### PROVINCIAL AMENDMENT.

#### BENGAL

For the heading " Fees in the High Courts and in the Courts of Small Causes at the Presidency-towns " the heading " Fees payable in Courts and in Public Offices " shall be *substituted*—*Bengal Act VII of 1935*.

4. No document of any of the kinds specified in the first or second schedule to this Act  
Fees on docu-                      annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall  
ments filed, etc.,                      be received or furnished by, any of the said High Courts in any case coming  
in High Courts                      be received or furnished by, any of the said High Courts in any case coming  
their extraordi-                      before such Court in the exercise of its extraordinary original civil jurisdiction ;  
nary jurisdiction ;                      before such Court in the exercise of its extraordinary original civil jurisdiction ;  
or in the exercise of its extraordinary original criminal jurisdiction ;

or in the exercise of its jurisdiction as regards appeals from the " [judgments (other than  
in their appel-                      judgments passed in the exercise of the ordinary original Civil Jurisdiction of the  
late jurisdiction ;                      Court) of one or more Judges of the said Court, or of a division Court ;

#### S. 3 (contd.)

[See also (Vol. 12) 1925 Mad 1216 (1216). (Fees-rules framed by High Court apply only to cases coming before it in the exercise of its ordinary original jurisdiction).]

3. Court-fees in appeals from the original side of Chartered High Courts.—[1] The provisions mentioned in the first clause empower the High Court to prescribe court-fees for appeals from the original side. (Vol. 9) 1922 Mad 421 (422) ; 45 Mad 849.

[But see (Vol. 22) 1935 Rang 460 (462) : 13 Rang 156 (High Court's power to impose such fees does not arise under the provisions mentioned).]

4. " Fees payable to clerks and officers of the High Courts.—[1] These words are not intended to be perquisites of the officers. (Vol. 25) 1938 Cal 755 (756) : 1 L R (1939) 1 Cal 56.

[But see (Vol. 9) 1922 Mad 421 (422) : 45 Mad 849 (" S. 3, Court-fees Act, clearly points to the fee which is to be taken by the officer as a perquisite"—Reference to s. 3 is an obvious error for s. 15 of the High Court's Charter Act).]

5. " By virtue of the power conferred by . . . "—[1] The section is not a charging section in regard to the fees mentioned in clause (1). It only prescribes the mode of collection in regard to them. The section assumes that the fees are made payable, apart from this Act, by means of rules made under the powers conferred by the enactments mentioned in this clause. (Vol. 18) 1931 Mad 457 (459).

[2] The powers of the High Court to make rules regarding court-fees are not confined to those conferred by the enactments specified in clause (1) of this section. (Vol. 22) 1935 Rang 460 (462) : 13 Rang 156 (Power under Letters Patent).

[3] The section must be given a reasonably wide construction and that if a particular fee could have been imposed under any of the enactments mentioned in this

clause it must be deemed as made payable by virtue of the power conferred by them although the High Court actually purports to impose such fee under a power derived from some other source. (Vol. 25) 1938 Cal 755 (756) : 1 L R (1939) 1 Cal 56. (Fees payable under Rules made under S. 112 of the Presidency Towns Insolvency Act held to be covered by this section).

6. Fees payable under Presidency Towns Insolvency Act.—[1] Fees payable under Rules made by the High Court under s. 112 of the Presidency Towns Insolvency Act are covered by this section. (Vol. 25) 1938 Cal 755 (757) : 1 L R (1939) 1 Cal 56.

7. Clause (2).—[1] This section, and not s. 4, applies to the question of court-fees on probate granted by a Chartered High Court.

[See however observations in (Vol. 31) 1944 All 119 (120) : 1 L R (1944) All 229 (DB) and in (Vol. 3) 1915 Mad 512 (513) : 38 Mad 988.

[2] This section, and not s. 6, applies to Court-fees payable in a Chartered High Court in an application for letters of administration. It was, however, assumed in (Vol. 22) 1935 All 442 (450) : 57 All 881 (DB) that s. 6 applies.

8. Fees chargeable in Presidency Small Cause Courts.—Clause (3).—[1] The fees leviable in such Courts are charged under other enactments, for instance, Chapter 10 of the Presidency Small Cause Courts Act of 1882. ('12) 1912 Pan L R No. 202, page 647 (650) (FB).

#### SECTION 4—Note 1.

[1] The section is a prohibition against the use of improperly stamped or unstamped documents and in that sense may be said to make the fees on those documents " payable " under this chapter for the purpose of S. 5. (Vol. 12) 1925 Pat 392 (394) : 4 Pat 336 (FB).

[2] The word " case " must be confined to judicial or quasi-judicial cases as opposed to transactions. ('12) 1912 Pan L R No. 202, page 647 (648) (FB).

**S. 5 (contd.)**

[6] A Taxing Officer has jurisdiction to decide if he has power under this section to demand additional court-fee on an appeal after the appeal has been admitted' (Vol. 30) 1943 Pat 102 (105) : 21 Pat 720.

**9. Fees in subordinate Courts.**—[1] The Taxing Officer or the Taxing Judge has no power to decide any question as to the court-fees payable in the lower Courts. (Vol. 22) 1935 All 817 (818) : 58 All 146 (FB). (Per Bennet J. in order of reference) \* (Vol. 32) 1945 Pat 81 (82) : 23 Pat 749 \* (Vol. 22) 1935 Cal 338 (339, 344) (DB) \* (Vol. 21) 1934 All 805 (806) : 57 All 71 (DB). (Dissenting from (Vol. 12) 1925 All 184) \* (Vol. 21) 1934 Rang 268 (269) : 12 Rang 335 \* (Vol. 12) 1925 Pat 392 (395) : 4 Pat 336 (FB) \* (Vol. 24) 1937 Pat 514 (516) : 16 Pat 491 \* (Vol. 14) 1927 Cal 775 (775) (DB).

[2] The Taxing Officer has power to decide all questions as to the court-fee payable in the High Court and he can decide such questions untrammelled by the consideration that his decision would be inconsistent with the view taken by the lower Courts as to the valuation of the matter. (Vol. 7) 1920 Pat 593 (593) : 4 Pat L Jour 700 (DB). (The terms of S. 5 are imperative and contain no restrictions on the power of Taxing Officer).

[3] The question of Court-fee payable in lower Courts is to be decided by the Bench hearing the appeal. The decision of the Bench on such question is unfettered by the Taxing Judge's decision which is final only as regards Court-fee on appeal to the High Court. Regarded as decision laying down general principles, the Taxing Judge's decision is merely that of a single Bench and not binding on a Division Bench. (Vol. 32) 1945 Pat 81 (82) : 23 Pat 749.

**10. Finality of Taxing Officer's decision.**—[1] The finality of the decision of the Taxing Officer applies not only to the litigant who contested the correctness of the taxation by the taxing clerk but also the respondent who was not a party to the decision by the Taxing Officer. ('97) 20 All 11 (17) (FB) (S. 12 is in contrast) \* (Vol. 24) 1937 Mad 46 (51) : 1 L R (1937) Mad 284 (DB) (20 Mad 393 (Foll.)) \* (Vol. 17) 1930 Mad 597 (598) : 53 Mad 540 (DB).

[2] The word "final" has the same meaning as it has under S. 12. ('90) 12 All 129 (152) (FB) \* (Vol. 14) 1927 Bom 643 (646) : 52 Bom 61 (DB).

[See however (Vol. 24) 1937 Mad 46 (51) : 1 L R (1937) Mad 284 (DB). (The order of the Court under S. 12 is subject to the revisional jurisdiction of the High Court [See S. 12 (ii)]—Taxing officer's order under this section cannot be reversed.)].

[3] The word "final" denotes that the decision of the Taxing Officer cannot be questioned in appeal, revision or review. (Vol. 30) 1943 Bom 441 (442) \* ('36 - 43) Tax Dec (Nag) 108 (109). (It cannot be reviewed under inherent powers of Court) \* ('36 - 43) Tax Dec (Nag) 57 (58) \* (Vol. 4) 1917 Pat 100 (100) : 3 Pat L Jour 92 (DB) \* (Vol. 24) 1937 Mad 46 (51) : 1 L R (1937) Mad 284 (DB). (Under S. 12 the order is subject to revision. No revision lies under this section) \* (Vol. 10) 1923 Pat 137 (138) : 2 Pat 198 (DB) \* (Vol. 14) 1927 Bom 643 (645, 646) : 52 Bom 61 (DB) \* ('90) 12 All 129 (160) (FB).

[4] Where the intention of the Taxing Officer is not to decide the matter finally but merely to express an opinion and refer the question to the Taxing Judge, the

Taxing Judge has jurisdiction to go into the matter. ('36 - 43) Tax Dec (Nag) 57 (58).

[5] The finality is not merely a temporary finality for the purpose of the preliminary proceedings in connection with getting an appeal or other proceeding filed. (Vol. 24) 1937 Mad 46 (51) : 1 L R (1937) Mad 284 (DB).

[6] Where once the question of court fee on an appeal has been decided by the Taxing Officer, it cannot be re-opened at the hearing of the appeal before the Court or at the time of admission. (Vol. 7) 1920 Pat 593 (593) : 4 Pat L Jour 700 (DB).

[See (Vol. 5) 1918 Pat 210 (210) : 3 Pat L Jour 443 (Case was followed in (Vol. 26) 1939 Pat 83 : 17 Pat 687 (DB).]

[7] However wrong the order of the Taxing Officer may be, it is final under this section and cannot be questioned by the Court. ('07) 1907 Pun Re No. 39, 168 (170) (DB) \* (Vol. 22) 1935 Cal 338 (339) (DB) \* (Vol. 24) 1937 Mad 46 (51) : 1 L R (1937) Mad 284 (DB) \* (Vol. 12) 1925 Pat 392 (394) : 4 Pat 336 (FB) \* (Vol. 19) 1932 All 319 (320) (DB) \* (Vol. 7) 1920 Pat 593 (593) : 4 Pat L Jour 700 (DB). (Even though the decision involves the determination of valuation of suit in lower Court).

[But see ('92) 15 All 117 (118) (FB) \* (Vol. 9) 1922 Bom 172 (172) : 46 Bom 840 (DB).]

[8] An accidental slip or an arithmetical mistake made in the Taxing Officer's decision can be corrected. ('36 - 43) Tax Dec (Nag) 108 (110).

[9] In order to be final under this section, the decision of the Taxing Officer must be one on the merits. (Vol. 21) 1934 All 56 (57, 58) (DB). (Refusal to consider on ground of delay.) \* (Vol. 12) 1925 Cal 1201 (1203) : 52 Cal 871 (DB). (Question must have been raised and the Taxing Officer must have applied his mind to it) \* ('98) 21 Mad 269 (270) (DB).

[10] The mere fact that an appeal is admitted does not necessarily involve a decision that the Court-fee paid is sufficient and therefore does not preclude the question as to sufficiency of Court-fee being raised at the hearing of the appeal. (Vol. 30) 1943 Pat 102 (105) : 21 Pat 720.

[11] An ex-parte order against the suitor without any opportunity being given to him to be heard will not be final under this section. (Vol. 12) 1925 Pat 392 (403) : 4 Pat 336 (FB).

[See however ('03) 1903 All W N 214 (215).]

[12] Notice to party—Ex parte order of Taxing Officer held final. (Vol. 33) 1946 Mad 257 (257).

[13] When there is no decision by the Taxing Officer under this section, and excess court-fee has been paid by a litigant by mistake or under an order of Court, the High Court has inherent power to direct the issue of a certificate to enable the party to obtain a refund from the revenue authorities. (Vol. 17) 1930 All 471 (471) : 52 All 546 (DB) \* (Vol. 5) 1918 Pat 496 (497) : 3 Pat L Jour 452 (DB) \* (Vol. 19) 1932 Lah 219 (220) \* (Vol. 19) 1932 Mad 488 (489) : 55 Mad 641 (DB) \* (Vol. 2) 1915 Low Bur 70 (71) : 8 Low Bur Rul 155 \* (Vol. 15) 1928 Pat 35 (35, 36) : 6 Pat 599 (DB).

**11. Reference by Taxing Officer.**—[1] The section leaves it absolutely to the judgment of the Taxing Officer whether a reference to the Judge must be made. There is no provision for compelling him to make the

**S. 5 (contd.)**

reference. (Vol. 34) 1937 Mad 46 (48): 1 L R (1937) Mad 234 (DB).

[2] The Taxing Judge has no power to entertain a taxing matter unless the Taxing Officer considers that the question is of general importance and then chooses to refer it to the Taxing Judge. ('36-43) Tax Dec (Nag) 57 (58).

[3] The Taxing Judge can decide only the point referred to him in the order and not any other point not referred. ('36-43) Tax Dec (Nag) 94 (95).

[4] Where there was a conflict of decisions in the same High Court on a question of Court-fees on a memorandum of appeal from a decree for mesne profits it was held that the Taxing Officer acted rightly in referring the question to the Judge under this section. (Vol. 20) 1933 Pat 81 (33): 12 Pat 183.

[5] Where the jurisdiction of the Taxing Officer to decide a matter or make an order is being questioned, he can refer the question under this section, if he thinks the question to be of general importance. (Vol. 30) 1943 Pat 102 (105): 21 Pat 720.

**12. Decision of Taxing Judge—Finality.**—[1] The decision of the Taxing Judge under this section is not liable to be set aside in appeal, revision or reference. ('03) 1903 All W N 214 (215) \* (Vol. 14) 1927 Bom 643 (647): 52 Bom 61 (DB).

**13. Reference to Bench.**—[1] A Bench of Judges may be appointed to answer a reference under this section. (Vol. 22) 1935 Pat 396 (397): 14 Pat 658 (SB) \* ('94) 4 Mad L Jour 22 (22) (DB) (Judgment by a Division Bench on reference under S. 5).

[But see (Vol. 1) 1914 Cal 40 (46). (Doubt expressed with reference to 9 Beng L R 30 where a reference was heard by a Bench of two Judges.) \* (Vol. 33) 1946 Lah 230 (234) (FB) (Per Munir, Teja Singh and Mohd. Sharif, JJ. in order of reference).]

[2] The Chief Justice can appoint himself as the Taxing Judge under this section. (Vol. 10) 1923 Mad 362 (362): 45 Mad 592.

[3] Reference to final decision of the Chief Justice, etc., implies that such Judge shall not have power to refer the matter further to another Bench for disposal. (Vol. 11) 1924 Pat 161 (161): 3 Pat 146 \* (Vol. 20) 1933 Pat 31 (33): 12 Pat 183 \* ('11) 33 All 20 (23).

[But see (Vol. 22) 1935 Pat 396 (397): 14 Pat 658 (SB).]

[4] The Judge to whom the question has been referred can refer to a Full Bench any question of law which may be involved and dispose of it in accordance with the opinion of the Full Bench. (Vol. 19) 1932 All 485 (485): 54 All 812 (FB).

[5] When there is no question of a reference by a Taxing Officer under this section, a reference by the Bench (before which a case may come) to a larger Bench or to a Full Bench is not precluded. ('07) 30 Mad 96 (97) (FB).

[6] Taxing Officer decided that a certain Court-fee be paid on a memo of appeal—Appellant failed to pay the same—Case placed before a Bench for orders—Order of the Taxing Officer attacked before the Bench as being *ultra vires*—The matter may be referred by such Bench to a Full Bench. (Vol. 12) 1925 Pat 392 (393): 4 Pat 336 (FB).

**14. Enquiry by Taxing Officer or Taxing-Judge.**—

[1] The parties should be called upon to produce in such manner as may be convenient, evidence to enable the Taxing Officer to decide the question of Court-fee. It should not be decided merely on the allegations in the plaint. (Vol. 12) 1925 Pat 392 (397): 4 Pat 336 (FB).

[2] Though the question of Court-fee is primarily one between the appellants and the Crown, the respondents can also be heard. (Vol. 30) 1943 Pat 102 (103, 104): 21 Pat 720.

**15. Powers and duties under this section.**—[1] The Taxing Officer or Taxing Judge has no power to dispose of the proceeding if the requisite Court-fee is not paid and if the fee is not paid as required, the matter must be laid before the Court for orders. See (Vol. 12) 1925 Pat 392 (393): 4 Pat 336 (FB) \* ('75) 24 South W R 253 (254) (DB). (No power to return petition of appeal when stamp insufficient) \* ('10) 32 All 59 (63) (No power to allow time for paying deficit in Court-fee).

[2] The Taxing Officer has no power to ask an appellant to the High Court to deposit any sum of money in Court as a condition precedent to having his case tried. The only power he has is to direct the appellant to pay Court-fee. (Vol. 15) 1928 Pat 29 (30): 6 Pat 602 (DB).

[3] A Taxing Judge is bound to follow the law as laid down by a Division Bench of the High Court whether he is acting administratively or judicially. ('40) 42 Pan L R 101 (102).

[4] It is not the Taxing Officer's duty to advise parties as to the stamp required under the Court-fees Act or to give them notice that they had not sufficiently stamped documents which that Act requires to be stamped. ('90) 12 All 129 (136) (FB).

[5] It is not for the Taxing Judge to see whether the suit is properly framed. (Vol. 30) 1943 Nag 70 (72): 1 L R (1943) Nag 440 \* ('36-43) Tax Dec (Nag) 61 (52) \* (Vol. 11) 1924 Cal 183 (184).

[6] The Taxing Officer must see that the appellant does not escape liability by vague and indefinite statements of facts or by adopting such expedients, as for instance, bringing essentially a title suit in the guise of a partition suit. (Vol. 30) 1943 Pat 102 (106): 21 Pat 720 (720).

[But see ('90) 12 All 129 (161) (FB).]

**16. Objection as to court-fee on appeal if can be taken after admission of appeal.**—[1] Where the memorandum of appeal is simply admitted without any objection being taken to the Court-fee paid, an objection as to Court-fee can be raised at the hearing of the appeal. ('98) 21 Mad 269 (270) (DB) \* ('10) 37 Cal 914 (917) (DB) \* (Vol. 12) 1925 All 787 (788): 47 All 756 (DB) \* (Vol. 17) 1930 Mad 597 (598): 53 Mad 540 (DB) \* (Vol. 30) 1943 Pat 102 (105): 21 Pat 720.

[But see ('97) 20 Mad 398 (401) (DB)].

[2] Objection as to Court-fee can be taken by the respondent to the appeal, (Vol. 12) 1925 All 787 (788): 47 All 756 (DB) \* (Vol. 17) 1930 Mad (597) (598): 53 Mad 540 (DB) \* (Vol. 30) 1943 Pat 102 (104): 21 Pat 720.

[3] Even after an appeal has been admitted, it is open to the Taxing Officer to consider the question of Court-fee on the appeal and require additional Court-fee to be paid. (Vol. 20) 1933 Pat 234 (235, 236): 12 Pat 694 \* (Vol. 30) 1943 Pat 102 (104, 105): 21 Pat 720.

## CHAPTER III.

## FEES IN OTHER COURTS AND IN PUBLIC OFFICES.

6. Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such documents.

Fees on documents filed, etc., in Mufassal Courts or in public offices.

## PROVINCIAL AMENDMENTS.

## BENGAL

(1) By Bengal Act VII of 1935, for the heading of this chapter, namely, "Fees in other Courts and in Public Offices" the heading "Computation of fees" was substituted.

(2) By the same Act, S. 6 was transferred from Chap. III and inserted after S. 5 in Chap. II and S. 6 as thus transferred was re-numbered as sub-s. (1) of S. 6 and in that section as so re-numbered for the words "be paid" the words "has been paid" were substituted.

(3) To the said section as so re-numbered and amended the following sub-section was added. [Note. The sub-section reproduced below is as further amended by S. 2 of the Bengal Act I of 1936] namely:

"(2) Notwithstanding anything contained in sub-s. (1) or in any other Act, a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid subject to the condition that the plaint or memorandum of appeal shall be rejected unless the plaintiff or appellant, as the case may be, pays to the Court within a time to be fixed by the Court such reasonable sum on account of the court-fees as the Court may direct."

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The whole of S. 6, as successively amended by the U. P. Acts, II of 1936, XIX of 1938 and IX of 1941 is reproduced below:

## S. 5 (contd.)

[4] A Taxing Officer can refer the question of Court-fee on an appeal to the Taxing Judge under this section even after admission of the appeal. (Vol. 30) 1943 Pat 102 (105): 21 Pat 720 \* (Vol. 21) 1934 All 807 (808).

[5] Stamp Reporter first made a mistake and reported that the Court-fee paid on the memorandum of appeal was sufficient. He can revise his report and refer the matter to the Taxing Officer. (Vol. 30) 1943 Pat 102 (104, 105): 21 Pat 720 \* (Vol. 20) 1933 Pat 234 (235, 236): 12 Pat 694.

[6] The question of Court-fee, raised before a Taxing Officer and decided by him cannot be re-agitated at the hearing of the appeal. (Vol. 24) 1937 Mad 46 (47, 51): 1 L R 1937 Mad 284 (DB). (Respondent cannot agitate on ground that he was not heard.) \* (Vol. 20) 1933 Pat 234 (235, 236): 12 Pat 694 \* (Vol. 15) 1928 Lah 370 (371) (DB).

## SECTION 6—SYNOPSIS.

1. Heading of Chapter.
2. Scope and applicability of section.
3. "Document of any of the kinds specified."
4. Probates and letters of administration.
5. "Furnished."
6. Power of Court to question valuation given by party.
7. "Amount not less than that indicated by either of the said schedules as the proper fee."
8. U. P. Local Amendments.

1. Heading of Chapter. [1] The heading of chapter III of which this is the first section is not an accurate

heading. If the heading was accurate, all the sections in the chapter would refer only to Courts other than Chartered High Courts and Presidency Small Cause Courts. This is not the case. For instance, Ss 7 and 8 are general in terms and refer to fees payable "under this Act", and not only to those "under this chapter". (See also the wording of S. 12) When there is inconsistency between the heading of a chapter and a section therein, the latter is to prevail. (Vol. 12) 1925 All 787 (789): 47 All 756 (DB) \* (Vol. 19) 1932 Cal 346 (348): 59 Cal 528.

2. Scope and applicability of section:—[1] The fees payable in the Madras City Civil Court are governed by this section. ('12) 35 Mad 567 (568) (FB).

[2] This section does not make provisions with regard to Chartered High Courts (Vol. 15) 1928 Sind 87 (88): 23 Sind LR 91 (DB).

[3] The failure to pay the prescribed court-fees on a plaint will not affect the jurisdiction of the Court to entertain the suit. (Vol. 5) 1918 P. C. 138 (191): 43 Bom 507: 46 Ind App 24 (P. C.) \* ('13) 24 Mad L Jour 658 (659) (DB)

[4] Government also is bound to pay court-fees like any other litigant in suits filed by the Government and, if successful, can recover the same as costs. ('08) 25 Mad 457 (497) (DB).

8. Document of any of the kinds specified. [1] An oral application to the Court, where such is allowed, does not require any court-fee under this section. ('70) 2 NWP HCR 418 (418) (DB).

[2] If a document does not fall under any of the categories listed in the first or second schedule as being chargeable with fees this section will not apply. (Vol. 18) 1926 Cal. 358 (359).

"6. (1) Except in Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited, or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

Provided that where such document relates to any suit, appeal or other proceeding under the United Provinces Tenancy Act, 1939, or the United Provinces Land Revenue Act, 1901, the fee payable shall be three quarters of the fee indicated in either of the said schedules except where the amount or value of the subject matter of the suit, appeal or proceeding to which it relates exceeds Rs. 500;

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before the first day of May 1936.

(2) Notwithstanding the provisions of sub-s. (1), a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid but no such plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant, as the case may be, makes good the deficiency in court-fee within such time as may from time to time be fixed by the Court.

(3) If a question of deficiency in court-fee in respect of any plaint or memorandum of appeal is raised by an officer mentioned in S. 24A the Court shall, before proceeding further with the suit or appeal, record a finding whether the court-fee paid is sufficient or not. If the Court finds that the court-fee paid is insufficient, it shall call upon the plaintiff or the appellant, as the case may be, to make good the deficiency within such time as it may fix, and in case of default shall reject the plaint or memorandum of appeal;

Provided that the Court may, for sufficient reasons to be recorded, proceed with the suit or appeal if the plaintiff or the appellant, as the case may be, gives security to the satisfaction of the Court, for payment of the deficiency in court-fee within such further time as the Court may allow. In no case, however, shall judgment be delivered unless the deficiency in court-fee has been made good, and if the deficiency is not made good within such time as the Court may from time to time allow, the Court may dismiss the suit or appeal.

(4) Whenever a question of the proper amount of court-fee payable is raised otherwise than under sub-s. (3) the Court shall decide such question before proceeding with any other issue.

(5) In case the deficiency in court-fee is made good within the time allowed by the Court, the date of the institution of the suit or appeal shall be deemed to be the date on which the suit was filed or the appeal presented.

(6) In all cases in which the report of the officer referred to in sub-s. (3) is not accepted by the Court, a copy of the finding of the Court together with a copy of the plaint, shall forthwith be sent to the Chief Inspector of Stamps."

#### S. 6 (contd.)

[See also (Vol. 24) 1937 Nag 6 (8) (Section 6 refers to Schedules.)]

[3] No court-fee is necessary on an application by a witness for return of documents filed by him in obedience to a summons. (71) 15 Suth W R 287 (237) (SB).

[4] Applications not required by the Civil Procedure Code to be in writing do not fall within the scope of this section. (70) 2 NWPHCR 418 (418) (DB).

[5] A written statement is not liable to court-fee as not being covered by the first or second schedule. (83) 12 Cal LR 367 (368) (DB).

[6] A memorandum of objections filed under O. 41, R. 28 of the Civil Procedure Code in regard to findings returned by the lower court on remand is not liable to court-fee. (Vol. 23) 1936 Owdh 180 (181); 11 Luck 704 (DB) \* (Vol. 19) 1932 All 526 (526, 527); 54 All 465 \* (Vol. 15) 1928 Pat 85 (85).

[7] No court-fee is payable on a claim filed by a creditor against the estate of a deceased in pursuance of a public notice inviting such claims, in an administration suit, after a preliminary decree for administration has been passed. (Vol. 18) 1931 Mad 683 (683, 684); 55 Mad 626 (DB).

[8] No court-fee is payable on a memorandum of appeal in an appeal to the Government preferred under Rule No. 22 of the Agency Rules framed by the Government under Act XXIV of 1839 and referred to the High Court under that rule by the Government. (99) 22 Mad 162 (163).

4. Probate and letters of administration. [1] Probates or letters of administration are documents of the kind specified in Art. 11 of Sch. I and would have been covered by this section. But S. 19K expressly provides that nothing in this section or S. 28 shall apply to probates or letters of administration. (12) 15 Ind Cas 621 (622) (DB) (Cal).

[But see (Vol. 22) 1935 All 449 (450); 57 All 881 (DB).]

[2] The liability for duty on probate or letters of administration does not depend on whether such probate or letters of administration are necessary under the law to entitle a person to get possession or deal with the estate of the deceased. (Vol. 22) 1935 All 449 (450); 57 All 881 (DB).

5. "Furnished." [1] With reference to the grant of a certificate under Act XXVII of 1860, it was held that the "furnishing" is made at the time when the Court determines to grant the certificate (when it is to be drawn up ready to be issued to the party). The

## Sections 6A, 6B, 6C.

## UNITED PROVINCES

a6A. (1) Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under S. 104 of the Code of Civil Procedure.

The party appealing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against.

(2) In case an appeal is filed under sub-s. (1), and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed, and all interim orders made including an order granting an injunction or appointing a receiver, shall be discharged.

(3) A copy of the memorandum of the appeal [together with a copy of the plaint and of the order appealed against] shall be sent forthwith by the appellate Court to the Chief Inspector of Stamps.

(4) If such order is varied or reversed in appeal, the appellate court shall, if the deficiency has been made good before the appeal is decided, grant to the appellant a certificate, authorising him to receive back from the Collector such amount as is determined by the appellate Court to have been paid in excess of the proper court-fee.

(5) The Court may make such order for the payment of costs of such appeal as it deems fit, and where such costs are payable to the Government, they shall be recoverable as arrears of land revenue.

[a] Inserted by the United Provinces Court-fees (Amendment) Act (XIX of 1938), s. 5.

[b] Inserted by the U. P. Act, 1941 (IX of 1941).

a 6B. (1) If the order of the Court passed under sub-s. (3) of S. 6 is at variance with the opinion of the officer by whom the question of deficiency in court-fee has been raised, the Chief Inspector of Stamps may, within three months from the date of receipt of such order, move, by an application in writing, the Court to which an appeal lies from a decree in the suit or appeal in which such order has been passed, for revision of such order.

## S. 6 (contd.).

"furnishing" does not refer to the time at which the certificate is actually issued to the applicant by the office. ('72) 17 Suth W R 489 (490) (DB).

[2] When a Court adjudged a person to be entitled to a certificate of guardianship under Act XL of 1858, such person substantially obtained the certificate although it might not be drawn up or issued at the time. ('90) 17 Cal 347 (357); 16 Ind App 195 (PC). (Reversing (1886) 12 Cal 542.)

6. Power of Court to question valuation given by party.—[1] It is the duty of the Court to enquire into the proper valuation of a suit when it has grounds to consider that the valuation given by the party is not correct. (Vol. 12) 1925 Pat 392 (396, 397); 4 Pat 336 (FB). \* (Vol 17) 1930 Cal 65 (66, 67); 57 Cal 587 (DB).

7. "Amount not less than that indicated by either of the said schedules as the proper fee."—[1] Plaint so worded that the plaint could be read both as falling under S. 39 of the Specific Relief Act for adjudging a written instrument void or voidable and as falling under S. 42 of the same Act for a mere declaration—Fee must satisfy both schedules—A fixed fee of Rs. 10 under Sch. II, Art. 17 will not be enough. An *ad valorem* fee under Sch. I, if such fee is higher than the fee of Rs. 10, must be paid. (Vol. 22) 1935 All 817 (833, 834); 58 All 146 (FB).

8. U. P. Local Amendments.—[1] Under sub-S. (2) added by the amendments the Court is authorised to receive an insufficiently stamped plaint or memorandum of appeal and grant time to the party to make good the deficiency. ('40) 15 Luck 390 (391) (DB).

[2] It is imperatively necessary that the provisions of clauses (2), (3) and (4) of S. 6 as amended should be faithfully followed. (Vol. 28) 1941 All 55 (56) (DB).

[3] Objection as to court-fee raised by the defendant in a suit for partition—Court decided the question of Court fee along with the merits of the case and embodied everything in a single judgment and added a direction that the decree be drawn up after the deficiency is made good—Procedure adopted by the Court is in flagrant violation of the provisions of S. 6, cl. (4) as amended in United Provinces. (Vol. 23) 1941 All 55 (56) (DB).

[4] Where on a report of the Mansarim of the Court that the court-fee paid on a memorandum of appeal is sufficient, the Court decides that it is sufficient and admits the appeal, the order is only provisional and not final and will not preclude the Court from considering and adjudicating upon an objection as to inadequacy of court-fee raised by the Inspector of Stamps or by the respondent who had not yet been heard on the point. (Vol 29) 1942 Oadh 385 (386).

[5] Revision application by the Chief Inspector of Stamps should state date on which order of lower court was received. (Vol. 33) 1946 All 355 (356) (FB).

[6] The only penalty against appellant not paying deficient court-fee is rejection of appeal—Deficiency cannot be recovered from him. (Vol. 33) 1946 All 355 (356) (FB).

## Section 6A to 6C (U. P. Local Amendment) Note 1.

[1] Where in a partition suit, on objection by the defendant regarding Court-fee, the Court passes a judgment in plaintiff's favour and orders that the decree should not be drawn up till the deficient Court-fee is paid and the plaintiff appeals without paying the deficiency in Court-fee, his appeal is only against an order under S. 6-A but not against a decree as no decree has been drawn up. (Vol. 23) 1941 All 55 (56) (DB).

(2) If such Court is of opinion that the proper court-fee has not been paid on the plaint or the memorandum of appeal to which such order relates, it shall record a declaration to that effect and determine the amount of deficiency in court-fee. No appeal shall lie from such order :

Provided that no such declaration shall be made until the party liable to pay the court-fee has had an opportunity of being heard.

(3) The Court, while recording a declaration under sub-s. (2) may make such order for the payment of costs as it deems fit. Where such costs are payable to the Government, they shall be recoverable in the manner laid down in sub-s. (4) for the recovery of deficiency in court-fee.

(4) When a declaration has been recorded under sub-s. (2), the Court recording the same shall, unless the suit or appeal has come up in appeal before such Court, in which case the deficiency in court-fee shall be recovered in the manner laid down in sub-s. (ii) of S. 12, send forthwith a copy of such declaration to the Court which passed the order under sub-s. (3) of S. 6. Such Court shall, if the suit or appeal is still pending before it, follow the procedure prescribed in sub-s. (3) of S. 6. If the suit or appeal has already been disposed of, the Court shall forward a copy of such declaration to the Collector who shall recover the deficiency from the party concerned as if it were an arrear of land revenue.

[a] *Inserted by the United Provinces Court-fees (Amendment) Act, 1938 (XIX of 1938), s. 5.*

\*6C. (1) When the Chief Controlling Revenue Authority is of opinion that the court-fee paid on any document filed in any Civil Court in a pending suit, appeal or other proceeding is insufficient, and that the question is one of general importance and no action under S. 6B has been taken, it may refer the case, with its own opinion thereon, to the High Court to which such Civil Court is subordinate.

(2) Every such case shall be decided by not less than two Judges of the High Court to which it is referred.

(3) The High Court upon the hearing of any such case shall decide the question raised thereby and shall deliver its judgment thereon containing the grounds on which the decision is founded.

(4) If the High Court finds that the court-fee paid was insufficient, the procedure prescribed by sub-s. (4) of S. 6B for realisation of the deficiency shall be followed as if the decision of the High Court were a declaration under that section.

[a] *Inserted by the United Provinces Court-fees (Amendment) Act, 1938 (XIX of 1938), s. 5.*

Computation of fees payable in certain suits.

7. The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :—

#### PROVINCIAL AMENDMENTS.

##### MADRAS

The words "except suits for relief under S. 14 of the Religious Endowments Act, 1863, or under S. 91 or S. 92 of the Code of Civil Procedure, 1908," were added between the words "mentioned" and "shall".—*Madras Act V of 1922. [30-8-1922.]*

##### ORISSA

For the words "in the suits next hereinafter mentioned" the words "in the suits next hereinafter mentioned except suits for relief under S. 14 of the Religious Endowments Act, 1863, or under S. 91 or S. 92 of the Code of Civil Procedure, 1908" were substituted.—*Orissa Act V of 1939. [31-10-1939.]*

##### S. 6 (contd.)

[2] It is not open to the defendant in an appeal by the plaintiff to file cross-objections to the effect that the plaintiff should have been called upon to pay a higher amount of court-fee. (Vol. 29) 1942 Oudh 391 (391): 18 Luck 256 (DB).

[3] When an appeal lies against an order directing payment of court-fees, incidental orders which led up to it can be set right. (Vol. 28) 1941 All 298 (300): 1 L R (1941) All 558 (DB).

[4] Suit filed before the coming into force of the amendment.—Order regarding court-fee passed against the plaintiff subsequently can be appealed against under S. 6-A (1). (Vol. 28) 1941 All 298 (300): 1 L R (1941) All 558 (DB).

[5] The Chief Inspector of Stamps is incompetent to make a reference to the High Court under S. 6D.

He is only entitled under S. 6-B within the prescribed period to move the prescribed Court by an application in writing for revision. A letter sent by the Chief Inspector containing a statement of his opinion and not bearing a stamp cannot be considered to be an application in writing for revision under S. 6-B. (Vol. 28) 1941 All 369 (370): 1 L R (1941) All 585 (DB).

[6] Appeal under S. 45 (2), U. P. Encumbered Estates Act.—District Judge directing payment of *ad valorem* court-fee and granting time to make good deficiency.—S. 46, U. P. Encumbered Estates Act, does not apply.—Remedy is by appeal under S. 6 A, Court-fees Act. (Vol. 30) 1943 Oudh 213 (214) (DB).

#### SECTION 7 (GENERAL)—SYNOPSIS.

1. Scope of the section.

2. Applicability of the section to High Courts.



## S. 7 (contd.)

3. General rules for determination of court-fees payable in suits.
4. Power of Court to question plaintiff's or appellant's estimate of value of subject-matter.
5. Value for purposes of court-fee and jurisdiction—Distinction.
6. Subject-matter in dispute in appeal.
7. Valuation of appeal—Valuation in lower Court, effect of.
8. Applicability of section to appeals.
9. Court-fee, a preliminary point.
10. Amendment of plaint and court-fees.
11. Relinquishment of claim for bringing suit or appeal within certain court-fee.
12. Court-fee on costs.

1. Scope of the section.—[1] This section deals with the mode of computing the court-fees payable in the various classes of suits enumerated therein. (Vol. 9) 1931 Sind 149 (149); 16 Sind L R 273 (DB).

[2] If a suit does not come under any of the categories mentioned in this section, the fees payable will be determined in accordance with such of the articles in the two schedules as may be applicable to the case. (Vol. 26) 1939 Rang 575 (576); 1939 Rang L R 474.

[3] The section only applies where *ad valorem* fee is payable. (Vol. 33) 1946 All 392 (393); 1 L R (1946) All 455 (DB).

[4] The section contemplates three modes of valuation of the subject-matter of a suit: (i) By valuing it according to its market-value (e.g. paras (iii), (iv), (d), (v) (e) etc). (ii) By ascribing to the subject matter an artificial value based simply on certain fixed rules of calculation (e.g. para. (v) clauses (a), (b), (c) and (iii) By requiring the plaintiff himself to value the relief he seeks (e.g. para (iv)). See (Vol. 26) 1939 Cal 155 (156); 1 L R (1939) 2 Cal 411 (DB).

[5] The defective drafting of the section has been the subject of comment. (Vol. 19) 1932 Cal 346 (348); 59 Cal 528 \*(Vol. 12) 1925 All 787 (789); 47 All 756 (DB).

2. Applicability of the section to High Courts.—[1] This section applies to all fees payable under this Act. Hence, it applies to the computation of court-fees on appeals in Chartered High Courts also. (Vol. 12) 1925 All 787 (789); 47 All 756 (DB) \*(Vol. 24) 1937 Mad 46 (50); 1 L R (1937) Mad 384 (DB) \*(Vol. 9) 1932 Cal 346 (348); 59 Cal 528 \* (Vol. 12) 1925 Pat 392 (404); 4 Pat 336 (FB).

3. General rules for determination of court-fees payable in suits.—[1] The schedules classify suits into different categories for the purpose of court-fees. The first thing to do in determining the court-fee payable on a plaint is to see under which of these categories the suit falls. (Vol. 12) 1925 Pat 392 (398); 4 Pat 386 (FB) \*(08) 35 Cal 202 (205); 35 Ind App 22 (PC).

[2] If the suit is specially dealt with, it must be held to fall within the specific provision rather than a general one which may also cover the case. (08) 35 Cal 202 (205, 206); 35 Ind App 22 (PC) \*(Vol. 23) 1936 Mad 383 (384); 59 Mad 382 \*(Vol. 19) 1932 Mad 605 (609); 36 Mad 212 (DB).

See (Vol. 32) 1945 Bom 474 (474) (DB).

[See also (Vol. 32) 1945 All 111 (112, 113): ILR (1945) All 68.]

[3] A suit under O. 21 R. 103 of the Civil Procedure Code though one for possession of immovable property is governed by sch. II, Art. 17, cl. (i) and not by para. (v) of this section read with Sch. I, Art. 1. (Vol. 20) 1933 Nag 362 (364) \*(Vol. 14) 1927 Pat 140 (141); 5 Pat 631 (DB).

[4] In determining the category of a suit for the purpose of court-fee, the Court must base its decision as to the court-fee payable on the allegations and prayers in the plaint. The plaintiff's allegations must be assumed to be correct for this purpose. (Vol. 30) 1943 Mad 474 (475) \*(Vol. 20) 1933 Mad 480 (481) (DB).

[5] The defendant's allegations and contentions and the evidence in the case are immaterial for determining the category of a suit for court-fee. \*(Vol. 30) 1943 Oudh 456 (457) \*(Vol. 23) 1936 Mad 525 (525) \*(Vol. 4) 1917 Cal 668 (668) (DB) \*(Vol. 15) 1928 Bom 476 (477, 488); 52 Bom 904 (DB) \*(12) 6 Sind L R 72 (74) (DB) \*(39) 182 Ind Cas 178 (179) (Pat) \*(Vol. 20) 1933 Mad 431 (432) \*(Vol. 14) 1927 Pat 140 (141); 5 Pat 631 (DB) \*(Vol. 17) 1930 All 443 (443, 444); 52 All 756 \*(Vol. 22) 1935 Cal 273 (275) (DB).

[6] At the institution of suit plaintiff in possession but deprived of possession by defendant subsequently during pendency of suit.—Plaintiff is not bound to add prayer for possession to his plaint and pay additional court-fee. (03) 26 All 215 (217) (DB).

[7] Question as to whether a suit comprises distinct subjects for purpose of S. 17, must be determined with reference to plaint. (Vol. 15) 1928 Pat 274 (275); 7 Pat 402.

[See (Vol. 26) 1939 Mad 360 (361): ILR (1939) Mad 367 (SB).]

[8] Court must look at what plaintiff is actually seeking for in his plaint. Suit as framed not maintainable—Court may give plaintiff opportunity, if it thinks fit, to amend plaint so as to make it sustainable in law. (Vol. 25) 1938 All 481 (482): ILR (1938) All 470 (DB) \*(12) 6 Sind L R 72 (76) (DB).

[9] Plaintiff is not liable to pay any court-fee in excess of amount that is payable on his suit as framed by him, merely because Court thinks that he ought to have framed his suit in a different manner or ought to have included a certain relief which he has not included. (Vol. 29) 1942 Pat 60 (62); 20 Pat 780 (DB) \*(Vol. 24) 1937 Mad 376 (377) \*(Vol. 25) 1936 Mad 470 (470) \*(Vol. 23) 1936 Pat 171 (172); 15 Pat 366 (DB).

[10] In construing plaint for purpose of court-fee court must take into consideration substance and not merely form of relief prayed for. (Vol. 14) 1927 Lah 499 (500); 8 Lah 531 (DB) \*(Vol. 33) 1946 Bom 365 (365) (DB) \*(Vol. 22) 1935 Cal 338 (340) (DB) \*(07) 35 Cal 202 (205, 206); 35 Ind App 22 (PC) \*(Vol. 26) 1939 Mad 435 (435) \*(Vol. 23) 1936 Mad 383 (384); 59 Mad 382 \*(Vol. 17) 1930 Nag 73 (75) (DB) \*(Vol. 21) 1934 Oudh 505 (506) (DB).

[See however (Vol. 15) 1928 Mad 929 (930) (DB).]

[11] Plaintiff suing to avoid attachment of his property in execution of a decree passed against another—Value of property and not amount of decree will be value of the suit unless amount of decree is less than value of property. (07) 35 Cal 202 (207); 35 Ind App 22 (PC).

**S. 7 (contd.)**

[See also (Vol. 28) 1941 All 295 (297).]

4. Power of Court to question plaintiff's or appellant's estimate of value of subject-matter. — [1] The power of a Court to require the value of a suit to be corrected under O. 7 R. 11 Civil P. C. applies even to cases in which, under S. 7, para. (iv) of this Act the court-fee on the suit is to be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The provisions of S. 7, para. (iv) are subject to the provisions of O. 7 R. 11. (Vol. 26) 1939 Nag 50 (56): ILR (1938) Nag 558 (FB). ((Vol. 24) 1937 Nag 14 overruled) \* (Vol. 23) 1936 Sind 25 (25) (DB) \* (Vol. 24) 1937 Sind 241 (241, 242): 31 Sind L R 442 (FB).

[2] Plaintiff's valuation is *prima facie* to be accepted as correct unless the Court has reason to think that it is fictitious or that for improper motives the plaintiff has undervalued or overvalued the relief claimed by him. ('07) 30 Mad 96 (98) (FB) \* (Vol. 26) 1939 Nag 50 (56): ILR (1938) Nag 558 (FB). ((Vol. 24) 1937 Nag 14 overruled).

[3] Subject matter not capable of being satisfactorily valued in terms of money, plaintiff's valuation is *prima facie* to be accepted as correct. ('07) 34 Cal 552 (556) (DB).

5. Value for purposes of court-fees and jurisdiction — Distinction. — [1] Court-fee payable being fixed amount, No valuation of suit or appeal is necessary for purpose of ascertaining court-fee payable. But there will have to be a valuation for purposes of jurisdiction. (Vol. 12) 1925 Pat 392 (398): 4 Pat 336 (FB) \* ('11) 37 Cal 860 (862) \* ('88) 15 Cal 104 (106, 107) (DB).

[2] Suit for bare declaration of title to property — Court-fee payable on plaint is Rs. 10 under Art. 17 of second schedule but value of suit for purposes of jurisdiction would be real value of property and not amount for which Rs. 10 would be an *ad valorem* fee under first schedule. (Vol. 5) 1918 P C 188 (191): 43 Bom 507: 46 Ind App 24 (PC).

[3] Even in those cases in which an *ad valorem* court-fee is payable, value of a suit or appeal for purpose of court-fees is not always the same as value for purposes of jurisdiction. ('88) 12 Bom 675 (677) (DB).

[4] Where an *ad valorem* court-fee is payable under Court-fees Act, value of a suit for purposes of court-fees and its value for purposes of jurisdiction are the same. ('88) 12 Bom 675 (677) (DB) \* (Vol. 12) 1925 All 602 (604): 47 All 501.

[5] In the absence of any special provisions the question of court-fees and that of valuation for jurisdictional purposes are distinct and fall to be decided separately under the respective enactments dealing with them. ('72) 18 Sath W R 109 (110) (DB) \* ('73) 20 Sath W R 33 (35) (DB) \* ('07) 31 Bom 73 (77) (DB) \* ('80) 4 Bom 515 (527) (FB).

[See also (1860) 7 Moo Ind App 428 (429) (PC).]

6. Subject-matter in dispute in appeal. — [1] Value of the subject-matter of an appeal simply means value of the relief which has been granted or refused by the decree or portion of the decree against which the appeal is preferred. (Vol. 28) 1941 All 295 (297).

[2] Party may confine his appeal to a portion of relief granted or refused and if he does so, it is the value of such portion that will constitute the value of the subject matter in dispute in the appeal. ('36-43) Tax Dec (Nag) 56 (37).

(3) Appeal directed against a decree or portion of decree granting any relief against appellant — Value of appeal is value of relief so granted, or such portion thereof as may be in dispute in appeal. (Vol. 9) 1922 Mad 211 (214): 45 Mad 246 \* (Vol. 12) 1925 Mad 323 (324): 48 Mad 652 \* (Vol. 13) 1926 Mad 225 (226) (DB).

[4] A filing suit for declaration of title and possession of certain lands with mesne profits — Suit decreed subject to condition that plaintiff must pay certain sum to defendant — Plaintiff appealing from decree — Subject matter in dispute in appeal is relief imposing payment on plaintiff and he is bound to pay Court-fee on such amount — Defendant appealing — Defendant is bound to pay Court-fee according to value of land and not such value reduced by amount directed to be paid to him by decree. (Vol. 9) 1922 Mad 211 (214): 45 Mad 246 \* (Vol. 12) 1925 Mad 323 (324): 48 Mad 652.

[5] Suit for redemption of kanoni mortgage-decree passed for redemption on payment not only of amount of kanom but also of value of improvements — Appeal preferred by plaintiff as regards value of improvements — Value of improvements constitute subject matter in dispute in appeal and Court-fee is to be proportionate to such value. (Vol. 13) 1926 Mad 225 (226) (DB).

[6] Suit for possession and mesne profits decreed in plaintiff's favour — Defendant appealing from whole decree — Claim for mesne profits also forms part of subject-matter of appeal although trial Court has directed their ascertainment in separate proceedings. (Vol. 16) 1929 Pat 731 (732): 8 Pat 906 (DB) \* (Vol. 6) 1919 Pat 471 (472).

[7] A plaintiff sued for dissolution of partnership and accounts — Suit dismissed — Claim for dissolution of partnership and accounts constitutes subject-matter in dispute in appeal. (Vol. 8) 1921 Sind 149 (151): 16 Sind L R 273 (DB).

7. Valuation of appeal — Valuation in lower Court, effect of. — [1] Plaintiff sued for accounts, valuing his suit under S. 7 para. (iv) (f) at Rs. 2000 — Suit dismissed — Appeal from the decision — It is not open to him to value his appeal at a lesser amount. (Vol. 8) 1921 Sind 149 (150): 16 Sind L R 273 (DB) \* (Vol. 20) 1933 Rang 410 (410) (DB).

[2] A plaintiff filed suit for accounts, valuing suit at a particular amount under S. 7 para. (iv) — Preliminary decree passed merely declaring plaintiff's right to have accounts taken and not granting him any particular sum — Defendant appealed — He must pay Court-fee on appeal according to amount at which plaintiff had valued relief in plaint. (Vol. 4) 1917 Mad 668 (669): 39 Mad 725 (FB).

[But see (Vol. 12) 1925 All 787 (790): 47 All 756 (DB)].

[3] Suit for mesne profits — Decree in plaintiff's favour simply declaring his right in general terms and leaving actual amount to be ascertained in supplemental proceedings — Defendant appealing — He is bound by plaintiff's estimate of relief in the suit. (Vol. 16) 1929 Pat 731 (732): 8 Pat 906 (DB).

[4] Suit for royalty and cesses — Trial Court declaring right and appointing commissioner to ascertain actual amount — Appeal by defendant — Defendant must accept valuation in lower Court. (Vol. 17) 1930 Pat 605 (607).

[5] Suit for declaration with consequential relief — Decree in favour of plaintiff — Defendant appealed — He is bound by valuation of plaintiff under S. 7, para. (iv). (1900) 23 Mad 490 (492) (DB) \* (Vol. 19) 1932 Lah 132 (135): 15 Lah 391 (DB).

For money. **7 (i).** In suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities, or of other sums payable periodically)—according to the amount claimed :

#### S. 7 (contd.)

[6] Plaintiff filed suit for possession of land and damages and for demolition of structures erected by defendant on the land—Suit decreed in its entirety—Defendant appealed—*Held* that value of subject-matter of appeal could not be less than value of subject-matter of suit as adopted and acted upon by lower Court. (Vol. 28) 1941 All 295 (297).

[7] Suit decreed by trial Court but dismissed in appeal—Plaintiff preferred second appeal. It is enough if he pays court-fees on valuation adopted in trial Court. (Vol. 4) 1917 Lah 386 (387) (DB).

[8] Suit in which fixed court-fee was payable erroneously treated, owing to defendant's action, as one in which *ad valorem* fee is payable and valued at a certain amount for that purpose—Valuation will remain good for purposes of appeal also—Suit decreed and defendant appealing—He cannot turn round and say that he will pay only a fixed court-fee. (Vol. 20) 1933 Nag 362 (364).

**8. Applicability of section to appeals.**—[1] This section applies also to the computation of court-fees on appeals from decrees and not only to original suits. (Vol. 12) 1925 All 787 (789); 47 All 756 (15B) \* (Vol. 19) 1932 Cal 346 (348); 59 Cal 528 \* (Vol. 24) 1937 Mad 46 (50); ILR (1937) Mad 284 (DB) \* (Vol. 24) 1937 Nag 6 (7) \* (Vol. 17) 1930 Cal 65 (66); 57 Cal 587 (DB) \* (Vol. 9) 1922 Oudh 82 (83); 25 Oudh Gas 50 (DB) \* ('10) 6 Nag L R 164 (167).

[2] The section will apply to appeals only if subject-matter in dispute in appeal falls within any of the categories mentioned in this section. (Vol. 18) 1931 Mad 710 (711) \* ('07) 30 Mad 96 (98) (FB).

[3] In the following cases it has been held that this section only applies to suits and not to appeals. (Vol. 26) 1939 Rang 375 (376); 1939 Rang LR 474 \* (Vol. 18) 1931 All 581 (552); 52 All 1029 \* ('09) 5 Nag LR 130 (132) \* (Vol. 1) 1914 All 520 (520); 36 All 40 (FB) \* (Vol. 18) 1926 Mad 225 (226) (DB).

[See also ('56-43) Tax Dec (Nag) 108 (108) \* ('06) 29 Mad 367 (369) (DB).]

[4] The following cases hold that the provision in para (iv) is an exception to the general provisions of the section and indicates that other paragraphs do not apply to appeals. ('09) 5 Nag LR 130 (132) \* (Vol. 26) 1939 Rang 375 (376); 1939 Rang LR 474.

[5] According to the following case para (iv) shows the trend of the Act and is in favour of holding that the other paragraphs apply to appeals also. See (Vol. 24) 1937 Mad 46 (50); ILR (1937) Mad 284 (DB).

**9. Court-fee, a preliminary point.**—[1] The question of court-fee is a preliminary point which ought to be decided by the Court before proceeding to decide the merits of the case. A judgment dismissing a suit on the merits as well as holding that the court-fee paid is not sufficient is not proper. (Vol. 25) 1933 Lah 311 (312).

**10. Amendment of plaint and court-fees.**—[1] Plaint amended—Court-fee to be paid is to be calculated on plaint as amended and not on original plaint. ('90) 14 Bom 335 (400, 401) (DB) \* ('85) 9 Bom 355 (357) (DB) \* ('92) 15 Mad 15 (18) (DB).

[2] It is entirely in the discretion of Court whether or not to allow amendment of plaint even though plaintiff may be willing to pay additional court-fee that may be necessitated by amendment of plaint. ('76) 1 Mad 40 (44) (DB).

[3] The following cases have held that even where a suit has been deliberately framed as one for more declaration with a view to avoid paying higher court-fee, it can be allowed to be amended so as to include a prayer for consequential relief. (Vol. 11) 1924 Pat 310 (311); 2 Pat 919 (DB) \* ('12) 59 Cal 704 (710) (DB).

**11. Relinquishment of claim for bringing suit or appeal within certain court-fee.**—[1] *Ad valorem* fee payable on plaint or memorandum of appeal according to amount or value of subject-matter—Court-fee paid not sufficient—It is open to plaintiff or appellant to relinquish part of claim so as to bring his suit or appeal within court-fee paid. (Vol. 26) 1939 Bom 354 (357) (DB) \* (Vol. 24) 1937 Cal 562 (564) (DB) \* (Vol. 13) 1926 Lah 477 (477, 478) (DB) \* (Vol. 18) 1931 Mad 716 (716) \* ('04) 27 All 151 (152) (DB) \* ('28) 9 Pat L R 613 (615) (DB) \* (Vol. 16) 1929 All 306 (309) (DB) \* (Vol. 14) 1927 Lah 543 (543).

[But see (Vol. 4) 1917 Cal 77 (78); 44 Cal 352 (DB) \* (Vol. 1) 1914 Bom 117 (118) (DB).]

[2] A relinquishment by plaintiff made in consequence of erroneous order of Court requiring plaintiff to pay additional court-fee cannot bind him. ('02) 12 Mad L Jour 66 (67) (DB).

**12. Court-fee on costs.**—[1] Ordinarily, court-fees are not payable upon costs entered in the decree against which an appeal is presented. (Vol. 14) 1927 Sind 251 (252); 23 Sind LR 277 (DB).

[2] Where apart from and independently of any other relief which appellant seeks in appeal from a decree he seeks distinct relief on ground that costs of parties have not been properly assessed or apportioned, court-fee will have to be paid on such costs. (Vol. 27) 1940 Oudh 182 (183); 15 Luck 392 (DB) \* ('01) 1901 All W N 21 (21) (DB) \* (Vol. 21) 1934 Lah 739 (739) \* (Vol. 5) 1918 Pat 210 (211); 3 Pat L Jour 443.

[3] [See also S. 17 Note "Court-fee on costs" and Sch. I Art. 1 Note "Appeal as to costs—Court-fee."]

#### SECTION 7 PARA (i)—SYNOPSIS.

1. Suit for money.
2. Suit for arrears of maintenance.
3. Suit for damages.
4. Court-fee in suit for mesne profits.
5. Suit for rent.
6. Suit on instalment-bond.
7. Claim for compensation for improvements in suit for ejectment.
8. Suit for movable property or its value.
9. "Amount claimed".
10. Court-fee on future interest.
11. Court-fee on written statement pleading set-off.
12. Court-fee on appeal—General.
13. Appeal from instalment decree.
14. Applicability of paragraph to suit for sale on mortgage.

**S. 7 (i) (contd.)**

15. Court-fees in suits on mortgages—Illustrative cases.

16. Court-fee on appeal from decree in mortgage suit.

17. Court-fee on appeal from personal decree in mortgage suit.

**1. Suit for money.**—[1] A suit for an ascertained sum of cesses is within this paragraph. (Vol. 17) 1930 Pat 605 (606).

[2] Suit by agent against principal for specified amount of money is governed by this paragraph. ('36-43) Tax Dec (Nag) 103 (105).

[3] Suit for enhancement of rent—Paragraph not applicable. (Vol. 21) 1934 Cal 674 (675): 61 Cal 513.

[4] Suit for declaration that plaintiff is liable to pay *achupahsha* at a rate lower than that claimed by the defendant Paragraph does not apply. (Vol. 11) 1924 Mad 621 (621) (DB).

[5] Memorandum of appeal by landlord from decree in a suit by tenant for commutation of grain rent into money rent, on the ground that the rate fixed by the lower Court is too low is not governed by this paragraph. (Vol. 11) 1924 Mad 623 (623, 624) (DB).

[6] Suit to obtain a declaration that plaintiff is the sole and exclusive owner of Government Promissory Notes which are not mature for payment—Paragraph does not apply. (Vol. 27) 1940 Lah 26 (26) (DB).

[7] Suit for possession of land with damages and mesne profits—Claim for possession falls under para (v) while claims for damages and mesne profits fall under this paragraph—Different reliefs should be valued according to mode indicated in respective paragraphs applicable to them. ('77) 1 All 552 (554) (FB).

**2. Suit for arrears of maintenance.**—[1] This paragraph refers only to claims for arrears of maintenance and does not apply to a claim for the establishment of the plaintiff's right to maintenance hereafter. Para (ii) refers to such suits and not to suits for arrears of maintenance. (Vol. 12) 1925 Nag 435 (436) \* (Vol. 14) 1927 Oudh 623 (624).

[2] Claim for arrears of maintenance founded on allegation of a contractual as well as legal right—Paragraph applies. See (Vol. 14) 1927 Oudh 623 (624).

[3] Plaintiff claimed that she had a charge on certain properties for Rs. 3,500 which she had to spend for her maintenance—Held that claim was really one for arrears of maintenance. (Vol. 21) 1934 Lah 150 (150) (DB).

**3. Suit for damages.**—[1] Suit for damages for breach of contract—Plaintiff alleging that he had sustained damages to the extent of Rs. 3,600 but deducting Rs. 2,000 which he owed to defendant for goods purchased actually claiming only Rs. 1,600—Court-fee need be paid only on Rs. 1,600. (Vol. 6) 1919 Lah 363 (364): 1919 Pan Re No. 61 (DB).

[2] Suit for damages—Plaintiff can enter in his plaint an approximate estimate of damages and offer to pay additional court-fee in case a larger amount is found to be due before decree is passed—Section 11 will not apply to the case and consequently plaintiff cannot be allowed to pay court-fee after decree is passed and before execution. ('07) 17 Mad L Jour 625 (626) (DB).

[3] Suit for redemption of *kanom* and for damages—Plaintiff is entitled to pay court fee in respect of damages after amount recoverable as damages is ascertained and set-off against the sum payable by plaintiff as compensation for improvements made by *kanomdar* and after it is decided what amount, if any, is due to plaintiff as damages after such set-off is made under s. 6. (2) of Malabar Compensation for Tenants Improvements Act (I of 1900). (Vol. 13) 1926 Mad 764 (765). ((Vol. 13) 1926 Mad 542 reversed on review).

[4] Suit for possession of land and damages Relief as to possession should be valued under para (v) of this section and relief as to damages should be valued under this paragraph. ('77) 1 All 552 (554) (FB).

[5] No court-fee need be paid on damages *pendente lite*. (Vol. 22) 1935 Pat 160 (163): 14 Pat 414 (DB).

**4. Court-fee in suit for mesne profits.**—[1] Claim for mesne profits is one for damages or compensation. (Vol. 24) 1937 Mad 46 (48): 1 L R (1937) Mad 284 (DB) \* (Vol. 4) 1917 Pat 79 (80): 3 Pat L Jour 67 (DB).

[See also (Vol. 13) 1926 Pat 218 (222): 5 Pat 361 (FB) \* (Vol. 28) 1941 Cal 1 (12) (DB)].

[2] The paragraph applies only to mesne profits up to institution of suit and not to mesne profits in regard to subsequent period. ('91) 15 Bom 416 (418) (DB) \* (Vol. 24) 1937 Mad 46 (48): 1 L R (1937) Mad 284 (DB) \* (Vol. 22) 1935 Pat 160 (163): 14 Pat 414 (DB) \* (Vol. 13) 1926 Pat 218 (225, 229): 5 Pat 361 (FB).

[3] Mesne profits up to institution of suit—Amount of court fees payable on plaint will depend on the amount at which plaintiff estimates his claim for mesne profits in the plaint. (Vol. 18) 1931 All 538 (539) (DB) \* (Vol. 28) 1941 Cal 1 (12) (DB) \* (Vol. 13) 1926 Pat 218 (222): 5 Pat 361 (FB).

[4] Decree in plaintiff's favour for a larger sum than claimed—Under first part of S. 11 he will have to pay additional court fee on extra amount decreed before he can execute decree. Court passing preliminary decree and leaving exact amount of mesne profits to be determined subsequently—Plaintiff need not pay any additional court-fee until exact amount due to him is ascertained and final decree is passed for amount in excess of that claimed. (Vol. 22) 1935 All 206 (206, 207) (DB).

[See however (Vol. 18) 1931 All 538 (539) (DB).]

[5] Suit for mesne profits dismissed—Plaintiff appealing He must pay court-fee on appeal according to amount at which he estimates his claim. (Vol. 4) 1917 Pat 79 (79): 3 Pat L Jour 67 (DB).

[See (Vol. 18) 1931 All 538 (539) (DB).]

[6] No Court-fee is payable on memorandum of appeal or cross-objection in regard to future mesne profits, filed by plaintiff whose claim has been dismissed by lower Court. (Vol. 24) 1937 Mad 46 (49) 1 L R (1937) Mad 284 (DB).

[See however (Vol. 20) 1933 Pat 234 (235): 12 Pat 694.]

[7] Preliminary decree for mesne profits passed against defendant—Defendant appealing—He must pay *ad valorem* court fee on amount claimed in plaint. ('09) 1 Ind Cas. 670 (673) (DB) (Cal) \* ('93) 16 Mad 310 (311) (LB) \* (Vol. 20) 1933 Pat 81 (83): 12 Pat 188 \* (Vol. 6) 1919 Pat 471 (472).

## S. 7 (i) (contd.)

[See however (Vol. 17) 1930 Mad 597 (599) : 53 Mad 540 (DB).]

[8] Final decree for mesne profits passed after preliminary decree for the same—Defendant appealing against final decree—He must pay *ad valorem* court-fee on amount in dispute under Art 1, Sch. 1. (Vol. 10) 1923 Mad 19 (19) : 43 Mad 280 (DB) \* (Vol. 20) 1933 Pat 81 (83, 84) : 12 Pat 188 \* (Vol. 20) 1933 Pat 234 (235) : 12 Pat 694.

[9] Decree passed against a number of defendants jointly—Some of them alone appealing—They must pay court-fee on whole amount and not only on a portion of it which may be proportionate to area of land in their occupation. (Vol. 20) 1933 Pat 81 (83, 84) : 12 Pat 188.

[10] Plaintiff appealing against order dismissing his application for ascertainment of mesne profits awarded by preliminary decree must pay *ad valorem* court-fee on amount claimed by him. (Vol. 18) 1931 All 538 (539) (DB) \* (Vol. 5) 1918 Pat 623 (624) : 3 Pat L Jour 101 (DB).

[But see (Vol. 26) 1939 Mad 667 (669).]

[11] Where a plaintiff wants to appeal against a final decree fixing the amount of mesne profits, and seeks for an enhancement of the amount awarded, he must pay *ad valorem* court-fees on the extra amount claimed by him, whether the decree appealed from relates to mesne profits before suit or to subsequent mesne profits. (Vol. 19) 1932 Pat 228 (230, 231) : 11 Pat 532 (DB) \* (Vol. 20) 1933 Pat 234 (235) : 12 Pat 694.

5. Suit for rent.—[1] This paragraph expressly includes a suit for sums payable periodically. Suit for arrears of rent will fall within this paragraph. Court fee would be payable according to amount of arrears claimed. (12) 6 Sind L R 114 (115) (DB).

[2] Suit for arrears of rent including also prayer for injunction restraining certain defendants from displacing plaintiff's title. Relief of injunctions should be valued under para (iv) of the section. (12) 6 Sind L R 114 (115) (DB).

[3] Suit for rent—Possession not claimed—Mere fact that court will have to decide question of title will not alter character of suit for purposes of court-fees—Fees paid according to amount or rent claimed will be enough. (93) 1893 Bom. P J 458 (DB).

[4] Suit for possession and rent—Future rent also claimed from date of suit to date of delivery of possession—Neither para (i) nor para (ii) of this section would apply to claim of future rent. (80) 2 All 632 (633) (FB). (Per Spankie J.).

6. Suit on instalment-bond.—Suit on instalment-bond—Court-fee is payable only on amount of instalment which has fallen in arrear and is being sued for—Court-fee need not be paid on whole amount of bond. (1865) 4 Sath W R (Sec) 12 (13) (DB).

7. Claim for compensation for improvements in suit for ejectment.—[1] Suit for ejectment of tenant—Tenant claimed a certain amount as compensation for improvements—On claim being disallowed and decree for ejectment being passed against him without giving him any compensation he filed appeal from decree repeating his claim for compensation—*Held* that in Madras Presidency such claims were not separately valued for purposes of court-fee and that

valuation of appeal as simply one against decree for possession was sufficient. (1900) 23 Mad 84 (85) (DB).

8. Suit for movable property or its value.—[1] Suit for recovery of certain movable properties or certain sum of money as compensation for their value comes under this paragraph—All items of the property claimed on basis of same cause of action Court-fee paid on their aggregate value is sufficient. (81) 3 All 131 (133, 134) (DB).

9 "Amount claimed".—[1] The court-fee under this paragraph is to be computed according to the amount claimed in the suit. This refers to the amount actually claimed in the plaint. (Vol. 12) 1925 Rang 65 (66) : 2 Rang. 462 \* (Vol. 6) 1919 Lah 363 (364) : 1919 Pan. Ke. No. 61 (DB).

10. Court-fee on future interest.—[1] Interest for period after institution of suit cannot be said to form any part of plaintiff's claim. No court-fee is chargeable on future interest, either at time of instituting suit or before execution of decree. (05) 27 All 559 (561) (DB) \* (06) 33 Cal 1232 (1235) (DB) \* (75) 12 Bom H C K 227 (228) \* (93) 17 Bom 41 (42) (DB) \* (1900) 10 Mad L Jour 144 (145) (DB) \* (Vol. 24) 1937 Nag 6 (8) \* (Vol. 16) 1929 Nag 1 (12) : 24 Nag L R 197 (DB) \* (Vol. 21) 1934 Pat 571 (573) : 14 Pat 4 (SB). ((Vol. 9) 1922 Pat 387 : 1 Pat 19 (DB) overruled).

[2] Plaintiff appealing from dismissal of his suit is not liable to pay court-fee on interest subsequent to institution of suit. (1900) 10 Mad L Jour 144 (145) (DB) \* (Vol. 14) 1927 Pat 230 (230) (DB) \* (93) 17 Bom 41 (42) (DB).

[See also (Vol. 21) 1934 Lah 32 (33) (DB).]

[But see (Vol. 24) 1937 Nag 6 (8) \* (Vol. 6) 1919 Oudh 305 (305) : 22 Oudh Cas 1 \* (Vol. 20) 1933 Lah 941 (943).]

[3] Decree awarding future interest—Defendant appealing against such decree is bound to pay court-fee on such interest calculated up to date of filing appeal—Appellant will not be liable for such court-fee if there is no ground of appeal challenging order as to future interest. (Vol. 26) 1939 Pat 83 (85) : 17 Pat 637 (DB) \* (Vol. 23) 1936 Oudh 151 (151) : 11 Luck 396 (DB) \* (Vol. 24) 1937 Oudh 3 (3) : 12 Luck 466 (DB) \* (Vol. 21) 1934 All 805 (807) : 57 All 71 (DB).

[4] Suit for money—Decree in plaintiff's favour making decretal amount payable by certain instalments—If default was made in paying any instalment, interest at a certain rate was to be recoverable by decreeholder on balance of amount.—Plaintiff appealed, praying that he must be allowed future interest on decretal amount till payment of each instalment, irrespective of default being made by judgment debtor or not.—Plaintiff was allowed to pay fixed court-fee of Rs. 10 under Art. 17 of second schedule on ground of subject-matter not being capable of valuation in money. (Vol. 24) 1937 Nag 95 (96).

11. Court-fee on written statement pleading set-off.—[1] Written statement pleading a set-off or counter-claim—Court-fee will be payable under Art. 1 Sch. 1 according to amount claimed to be set off and not according to difference between such amount and amount claimed by plaintiff in plaint. (Vol. 25) 1938 All 522 (523) \* (89) 13 Bom 672 (673) (DB) \* (92) 15 Mad 29 (34) (DB) \* (12) 15 Ind Cas 526 (528) (Oudh) \* (Vol. 12) 1925 Rang 65 (67) : 2 Rang 462 \* (Vol. 10) 1923 All 113 (119) : 45 All 218 (DB).

**S. 7 (i) (contd.)**

[2] No court-fee is payable on a written statement which does not plead a set-off or counter-claim but merely pleads that there has been adjustment of accounts between parties before suit and that consequently only a fraction of sum claimed in plaint is due to plaintiff. See (Vol. 24) 1937 Lah 62 (62).

**12. Court-fee on appeal—General.**—[1] Plaintiff sued for recovery of Rs. 1,000 from defendant and on his suit being dismissed, appeals from decree but reduced his claim in appeal to Rs. 750—He will have to pay court-fees under this paragraph only on Rs. 750—Plaintiff sued for Rs. 6,000 but only gets a decree for Rs. 4,000 and he appeals from decree, claiming whole amount—He must pay court-fee on Rs. 2000. (Vol. 1) 1914 Lah 390 (390); 1915 Pan Re No. 12 (DB).

[See also (Vol. 27) 1940 Bom 369 (372) : I L R (1941) Bom 71 (DB).]

[But see ('36-43) Tax Dec (Nag) 103 (106).]

[2] Plaintiff claiming a fixed sum and obtaining decree—Defendant appealing and asking for accounts to be taken must pay *ad valorem* court-fee on valuation of suit as fixed in plaint. (Vol. 22) 1935 Bom 69 (70) (DB).

[3] If the dispute in appeal does not relate to a claim for money this paragraph will not apply to the appeal. (Vol. 9) 1922 Mad 211 (214) : 45 Mad 246.

[4] Plaintiff claiming a decree for money against a number of defendants—Suit decreed only against one or some of them alone—Plaintiff appealing praying for a decree against remaining defendants also—His appeal will come under this paragraph. (Vol. 10) 1923 Lah 135 (136) (DB) \*(Vol. 9) 1922 Bom 172 (173) : 46 Bom 840 (DB) \*('98) 12 C P L R 43 (44, 45).

[5] In the trial Court plaintiff seeking a decree for a certain sum of money against defendant 1 personally and against assets of a deceased person in the hands of defendants 2 to 5 who are his legal representatives—Suit decreed against first defendant but dismissed as against other defendants—Plaintiff appealing from latter part of decree will have to pay *ad valorem* fee either on value of assets in the hands of defendants 2 to 5 or on amount claimed by plaintiff appellant whichever is less. (Vol. 19) 1932 All 406 (407) : 54 All 608.

**13. Appeal from instalment decree.**—[1] Plaintiff appealing against instalment decree and praying for a decree for a lump sum—He is liable to *ad valorem* court-fee on the difference between decretal amount taken as a whole and present value of instalments—In such a case, this paragraph does not apply. (Vol. 23) 1936 Pesh 232 (232) (DB) \*(Vol. 1) 1914 Lah 390 (391) : 1915 Pan Re No. 12 (DB) \*('92) 19 Cal 272 (274) (DB).

[2] Instalment decree—Defendant required to give security for due payment of instalments—Defendants only appealing against imposition of condition as to security—Subject-matter of appeal is not capable of valuation—Defendant need pay only fixed fee of Rs. 10 under Art. 17 (vi) of second schedule. ('84) 14 C P L R 172 (173).

**14. Applicability of paragraph to suit for sale on mortgage.**—[1] A "suit for money" includes a suit for sale in enforcement of a mortgage—Amount of court-fee payable thereon is according to the amount

claimed by the plaintiff and not the principal money secured by the mortgage as under para (ix). (Vol. 18) 1931 Cal 159 (159) : 58 Cal 829 (DB) \*(Vol. 18) 1931 Mad 710 (711) \*('94) 18 Bom 696 (698) \*(Vol. 25) 1938 Mad 30 (31) \*(Vol. 29) 1942 Mad 205 (207) : I L R (1942) Mad 438 (DB).

[2] The paragraph also applies to cases in which no personal decree or decree against the other properties of the defendant is sought in the plaint in suit for sale on mortgage. ('05) 7 Bom L R 194 (195) (DB).

[3] Where a plaintiff in a suit on a mortgage seeks for a decree for sale of the mortgaged property and also for a money decree, the former relief falls under para (iv) (c) of this section and the latter relief under this paragraph. ('76) 1876 Oudh S C No. 34.

[4] The same principle applies to a suit for sale in enforcement of a charge on immovable property as a suit on a mortgage. (Vol. 29) 1942 Mad 205 (207) : I L R (1942) Mad 438 (DB).

**15. Court-fees in suits on mortgages—Illustrative cases.**—[1] Mortgagee suing on a puisne mortgage and praying that sale under such mortgage should be subject to prior mortgage. It is enough if he pays *ad valorem* court fee according to amount claimed by him in respect of puisne mortgage. In regard to prior mortgage it is enough if he pays fixed court-fee of Rs. 10 under Act 17 cl. (iii) of the second schedule. (Vol. 22) 1935 All 100 (101, 102) : 57 All 602 (DB).

[2] A sub-mortgagee suing for sale of properties mortgaged to his mortgagor, i.e., the main mortgagee—under this paragraph, must pay court-fee on the amount of the main mortgage and not on that of the sub-mortgage. (Vol. 25) 1938 Mad 30 (31).

[3] One co-mortgagee suing for his share of the mortgage-money making other co-mortgagees defendants to the suit must pay court-fee on the whole amount due on the mortgage. (Vol. 24) 1937 Mad 922 (925) (DB) \* (Vol. 29) 1942 Mad 205 (208) : I L R (1942) Mad 438 (DB). ((Vol. 17) 1930 Mad 985 disentled from.)

[4] Plaintiff sued for sale on his mortgage. The plaintiff did not ask for any relief in respect of two prior mortgages on the property. The plaintiff is only bound to pay court-fee on the amount of his mortgage. He is not liable to pay court-fee in addition under para (ix) on the footing of his suit being one for redemption of the prior mortgages. ('08) 30 All 103 (105) (DB).

[5] Suit on mortgage—Prayer for sale of mortgaged property free from claims of other alienances—Plaintiff not party to document of alienation—Relief of cancellation held unnecessary—No additional court-fee payable under s. 7 (iv A) (Madras) (Vol. 33) 1946 Mad 131 (133, 134).

**16. Court-fee on appeal from decree in mortgage suit.**—[1] Decree in favour of plaintiff in suit for sale on mortgage—Defendant appealing from such decree—Court-fee will be payable under this paragraph according to amount of the decree. (Vol. 14) 1927 Sind 251 (251, 252) : 28 Sind L R 277 (DB).

[See (Vol. 1) 1914 All 520 (520, 521) : 36 All 40 (FB).]

[2] Decree granting interest on mortgage-money from date of institution of suit to date of decree—Defendant appealing from whole decree—He will have to pay court-fee on whole amount of decree although plaintiff, in trial Court, would have had to pay court-fee only according to amount due at date of institution of suit.

for maintenance and annuities.

ii. In suits for maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year:

S. 7 (i) (contd.)

('13) 35 All 94 (98) (DB) \* (Vol. 14) 1927 Sind 251 (252): 23 Sind L R 277 (DB).

[3] Plaintiff's suit dismissed—Appeal from decree—Court fee would be payable according to amount claimed in appeal. See (Vol. 2) 1915 Nag 48 (49): 11 Nag L R 83 (DB).

[4] Decree passed against defendant in suit for sale on mortgage—Defendant in appeal questioning not amount for which decree has been passed but only contending that certain items of properties against which decree has been passed or certain shares in such properties are not liable for mortgage debt—*Ad valorem* court-fee is payable according to value of property in respect of which exemption is sought or amount of this decree whichever is less. (Vol. 7) 1920 Pat 642 (643) \* (1882) All W N 57 (38) (DB) \* ('10) 37 Cal 914 (917) (DB) \* (Vol. 13) 1926 Lah 408 (408): 7 Lah 215 (DB) \* ('87) 10 Mad 187 (188, 189) (DB) \* (Vol. 18) 1931 Mad 710 (712) \* (Vol. 5) 1918 Oudh 348 (348) \* (Vol. 3) 1916 Lah 151 (151): 1916 Pun Re. No. 11 (DB) \* (Vol. 15) 1928 Nag 316 (318): 24 Nag L R 142.

[5] Trial court decreeing amount claimed by plaintiff in suit for sale on mortgage but holding that certain of the properties sought to be proceeded against are not liable for mortgage debt—Plaintiff appealing from latter portion of decree—*Ad valorem* fee is payable according to value of the property or amount of decree whichever is less. (Vol. 8) 1921 Oudh 237 (237): 24 Oudh Cas 295 \* ('11) 33 All 20 (24) \* ('07) 50 Mad 96 (98) (FB) \* ('90) 13 Mad 508 (509, 510) (DB) \* (Vol. 1) 1914 Oudh 396 (397): 17 Oudh Cas 90.

[6] Appeal from final decree in mortgage suit—*Ad valorem* court-fee is payable on such appeal according to value of subject-matter in dispute. (Vol. 15) 1928 Nag 146 (147) \* (Vol. 2) 1915 Oudh 121 (121): 18 Oudh Cas 114 (DB) \* ('13) 35 All 476 (478) (FB) \* (Vol. 6) 1919 Pat 425 (425) \* (Vol. 14) 1927 Pat 46 (47): 5 Pat 721 \* (Vol. 15) 1928 Rang 194 (195): 6 Rang 285 (DB).

[7] On appeal from order rejecting an application for final decree *ad valorem* court-fee is payable. Such an appeal is not one from an order for purposes of court-fees. (Vol. 7) 1920 All 145 (147) (DB) \* ('08) 12 Cal W N 1028 (1029) (DB).

[See also (Vol. 18) 1931 All 538 (539) (DB).]

[8] Appeal preferred against preliminary decree—Before its disposal appeal also preferred against final decree—In computing court-fees on appeal from final decree amount paid as court-fee on appeal from preliminary decree must be deducted—Combined appeal filed against both preliminary and final decrees—Court-fee on appeal from preliminary decree must be deducted in computing court-fee on appeal from final decree. (Vol. 4) 1917 All 158 (159): 29 All 452 \* (Vol. 16) 1929 Cal 315 (317): 57 Cal 463 \* (Vol. 19) 1932 Mad 453 (455): 55 Mad 664 (DB) \* (Vol. 12) 1925 Oudh 39 (42) (DB) \* (Vol. 11) 1924 Pat 694 (694): 3 Pat 815 (DB) \* (Vol. 20) 1935 Pat 81 (83, 84): 12 Pat 198.

[See (Vol. 24) 1937 Mad 569 (571): 1 I L R (1937) 344 936.]

[9] Before appeal from final decree is filed, appeal against preliminary decree disposed of and dismissed—Court-fee paid on appeal from preliminary decree cannot be deducted from court-fee payable on appeal from final decree. (Vol. 19) 1932 Mad 453 (455): 55 Mad 664 (DB) \* ('24) 79 Ind Cas 906 (906) (Pat).

[But see (Vol. 11) 1924 Pat 694 (694): 3 Pat 815 (DB).]

[10] Suit on a mortgage—Person impleaded as subsequent mortgagee appealing from decree claiming priority over plaintiff's mortgage—Court-fee payable on memorandum of appeal is *ad valorem* on value of subject-matter in dispute. (Vol. 19) 1932 All 221 (222): 43 All 341.

[11] Suit for sale of mortgaged property—Puisne mortgagee and mortgagor impleaded—Mortgagor denied puisne mortgage but Court found it to be subsisting and ordered that the balance after paying off plaintiff's mortgage should be paid to puisne mortgagee to the extent of amount due on his mortgage—Appeal by mortgagor challenging this portion of the decree—Court-fee payable on appeal is *ad valorem* on amount due on mortgage. (Vol. 20) 1933 Lah 954 (955) (DB).

[12] Suit on mortgage by co-mortgagee—Widow of other co-mortgagee made party—Widow claimed a declaration that mortgagees were not members of a joint Hindu family and that she was entitled to half the money—Court granting the declaration passed a decree in favour of both—Appeal by plaintiff—Held that *ad valorem* court-fee on subject-matter in dispute was payable. (Vol. 30) 1943 Oudh 361 (365).

[13] Suit on a mortgage—Court passed a decree overruling defendant's contention that plaintiff was not entitled to get a decree without rendering accounts—Defendant appealed claiming the same relief and putting his own valuation on appeal—Held that appeal must be valued at amount of the decree and court-fee on that amount must be paid. (Vol. 22) 1935 Bom 69 (70) (DB).

17. Court-fee on appeal from personal decree in mortgage suit.—[1] A personal decree against mortgagor under O. 34, R. 6 of the Civil Procedure Code is a decree and hence, on an appeal from such decree, *ad valorem* court-fee is payable according to the amount of the decree. (Vol. 11) 1924 All 292 (293) (DB) \* (Vol. 3) 1916 All 357 (358) \* ('13) 19 Ind Cas 971 (973) (DB) (Cal) \* ('35) 62 Cal 568 (571) \* (Vol. 2) 1915 Oudh 122 (123): 18 Oudh Cas 121.

## SECTION 7 Para (ii)—SYNOPSIS.

1. Nature of suits to which paragraph applies.
2. "Maintenance."
3. "Annuity."
4. "Other sums payable periodically."
5. Applicability of paragraph—Illustrative cases.
6. Suit for reduction of maintenance.
7. Claim for future rent in suit for possession.
8. Mode of valuation under the paragraph.



## PROVINCIAL AMENDMENTS.

## AJMER—MERWARA

Add the following proviso to S. 7 para (ii):—

“Provided that, in suits by widows for maintenance, such value shall be deemed to be the amount claimed to be payable for one year.”—*Ajmer-Merwara Court-fees (Amendment) Act, 1930* [31 XXXI of 1930], s. 2 [25-7-1930.]

## MADRAS

In S. 7 (ii) after the words “shall be deemed to be” the words “in suits for maintenance, the amount claimed to be payable for one year and in other suits” were added.—*Madras Act V of 1922*. [30-3-1922.]

## ORISSA

In S. 7 (ii) after the words “shall be deemed to be” the words “in suits for maintenance five times and in other suits” were inserted.—*Orissa Act V of 1939*. [31-10-1939.]

## UNITED PROVINCES

For sub-s. (ii) of S. 7 the following was substituted:—

“(ii). (a) In suits for maintenance and annuities or other sums payable periodically:—

according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount claimed to be payable for one year:

Provided that in suits for personal maintenance by females and minors such value shall be deemed to be the amount claimed to be payable for one year.

(b) In suits for reduction or enhancement of maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount sought to be reduced or enhanced for one year.”—*U. P. Act XIX of 1938*. [9-1-1939.]

## S. 7 (ii) (contd.)

1. Nature of suits to which paragraph applies.—[1] A claim for arrears of maintenance or other sums periodically payable comes under para (i) and not under this paragraph. (Vol. 14) 1927 Oudh 623 (624).

[2] The paragraph does not apply to a suit for a bare declaration of the plaintiff's right to receive a periodical payment. (Vol. 12) 1925 Bom 282 (282) (DB).

[3] In the following cases it was held that a suit for declaration that the plaintiff is entitled to receive a certain sum periodically from the defendant is a suit within this paragraph. (Vol. 7) 1920 All 40 (40): 42 All 353 (DB) \* (Vol. 21) 1934 Lah 150 (150) (DB) \* (Vol. 21) 1934 Pat 240 (242): 13 Pat 290 (DB).

2. ‘Maintenance’.—[1] Maintenance ordinarily imports a conception of amounts payable for life to a person by virtue of his standing in a particular relationship with somebody else and though the obligation to make the payment may often be defined in a contract, the original relationship which gives rise to the obligation is not necessarily contractual. (Vol. 21) 1934 Cal 674 (675): 61 Cal 513.

3. ‘Annuity’.—[1] Annuity is a yearly payment of a certain sum of money granted to another in fee for life or years charging the person only. (Vol. 21) 1934 Cal 674 (675): 61 Cal 513.

4. Other sums payable periodically.—[1] Expression “other sums payable periodically” must be held to refer to claims which are of the same nature as a claim for maintenance or an annuity. (Vol. 21) 1934 Cal 674 (675): 61 Cal 513 \* (Vol. 6) 1919 Pat 541 (542): 4 Pat L Jour 561 \* (Vol. 14) 1927 Pat 123 (125): 6 Pat 17.

[2] A suit for assessment of rent or enhancement of rent does not come under this paragraph. (Vol. 21) 1934 Cal 674 (675): 61 Cal 513 \* (Vol. 6) 1919 Pat 541 (542): 4 Pat L Jour 561 \* (Vol. 14) 1927 Pat 123 (124, 125): 6 Pat 17.

[But see (Vol. 19) 1932 Cal 674 (677, 678): 59 Cal 997 (DB). \* (Vol. 23) 1936 Cal 804 (807): 1LR (1937) 1 Cal 103 (DB)].

[3] A claim that plaintiff and her descendants are entitled to receive generation after generation, a certain sum every month from defendants and their successors is a claim coming within this paragraph. (Vol. 7) 1920 All 40 (40): 42 All 353 (DB).

[4] Claim that plaintiff is entitled to receive every year certain articles of value from defendant—This paragraph does not apply. (85) 8 Mad 384 (388) (DB).

## 5. Applicability of paragraph—Illustrative cases.—

[1] A wakf-deed purported to create wakf and appointed A as mutwalli. The deed provided for annual payment of Rs. 50 to B. Descendants of settlor sued A and B praying for removal of mutawalli, A, for appointment of new Mutwalli and for benefits conferred on them under wakf-deed under which, on disagreement between parties, income was to be divided and enjoyed in proportions set out. Plaintiffs claimed to be entitled to annual receipts capable of valuation at least on an average basis. Held that case came within this paragraph and that plaintiffs should pay court-fee on ten times annual value of receipts to which they claimed to be entitled. (Vol. 29) 1942 Sind 160 (161): 1LR (1942) Kar 424 (DB).

[2] In previous suit a decree passed declaring that A was entitled to a charge on B's property in respect of a right of maintenance for Rs. 200 per annum.—B suing to set aside decree.—This paragraph does not apply. (Vol. 23) 1936 Oudh 817 (819) (DB).

[3] Suit praying that defendant should be required to furnish security for due payment of Rs. 27-8-0 per mensem to plaintiff or should be directed to invest Rs. 8,250 which will yield annually Rs. 380 as interest thereon to be paid to plaintiff.—Under this paragraph



for movable property having a market-value;

iii. In suits for movable property other than money, where the subject-matter has a market-value—according to such value at the date of presenting the plaint:

iv. In suits—

for movable property of no market-value;

to enforce a right to share in joint family property;

for a declaratory decree and consequential relief;

for an injunction;

for easements;

for accounts;

(a) for movable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,

(b) to enforce the right to share in any property on the ground that it is joint family property,

(c) to obtain a declaratory decree or order, where consequential relief is prayed,

(d) to obtain an injunction,

(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

(f) for accounts—

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

In all such suits the plaintiff shall state the amount at which he values the relief sought \* [ \* \* \* ]:

[a] The words “ and the provisions of the Code of Civil Procedure, section thirty-one, shall apply as if for the word ‘claim’ the words ‘relief sought’ were substituted ” were *repealed* by the Amending Act, 1891 (12 [XII] of 1891).

#### S. 7 (ii) (contd.)

court-fee is to be computed according to ten times the amount claimed for each year. ('86) 1886 All W N 228 (228).

[4] A sued B and C for declaration of his title to certain property and for an injunction restraining C from paying and B from receiving an allowance of Rs. 2,400 a year out of the income of the property in dispute—*Held* that this paragraph did not apply. ('93) 17 Bom 56 (59) (DB).

[5] Suit for declaration that plaintiffs are entitled to certain properties subject to certain trusts created by the will of last owner in favour of some temples and provision for maintenance of his son, is not governed by this paragraph. ('93) 3 Mad L Jour 242 (244) (DB).

6. Suit for reduction of maintenance.—[1] Maintenance awarded by a decree—Judgment-debtor sued to have rate of maintenance reduced on ground of change in circumstances—Suit does not come under this paragraph. (Vol. 32) 1945 Nag 264 (266) (DB) \* ('36-43) Tax Dec (Nag) 29 (30) \* (Vol. 22) 1935 Mad 655 (655): 59 Mad 159 \* (1900) 24 Bom 386 (390) (DB).

[2] Claim for enhancement of maintenance awarded by decree would come under this paragraph and court-fee would be payable on ten times the amount of enhancement claimed for each year. ('36-43) Tax Dec (Nag) 76 (77, 78).

7. Claim for future rent in suit for possession.—[1] A claim for future rent from date of suit to delivery of possession in suit for possession held would come under this paragraph. ('80) 2 All 682 (685, 686) (FB). (Per Stuart G. J.; Spankie, J. dissenting.)

#### 8. Mode of valuation under this paragraph.—[1]

The paragraph provides that value of subject-matter of the suit is to be regarded as being ten times the amount claimed as payable for one year. See ('68) 5 Bom HCR (A C) 55 (56, 57) (DB).

[2] Claim for arrears of the amount as well as for a decree for payment of future instalments made in the same suit. Former claim must be charged with the court-fee under para. (i) and latter claim must be charged, under this paragraph according to ten times the amount for each year. ('86) 1866 All W N 228 (228) \* (Vol. 23) 1936 Mad 388 (393, 394, 397) (FB).

#### SECTION 7, Para. (iii)—Note 1.

[1] Movable property in plaintiff's possession attached—He sued for removal of attachment—His suit does not fall under this paragraph. ('80) 2 All 63 (65, 66) (DB).

[2] A hut would be immovable property according to definition in S. 3 (25) General Clauses Act and therefore would not be movable property. See ('72) 8 Beng L R 508 (519) (FB).

[3] Standing crops would be immovable property and not movable property. ('95) 22 Cal 877 (887, 898) (DB).

[4] “Market-value” has been defined as meaning what the property would fetch in the market under the state of things existing at the time. (Vol. 11) 1924 Mad 19 (21): 46 Mad 782 (FB).

## PROVINCIAL AMENDMENTS.

## BENGAL

(1) Clause (b) of para. (iv) was *omitted*.

(2) In para. (iv) after the words "memorandum of appeal" the words, figure and letter "subject to the provisions of S. 8C" were *inserted*.—*Bengal Act VII of 1935*. [2-5-1935.]

## BOMBAY

(1) To clause (d) of para. (iv) the words "or other consequential relief" were *added*.

(2) After the word "appeal" in para. (iv) the words "with a minimum fee of Rs. 5 in the case of suits falling under clause (c)" were *inserted*.—*Bombay Act II of 1932*. [29-3-1932.]

## CENTRAL PROVINCES

After the word "appeal" in para. (iv) the words "with a minimum fee of Rs. 5 in the case of suits falling under clause (c)" were *inserted*.—*C P. Act XVI of 1935*. [21-5-1935.]

## MADRAS

The following proviso was *added* after the words "memorandum of appeal" in para. (iv):

"Provided that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any immovable property such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by para. (v) of the section."—*Madras Act V of 1922*. [30-3-1922.]

## ORISSA

Clause (b) of S. 7 (iv) was *omitted*.—*Orissa Act V of 1939*. [31-10-1939.]

## SIND

The amendments made by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2, Bombay Finance (Sind Amendment) Act, I of 1933. [22-3-1938.]

## UNITED PROVINCES

For sub-s. (iv) of S. 7 the following sub-section was *substituted*, namely:—

"(iv). In suits—

(a) to obtain a declaratory decree or order, where consequential relief other than relief specified in sub-s. (ivA) is prayed; and

(b) for accounts;

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

Provided that in suits falling under cl. (a), where the relief sought is with reference to any immovable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immovable property computed in accordance with sub-s. (v), (vA) or (vB) of this section as the case may be:

Provided further, that in suits falling under clause (b), such amount shall be the approximate sum due to the plaintiff and the said sum shall form the basis for calculating (or determining) the valuation of an appeal from a preliminary decree passed in the suit.—*U.P. Act XIX of 1938 [9-1-1939] as amended by U.P. Act IX of 1941*. [19-6-1941.]

## Section 7, sub-sections (iv-A), (iv-B), (iv-C).

## MADRAS

The following paragraph was added between paras. (iv) and (v), as para. (iv-A):

"(iv-A). In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value,

according to the value of the subject-matter of the suit and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or the other document executed,

if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property."—*Madras Act V of 1922*. [30-3-1922.]

## ORISSA

After para. (iv) the following paragraph was inserted, viz.,

"(iv-A). In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value, according to the value of the subject-matter of the suit and such value shall be deemed to be —

## SECTION 7, Para. (iv) Clause (a).

[1] 'Documents relating to title' will include not only documents of title to immovable property like deeds of sale or mortgage of immovable property, but

also such documents as promissory-notes, bonds, Government securities, etc. Hence, a suit to recover possession of such documents will come under this clause and not under para. (ii). ('94) 1894 Bom P J 145 (DB) \* (Vol. 21) 1934 Mad 730 (730): 58 Mad 228.

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed ;

if a part of the decree or other document is sought to be cancelled such part of the amount or value of the property.

*Explanation.*—In any case where a suit for the cancellation of a whole decree for money or other property having a money value, or other document securing money or other property having such value has to be instituted, but the substantial relief claimed is only in respect of a part of the amount or the value of the property for which the decree was passed or the other document was executed, the value of the subject-matter of the suit shall be deemed to be such part of the amount or value of the property in respect of which the relief is sought.”—*Orissa Act V of 1939.* [31-10-1939.]

#### UNITED PROVINCES

“(iv-A). In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value,

- (1) where the plaintiff or his predecessor-in-title was a party to the decree or the instrument, according to the value of the subject-matter, and
- (2) where he or his predecessor-in-title was not a party to the decree or instrument, according to one-fifth of the value of the subject-matter, and such value shall be deemed to be—

if the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

*Explanation.*—“The value of the property” for the purposes of this sub-section shall be the market-value, which in the case of immovable property shall be deemed to be value as computed in accordance with sub-s (v), (vA) or (vB) as the case may be.”—*U.P. Act XIX of 1938.* [9-1-1939.]

“(iv-B). In suits—

- (a) for a right to some benefit (not herein otherwise provided for) to arise out of land ;
  - (b) to obtain an injunction ;
  - (c) to establish an adoption or to obtain a declaration that an alleged adoption is valid ;
  - (d) to set aside an adoption or to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place ;
  - (e) to set aside an award not being an award mentioned in S. 8 ;
- according to the amount at which the relief sought is valued in the plaint :

Provided that in the case of (a), (b) and (c) such amount shall be not less than one-tenth of the market-value of the property involved in or affected by the relief sought or Rs. 50 whichever is greater, and in the case of the remaining classes of suits not less than one-fifth of such value or Rs. 200 whichever is greater :

And provided further that in the case of (a) and (b) the amount of court-fee leviable shall in no case exceed Rs. 200.

*Explanation 1.*—When the relief sought is with reference to any immovable property the market-value of such property shall be deemed to be the value computed in accordance with sub-s. (v), (vA) or (vB) of this section as the case may be.

*Explanation 2.*—In the case of suits—

(i) falling under clause (a) and (b), the property which is affected by the relief sought, and where properties of both the plaintiff and the defendant are affected, the property of the plaintiff so affected,

(ii) falling under clauses (c) and (d), the property to which title by succession or otherwise may be diverted or affected by the alleged adoption, and

(iii) falling under clause (e), the property which forms the subject-matter of the award, shall be deemed to be the property involved in or affected by the relief sought within the meaning of the proviso to this sub-section.”—*U. P. Act XIX of 1938.* [9-1-1939.]

“(iv-C). In suits—

- (a) for the restitution of conjugal rights ;
- (b) for establishing or or annulling or dissolving a marriage ;
- (c) for establishing a right to the custody or guardianship of any person such as a minor, including guardianship for the purpose of marriage ;

according to the amount at which the relief sought is valued in the plaint, but in no case shall such amount be less than Rs. 200.

*Explanation.*—Clauses (a) and (b) do not include petitions or suits under any special Act relating to the dissolution of marriage.”—*U.P. Act XIX of 1938.* [9-1-1939.]

**S. 7 (iv) (contd.)**

[2] A suit merely for possession of documents of title is not a suit for the recovery of the property to which the document relates. *See* ('79) 4 Cal 322 (326) (DB).

[3] Plaint in a suit for possession of document need not be stamped as plaint in a suit for possession of property to which the document relates. (Vol. 21) 1934 Mad 730 (730) : 58 Mad 228.

[But see ('71) 1871 Pun Re No. 10, page 15 (17) (DB).]

[4] A suit for return of a mortgage-bond with endorsement of full satisfaction is really a suit for redemption and is not covered by this clause. Such a suit will come under para. (ix). ('36) 63 Cal 657 (660).

[5] A suit for cancellation and delivery of a document will not come under this clause. ('04) 27 Mad 480 (481) (DB).

[6] Mortgagee sued mortgagor for return of mortgage-deed on ground that mortgagor had not paid mortgage-money. *Held* that real point in issue was not about return of mortgage-deed but whether mortgage-money had been paid and that this clause did not apply. ('75) 1875 Pun Re No. 39, p. 117 (117) (DB).

[7] A sued B and others trustees, to set aside a deed of trust and to recover the trust money which was in the form of Government promissory-notes. *Held* that Court-fee must be paid according to amount of the Government promissory-notes. ('84) 10 Cal 380 (382).

[8] Relief coming under this clause combined with one not coming under it. Two reliefs must be valued separately under respective provisions that would apply to them for purposes of court-fees. ('94) 1894 Bom P J 145 (DB).

**SECTION 7, Para. (iv), Clause (b)—SYNOPSIS.**

1. U.P. Amendment.
2. Suit for share of profits of impartible property.
3. Suit for partition by person in joint possession.
4. Suit by excluded coparcener for joint possession.
5. Suit for partition by excluded coparcener.
6. Suit for declaration of title.
7. Suit by purchaser from co-owner.
8. "Joint family property."
9. Appeal in partition suit—Court-fee.
10. Liability of defendant to pay Court-fee in partition suit.
11. Amendment of plaint in partition suit—Court-fee.
12. Suit for re-opening of partition.
13. Other reliefs in suit for partition—Court-fee.

**1. U.P. Amendment.**—[1] Suit instituted before the amending Act—Plaintiff sought an amendment of plaint claiming an additional share—*Held* that so far as claim for an additional share was concerned, it was governed by the amending Act which had come into force then and *ad valorem* fee in respect of such share must be paid. (Vol. 29) 1942 All 222 (223) : I L R (1942) All 376 (DB).

[2] Section 2 of Court-fees Act as inserted by the U.P. Court-fees (Amendment) Act defines suit as including an appeal. The section therefore is also applicable to

an appeal in partition suit and the court-fee payable is on the value of appellant's share which is in dispute in the appeal. (Vol. 30) 1943 All 281 (282) : I L R (1943) All 507 \* (Vol. 32) 1945 Oudh 207 (208) (DB).

[3] No dispute about a share in a partition suit—Only question is whether one particular property should be allotted to one party or the other—Act 17 (vi) of schedule II applies. (Vol. 30) 1943 All 281 (282) : I L R (1943) All 507.

[4] Words "his claim to be a co-owner on such date is denied" should be interpreted to mean both when it is denied in its entirety or even when only the extent of the share claimed is in dispute. (Vol. 31) 1944 All 199 (200) : I L R (1944) All 478.

**2. Suit for share of profits of impartible property.—**

[1] Suit to enforce right to share in the profits of an impartible property on the ground that it is joint family property falls within this clause. (36-43) Tax Dec (Nag) 61 (63).

**3. Suit for partition by person in joint possession.—**

[1] This clause does not apply to a suit for partition by a co-owner not excluded from enjoyment of common property. Such a suit comes under cl. (vi) of Art 17 of Seb. II. (Vol. 30) 1943 Pat 433 (438) (DB) \* (Vol. 32) 1945 Sind 11 (20) : I L R (1944) Kar 325 \* (Vol. 29) 1942 Pat 60 (61) : 20 Pat 780 (DB) \* (Vol. 17) 1930 All 443 (443, 444) : 52 All 756 \* (Vol. 29) 1942 Cal 180 (200) (DB) \* (Vol. 21) 1934 Lah 563 (573) : 15 Lah 531 (FB) \* (Vol. 28) 1941 Lah 152 (156) : I L R (1941) Lah 308 (FB) \* (Vol. 27) 1940 Mad 113 (117) : I L R (1940) Mad 259 (FB) 8 Ind Cas. 512 (Mad) (overruled) \* (Vol. 11) 1924 Nag 86 (86, 87) : 20 Nag L R 43 \* (Vol. 14) 1927 Nag 248 (249) : 23 Nag L R 73 \* (Vol. 27) 1940 Oudh 47 (50) : 15 Luck 76 (DB) \* (Vol. 25) 1938 Rang 76 (78, 80) : 1937 Rang L R 447 (DB) \* (Vol. 29) 1942 Mad 103 (103) \* ('36) 163 Ind Cas 821 (821) (DB) (Nag) \* (Vol. 22) 1935 All 292 (293) : 57 All 787 (DB).

[But see ('98) 22 Bom 315 (316) (DB) \* (Vol. 28) 1941 Rang 297 (298) : 1941 Rang L R 249 (DB) \* (Vol. 16) 1929 Rang 211 (212) : 7 Rang 164.]

[2] In the following cases it was held that a suit for partition by a member of a joint family would come under para (v) of this section. ('09) 33 Bom 658 (663) (DB) \* ('94) 18 Bom 209 (211) (DB).

[3] The following case has held that even where the plaintiff in a suit for partition is in joint possession, he must pay *ad valorem* court-fee on the value of the share claimed by him. ('23) 73 Ind Cas 788 (790) (Pesh).

[4] The question whether a suit is one by a person in joint possession for partition or by an excluded coparcener depends on the allegations in the plaint and not on the defence or the evidence in the case. (Vol. 24) 1937 Pat 514 (515) : 16 Pat 491 \* (Vol. 19) 1932 Cal 353 (355) (DB) \* (Vol. 2) 1915 Oudh 208 (208) (DB) \* (Vol. 17) 1930 All 443 (443, 444) : 52 All 756 \* (Vol. 22) 1935 Cal 273 (275) (DB) \* (Vol. 21) 1934 Lah 563 (573) : 15 Lah 531 (FB) \* (Vol. 24) 1937 Mad 606 (607) \* (Vol. 11) 1924 Nag 105 (105, 106) \* (Vol. 27) 1940 Oudh 47 (50) : 15 Luck 76 (DB) \* (Vol. 14) 1927 Pat 145 (164) : 6 Pat 506 (DB) \* (Vol. 25) 1938 Rang 76 (78, 80) : 1937 Rang L R 447 (DB) \* (Vol. 25) 1938 Sind 189 (190) : 32 Sind L R 124 (DB) \* (Vol. 28) 1941 Sind 154 (156) : I L R (1941) Kar 103 (DB).

**S. 7 (iv) (contd.)**

[See (Vol. 14) 1927 Nag 248 (249): 23 Nag L R 73.]

[5] Suit for partition by a member of a joint-family - Nature of suit is not altered for purposes of court-fee merely because the defendant denies that property is joint-family property. (Vol. 19) 1932 Cal 227 (229): 59 Cal 315 \* (Vol. 14) 1927 Cal 411 (412): 54 Cal 524 (DB).

[But see (Vol. 11) 1924 Nag 86 (87): 20 Nag L R 43 \* (Vol. 14) 1927 Nag 248 (249): 23 Nag L R 73.]

[6] Facts proved showing that plaintiff is not in joint possession—Suit not liable to be thrown out on ground of insufficient Court-fee but may be dismissed on ground that plaintiff being out of possession is not entitled to sue for partition without suing for possession of the property, unless the Court deems it fit to allow an amendment of plaint. (Vol. 2) 1915 Cal 357 (361) (DB) (Plaintiff may be allowed to amend his plaint where it is found he is not in joint possession) \* (Vol. 21) 1934 Lah 563 (573): 15 Lah 531 (FB) \* (Vol. 8) 1921 Oudh 174 (175) (DB) \* (Vol. 25) 1933 Sind 189 (190): 32 Sind L R 124 (DB).

[See (Vol. 12) 1925 Pat 47 (47): 3 Pat 654 (DB).]

[7] So long as there is no ouster every member of the joint family will be deemed to be constructively in possession of the family properties and a suit for partition by a member in such circumstances must be deemed to be one by a member in joint possession and not as one by a person who is out of possession. (Vol. 14) 1927 Cal 411 (412): 54 Cal 524 (DB) \* (Vol. 29) 1942 Cal 180 (200) (DB) \* (Vol. 13) 1926 Mad 122 (123) \* (Vol. 24) 1937 Mad 606 (607) \* (Vol. 11) 1924 Pat 640 (640) (DB).

[8] Unless there are express allegations that she has been kept out of possession or is out of possession in some other way, a Hindu widow's suit for partition under Hindu Women's Right to Property Act is a suit for partition by a coparcener in joint possession and as such is governed by Sch. II, Art. 17 (vi). (Vol. 30) 1943 Mad 654 (654).

**4. Suit by excluded coparcener for joint possession.**—[1] Suit by an excluded coparcener for joint possession—Court-fee is to be computed under this clause on the basis of the amount at which plaintiff values his relief in the plaint. ('07) 6 Cal L Jour 651 (655) (DB) \* (Vol. 21) 1934 Lah 563 (573): 15 Lah 531 (FB).

[See also (Vol. 29) 1942 Cal 180 (200) (DB).]

**5. Suit for partition by excluded coparcener.**—[1] Suit for partition by an excluded coparcener comes under this clause and court-fee is to be computed on basis of amount at which plaintiff values relief in his plaint. (Vol. 27) 1940 Oudh 47 (51): 15 Luck 76 (DB) \* (Vol. 11) 1924 Nag 86 (87): 20 Nag L R 43 \* (Vol. 28) 1941 Rang 297 (298): 1941 Rang L R 249 (DB).

[2] Suit for partition by an excluded coparcener—Court-fee payable is *ad valorem* according to the value of the share claimed by the plaintiff. (Vol. 30) 1943 Mad 655 (655) \* (Vol. 32) 1945 Sind 128 (131): 1 L R (1945) Kar 84 \* (Vol. 29) 1942 Pat 60 (62): 20 Pat 780 (DB) \* (Vol. 26) 1939 Pat 274 (275): 18 Pat 267 (DB) \* (Vol. 25) 1938 Mad 474 (475) \* ('86-43) Tax Dec. (Nag) 73 (75) (DB) \* ('12) 34 All 184 (185) (DB) \* (Vol. 17) 1930 All 443 (443, 444): 52 All 756 \* (Vol.

29) 1942 Cal 180 (200) (DB) \* (Vol. 21) 1934 Lah 563 (573): 15 Lah 531 (FB) \* (Vol. 14) 1927 Nag 248 (249): 23 Nag L R 73.

[3] If the extent of property is definitely stated in plaint, plaintiff is bound to value his suit according to share claimed by him and pay court-fee on value of such share. ('02) 15 CP LR 120 (122).

**6. Suit for declaration of title.**—[1] A suit for a mere declaration of the plaintiff's title will not come under this clause. ('95) 1895 Pun Re No. 104, p. 490 (492) (DB).

[2] This clause does not apply to a suit for partition by a Hindu coparcener. Wording of the clause seems to contemplate a suit for enforcement of an abstract claim of right. ('09) 33 Bom 654 (663) (DB).

[3] This clause appears to be designed to cover merely the rare, but quite possible, cases where the plaintiff's status as a coparcener is in dispute and is sought to be enforced. ('10) 8 Ind Cas 512 (516, 517) (FB) (Mad) (Per Ayling J.).

[4] Plaintiff who is in joint possession and sues for partition need not pay *ad valorem* court-fee on value of share claimed by him but need only pay a fixed court-fee of Rs. 10 under Sch. II, Art. 17, cl. (vi). If plaintiff is out of possession and is suing for recovery of possession or of the establishment of title to the property, he would have to pay *ad valorem* court-fee. ('82) 8 Cal 757 (758).

[5] Even if a plaintiff merely sues to establish his title to the share he claims he would still have to pay an *ad valorem* court-fee on the value of that share. ('94) 18 Bom 209 (211) (DB).

**7. Suit by purchaser from co-owner.**—[1] Purchaser of share of one of the co-owners suing for possession—Court-fee paid with reference to value of share claimed by him is enough—He need not pay any separate court-fee for determination of extent of his vendor's share. ('81) 1881 All WN 161 (161) (DB).

[2] Purchaser of a part of a coparcener's interest in joint-family property sued for partition—Court-fee is payable on value of property he has purchased and not on value of the coparcener's whole interest in family property, though prayer in the suit is for ascertaining share of the coparcener from whom he has purchased. ('82) 1882 Bom P J 148.

[3] Person purchasing share of coparcener in certain land suing for possession of such share—Person asking for declaration of entire share of his vendor and then for recovery of possession of what he had purchased out of that share—Separate court-fee is necessary for two reliefs—Claim for partition falls under Sch. II, Art. 17 (vi)—Additional fee for recovery of possession of vendor's possession must also be paid. (Vol. 32) 1945 Bom 386 (387) (DB).

[4] Pending suit for partition by member of a joint family, he transferred his interest in suit properties partially to another person—Such person made a party to suit—Court deciding that court-fee of Rs. 10 under Sch. II, Art. 17 (vi) is sufficient—Order cannot be changed merely because subsequently plaintiff has transferred a portion of his interest. (Vol. 12) 1925 Pat 47 (48): 3 Pat 654 (DB).

**8. "Joint family property."**—[1] The clause does not apply to a suit relating to property owned by the members of a Mahomedan family. (Vol. 21) 1934 Lah 563 (573

**Section 7 (iv) (contd.)**

568 (573): 15 Lah 531 (FB). (*Held* (Vol. 19) 1932 Lah 421, taking the view that it applies to Mahomedans is to that extent erroneous) \*('86-43) Tax Dec (Nag) 33 (34) \* (Vol. 11) 1924 Mad 207 (208).

[See also (Vol. 16) 1929 Rang 211 (212): 7 Rang 164.]

[2] Where property is owned as tenants-in-common by members of a Mahomedan or some other family and there is no ouster one of them can, relying on the principle of constructive possession, sue for partition by paying only a fixed court-fee of Rs. 10 under Sch. II, Art. 17, cl. (vi). (Vol. 23) 1941 Lah 152 (156): I L R (1941) Lah 308 (FB) (*Overruled* (Vol. 26) 1939 Lah 568) \*('86-43) Tax Dec (Nag) 33 (34) \* (Vol. 11) 1924 Mad 207 (208) \* (Vol. 22) 1935 Pesh 30 (33) (DB) \* (Vol. 7) 1930 Mad 585 (585): 43 Mad 396 (DB).

[But see ('91) 4 Mad L Joar 110 (111) (DB) ]

[3] If plaintiff is out of possession and sues for partition he will have to pay *ad valorem* fee on his plaintiff according to the value of the share claimed by him. (Vol. 26) 1939 Mad 506 (507) (DB) \* (Vol. 25) 1938 Lah 275 (277): I L R (1938) Lah 240 (DB) \* (Vol. 25) 1938 Mad 278 (279): I L R (1938) Mad 309 (DB) \* (Vol. 22) 1935 Pesh 30 (33) (DB) \* ('09) 3 Ind Cas 304 (305) (DB) (Cal) \* (Vol. 3) 1916 Low Bur 72 (73) (DB).

[4] Where there has been a division in status, the property which belonged to the joint family will cease to be joint family property. A suit for partition by nieces and bonds in such cases will not come under this clause. In such a case, where the plaintiff is in joint possession, the court-fee on the suit for partition will have to be the fixed court-fee of Rs. 10 under Sch. II, Art. 17, cl. (vi). ('86-43) Tax Dec (Nag) 33 (34) \* (Vol. 18) 1931 Mad 49 (49) \* (Vol. 20) 1933 Mad 430 (431) (DB).

[5] Plaintiffs alleged that they were in joint possession of emoluments of an office and asked Court to frame a scheme whereby plaintiffs and defendants might enjoy the emoluments separately—*Held* that suit was of a nature similar to a suit for partition and was governed by Sch. II, Art. 17 (vi). (Vol. 22) 1935 All 292 (293): 57 All 787 (DB).

**9. Appeal in partition suit—Court-fee.**—[1] Plaintiff who is not in joint possession suing for partition and separate possession of his share and on his suit being dismissed, appealing from decree—He must pay *ad valorem* court-fee on appeal according to value of share claimed by him. ('09) 3 Ind Cas 304 (305) (DB) (Cal) \* (Vol. 17) 1930 All 443 (443, 444): 52 All 756 \* ('92) 1892 Bom P J 13.

[2] Where plaintiff is in joint possession, actually or constructively, and sues for partition and on his suit being dismissed, appeals from such decree, he is liable to pay only a fixed fee of Rs. 10 on his appeal under Sch. II, Art. 17, cl. (vi). ('86) 163 Ind Cas 821 (821) (DB) (Nag) \* (Vol. 17) 1930 All 443 (443, 444): 52 All 756 \* (Vol. 19) 1932 Cal 227 (229): 59 Cal 315 \* (Vol. 26) 1939 Oudh 90 (91): 14 Luck 346 (DB).

[3] The fact that the lower Court has found that the plaintiff is not in joint possession, or that he is not entitled to any interest in the property, is immaterial for the purpose of calculating the court-fee on the memorandum of appeal. (Vol. 17) 1930 All 443 (443, 444): 52 All 756.

[But see (Vol. 24) 1937 Pat 514 (515): 16 Pat 491 \* (Vol. 26) 1939 Oudh 90 (90, 91): 14 Luck 346 (DB).]

[4] Plaintiff alleging himself to be in joint possession suing for various reliefs, such as partition, declaration, injunction, etc.—Suit dismissed. In appeal plaintiff confining himself to relief as to partition—It is enough if he pays fixed court-fee of Rs. 10 under Sch. II, Art. 17 cl. (vi) on such appeal. (Vol. 19) 1932 Cal 353 (355) (DB) \* (Vol. 19) 1932 Cal 227 (229): 59 Cal 315.

[5] Plaintiff suing for partition on allegation of his being in joint possession with defendant—Suit decreed—Defendant appealing—He need pay only fixed court-fee of Rs. 10 on his memo of appeal. (Vol. 17) 1930 Rang 164 (165) (DB).

[See also (Vol. 6) 1919 Pat 403 (404).]

[6] Only question raised by defendant in appeal from a decree for partition in a suit by a minor being that partition not being for benefit of the minor should not be decreed—Subject matter in appeal is only a change in mode of enjoyment—Court-fee payable is under Sch. II, Art. 17 (vi). ('86-43) Tax Dec (Nag) 94 (94).

[7] Plaintiff alleging dispossession from joint property and suing for partition—Suit decreed—Defendant appealing from decree must pay *ad valorem* court-fee on amount at which suit was valued in plaint. ('86-43) Tax Dec (Nag) 73 (74) \* ('08) 1908 Pan Re No. 150, p. 681 (685).

[8] Suit for partition and separate possession in which plaintiff's right to share is in dispute decreed—Defendant appealing from decree raising same plea—Court-fee payable on appeal is *ad valorem* on value of plaintiff's share. ('86-43) Tax Dec (Nag) 87 (88) \* ('86-43) Tax Dec (Nag) 73 (74, 75).

[9] In a partition suit, trial Court holding that certain property which is alleged to be wakf property and as such impartible, is liable to partition and including it in preliminary decree for partition—Decision amounts to declaration that property is partible—Court-fee on memorandum of appeal with reference to that property need not be *ad valorem*. (Vol. 18) 1931 Lah 170 (175) (DB).

[10] Appeal against final decree for partition—No dispute as to the extent of share to which each party is entitled—Appeal only seeking to impeach mode of partition—Under Sch. II, Art. 17, cl. (vi) fixed court-fee of Rs. 10 on memorandum of appeal is sufficient. (Vol. 30) 1945 All 231 (232): I L R (1945) All 507 \* ('21) 62 Ind Cas 979 (980) (DB) (Lah).

[11] Suit for partition by vendee of a share of one of heirs of deceased Mahomedan. Preliminary decree directed plaintiff to pay a proportionate share of mortgage-money due on a mortgage executed before sale in favour of plaintiff—Plaintiff appealed seeking to delete the direction—*Held* that subject-matter of appeal related to the mode of enjoyment—Court-fee payable was under Sch. II, Art. 17 (vi). ('86-43) Tax Dec (Nag) 79 (80).

[12] Appeal from final decree passed in suit for partition—It is necessary to pay *ad valorem* court-fee on amount alleged to have been wrongly allowed to other party. (Vol. 11) 1924 Lah 325 (326) (DB).

[13] Where appellant claims more amount than what has been awarded to him or disputes amount awarded to other party he must pay *ad valorem* court-fee on amount in dispute. (Vol. 22) 1935 Lah 14 (15) (DB) \* ('33) 142 Ind Cas 829 (829) (DB) (Lah) \* (Vol. 19) 1932 Lah 127 (127) (DB).

## Section 7 (iv) (contd.)

[14] Parties to partition suit being in possession of different items of properties—Appeal against decree for partition—Appellant questioning decree only so far as property in his possession is concerned.—It is sufficient if he pays court-fee on value of property in his possession. ('73) 10 Bom H C R 444 (445) (DB).

**10. Liability of defendant to pay court-fee in partition suit.**—[1] There is no provision in the Act which makes the defendant in a suit for partition liable for court-fee in respect of the separation of his share in the property. (Vol. 31) 1944 Bom 58 (58) \* ('05) 29 Bom 79 (81) (DB) \* (Vol. 23) 1936 Lah 1 (3, 4): 16 Lah 961 (DB) \* (Vol. 19) 1932 Mad 722 (723): 55 Mad 975 (DB) \* (Vol. 13) 1926 Pat 154 (156) (DB) \* (Vol. 28) 1941 Sind 50 (67): 1 L R (1940) Kar 534.

[But see ('99) 23 Bom 184 (186) (DB) \* (1900) 24 Bom 128 (131) (DB) \* ('13) 20 Ind Cas 177 (178) (DB) (Lah) \* (Vol. 5) 1918 Mad 443 (444) (DB) \* (Vol. 26) 1939 Mad 576 (577): 1 L R (1939) Mad 913 (DB) \* (Vol. 29) 1942 Mad 364 (365).]

[2] Suit for partition—Stranger in possession of some of joint family property also made party—Defendant claiming that their share be separated and put in their possession—No court-fee payable. (Vol. 32) 1945 Nag 273 (275): 1 L R (1945) Nag 856.

**11. Amendment of plaint in partition suit—Court-fee.**—[1] *Ad valorem* fee payable on a partition suit.—Fresh items of property added after institution of suit on objection taken by defendant that suit must include all joint properties—Plaintiff is bound to pay extra court-fee in respect of added items. ('87) 14 Cal 835 (838).

[2] Plaintiff in a suit for partition allowed to amend his plaint by including some fresh items of property.—Valuing additional items for purposes of court-fee on market-value of property at date of amendment and not at date of original institution of suit was held proper. ('73) 10 Bom H C R 444 (447) (DB).

[3] A plaintiff cannot be compelled to amend his plaint by inclusion of certain property and to pay court-fee thereon. (Vol. 30) 1943 Bom 441 (442).

[4] In a partition suit after preliminary decree, a new born person added as a plaintiff and given a share—Defendant's appeal is against modification of the decree—Court-fee payable on memo. of appeal is *ad valorem* on value of such share. ('36-43) Tax Dec (Nag) 25 (28).

**12. Suit for re-opening of partition.**—[1] Partition already taking place—Plaintiff filing suit alleging that partition deed is not binding on him as it was executed under coercion and praying for a fresh partition being made—Suit is in substance a suit for a declaration and further relief—Clause (c) of this paragraph will apply. (Vol. 18) 1931 Mad 94 (96).

[2] Plaintiff sued only for partition alleging that an alleged deed of partition taken by defendant was executed by plaintiff when he was a minor and that deed was a colourable transaction and was never acted upon, and that parties continued to be joint in spite of the deed—Held that relief of declaration either with or without consequential relief cannot be imported into plaint and court-fee payable was fixed fee under Sch. II, Art. 17 (vi). (Vol. 29) 1942 Pat 60 (62): 20 Pat 780 (DB).

[3] In a partition suit plaintiff alleging that previous partition effected between parties was unfair and that he is entitled to more property than what was allotted

to his share—Value of suit for purposes of court-fee is difference between value of property in his possession and value of property claimed by him as failing to his share. (Vol. 26) 1939 Pat 274 (276): 18 Pat 267 (DB).

[4] In a suit to set aside a partition deed so far as plaintiffs are concerned, court-fee to be paid is on value of the plaintiff's share and not on value of whole property. (Vol. 19) 1932 Mad 491 (493).

[5] Plaintiff abandoning his claim to portion of property allotted to him at a prior partition and seeking a re-partition of entire estate, throwing into hotch-pot that portion of it which has been in his exclusive possession—He cannot be given credit for any part of court-fee payable on ground that he is in possession of a portion of estate of which he seeks partition. (Vol. 28) 1941 Sind 154 (158): 1 L R (1941) Kar 102 (DB).

**13. Other reliefs in suit for partition—Court-fee**—[1] Suit for partition and accounts—Court-fees must be paid both in respect of prayer for partition and in regard to claim for accounts. (Vol. 23) 1936 Mad 562 (563) \* (Vol. 20) 1933 Mad 431 (432) \* (Vol. 14) 1927 Pat 413 (413).

[But see (Vol. 17) 1930 Pat 1 (5, 6): 8 Pat 318 (DB).]

[2] Immovable property belonging to the family alienated by manager of the family and in possession of alienee—Plaintiff challenging alienation—Plaintiff must pay court-fee in respect of such property under para (v) of this section. (Vol. 23) 1936 Mad 411 (412) \* (Vol. 23) 1936 Mad 562 (563) \* (Vol. 27) 1940 Mad 113 (118): 1 L R (1940) Mad 259 (FB).

[3] Decree obtained against the family—Decree to be set aside before partition can be effected as claimed by plaintiff—Court-fee must be paid in regard to setting aside of such decree—Plaintiff must pay court-fees in respect of whole amount for which decree may have been passed. (Vol. 31) 1944 Mad 19 (19) \* (Vol. 34) 1947 Mad 16 (17) \* (Vol. 27) 1940 Mad 113 (118): 1 L R (1940) Mad 259 (FB) \* (Vol. 14) 1927 Nag 239 (240).

[4] In a partition suit plaintiff impleading certain creditors and claiming a declaration that debts alleged to be due to them were not binding on his share, plaintiff not being a party to the transaction—Separate court-fee in respect of each debt must be paid. (Vol. 24) 1937 Mad 876 (878) \* (Vol. 22) 1935 Mad 419 (420): 58 Mad 821.

[5] Under an alienation of family property by father, alienee not given possession—Plaintiff in suit for partition is not bound to pay court-fee for avoiding alienation. (Vol. 27) 1940 Mad 113 (118): 1 L R (1940) Mad 259 (FB).

[6] Suit for partition—Plaintiff challenging various transactions relating to joint family property entered into by manager and asking for appointment of a receiver to manage properties and to collect the rents and profits—He need not pay a separate court-fee in respect of prayer for appointment of a receiver. (Vol. 27) 1940 Mad 113 (119): 1 L R (1940) Mad 259 (FB).

## SECTION 7 para (iv) Clause (C)—Synopsis.

1. Scope and applicability of this clause.
2. Suit for declaration of title and possession.
3. Suit for declaration and injunction.
4. Suit to set aside decrees and instruments—General.
5. Suit for setting aside decree and execution sale.

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6. Suit for setting aside decree and for refund of money realized under it.
7. Suit for setting aside decree and for injunction against execution.
8. Suit for avoiding deed of transfer or decree—Plaintiff not entitled to sue for possession—Effect on court-fee.
9. Suit to set aside decree for partition and for fresh partition.
10. Minor.
11. Hindu joint family.
12. Suit by Hindu reversioners.
13. Malabar tarwad.
14. Deed of adoption.
15. Suit under S. 53, Transfer of Property Act.
16. Other illustrative cases.
17. Mode of valuation under para (iv) (General).
18. Court-fee and jurisdiction.
19. Valuation of suits coming under cl. (c).
20. Suit to set aside deed or decree—Made of valuation.
21. Court-fee on appeal—Applicability of the provision of S. 7 and Sch. II, Art. 17.
22. Local Amendments.

**1. Scope and applicability of this clause.**—[1] Suits for bare declarations are provided for by S. 42 of the Specific Relief Act. Under that section the declaration sought for must relate to the title to any legal character or to any right as to any property and the plaintiff must be unable to seek further relief than a mere declaration of title. (Vol. 8) 1921 PC 50 (51) : 47 Ind App 255 : 48 Cal 110 (PC) \* ('99) 22 Mad 270 (282) : 26 Ind App 16 (PC).

[2] The following cases hold that the section is not exhaustive on the subject of declaratory decrees and Courts in India have power to pass merely declaratory decrees in cases not falling within the section. (Vol. 20) 1933 All 488 (490) : 55 All 791 (FB) \* (Vol. 17) 1930 Cal 787 (793) : 58 Cal 474 (DB) \* (Vol. 7) 1920 Mad 665 (665) : 43 Mad 410 (DB) \* (Vol. 15) 1928 Rang 143 (144) : 6 Rang 188 (DB).

[But see ('12) 39 Cal 704 (708) (DB).]

[3-4] In the following cases it has been held that unless the declaration sought for is of the character contemplated by S. 42 of the Specific Relief Act, the suit will not come under Sch. II, Art. 17 (iii). (Vol. 25) 1938 Oudh 201 (203) : 14 Luck 176 (FB) \* (Vol. 25) 1938 Oudh 1 (7) : 13 Luck 628 (FB) \* (Vol. 21) 1934 Cal 674 (675, 676) : 61 Cal 513.

[5] The question whether a suit comes within the terms of S. 42 of the Specific Relief Act, or not will not affect the question of court-fees which must be determined on the basis of what the plaintiff actually sues for and not on the basis of what he is entitled, under the law, to sue for. (Vol. 31) 1944 Pat 17 (20) : 22 Pat 783 (FB) \* (Vol. 28) 1941 Lah 97 (104) : I L R (1941) Lah 451 (FB) \* (Vol. 9) 1922 Pat 392 (392, 393) : 1 Pat 1 (DB).

[6] If, on the whole, and in substance, a suit appears to ask for some relief other than or in addition to a mere declaration the suit must be held not to be one for a bare declaration although the prayers in the plaint may have been cast in a declaratory form. (Vol. 31) 1944 Pat 17 (21, 23) : 22 Pat 783 (FB) \* (Vol. 31)

1944 All 271 (271, 272) : I L R (1944) All 336 \* (Vol. 33) 1946 Nag 30 (35) : I L R (1945) Nag 975 (DB) \* (Vol. 30) 1943 Oudh 361, (364, 365) \* (Vol. 29) 1942 Lah (209, 210) (DB) \* (Vol. 29) 1942 Pesh 62 (63) (DB) \* (Vol. 28) 1941 Lah 97 (104) : I L R (1941) Lah 451 (FB) \* (Vol. 25) 1938 Oudh 1 (6, 7) : 13 Luck 628 (FB). ((Vol. 23) 1936 Oudh 317 (DB) overruled) \* (Vol. 14) 1927 Cal 775 (775) (DB) \* ('86) 1886 All W N 54 (55) (FB).

[7] The maintainability or otherwise of a suit for a bare declaration may be taken into consideration in determining what is the substance of the plaint. (Vol. 28) 1941 Lah 97 (104) : I L R (1941) Lah 451 (FB) \* (Vol. 9) 1922 Pat 404 (405) : 1 Pat 197 (DB).

[See ('12) 39 Cal 704 (709) (DB).]

[8] Plaint only asking for a bare declaration will be governed for purposes of court-fee by Sch. II, Art. 17 (iii)—It is not permissible to hold that suit is of some other character merely because in the circumstances disclosed in plaint Court considers that suit for a bare declaring is not maintainable under law. (Vol. 28) 1941 Lah 97 (105) : I L R (1941) Lah 451 (FB) \* (Vol. 24) 1937 Sind 248 (250) \* ('76) 1 Bom 538 (542) (DB) \* (Vol. 30) 1943 Lah 39 (41) (DB) \* (Vol. 24) 1937 All 411 (412) : I L R (1937) All 259 (DB) \* (Vol. 20) 1933 All 350 (351) : 55 All 274 (DB) \* (Vol. 9) 1922 Pat 392 (392, 393) : 1 Pat 1 (DB).

[9] Plaintiff omitting to ask for further relief to which he is entitled—Suit liable to be dismissed under provision to S. 42 of Specific Relief Act—Court cannot treat plaint as including prayer for such relief and to hold that suit come under S. 7 (iv) (c). (Vol. 31) 1944 Pat 17 (20) : 22 Pat 783 (FB) \* (Vol. 29) 1942 Pat 60 (62) : 20 Pat 780 (DB) \* (Vol. 23) 1936 Oudh 317 (319) (DB) \* (Vol. 22) 1935 All 667 (668) : 57 All 943 (DB) \* (Vol. 20) 1933 All 488 (489) : 55 All 791 (FB) \* (Vol. 11) 1924 Cal 183 (184) \* ('86-48) Tax Dec (Nag) 51 (52).

[See (Vol. 6) 1919 Lah 63 (64, 65) (DB).]

[10] Number of separate declarations asked for in a suit—Separate court-fee of Rs. 10 will have to be paid in respect of each declaration. (Vol. 20) 1933 All 360 (351) : 55 All 274 (DB) \* ('95) 18 Mad 459 (460) (DB) \* ('91) 13 All 389 (390, 391) (DB).

[11] Suit cast in a declaratory form but held not to come within Sch. II Act. 17 (iii).—Suit will not necessarily come under this clause. See (Vol. 25) 1938 Oudh 1 (7) : 13 Luck 628 (FB) \* (Vol. 25) 1938 Oudh 201 (203) : 14 Luck 176 (FB).

[12] Declaration for which plaintiff asks in fact amounting only to a finding as basis for decree for some substantial relief—Suit will not come under this clause. (Vol. 25) 1938 Pat 22 (26) : 16 Pat 766 (FB) \* (Vol. 32) 1945 Pat 81 (83, 85) : 23 Pat 749 \* (Vol. 29) 1942 Pat 60 (63) : 20 Pat 780 (DB).

[13] Suit ostensibly professed to be one for declaration and further relief—Held suit was really one for substantial relief alone as declaration was unnecessary. (Vol. 28) 1941 Mad 91 (93) : I L R (1941) Mad 157 \* (Vol. 9) 1922 Pat 615 (616, 617) : 2 Pat 125 (SB) \* (Vol. 7) 1920 All 158 (159).

[14] Suit professing to be one for declaration and further relief—Court holding that plaintiff wants a declaratory decree to be passed in his favour—Suit must be held to include a prayer for a declaratory decree for purposes of court-fee though declaration is unnecessary for granting of the relief. ('88) 1938 Nag L Jour 130 (132) \* (Vol. 18) 1931 Rang 319 (320) : 9 Rang 401



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(DB) \* (Vol. 15) 1928 All 248 (250) : 50 All 619 \* (Vol. 11) 1921 All 612 (612) : 47 All 78.

[See also (Vol. 30) 1943 Sind 56 (58) : 1 L R (1942) Kar 558 (1942).]

[15] Suit including relief for declaratory decree and relief for some substantial relief. Two reliefs independent of each other. This clause will not apply. Declaratory relief will come under Sch. II, Art. 17 (iii) and other relief will come under other appropriate provision. (37) 1927 All W R 417 (417) (DB).

[16] "Further relief" in S. 32 Specific Relief Act refers to some relief to which plaintiff will be successively entitled after the title has been declared. (Vol. 6) 1919 Mad 23 (24) : 35 (DB) \* (13) 1918 Pan L R No. 211 Rang 44 (75) (DB) : 1913 Pan Re No. 48 (DB) \* (22) 5 All 65 (57) (DB).

[17] "Consequential relief" in this clause must be such that it will constitute further relief within S. 32, Specific Relief Act. (35) 1935 All L Jour 1319 (1320) (DB) \* (Vol. 32) 1935 All 290 (290) : 1 L R (1935) All 516 (1935) \* (Vol. 2) 1935 Mad 414 (415) : (Vol. 24) 1937 Sind 28 (249).

[18] A relief to which plaintiff would not be entitled unless a certain title were established will not be a further relief based on such title unless plaintiff would necessarily be entitled to such relief if title was established. See (Vol. 22) 1935 Mad 203 (206) : 38 Mad 448.

[See however (Vol. 19) 1932 All 111 (115) : 51 All 232.]

[19] Mere fact that a certain relief flows from the right declared will not *ipso facto* make it consequential relief within the meaning of this clause. It will be a consequential relief only if it is asked for as incidental to the declaratory decree. (Vol. 19) 1932 All 485 (487) : 54 All 512 (FB).

[20] In the following cases it has been held that a relief which flows from the right declared will necessarily be a consequential relief within this clause. (Vol. 24) 1937 Nag 14 (15) \* (35) 1935 All L Jour 1319 (1320) (DB) \* (Vol. 13) 1926 Mad 678 (679).

[21] In the following cases the suit was held to be one for a bare declaration coming under Sch. II, Art. 17 (iii) (Vol. 30) 1943 Lah 39 (41) (DB) \* (Vol. 29) 1942 Cal 539 (542) : 1 L R (1942) 2 Cal 253 \* (Vol. 29) 1942 Pesh 62 (63) (DB) \* (39) 1939 Oudh W N 152 (153, 154) (DB) \* (Vol. 22) 1935 All 100 (101) : 57 All 602 (DB) \* (Vol. 20) 1933 Pat 224 (232) : 12 Pat 261 : (DB) \* (Vol. 16) 1929 Mad 572 (573) \* (Vol. 13) 1926 Rang 184 (186) (FB) \* (Vol. 11) 1924 Mad 621 (621) (DB) \* (Vol. 5) 1918 Lah 246 (246) : 1918 Pan Re No. 81 (DB).

[22] In the following case the suit was held to come under this clause though it was ostensibly cast in the form of a pure declaratory suit. (36) 1936 All W N 54 (55) (FB).

[23] Suit for rectification of instrument under S. 31 Specific Relief Act.—Suit held to be for declaration and consequential relief within this clause. (Vol. 9) 1922 Nag 264 (265).

[24] For other instances of suits for declaration with consequential relief, see the following cases. (Vol. 26) 1939 Pat 219 (220) (DB) \* (Vol. 25) 1938 Cal 865 (865) : 1 L R (1938) 2 Cal 64 (DB) \* (Vol. 14) 1927 Pat 128 (128) : 6 Pat 17.

[25] In the following cases, even a mere declaration has been held to be capable of being a consequential relief within the meaning of this clause. (Vol. 26) 1939 Oudh 125 (126) : 14 Luck 536 (DB) \* (Vol. 25) 1939 Pat 213 (229) (DB) \* (Vol. 33) 1946 Bom 167 (167, 168) : 1 L R (1945) Bom 198 (198) : (Vol. 13) 1926 Pat 453 (455) : 5 Pat 396 (DB).

[26] Plaintiff suing for declaration that a decree is null and void and is not enforceable against him.—*Held* nature of the declaration may be regarded as a consequential relief. (Vol. 28) 1941 L R 97 (105) : 1 L R (1941) Lah 151 (151).

[27] Prayer for consequential relief pure surplusage.—Suit is for only a declaratory suit pure and simple. (Vol. 16) 1921 Vol 396 (398) (DB) \* (11) 1914 Pan L R No. 14 Rang 215 (217) (DB) : 1911 Pan Re No. 1 (DB) \* (1913) 12 Cal L Jour 638 (641) (DB) \* (31) 1881 All W N 13 (13) (DB).

[See also (Vol. 13) 1926 Pat 454 (456) : 5 Pat 466 (193).]

[28] Plaintiff in addition to reliefs claimed any other relief when the court may find the plaintiff entitled may be granted to him, added in plaintiff's coupled with a prayer for declaration, is not an element of suit and makes no difference for a declaratory decree or other where consequential relief is prayed. (Vol. 27) 1939 Pat 158 (158) : 38 Pat 756 (DB) \* (Vol. 39) 1943 All 481 (481) : 55 All 564 (564) : (Vol. 13) 1926 Pat 453 (455) : 5 Pat 493 (DB) \* (Vol. 6) 1919 Lah 61 (61) (DB).

[But see (12) 30 Cal 704 (710) (DB) \* (Vol. 38) 1936 Nag 251 (251, 252, 253) : 1 L R (1936) Nag 578.]

[29] At date of institution of suit plaintiff not entitled to possession of suit property.—Plaintiff suing for mere declaration.—Pending suit he becoming entitled to one for possession.—This will not affect maintainability of suit as one for bare declaration. (34) 26 All 215 (219) (DB) \* (38) 12 Mad 136 (138) (DB).

[See (Vol. 26) 1939 Pat 219 (220) (DB).]

## 2. Suit for declaration of title and possession.—[1]

In the following cases where plaintiff sued for declaration of title to immovable property and recovery of possession it was held that the suit comes under para (v). (Vol. 27) 1940 Mad 273 (273) (DB) \* (Vol. 33) 1946 Bom 363 (365) (DB) \* (Vol. 24) 1937 Mad 529 (529) : 1 L R (1937) Mad 672 (DB) \* (Vol. 22) 1935 Mad 346 (347) \* (Vol. 2) 1915 Mad 948 (950) : 38 Mad 922 (FB) \* (Vol. 29) 1942 Lah 209 (210, 211) (DB) \* (42) 1942 Nag L Jour 372 (372, 373) \* (Vol. 28) 1941 Pat 167 (169) (DB) \* (Vol. 25) 1938 Pat 22 (26, 27) : 16 Pat 766 (FB) \* (37) 1937 All W R 417 (417) (DB) \* (Vol. 23) 1936 Cal 264 (264) \* (Vol. 18) 1931 Rang 319 (320) : 9 Rang 401 (DB) \* (Vol. 17) 1930 Oudh 368 (369) : 6 Luck 64 (DB) \* (Vol. 17) 1930 Oudh 104 (104, 105) : 5 Luck 474 (DB) \* (Vol. 9) 1922 Pat 615 (617, 618) : 2 Pat 125 (SB) \* (Vol. 7) 1920 All 158 (159) \* (05) 29 Bom 98 (98) (DB).

[2] In the following cases the suit was held to come under this clause and not para (v). (Vol. 20) 1933 Mad 42 (43) : 56 Mad 314 (DB) \* (Vol. 16) 1929 Mad 529 (535, 539) (DB) \* (Vol. 29) 1942 Lah 209 (211) (DB) \* (38) 1938 Nag L Jour 130 (132) \* (Vol. 21) 1934 Pat 641 (642) : 14 Pat 220 (DB) \* (Vol. 14) 1927 Pat 123 (125) : 6 Pat 17 \* (Vol. 11) 1924 All 612 (612) : 47 All 78 \* (Vol. 9) 1922 Pat 615 (616, 617) : 2 Pat 125 (SB) \* (Vol. 9) 1922 All 358 (360) : 44 All 629 \* (13) 40 Cal 615 (618) (DB).

[See also (Vol. 30) 1943 Sind 55 (58) : 1 L R (1942) Kar 558 (DB).] \*

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[3] Declaration and possession asked for as two separate reliefs—Declaratory part will come under Sch. II, Art. 17 (iii) and relief as to possession will come under para. (v). ('37) 1937 All W N 417 (217) (DB).

[See also (Vol. 23) 1936 Mad 344 (345).]

[4] Plaintiff's title (possession depending on his getting a decree setting aside a deed of transfer or decree—Plaintiff suing for possession—His suit will necessarily imply a prayer for cancellation of the deed or decree. (Vol. 17) 1930 Oudh 16+ (104, 105); 5 Luck 474 (DB) \*(Vol. 4) 1917 Pat 108 (108); 3 Pat T. Jour 92 (DB).

[See also (Vol. 24) 1937 Pat 141 (142) (DB) \*(37) 172 Ind Cas 724 (795, 796) (DB) (Cal).]

[Pat 206 (Vol. 16) 1929 Oudh 119 (120); 5 Luck 98 (DB) \*(Vol. 13) 1926 Oudh 330 (380) \*(Vol. 20) 1933 Mad 93 (93, 91).]

[5] Under proviso to S. 72 of the Specific Relief Act, a suit for mere declaration of title will not be maintainable where plaintiff is able to ask for a decree for possession also but obtains from doing so. (Vol. 26) 1930 Pat 419 (220, 221) (DB) \*(Vol. 3) 1916 Low Bar 64 (64) (DB) \*(35) 13 Mad 405 (107) (DB) \*(92) 15 Mad 255 (257) (DB).

[6] Plaintiff not able to sue for possession—He will be entitled to sue for a mere declaration and his suit will come under Sch. II, Art. 17 (iii). (Vol. 30) 1943 Oudh 432 (432) (DB) \*(Vol. 11) 1924 Pat 385 (386) (DB) \*(Vol. 4) 1917 Cal 559 (559) (DB) \*(13) 56 Mad 62 (63) (DB) \*(04) 27 Mad 591 (593, 594) (DB) \*(Vol. 29) 1912 Oudh 53 (60); 17 Luck 145 (DB) \*(Vol. 19) 1932 Lah 97 (98) (DB) \*(Vol. 9) 1922 Cal 419 (120); 49 Cal 544 (DB) \*(91) 1891 Bom P J 38 (DB) \*(64) 1884 All W N 11 (12) (DB).

[See also (Vol. 14) 1927 Nag 316 (317).]

[7] Plaintiff suing for possession simpliciter—Court cannot demand court-fee under this clause on ground that suit as framed will not be maintainable under law, unless he obtains declaration of title. (Vol. 16) 1929 Nag 276 (276).

**3. Suit for declaration and injunction.**—[1] Suit for declaration and injunction will come under this clause where injunction is asked for as a consequential relief based on declaratory decree. (Vol. 24) 1937 Nag 14 (15) \*(36) 33 Pun L R 638 (639) (DB) \*(35) 1935 All L Jour 1319 (1320) (DB) \*(Vol. 17) 1930 Sind 198 (199) \*(12) 39 Cal 704 (710) (DB) \*(94) 18 Bom 100 (103) (DB) \*(Vol. 12) 1925 Mad 1143 (1143) \*(Vol. 9) 1922 Sind 20 (21); 16 Sind L R 109 \*(Vol. 5) 1918 Cal 193 (194) (DB) \*(Vol. 3) 1916 Cal 392 (393) (DB) \*(36) 10 Bom 60 (61).

[2] A suit for declaration is not one under this clause merely because an *ad interm* injunction is asked for. (Vol. 27) 1940 Pat 158 (159); 18 Pat 756 (DB).

[See (Vol. 9) 1922 Sind 20 (21); 16 Sind L R 109.]

[But see (Vol. 13) 1926 Pat 249 (251); 5 Pat 211 \*(Vol. 11) 1924 Pat 532 (535); 3 Pat 640 \*(12) 39 Cal 704 (710) (DB).]

[3] Plaintiff suing for declaration and injunction as independent reliefs—Sch. II Art. 17 (iii) will apply to former relief and S. 7 (iv) (d) will apply to latter relief. (Vol. 13) 1926 All 423 (423); 48 All 412 (DB) \*(04) 1904 Pun L R No. 118 P. 419 (422) (DB).

[4] Prayer for injunction superfluous—Suit held to be one for pure declaration. ('40) 42 Pun L R 364 (365)

\*(Vol. 22) 1935 Mad 318 (318) \*(Vol. 5) 1913 PC 188 (191); 43 Bom 507; 46 Ind App 24 (PC).

[5] In the following case suit was held to be really for possession though ostensibly it professed to be one for declaration and injunction. (Vol. 17) 1930 Cal 41 (42) (DB).

[6] In the following cases suit was mentioned as falling under cls. (c) and (d) of this paragraph. (Vol. 26) 1939 Cal 743 (744); 1 L R (1939) 2 Cal 20 \*(Vol. 25) 1938 Cal 302 (303) \*(Vol. 11) 1924 Nag 316 (318) (DB) \*(13) 1913 Pun L R No. 232 page 775 (778); 1913 Pun Re No. 93 (DB) \*(92) 17 Bom 56 (59, 61) (DB).

**\* Suit to set aside decrees and instruments—General.**

[1] A suit for a mere declaration that an instrument or decree is void against plaintiff comes under Sch. II, Art. 17 (iii). (Vol. 20) 1933 All 488 (490); 55 All 791 (FB) \*(Vol. 13) 1931 All 369 (372); 53 All 552 (DB) \*(Vol. 4) 1917 Cal 668 (669) (DB) \*(03) 30 Cal 783 (790) (DB) \*(96) 29 Bom 736 (742) (DB) \*(84) 7 Mad 134 (136).

[See also (Vol. 23) 1942 Pat 309 (309).]

[2] Suit to declare decree void—Sch. II Art. 17 (v) (Bom) applies (Vol. 32) 1945 Bom 474 (475) (DB).

[3] Suit for cancellation of instrument or decree comes under S. 7 (iv) (c). (Vol. 30) 1943 Pat 102 (107); 21 Pat 720 \*(Vol. 35) 1938 Oudh 1 (7); 13 Luck 628 (FB) \*(35) 62 Cal 479 (482) \*(Vol. 21) 1934 Oudh 506 (506) (DB) \*(Vol. 20) 1933 Nag 214 (215) \*(Vol. 8) 1921 Pat 78 (80); 5 Pat L Jour 540 (DB) \*(Vol. 7) 1920 Nag 243 (243); 16 Nag L R 84 (DB) \*(Vol. 6) 1919 Mad 223 (224) (DB) \*(Vol. 3) 1916 Upp Bur 4 (5); 2 Upp Bur Rul 102 \*(01) 28 Cal 334 (338) (DB) \*(04) 27 Mad 430 (431) (DB).

[See (Vol. 23) 1941 Lah 265 (267) (DB).]

[4] The following cases hold that a suit for cancellation of instrument or decree will come under Sch. I, Art. 1. (Vol. 23) 1936 All 710 (712) (DB) \*(Vol. 20) 1933 All 488 (489, 490); 55 All 791 (FB) \*(Vol. 23) 1941 Lah 97 (104, 105, 106, 108); 1 L R (1941) Lah 451 (FB) \*(41) 16 Luck 526 (527) (DB) \*(Vol. 19) 1932 All 485 (487); 51 All 812 (FB).

[5] If on true construction of plaint suit appears to be one for cancellation, it must be held to be such a suit although prayer portion of plaint may be cast in a declaratory form. (Vol. 31) 1944 Pat 17 (20, 21, 24); 22 Pat 788 (FB) \*(Vol. 30) 1943 Nag 70 (71); 1 L R (1943) Nag 440 \*(Vol. 30) 1943 Pat 102 (107); 21 Pat 720 \*(Vol. 23) 1941 Lah 97 (99); 1 L R (1941) Lah 451 (FB) \*(Vol. 25) 1938 All 481 (482); 1 L R (1938) All 470 (DB) \*(Vol. 25) 1938 Nag 183 (185); 1 L R (1939) Nag 373 (DB) \*(Vol. 25) 1938 Oudh 1 (6, 7); 13 Luck 628 (FB) \*(Vol. 24) 1937 All 411 (412, 414); 1 L R (1937) All 259 (DB) \*(Vol. 23) 1936 Pesh 180 (181) \*(Vol. 21) 1934 Lah 235 (236, 237) (DB).

[6] Suit merely for a declaration—Courts are not entitled to treat it as being one for cancellation merely because plaintiff's proper remedy is to ask for cancellation and a suit for a bare declaration is not maintainable under the circumstances of the case. ('36-43) Tax Dec (Nag) 51 (52) \*(Vol. 20) 1933 All 488 (490); 55 All 791 (FB) \*(Vol. 12) 1925 Mad 713 (714) \*(Vol. 25) 1938 Mad 645 (646) \*(Vol. 22) 1935 All 817 (829); 58 All 146 (FB).

[7] Plaintiff being a party to instrument or decree sought to be avoided.—Decree or instrument not absolutely void—He must sue for cancellation—Mere suit for declaration that it is not binding on plaintiff

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will not be competent. (Vol. 30) 1943 Mad 106 (107) \* (Vol. 31) 1944 Mad 478 (478, 479) (DB) (Suit for declaration that compromise decree is not binding on plaintiff—If cancellation is necessarily implied, suit comes under S. 7 (iv) (a) (Mad)) \* (Vol. 33) 1946 Nag 30 (31): I L R (1945) Nag 975 (DB) (Agreement under Debt Conciliation Act Suit by representatives of debtor to have decree unenforceable—*Ad valorem* court-fee is required.) \* (Vol. 29) 1942 Pat 60 (62): 20 Pat 780 (DB) \* (Vol. 27) 1940 Mad 113 (118, 123): I L R (1940) Mad 259 (FB) \* ('36-43) Tax Dec (Nag) 36 (38) \* (Vol. 2) 1915 Mad 948 (950): 38 Mad 922 (FB) \* (Vol. 20) 1933 Pesh 13 (14) (DB) \* (Vol. 29) 1942 Pat 309 (309) \* (Vol. 28) 1941 Lah 284 (285): I L R (1942) Lah 379 (DB) \* ('41) 16 Luck 526 (527) (DB) \* (Vol. 25) 1938 Nag 183 (184): I L R (1939) Nag 373 (DB) \* (Vol. 25) 1938 Oudh 1 (7): 13 Luck 628 (FB) \* (Vol. 24) 1937 All 411 (412, 414): I L R (1937) All 259 (DB) \* (Vol. 21) 1934 Pesh 109 (110) \* (Vol. 16) 1929 Lah 463 (464) (DB) \* (Vol. 14) 1927 Lah 499 (500): 8 Lah 531 (DB).

[But see (Vol. 15) 1928 Mad 416 (419): 51 Mad 664 (DB).]

[8] Plaintiff being third party to document or decree—He may avoid it by merely suing for a declaratory decree to the effect that deed or decree is not binding on him. (Vol. 31) 1944 Mad 19 (19): I L R (1944) Mad 430 \* (Vol. 33) 1946 Mad 181 (183, 184). (Suit on mortgage—Prayer for sale if mortgaged property free from claims of other alienees—Plaintiff not party to document of alienation—Relief of cancellation not necessary) \* (Vol. 34) 1947 Mad 130 (130) \* (Vol. 30) 1943 Lah 348 (349): I L R (1943) Lah 565 (DB) \* (Vol. 30) 1943 Mad 490 (491) \* (Vol. 29) 1942 Pat 60 (62, 63): 20 Pat 780 (DB) \* (Vol. 28) 1941 Lah 159 (160) (DB) \* ('36-43) Tax Dec (Nag) 36 (38).

[9] Alienation by a Hindu widow is not void but only voidable by reversioner—He can sue alienee for possession—Mere declaration would be enough, though it would not be necessary for purpose of decreeing possession in favour of reversioner. ('07) 34 Cal 329 (333): 34 Ind App 87 (PO).

[10] Instrument or decree absolutely void—Mere suit for declaration would be enough to enable plaintiff to avoid it and get relief inconsistent with it although he may have been party to document or decree. ('36-43) Tax Dec (Nag) 36 (37, 38) \* (Vol. 33) 1946 Mad 342 (343, 344) (Allegation that material page of document fraudulently abstracted by defendant—Sch. II Art. 17 A (Mad) applies) \* (Vol. 31) 1944 Mad 408 (408) (DB) \* ('08) 80 All 375 (377) (DB) \* (Vol. 20) 1933 Rang 109 (110): 11 Rang 66.

[11] Document attacked as being sham transaction—Plaintiff being party to the deed—*Held* that relief prayed for should be cancellation and not mere declaration. (Vol. 34) 1947 Mad 57 (57, 58).

[12] Test adopted by Madras High Court to determine if suit attacking instrument is one for bare declaration or for its cancellation, is to see if instrument is one which cannot be avoided by plaintiff except by suit for setting it aside. (Vol. 18) 1929 Mad 396 (398) (DB) \* (1900) 23 Mad 490 (491, 492) (DB) \* (Vol. 23) 1936 Mad 286 (286).

[13] According to following cases test as to whether a suit attacking an instrument is for declaration or cancellation is to see whether suit falls under S. 39 or S. 42. (Vol. 22) 1935 All 817 (822): 58 All 146 (FB) \* (Vol. 28) 1936 Lah 703 (703) (DB) \* (Vol. 21) 1934

Oudh 505 (506) (DB) \* (Vol. 18) 1931 Pat 78 (79): 10 Pat 432 (DB) \* (Vol. 16) 1929 Nag 71 (72): 25 Nag L R 52 \* (Vol. 28) 1941 Rang 269 (270): 1941 Rang L R 387 \* (Vol. 20) 1933 Oudh 116 (117): 8 Luck 674 (DB).

[14] Express prayer for cancellation of instrument—Suit will be held to be one under S. 39 and as such for cancellation for purposes of court-fees. (Vol. 28) 1941 Lah 265 (267) (DB) \* ('35) 62 Cal 479 (481) \* (Vol. 20) 1933 Rang 410 (410) (DB) \* (Vol. 20) 1933 Rang 40 (40) \* (Vol. 16) 1929 Oudh 491 (493): 5 Luck 235 (DB) \* (Vol. 5) 1918 Pat 482 (483): 3 Pat L Jour 194 \* (Vol. 3) 1916 Lah 21 (21): 1916 Pun Re No. 87 (DB) \* ('05) 29 Bom 207 (210) (DB) \* ('01) 28 Cal 334 (338) (DB).

[But see (Vol. 20) 1933 Oudh 116 (117): 8 Luck 674 (DB).

[15] No express prayer for cancellation—Court must consider if primary object of plaintiff is to attack instrument and have it adjudged void or voidable or whether object is only to obtain declaration of plaintiff's rights in property and instrument is merely referred to incidentally. (Vol. 22) 1935 All 817 (822): 58 All 146 (FB).

[16] Instrument being one which cannot be avoided by plaintiff otherwise than by bringing a suit for setting it aside—Primary object of plaintiff is to attack instrument and get it vacated by Court. (Vol. 31) 1944 Pat 17 (24): 22 Pat 783 (FB) \* (Vol. 28) 1941 Lah 97 (99, 106): I L R (1941) Lah 451 (FB) (Overruling (Vol. 10) 1923 Lah 373 (DB)) \* (Vol. 22) 1935 Lah 611 (DB) \* (Vol. 22) 1935 All 207 (208, 210): 57 All 638 (DB).

[17] If a document is void and is declared to be void its actual cancellation cannot by itself be a very valuable remedy. (Vol. 28) 1941 Lah 265 (267) (DB).

[18] Section 39, Specific Relief Act does not apply to decrees. (Vol. 18) 1931 All 369 (370): 53 All 552 (DB).

[But see ('40) 1940 Nag L Jour 96 (97).]

[19] In the following case a third party's suit to avoid a decree was held to be one for cancellation. ('34) 152 Ind Cas 847 (847) (DB) (Lah) \* (Vol. 20) 1933 Nag 214 (215).

[20] Suit impeaching instrument by person having present interest in property sought to be affected by instrument—Suit held to be under S. 39 and one for cancellation of instrument for purpose of court-fees. (Vol. 22) 1935 All 817 (833): 58 All 146 (FB).

[21] Suit seeking to avoid decree—*Held* suit can never be mere suit for declaration coming under Sch. II, Art. 17 (iii). (Vol. 25) 1938 Oudh 201 (203, 204): 14 Luck 176 (FB) \* (Vol. 25) 1938 Oudh 1 (7): 13 Luck 628 (FB).

[See ('12) 39 Cal 704 (709, 710) (DB).]

[22] Deed of transfer not requiring setting aside by Court—Plaintiff entitled to get back possession from defendant—He will have to claim possession in his suit—Such suit comes under this clause. (Vol. 29) 1942 Lah 209 (210, 211) (DB) \* (Vol. 11) 1924 All 612 (612): 47 All 78 \* (Vol. 9) 1922 All 358 (360): 44 All 629.

[See also (Vol. 30) 1943 Pat 102 (107): 21 Pat 720.]

[23] Where plaintiff is in a position to ask for some relief besides a mere declaration that a certain document which is void against him, does not affect his rights, his suit will come under this clause. (Vol. 30) 1943 Mad 490 (491) \* (Vol. 25) 1938 Mad 474 (475) \* ('82) 4 All 520 (328) (FB).

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[24] Possession delivered to transferee under voidable deed requiring suit to set it aside—Suit brought for setting aside deed and for recovery of possession—Suit for purposes of court-fee, is only one for cancellation of deed—Prayer for possession is only ancillary. (Vol. 26) 1939 Mad 462 (463) : I L R (1939) Mad 764 \* (Vol. 25) 1938 Mad 921 (922).

[See (Vol. 20) 1933 Sind 53 (55).]

[25] Suit to declare sale deed invalid and for possession—Cause of action for suit under S. 39, Specific Relief Act and suit for declaration and possession under S. 42, Specific Relief Act would be different—S. 17 (1) would apply. (Vol. 32) 1945 All 290 (290) : I L R (1945) All 516 (DB).

[26] Suit by vendee under sale deed for refund of consideration on ground that he has been induced by fraud to purchase property is really one for setting aside deed—Relief as to refund is only ancillary. (Vol. 13) 1926 Mad 96 (99).

[27] Suit to have rate of maintenance fixed by decree altered owing to change in circumstances is not one to set aside decree for purposes of court-fees. (Vol. 22) 1935 Mad 655 (655) : 59 Mad 159 \* (Vol. 32) 1945 Nag 264 (266) : I L R (1945) Nag 661 (DB).

[28] Suit for declaration that decree is fraudulent collusive, etc., and that family property of plaintiff is not liable to be taken in execution of decree comes under this clause. ('13) 40 Cal 615 (617, 618) (DB).

**5. Suit for setting aside decree and execution sale.—**

[1] Decree executed and property sold in execution—Suit brought thereafter for impeaching decree—If decree is void against plaintiff suit would be for declaration that decree is void.—No suit for cancelling sale necessary. (Vol. 30) 1943 Lah 348 (349) : I L R (1943) Lah 565 (DB).

[2] Possession delivered to auction-purchaser—It is open to plaintiff to sue for declaration that decree and sale are void and as a consequential relief, for possession of property sold—Suit will come under this clause. (Vol. 13) 1931 Mad 375 (376) \* (Vol. 15) 1928 All 248 (250) : 50 All 610.

[3] Decree requiring setting aside before it can be avoided—Suit will be for setting aside decree though sale has taken place in execution of decree and sale is also attacked—No separate court-fee will be necessary for setting aside sale. (Vol. 31) 1944 Oudh 118 (119) : 19 Luck 54 (DB).

[4] Decree requiring setting aside before it can be avoided—Sale in execution—Possession delivered to auction-purchaser—Plaintiff suing to recover possession also—Held setting aside of decree is substantive relief and recovery of possession is only ancillary relief. (Vol. 7) 1920 Pat 656 (658, 659) : 4 Pat L Jour 703 (DB) \* (Vol. 7) 1920 Pat 290 (290) : 5 Pat L Jour 394 (DB) \* (Vol. 2) 1915 Mad 650 (551) : 38 Mad 1184 (DB).

[But see (Vol. 31) 1944 Oudh 118 (119) : 19 Luck 54 (DB) \* (Vol. 9) 1922 Cal 242 (243) (DB).]

[5] Validity of decree not questioned but sale in execution of decree attacked as a nullity—Suit for recovery of property is one for possession falling under S. 7, para (v). (Vol. 9) 1922 Cal 506 (507) : 49 Cal 880 (DB).

**6. Suit for setting aside decree and for refund of money realised under it.—**[1] Suit by A for declaring that decree obtained by B against C is null and void and for refund of amount realised by B under his decree

by way of rateable distribution comes under this clause. (Vol. 24) 1937 Nag 316 (317) : I L R (1938) Nag 302.

**7. Suit for setting aside decree and for injunction against execution.—**[1] Suit for declaring decree to be void and for injunction restraining its execution will come under this clause. (Vol. 27) 1940 Cal 482 (484) : I L R (1940) 1 Cal 409 \* (Vol. 21) 1934 Rang 152 (152, 153) (DB) \* (Vol. 20) 1933 Nag 214 (215) \* (Vol. 2) 1915 Mad 948 (950) : 38 Mad 922 (FB) \* ('86) 1886 All W N 54 (55) (FB).

[2] Suit for declaring decree to be fraudulent and for injunction will come under this clause. (Vol. 20) 1933 Lah 246 (246, 247) : 13 Lah 788 \* (Vol. 11) 1924 Cal 969 (970) (DB) \* (Vol. 9) 1922 Cal 242 (243) (DB).

[3] Sch. II, Art. 17 (v), (Bombay) and (Sind), will not apply to suit to set aside decree and for injunction restraining its execution—Separate court-fee must be paid in respect of injunction. (Vol. 24) 1937 Sind 241 (242) : 31 Sind L R 442 (FB).

[4] Decree void against plaintiff—It is not necessary for him, when suing for a declaration that decree is not capable of being executed against him, to ask for injunction against execution. (Vol. 16) 1929 Lah 446 (447) \* ('13) 17 Cal L Jour 30 (33) (DB).

[But see (Vol. 6) 1919 Lah 63 (64) (DB).]

**8. Suit for avoiding deed of transfer or decree—Plaintiff not entitled to sue for possession—Effect on Court-fee.—**[1] Suit to set aside sale-deed—Plaintiff in possession of property affected—Value of relief for purposes of court-fees would be consideration for which sale-deed was executed and not market value of property. (Vol. 27) 1940 Oudh 248 (249) : 15 Luck 531.

[2] Plaintiff in possession—Document sought to be avoided absolutely void—Suit will come under Sch. II, Art. 17 (iii) (Vol. 10) 1923 Cal 362 (363) (DB).

[3] In the following cases deed in question was not absolutely void and plaintiff was a party to deed. It was held that suit was one for a bare declaration and not for cancellation, because plaintiff was in possession. (Vol. 20) 1933 Oudh 127 (127) (DB) \* ('32) 138 Ind Cas 147 (148) (Oudh).

[But see (Vol. 8) 1921 Oudh 217 (219) : 24 Oudh Cas 361 (DB).]

**9. Suit to set aside decree for partition and for fresh partition.—**[1] Suit to set aside prior decree for partition with prayer for fresh partition—Held suit is for declaratory decree where consequential relief is prayed. (Vol. 28) 1941 Sind 154 (157) : I L R (1941) Kar 102 (DB) \* (Vol. 26) 1939 Cal 627 (627) (DB) \* (Vol. 25) 1938 Sind 189 (190) : 32 Sind L R 124 (DB).

**10. Minor.—**[1] Decree passed against minor represented by duly qualified guardian impeaching by means of suit decree on ground of fraud, collusion or gross negligence of guardian—Suit would be one for setting aside or cancellation of decree and not mere declaratory suit for purposes of court-fees. (Vol. 29) 1942 Pat 309 (309) \* (Vol. 27) 1940 Mad 113 (118) : I L R (1940) Mad 259 (FB) \* (Vol. 23) 1936 Pesh 180 (181) \* (Vol. 19) 1932 All 485 (487) : 54 All 812 (FB) \* (Vol. 19) 1932 Lah 132 (133) : 13 Lah 391 (DB) \* (Vol. 8) 1921 Oudh 217 (219) : 24 Oudh Cas 361.

[2] Minor not represented by guardian in former suit—Decree would be absolutely void against him—He can simply sue for declaration that decree is void against him. ('36-43) Tax Dec (Nag) 36 (38) \* (Vol. 23) 1936 Mad 470 (470).

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[3] Contract or transfer of property made by minor—Suit by minor to avoid such a transaction would only be a suit for mere declaration under Sch. II, Art. 17 (i). (Vol. 20) 1933 Rang 109 (110) : 11 Rang 66.

[4] Guardian transferring minor's property in circumstances in which such a transfer is not justified—Minor is not bound to sue to set aside transfer—Minor's suit for declaring invalidity of transfer would be only for mere declaration coming under Sch. II, Art. 17 (iii). (Vol. 30) 1943 Mad 427 (428) \* (Vol. 15) 1928 Mad 816 (816) (DB).

[But see (Vol. 25) 1938 Mad 921 (922) \* ('37) I L R (1937) 2 Cal 501 (504) (DB) \* (Vol. 24) 1937 Pat 141 (142) (DB) \* (Vol. 16) 1929 Mau 668 (669) \* (Vol. 34) 1947 Mad 130 (131) \* ('11) 7 Nag L R 190 (191).]

13. Hindu joint family.—[1] In the following cases suit for avoiding a decree passed against manager of a joint Hindu family was treated as one for cancellation of decree. (Vol. 31) 1944 Mad 19 (19) : I L R (1944) Mad 439 \* (Vol. 31) 1944 All 208 (209) : I L R (1944) All 388 \* (Vol. 34) 1947 Mad 16 (17) \* (Vol. 30) 1943 Nag 79 (73, 74, 75) : I L R (1943) Nag 140 \* (Vol. 23) 1941 Lah 97 (105) : I L R (1941) Lah 451 (FB) \* (Vol. 23) 1936 Lah 166 (166) (DB) \* (Vol. 21) 1931 Oudh 212 (212) : 8 Luck 688 \* (Vol. 17) 1930 Oudh 104 (104, 105) : 5 Luck 474 (DB) \* (Vol. 7) 1920 Pat 290 (290) : 5 Pat L Jour 394 (DB) \* (Vol. 5) 1918 Pat 131 (131, 132) : 4 Pat L Jour 191 (DB).

[2] In the following cases suit for avoiding decree passed against manager of joint family was treated as suit for mere declaration. (1935) 16 Lah 752 (755) (DB) \* (Vol. 22) 1935 All 667 (669) : 57 All 943 (DB) \* (Vol. 21) 1934 Oudh 212 (213) (DB).

[3] Mortgage decree against Hindu father—Suit by son for declaration that decree was not binding on him on ground of want of necessity and also immorality and illegality of debt—Suit is one for declaration with injunction as a consequential relief as decree for declaration pure and simple cannot stop execution of decree (Vol. 32) 1945 Lah 13 (14) (DB).

[4] Suit by Junior member of Hindu Joint family seeking to avoid alienation of joint family property by manager—Suit is mere suit for declaration. (Vol. 23) 1935 All 817 (824, 829) : 58 All 146 (FB) \* (Vol. 22) 1935 Mad 66 (67) : 58 Mad 385 \* (Vol. 12) 1925 Mad 713 (713, 714).

[But see (Vol. 29) 1942 Lah 209 (210, 211) (DB) \* (Vol. 28) 1941 Lah 97 (105) : I L R (1941) Lah 451 (FB) \* ('35) 1885 All W N 48 (49) \* (Vol. 12) 1925 Mad 1248 (1249) (DB).]

[5] Suit for possession of some properties sold by private sale and some in execution of mortgage decree—With regard to properties sold in execution of mortgage decree plaintiff must state amount at which relief sought is valued—With regard to other properties value shall be decreed to be twenty times the revenue payable for them. (Vol. 32) 1945 Pat 421 (424) : 24 Pat 334 (DB).

12. Suit by Hindu reversioners.—[1] Alienation by Hindu—Suit by reversioners for declaration that alienation will not be binding on them will come under Sch. II, Art. 17 (iii). (Vol. 20) 1933 Mad 108 (109) \* ('93) 1893 Pun Re No. 109, p. 430 (433) \* ('77) 1877 Pun Re No. 70 p. 181 (182) (DB).

[2] A reversioner can sue for injunction or for appointment of Receiver for estate during life-time of

the widow if he can make out that she has been wasting or mismanaging the estate—Injunction or appointment of Receiver asked for along with declaration—Where declaration and injunction or appointment of Receiver are sought as joint relief, suit will come under this clause. (Vol. 19) 1932 All 114 (115, 116) : 54 All 232 \* (Vol. 33) 1916 All 322 (323) : I L R (1916) All 155 (DB) \* (Vol. 11) 1921 Nag 316 (317, 318) (DB) \* (Vol. 9) 1922 Pat 61 (61) \* (Vol. 9) 1917 Mad 151 (151).

[3] Partition sued for declaration that certain alienation would be void beyond widow's life-time and for appointment of Receiver to the estate—Held that latter relief was not consequential relief within the meaning of this clause. (Vol. 13) 1926 Mad 678 (678, 679).

[4] A suit in which merely *ad interim* injunction is prayed for or in which a Receiver is sought to be appointed during pendency of the suit is not one for an injunction or appointment of Receiver. (Vol. 27) 1940 Pat 158 (158, 159) : 18 Pat 756 (DB).

[See (Vol. 25) 1938 Mad 11 (119) : I L R (1938) Mad 386 (DB).]

[5] Where a widow dies leaving alienated her husband's property and the office is in possession, the reversioner is entitled to sue alienor straightaway for possession. He is not bound to sue for setting aside alienation. ('07) 34 Cal 329 (333, 334) : 34 Ind App 87 (PC).

[6] Reversioner after widow's death sued praying that it may be held that an alienation by widow is not binding on him and that possession may be deemed in his favour—Suit will be one simply for possession—Prayer for declaration—Court can ignore the prayer and treat suit as simple suit for possession. (Vol. 9) 1922 Pat 615 (616, 617) : 2 Pat 125 (SB) \* (Vol. 7) 1920 All 158 (159).

[7] Suit for possession of property alienated by Hindu widow with declaration that plaintiff was owner of property and that sale deed in respect thereof was illegal—Held relief of possession being principal relief and not consequential relief suit was governed by S. 7 (v) : Market value at date of suit held should be considered. (Vol. 33) 1946 Ben 363 (365) (DB).

[8] If plaintiff clearly wants a declaratory decree to be passed in addition to decree for possession, Court will not be entitled to ignore the prayer for declaration. (Vol. 22) 1935 Mad 346 (347).

[9] In the following cases relief as to possession was treated as consequential relief. (Vol. 30) 1943 Sind 56 (58) : I L R (1943) Kar 358 (DB) \* (Vol. 4) 1921 Pat 57 (59) : 6 Pat L Jour 101 (DB).

13. Malabar tarward.—[1] Suit by member of Malabar tarward for declaration that instrument executed by other members including karnavan is not binding on him—Suit is for mere declaration. ('07) 30 Mad 18 (20, 21) (DB) \* ('91) 14 Mad 26 (28) (DB).

[2] Some of the members of Malabar tarward, being dissatisfied with a partition arrangement entered into during their minority, sued to have partition deed set aside. Held that suit was for cancellation of partition deed and was governed by S. 7 (IV-A) of Madras Amendment. (Vol. 19) 1932 Mad 491 (492, 493).

[3] Suit by junior member of tarward seeking to avoid decree passed against karnavan in his representative capacity as karnavan will be one for cancellation of decree but if allegation of plaintiff is that person

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against whom decree had been obtained was not karnavan he can sue for mere declaration. (Vol. 31) 1944 Mad 19 (19) : I L R (1944) Mad 430 \* (Vol. 32) 1945 Mad 430 (431) : I L R (1945) Mad 888 \* ('40) 1940 2 Mad L Jour 53 (NRC).

[But see (Vol. 18) 1981 Mad 375 (376).]

**14. Deed of adoption.**—[1] Mere suit for declaration is enough for the purpose of avoiding a deed of adoption. (Vol. 25) 1938 Mad 824 (826).

[See also (Vol. 24) 1937 Rang 400 (400) \* (Vol. 18) 1931 Rang 319 (320) : 9 Rang 401 (DB).]

**15. Suit under S. 53, Transfer of Property Act.**—[1] Creditor's suit under S. 53 Transfer of Property Act is a purely declaratory suit for purposes of Court-fee. (Vol. 26) 1939 Mad 894 (895) : I L R (1940) Mad 73.

**16. Other illustrative cases.**—[1] *Suits for damages.*—Plaintiff seeking account of his father's estate from defendant, as executor appointed under his father's will and in default of obtaining such accounts claiming damages to the extent of a definite sum—He is liable to pay *ad valorem* court-fee on such amount. ('71) 16 Suth W R 156 (157) (DB).

[2] Suit for assessment of rent and for recovery of a specific sum of money as damages for use and occupation of land is to obtain a declaratory decree or order where consequential relief is prayed. (Vol. 6) 1919 Pat 541 (542) : 4 Pat L Jour 561.

[3] *Suits to set aside revenue sales.*—A suit to have a revenue sale set aside must be stamped as one for recovery of property. ('82) 9 Cal L Rep 231 (232) (DB).

[4] Suit to set aside revenue sale and for confirmation or restoration of possession of property is a suit to obtain a declaratory order where consequential relief is prayed. (Vol. 22) 1935 Pat 459 (459, 460) (DB) \* (Vol. 5) 1918 Pat 437 (437) : 3 Pat L Jour 448 (DB).

[5] Even if interest of plaintiff extends only to a portion of property sold, relief asked being that whole sale should be set aside, court-fee must be paid on value of entire property and not on value of plaintiff's share. (Vol. 5) 1918 Pat 437 (437) : 3 Pat L Jour 448 (DB) \* (Vol. 11) 1924 Cal 239 (239) : 50 Cal 392 (DB) \* ('74) 12 Beng L R 370 (372) (FB).

[But see (Vol. 22) 1935 Pat 459 (459, 460) (DB).]

[6] *Suits to set aside patni sales.*—A suit under S. 14 of the Bengal Patni Taluks Regulation (VIII of 1819) against the zamindar for reversal of the patni sale is not a suit for a mere declaratory decree within the meaning of Sch. II, Art. 17 (iii). (Vol. 11) 1924 Cal 731 (732) : 51 Cal 216 (DB).

[7] *Suits under the Madras Estates Land Act.*—Suit by a person, unsuccessful in getting himself registered as a landholder by the Collector under S. 3 (5) of the Madras Estates Land Act (I of 1908), with prayer that order of Collector be set aside and plaintiff be recognised as landholder, is essentially a suit for a declaratory decree falling under Sch. II, Art. 17 A (i) as amended by Madras Act V of 1922. (Vol. 23) 1936 Mad 333 (334) : 59 Mad 882.

[8] *Suits under the Bengal Tenancy Act.*—Suit by person under S. 104H of the Bengal Tenancy Act, 1885, for declaration that his status is that of an occupancy ryot and not of tenure-holder as recorded in Settlement Revenue Roll and for settlement of fair and

equitable rent on that basis in respect of the holding is one under S. 7 (iv) (c). (1912) 16 Cal L Jour 333 (334, 335) (DB) \* ('13) 17 Cal L Jour 426 (427) (DB).

[See (Vol. 28) 1941 Pat 463 (465) (DB)].

[9] Application under S. 105—Several parties joined—Stamp of 12 annas is to be put for each tenancy—If issue is raised by applicant under S. 105A, then in addition to above stamp, a stamp of the amount of *ad valorem* fee chargeable under Sch. I, Art. 1 must be put subject to a maximum of twenty rupees in respect of each tenancy. (Vol. 19) 1932 Cal 674 (676) : 59 Cal 997 (DB) \* (Vol. 11) 1924 Cal 345 (345) : 50 Cal 903.

[10] Suit under S. 106 of the Act—Court-fee on such application is to be calculated under Sch. I, Art. 1—Where amount of such *ad valorem* fee is less than twenty rupees application is to be stamped according to valuation put on relief sought subject to maximum of 20 rupees in respect of each tenancy. (Vol. 19) 1932 Cal 674 (676) : 59 Cal 997 (DB).

[11] Application under S. 105A or S. 106 seeking for alteration of rent as recorded in Record of Rights—Plaintiff should value his relief against each tenancy at ten times the difference between rent claimed and rent recorded. (Vol. 19) 1932 Cal 674 (676) : 59 Cal 997 (DB).

[12] Suit under proviso to S. 111A—Plaintiff claiming that he is in possession of occupancy right—He is entitled to ask for declaration of his occupancy right—In addition to such declaration, plaintiff also asking for declaration that entry in the records as to his status as tenure-holder is a nullity—Case is one in which plaintiff asks for a declaratory decree with consequential relief. (Vol. 4) 1917 Cal 77 (77) : 44 Cal 352 (DB).

[But see (Vol. 6) 1919 Pat 13 (13) : 4 Pat L Jour 302.]

**17. Mode of Valuation under para (iv) (General).**

[1] Different views are held as regards the question whether plaintiff is entitled to value his suit arbitrarily and in any manner he chooses or whether the Court is entitled to revise his valuation and require him to correct it.

(a) According to the following decisions the Court has no power under O. 7 R. 11 (b) to interfere with plaintiff's valuation under this paragraph. (Vol. 12) 1925 Bom 282 (282) (DB) \* ('73) 2 Bom 219 (226, 227) (DB) \* (Vol. 33) 1946 Lah 94 (96) (FB) \* (Vol. 1) 1914 Lah 214 (219) : 1918 Pun Re No. 111 (FB) \* (Vol. 23) 1941 Mad 91 (94) : I L R (1941) Mad 157 \* (Vol. 29) 1942 Pesh 4 (5) (DB) \* (Vol. 24) 1937 Nag 14 (15, 16) \* (Vol. 14) 1927 Nag 375 (376) \* (Vol. 2) 1915 Mad 948 (950) : 38 Mad 922 (FB). (24 Mad L Jour 233 (FB) followed) \* (Vol. 21) 1934 Rang 268 (269) : 12 Rang 335 \* (Vol. 11) 1924 Rang 378 (379) \* (Vol. 25) 1938 Sind 189 (190) : 32 Sind L R 124 \* (Vol. 11) 1924 Sind 105 (110) : 17 Sind L R 15 \* (Vol. 17) 1930 Cal 686 (688) : 58 Cal 281 \* (Vol. 17) 1930 Cal 473 (474) (DB).

(b) The following cases hold that Court has power even in cases coming under this paragraph to consider if plaintiff has undervalued relief and to require him to correct valuation if Court considers that the valuation is too low. (Vol. 26) 1939 Nag 50 (56) : I L R (1938) Nag 558 (FB) \* (1903) 1903 Pun Re No. 28 Page 88 (90) \* (Vol. 20) 1933 Rang 40 (40) \* (Vol. 11) 1924 All 652 (656) : 46 All 553 (DB) \* (Vol. 31) 1944 Pat 17 (24) : 22 Pat 783 (FB) \* (Vol. 32) 1945 Pat 421 (425) : 24 Pat 334 (DB) \* (Vol. 30) 1943 Pat 218 (227) : 22 Pat 114 (DB) \* (Vol. 22) 1935 Lah 689 (689) \* (Vol.

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(28) 1941 Sind 154 (157): I L R (1941) Kar 102 (DB)\* (Vol. 24) 1937 Sind 241 (241, 242): 31 Sind L R 442 (FB)\* (Vol. 25, 1938 Cal 302 (304)\* (Vol. 21) 1934 Cal 448 (451): 61 Cal 796 (FB).

(c) The following case has held that where plaintiff makes an absurd and outrageous valuation in order to have his suit tried in a particular Court, Court can interfere with plaintiff's valuation under S. 151 of the Civil Procedure Code. (Vol. 15) 1928 Oudh 260 (231).

(d) The following cases hold that whatever may be the case in regard to other kinds of suits coming under this paragraph Court is bound to accept plaintiff's valuation, however arbitrary it may be, in suits for accounts. (Vol. 31) 1914 All 84 (87): I L R (1914) All 133 (DB)\* (12) 1942 Nag L Jour 197 (199)\* (Vol. 28) 1941 Rang 322 (324): 1941 Rang L R 512 (FB)\* (Vol. 23) 1936 Bom 166 (166, 167)\* (Vol. 23) 1936 Mad 562 (563)\* (Vol. 22) 1935 Bom 212 (212, 213) (DB)\* (Vol. 22) 1935 Rang 13 (14): 12 Rang 512 (DB)\* (Vol. 19) 1932 Mad 656 (657)\* (Vol. 13) 1926 Lah 242 (242).

[2] In Bengal now the Court is expressly given power to revise and determine the correct valuation if in its opinion the subject-matter of the suit has been wrongly valued. (Vol. 27) 1940 Cal 483 (484): I L R (1940) 1 Cal 409\* (Vol. 27) 1940 Cal 451 (452): I L R (1940) 2 Cal 166.

**18. Court-fee and jurisdiction.**—[1] The proper construction of S. 8, Suits Valuation Act is that suit must first be valued for purposes of court-fees and then the valuation should be adopted for purpose of jurisdiction also. (Vol. 26) 1939 Cal 155 (156): I L R (1938) 2 Cal 411 (DB)\* (Vol. 24) 1937 Bom 167 (169): I L R (1937) Bom 623\* (Vol. 21) 1934 Rang 268 (269): 12 Rang 335\* (Vol. 12) 1925 All 602 (604): 47 All 501\* (Vol. 11) 1924 Nag 316 (318) (DB)\* (Vol. 5) 1918 P C 135 (136): 43 Bom 376: 46 Ind App 15 (PC).

[2] Rules made under S. 9, Suits Valuation Act for purposes of jurisdiction—Plaintiff is not bound to adopt the same valuation for purposes of Court-fee. (Vol. 33) 1946 Lah 94 (96) (FB).

[3] Plaintiff, on the view that this paragraph does not apply valuing suit for purposes of jurisdiction—Court cannot on coming to the conclusion that the suit comes under this paragraph, require him to pay court-fee on value given for purposes of jurisdiction. (Vol. 21) 1934 Rang 268 (269): 12 Rang 335\* (Vol. 14) 1927 Lah 890 (891): 9 Lah 366 (DB).

[4] In the following cases valuation given by plaintiff for purposes of jurisdiction was adopted for purposes of court-fees also. (136-43) Tax Dec (Nag) 31 (33) (DB)\* (Vol. 23) 1936 Lah 990 (990) (DB)\* (36) 38 Pun L R 638 (639) (DB)\* (Vol. 21) 1934 Rang 152 (153) (DB)\* (Vol. 13) 1928 All 423 (423): 43 All 412 (DB)\* (Vol. 9) 1922 All 358 (360): 44 All 629\* (Vol. 8) 1921 Oudh 217 (218): 24 Oudh Cas 361\* (Vol. 3) 1916 Cal 649 (649) (DB)\* (13) 40 Cal 245 (249) (DB).

[5] Value given for purposes of jurisdiction may often furnish a criterion for seeing proper value for court-fees. (Vol. 1) 1914 All 72 (72): 36 All 500 (DB).

[See (Vol. 25) 1938 Lah 647 (649): I L R (1939) Lah 172.]

[6] Plaintiff may be precluded, on principles of estoppel, from contending that different valuation should be applied for purposes of court-fee from what

he has given as value for purposes of jurisdiction. (Vol. 28) 1941 Lah 97 (108, 109): I L R (1941) Lah 451 (FB)\* (Vol. 17) 1930 Cal 686 (687): 58 Cal 281\* (Vol. 12) 1925 All 602 (604): 47 All 501.

[See (Vol. 19) 1932 All 114 (116): 54 All 232.]

[7] Plaintiff not giving any value for court-fee but only for jurisdiction—Latter may be taken as value for court-fee also. (Vol. 13) 1926 Mad 591 (592).

[8] Suit for accounts under cl. (f)—Value of subject-matter of original suit is value given in plaint, unless it is enhanced by adjudication that a higher sum is due in which case it is this latter sum on which court-fee is computed. (Vol. 21) 1934 Lah 488 (491, 492): 15 Lah 151 (FB).

[See also (Vol. 31) 1944 Nag 7 (10): I L R (1944) Nag 63 (DB).]

**19. Valuation of suits coming under clause (c).—**

[1] Relief under this clause is to be valued as a single and conjoint relief. It is not proper to split up reliefs into a declaration and a consequential relief and value each of them separately, add up the values and regard the aggregate as the value of the relief. (Vol. 31) 1944 All 113 (114): I L R (1944) All 214\* (Vol. 28) 1941 Cal 509 (512) (DB)\* (35) 1935 All L Jour 1319 (1320) (DB)\* (Vol. 17) 1930 Cal 686 (687): 58 Cal 281\* (Vol. 2) 1915 Mad 386 (387) (DB).

[But see (Vol. 12) 1925 All 602 (604): 47 All 501\* (Vol. 9) 1922 Lah 236 (237)\* (Vol. 1) 1914 All 72 (73): 36 All 500 (DB).]

[2] In the following cases the consequential relief alone was valued and value of consequential relief was taken as the value of the whole relief. (Vol. 27) 1940 Cal 560 (561): I L R (1940) 2 Cal 33\* (Vol. 15) 1928 Cal 55 (56) (DB)\* (Vol. 11) 1924 Pat 532 (535): 3 Pat 640\* (Vol. 2) 1915 Mad 386 (387) (DB).

[3] In the following cases it was held that the declaration should be charged with a court-fee of Rs. 10 under Sch. II Art. 17 (iii) and the consequential relief should be valued separately and charged with an *ad valorem* fee. (Vol. 21) 1934 Rang 268 (270): 12 Rang 335.

**20. Suit to set aside deed or decree—Mode of valuation.**—[1] Suit for setting aside decree—Amount of decree would be value of the relief if court-fee is to be computed according to value of the relief. (Vol. 9) 1922 Sind 20 (21): 16 Sind L R 109\* (108) 8 Cal L Jour 485 (488) (DB).

[See (140) 1940 Nag L Jour 96 (97).]

[2] If decree sought to be avoided is mortgage-decree, amount of decree or value of plaintiff's interest in the property, whichever is less would be value of the relief. (Vol. 16) 1929 Pat 615 (617) (DB)\* (Vol. 2) 1915 Cal 705 (708): 42 Cal 370 (DB)\* (108) 35 Cal 202 (207): 35 Ind App 22 (PC) (31 Cal 511 overruled—Suit under O. 21 R. 63 Civil PC).

[3] Suit for setting aside decree brought after some property has been sold in execution of decree—Held value of property will determine value of relief for purposes of court-fees. (Vol. 28) 1941 Pat 532 (535) (DB)\* (Vol. 26) 1939 Pat 254 (254).

[But see (Vol. 9) 1922 Cal 242 (243) (DB).]

[4] Suit to declare void and cancel instrument of relinquishment of management of Gurdwara brought by a third person—The value of the property of the Gurdwara does not determine the court-fee or jurisdiction. (Vol. 28) 1941 Lah 265 (267) (DB).



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[5] Suit to set aside pronote—*Held*, no objective valuation is possible. (Vol. 24) 1937 Cal 748 (749): 1 L R (1938) 1 Cal 196.

[6] Suit for cancellation of mortgage decree—Cancellation of the decree leaving defendant with the right and opportunity to obtain another similar decree on same mortgage in another properly framed suit—*Held*, valuation of claim is value of decree minus value of chance of defendant obtaining another decree—Latter being incapable of valuation, value of claim was not capable of ascertainment. (Vol. 12) 1925 Nag 66 (66).

[7] Suit brought by members of Malabar tarwad to set aside an instrument affecting the whole of the tarwad property—The plaint cannot be valued according to the value of whole of the tarwad property but must be valued only according to value of plaintiff's share. (91) 14 Mad 169 (169, 170) (DB).

### 21. Court-fee on appeal—Applicability of the provisions of Section 7 and Schedule II, Article 17.—

[1] S. 7 (IV) (c) has been applied to appeal arising from mortgage suit. (Vol. 18) 1931 All 251 (252) \* (Vol. 15) 1928 Nag 316 (318, 319): 24 Nag L R 142 \* (Vol. 8) 1921 Oudh 237 (237): 24 Oudh Cas 295 \* (Vol. 5) 1918 All 79 (81) \* (Vol. 5) 1918 Oudh 348 (348) \* ('94) 1894 Bom P J 153 (154) \* ('87) 10 Mad 187 (188) (DB).

[2] In some cases, the plaint may fall under one para of S. 7 and the appeal may fall under a different para of the same section. In others, the plaint may fall under some para of S. 7 and the appeal may not fall under S. 7 at all. (Vol. 9) 1922 All 358 (360): 44 All 629 \* (Vol. 11) 1924 Pat 582 (585): 3 Pat 640.

[3] Plaintiff's suit dismissed in its entirety—Appeal from decree—Appeal will be governed by same provisions as suit for purposes of court-fees. (Vol. 19) 1932 All 114 (117): 54 All 232 \* (Vol. 18) 1926 Pat 249 (251): 5 Pat 211 \* (Vol. 8) 1921 Sind 149 (150, 151): 16 Sind L R 273 (DB) \* (Vol. 5) 1918 Cal 193 (194) (DB) \* ('86) 10 Bom 60 (61).

[4] Suit entirely decreed—Defendant's appeal—Appeal will be subject to same provisions as to court-fees as the suit. (41) 16 Luck 526 (527) (DB) \* (Vol. 20) 1933 Rang 410 (410) (DB) \* (Vol. 16) 1929 Sind 161 (161) (DB) \* (1900) 23 Mad 490 (491, 492) (DB) \* ('84) 10 Cal 380 (382).

[5] Different views are held as regards the question whether the applicability of clauses of Sch. II Art. 17 to appeals is to be determined with reference to the subject-matter in dispute in the appeal or in the original suit.

(a) According to the following decisions the criterion is the subject-matter of the suit in the *trial Court*. (Vol. 28) 1941 Lah 123 (127): 1 L R (1941) Lah 234 (FB) \* (Vol. 15) 1928 Cal 878 (879): 56 Cal 188 \* ('36-43) Tax Dec (Nag) 47 (48) \* (Vol. 20) 1933 All 45 (46): 54 All 553 \* (Vol. 19) 1932 All 221 (222): 54 All 347 \* (Vol. 9) 1922 Cal 203 (205) (DB).

(b) It has been held in the following decisions, that the criterion for applying the provisions of this article to an appeal is only the nature of the subject-matter of the *appeal*. (Vol. 25) 1938 Nag 409 (411): 1 L R (1938) Nag 423 (FB) \* (Vol. 24) 1937 Nag 95 (96) \* (Vol. 24) 1937 Pesh 89 (89, 90) (DB) \* (Vol. 24) 1937 Pesh 31 (32) (DB) \* (Vol. 23) 1936 Lah 663 (663) \* (Vol. 21) 1934 Pat 473 (473) \* (Vol. 11) 1924 Pat 582

(585): 3 Pat 640 \* (Vol. 24) 1937 Mad 840 (842): 1 L R (1938) Mad 253 \* (Vol. 28) 1941 Oudh 622 (623): 17 Luck 246 \* (Vol. 32) 1945 Oudh 30 (31): 20 Luck 101 (DB) \* (Vol. 23) 1936 All 221 (221) (DB) \* (Vol. 22) 1935 Lah 14 (15) (DB).

[6] Suit under any of the clauses of Art. 17—Subject-matter of appeal arising from it being the same as that in the suit—Same clause will apply to the appeal also. (Vol. 26) 1939 Oudh 90 (91): 14 Luck 346 (DB) \* (Vol. 26) 1939 Oudh 64 (64) (DB) \* (Vol. 24) 1937 Mad 736 (737): 1 L R (1937) Mad 930 (DB) \* (Vol. 20) 1933 Mad 108 (109, 110) \* (Vol. 20) 1933 Pat 224 (232): 12 Pat 264 (DB) \* (Vol. 19) 1932 Cal 47 (47, 48, 49): 58 Cal 710 \* (Vol. 17) 1930 Lah 839 (840) (DB) \* (Vol. 17) 1930 Rang 164 (168) (DB) \* (Vol. 11) 1924 Cal 183 (184) \* (Vol. 8) 1921 Pat 305 (306).

[7] If a suit does not fall under any clause of this Article and there is no difference in subject-matter of the appeal which arises from the suit, appeal also will not come under this article. (Vol. 25) 1938 All 97 (98): 1 L R (1938) All 230 (FB) \* (Vol. 23) 1936 Oudh 151 (151): 11 Luck 396 (DB) \* (Vol. 9) 1922 Bom 172 (173): 46 Bom 840 (DB) \* (Vol. 1) 1914 Lah 507 (507): 1915 Pun Re No. 7 (DB) \* ('09) 1 Ind Cas 670 (673) (DB) (Cal).

[8] Where the subject-matter of appeal is such that there is no specific provision applicable to it, if the subject-matter is capable of valuation, Sch. I, Art. 1 will apply to the appeal. (Vol. 24) 1937 Oudh 501 (502) (DB) \* (Vol. 23) 1936 All 216 (217) \* (Vol. 23) 1936 Pesh 232 (232) (DB) \* (Vol. 21) 1934 Lah 958 (959): 15 Lah 893 (DB) \* (Vol. 21) 1934 Mad 230 (231): 57 Mad 632 (DB) \* (Vol. 18) 1931 Mad 710 (711) \* (Vol. 17) 1930 Lah 825 (826, 827) \* (Vol. 6) 1919 Pat 425 (425) \* ('10) 37 Cal 914 (917) (DB).

[See also (Vol. 22) 1935 Nag 83 (86, 88) (FB) \* (Vol. 23) 1936 All 221 (221) (DB).]

[9] If the subject-matter in appeal is not capable of valuation the appeal will come under Sch. II, Art. 17 (vi). (Vol. 27) 1940 Oudh 183 (184): 15 Luck 321 (DB) \* (Vol. 22) 1935 Bom 111 (112): 59 Bom 439 \* (Vol. 21) 1934 Cal 377 (379): 61 Cal 320 \* (Vol. 20) 1933 Lah 678 (680) (DB) \* (Vol. 15) 1928 Nag 333 (334, 335): 25 Nag L R 175 \* (Vol. 14) 1927 Lah 189 (189) \* (Vol. 14) 1927 Nag 100 (101, 102) \* ('35) 8 Mad 22 (24) (DB) \* (Vol. 11) 1924 Cal 600 (605) (DB).

22. Local Amendments.—[1] [4] Section 7 (iv) (c) *Proviso (Madras)*—Suit for declaration of title to immovable property and for injunction falls under the proviso and court-fee is payable on half the value of the immovable property computed in accordance with para (v) of S. 7. (Vol. 12) 1925 Mad 1143 (1143) \* (Vol. 18) 1931 Mad 69 (70).

[2] Proviso should be read with para (v) of S. 7 so as to make the words "with reference to" mean involving possession of land, houses or gardens. Proviso held to be inapplicable to a case where relief claimed was a declaration of right of easement. (Vol. 14) 1927 Mad 348 (349).

[3] Words "the relief sought is with reference to any immovable property" in the proviso, should in some sense relate to the title to immovable property. (Vol. 23) 1936 Mad 201 (202): 59 Mad 962 \* (Vol. 33) 1946 Mad 235 (236): 1 L R (1946) Mad 885.

[4] The words "relief sought" in the proviso must be read as relating to the words "consequential relief".



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in clause (c) of the main Act. (Vol. 23) 1936 Mad 201 (202): 59 Mad 962.

[5] The proviso merely introduces a downward limit below which relief sought in respect of immovable property consequential on a declaratory decree shall not be valued. It does not lay down that if the relief sought properly falls within any other provision requiring a higher valuation, the higher valuation is not to be made. (Vol. 19) 1932 Mad 605 (609): 56 Mad 212 (DB).

[6] [B] *Section 7 (iv) (a) (U. P.)*.—Suit to obtain declaratory decree—Consequential relief sought in respect of immovable property—Relief incapable of valuation in money—*Ad valorem* Court-fee is payable as if relief was one for possession of immovable property. (Vol. 27) 1940 Oudh 249 (250): 15 Luck 415 (DB).

[7] The words "relief sought" in para (iv) of the amendment mean the whole relief which is prayed for in the suit. (Vol. 31) 1944 All 113 (114): 1 L R (1944) All 214.

[8] [C] *Section 7 (iv) (b) (U. P.)*.—There is nothing in law to prevent the plaintiff from valuing a relief for accounting at any figure chosen by him but he cannot get a decree for any amount in excess of that amount until he pays the proper Court-fee. (Vol. 31) 1944 All 84 (87): 1 L R (1944) All 133 (DB).

[9] [D] *Section 7 (iv-A) (U. P.)*.—The paragraph is not retrospective in operation. ('41) 1941 Oudh W N 471 (472).

[10] This paragraph applies to appeal. (Vol. 31) 1944 Oudh 29 (30).

[11] This paragraph will not apply to an appeal by an unsuccessful defendant in a suit although it involves the cancellation of a decree passed by the Court of first instance. (Vol. 31) 1944 Oudh 29 (30).

[12] The words "a decree for money" include decree in a mortgage suit where the amount of the decree in such a suit is immediately apparent. (Vol. 31) 1944 Oudh 118 (119): 19 Luck 54 (DB).

[13] Plaintiff is not required to pay separate Court-fee for cancellation of sale held in execution of decree sought to be cancelled. (Vol. 31) 1944 Oudh 118 (119): 19 Luck 54 (DB).

[14] Plaintiff praying that he may be given possession of the property after cancellation of decree and sale—Separate Court-fee is payable on claim for possession. (Vol. 31) 1944 Oudh 118 (119): 19 Luck 54 (DB).

[15] A will cannot be described as an "instrument securing any property" within the meaning of this paragraph. (Vol. 31) 1944 All 84 (87): 1 L R (1944) All 133 (DB). (It is no more than the declaration of an intention).

[16] [E] *Section 7 (iv-B) (U. P.)*.—Clause (b) of the paragraph applies to a suit in which the only relief claimed is one to obtain an injunction. (Vol. 27) 1940 Oudh 249 (250): 15 Luck 415 (DB).

[17] The "market-value" referred to in the first proviso of the paragraph means the market-value of the property on the date of presenting the plaint. (Vol. 28) 1941 All 134 (135): 1 L R (1940) All 793.

[18] Suit by Zamindar for injunction restraining defendant from interfering with plaintiff's right to realize *tahbazan* dues from shopkeepers of bazar—

Relief to be valued not less than one-tenth of market-value of land—Market-value to be computed according to sub-S. (v). (Vol. 33) 1946 Oudh 61 (62): 21 Luck 245 (DB).

[19] Suit for injunction restraining transfer of certain postal certificates—*Ad valorem* Court-fee is to be paid on one-tenth of value of certificates. (Vol. 33) 1946 All 392 (392): 1 L R (1946) All 455 (DB).

**SECTION 7 PARA (iv), CLAUSE (d)—Note 1.**

[1] The kind of suit contemplated by this clause is that in which a perpetual injunction is claimed. Suit will not come under this clause merely because an application is made therein under O. 39 of the Civil Procedure Code for the grant of a temporary injunction. But where the suit itself is for an injunction this clause will apply whether the injunction sought is preventive or mandatory. ('82) 4 All 320 (329, 330) (FB) \* (Vol. 27) 1940 Cal 552 (553) (DB).

[2] Relief of injunction asked as substantive relief in addition to relief of declaration. ('97) 19 All 60 (63) (DB).

[3] Suit on behalf of certain idols for declaration that defendant had no power to manage property of the minors and for perpetual injunction restraining defendant from interfering with management of the properties—*Held* that suit was one for declaratory decree with prayer for consequential relief. (Vol. 12) 1925 All 602 (604): 47 All 501.

[See also ('96) 10 Bom 60 (61).]

[4] Suit framed as one for injunction restraining defendant from interfering with plaintiff's possession as sale-deed executed by plaintiff in favour of defendant was void—*Held* that object of suit was avoidance of sale-deed and that suit should be valued as one for declaration and not as one in which there was only prayer for injunction. (Vol. 26) 1939 Mad 435 (435).

[5] Plaintiff prayed for permanent injunction restraining certain persons from quarrying and removing stones without paying necessary fees to plaintiff—*Held* suit came under this clause. (Vol. 23) 1936 Mad 200 (201).

[6] Plaintiff claimed that he was entitled to customary supply of water to his irrigation tank from overflow of water from defendant's tanks and sued for an injunction restraining defendant from carrying out certain projected works which would endanger customary flow of water to plaintiff's tank—*Held* suit was only for injunction coming under this clause and not one for declaratory decree with consequential relief. (Vol. 28) 1941 Mad 91 (93,94): 1 L R (1941) Mad 157.

[7] Suit for permanent injunction restraining defendant from erecting permanent structures on suit land and for mandatory injunction for removal of construction already made alleging that defendant's interest in land was not sufficient to entitle him to erect such structures comes under this clause. ('82) 4 All 320 (329, 330) (FB) \* (Vol. 27) 1940 Cal 552 (553) (DB).

[8] Suit for possession of money bonds and for an injunction restraining defendants from drawing money from the bank—Prayer for recovery of bonds will fall under clause (a) and prayer for injunction will fall under this clause. ('94) 1894 Bom P J 145 (DB).

[9] Plaintiff sued for declaration that he was the sole shebait, that a certain consent decree was not operative and that defendants who were constituted joint shebait were not validly appointed and for an

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injunction restraining defendants from interfering with management of the endowed property. *Held* that as plaintiff alleged himself to be already in possession, relief of injunction was to be valued for purposes of Court-fee under this clause at the amount mentioned by plaintiff and value of the endowed property was not material for this purpose. (Vol. 1) 1914 Cal 879 (880, 881) (DB).

[10] Suit for permanent injunction restraining defendant from cutting timber and undergrowth from a jungle belonging to plaintiff falls under this clause. (Vol. 6) 1919 Cal 975 (975) (DB).

[11] Suit for injunction restraining Municipality from demolishing a *thera* alleged to be not constructed in accordance with Municipal sanction falls under this clause. (Vol. 16) 1929 Lah 566 (568) (DB).

[12] Suit to restrain defendant from opening certain windows in his wall and from preventing or obstructing plaintiff from building a second storey to his own house falls under this clause. ('01) 24 Mad 34 (36) (DB).

[13] Suit for injunction to remove obstruction to plaintiff's window from which he derived light and air—Suit valued as one for declaration—*Held*, claim should be valued by ascertaining the difference between the value of the room before the window was blocked up and the value after it was blocked up—Value of the property to be removed need not be considered. ('87) 1887 Pun Re. No. 52, page 109 (109) (DB).

**SECTION 7, PARA (IV), CLAUSE (E)—Note 1.**

[1] Suit to establish an easement comes under this clause. ('82) 4 All 320 (329) (FB) \* (Vol. 16) 1929 Bom 341 (342, 343) : 53 Bom 552 (DB) \* ('12) 16 Ind Cas 963 (965) (DB) (Cal).

[2] Plaintiff sued for declaration that he was liable to pay certain kind of royalty and not at higher rate claimed by defendant. It was held that the suit did not come under this clause as, if there was a benefit, it was a benefit to the defendant and the plaintiff aimed at reducing such benefit. (Vol. 11) 1924 Mad 621 (622) (DB).

[3] Suit to recover possession of a mine—Suit is governed by S. 7 (v) and not by this clause. ('12) 16 Ind Cas 963 (965) (DB) (Cal).

**SECTION 7, PARA (IV), CLAUSE (F)—SYNOPSIS.**

1. Suit for accounts.
2. Suit for dissolution of partnership and for accounts.
3. Suit for administration.
4. Suit for partition.
5. Suit under S. 92, Civil Procedure Code.
6. Appeal against final decree in suit for accounts—Court-fee.
7. Appeal from preliminary decree.
8. Appeal from dismissal of suit for accounts.
9. Appeal in mortgage suit.
10. Appeal in suit for money due on accounts.
11. Appeal from preliminary decree in suit for money.
12. Decree in favour of defendant—Court-fees.
13. Suits under S. 33, U. P. Agriculturists' Relief Act.

1. **Suit for accounts.**—[1] A suit for accounts contains that the defendant is liable in law to render accounts to the plaintiff. (Vol. 31) 1944 Oudh 101 (102) \* (Vol. 5) 1918 Cal 1037 (1039) (DB) \* (Vol. 3) 1916 Mad 990 (990) \* ('97) 20 Mad 418 (420) (DB).

[2] Suit for money will not be one for accounts merely because Court will have to look into accounts before passing a decree. ('86-43) Tax Dec (Nag) 103 (105) \* (Vol. 19) 1932 Mad 565 (565, 566) \* (Vol. 15) 1928 Bom 476 (477, 483) : 52 Bom 904 (DB) \* (Vol. 5) 1918 Cal 1037 (1039) (DB) \* (Vol. 1) 1914 All 108 (108) (DB) \* ('05) 28 Mad 394 (395, 396) (DB) \* (Vol. 28) 1941 Oudh 622 (623) : 17 Luck 246.

[3] The case must be one in which owing to the nature of the relationship between the parties, the plaintiff is not in a position to state definitely whether anything, and if so, how much is due to him from the defendant. (Vol. 15) 1928 Bom 476 (479, 483) : 52 Bom 904 \* (Vol. 2) 1915 Cal 365 (366) (DB) \* ('12) 8 Nag L R 36 (38).

[4] A merely incidental or ancillary relief as to taking accounts will not make a suit one for accounts. ('99) 21 All 200 (203) (DB) (Suit under S. 92, Civil P. C., containing an incidental prayer for accounts.)

[5] A suit for money due on a mortgage does not become a suit for accounts merely because it involves taking of accounts or because defendant claims that accounts should be taken according to a certain method. (Vol. 9) 1922 Pat 59 (60) (DB) \* (Vol. 22) 1935 Bom 69 (70) (DB).

[6] Plaintiff specially mentioning specific amount misappropriated by defendant—Claim in respect of such amount not independent of claim for accounts—This clause applies. (Vol. 24) 1937 Mad 235 (236, 237).

[7] Plaintiff in a suit for accounts referring in plaint to account sent by defendant wherein it was stated that a specific amount was remaining in the hands of defendant—Suit does not become a simple suit for money. (Vol. 23) 1936 Mad 525 (525, 526).

[8] Prior to suit for accounts plaintiff had sent notice to defendant claiming a definite sum of money—This does not make it a simple suit for money. (Vol. 23) 1936 Bom 166 (166, 167).

[9] Defendant accounting to party—Plaintiff suing him for definite sum of money—Suit will not be one for accounts. (Vol. 1) 1914 Mad 100 (100).

[10] Suit to surcharge and falsify accounts already furnished and to recover specific sums—Suit is not for accounts—Plaintiff must value and pay *ad valorem* Court-fee on basis of specific sums. (Vol. 88) 1946 Mad 136 (137).

2. **Suit for dissolution of partnership and for accounts.**—[1] Suit for accounts of a dissolved partnership—Suit is one for accounts. ('95) 22 Cal 692 (708) (DB).

[2] Suit for dissolution of partnership and for accounts is a suit for accounts. ('14) 22 Ind Cas 71 (72) (DB) (Bom) \* ('10) 32 All 517 (521).

[See (Vol. 24) 1937 Lah 694 (696) : I L R (1937) Lah 196 (DB).]

[3] Partnership at will—Institution of suit itself dissolves partnership—Suit may be treated for purposes of Court-fee as merely a suit for accounts. (Vol. 30) 1943 Mad 639 (640, 641) : I L R (1944) Mad 271 (DB).

**S. 7 (iv) (f) (cont'd.)**

[4] Suit purely for dissolution of partnership—No money-decree asked for against defendant on the basis that he is an accounting party—Suit is not one for accounts. (Vol. 31) 1944 Oudh 101 (102).

**3. Suit for administration.**—[1] Suit for administration is a suit for accounts for purposes of this clause, (Vol. 23) 1941 Rang 322 (323); 1941 Rang L R 512 (FB) \* (Vol. 32) 1945 Sind 11 (20); I L R (1944) Kar 325 \* (Vol. 33) 1946 Bom 356 (359) \* (40) 42 Pun L R 101 (102) \* (Vol. 23) 1936 Bom 353 (356) (DB) \* (Vol. 23) 1936 Lah 879 (881) (DB) \* (Vol. 22) 1935 Rang 13 (14); 12 Rang 512 \* (Vol. 5) 1918 Cal 895 (895); 45 Cal 634 (DB) \* (Vol. 1) 1914 Oudh 1 (18) (DB) \* (Vol. 5) 1918 Cal 883 (886); 44 Cal 890 (DB) \* (Vol. 1) 1914 Lah 490 (491); 1914 Pun Re. No. 100 (DB).

[But see (Vol. 29) 1942 Mad 217 (248, 249); I L R (1942) Mad 455.]

[2] Different views are held as to the liability of creditors other than the plaintiff, to pay court-fees in respect of claims which they put forward under a preliminary decree for administration.

(a) In the following case it was held that such a creditor may be required to pay *ad valorem* court-fees on his claim. (Vol. 5) 1918 Cal 883 (886); 44 Cal 890 (DB).

(b) In the following decision it was held that such a creditor was liable to pay court-fee not on the amount claimed by him but on the actual dividend that was payable to him. (Vol. 25) 1938 Cal 785 (787, 788); I L R (1939) 1 Cal 152 (DB).

(c) The following case holds that a creditor coming in with a claim after a preliminary decree for administration was liable to pay court-fee on his claim. (Vol. 26) 1939 Rang 115 (117); 1939 Rang L R 134 (DB).

(d) The following case has held that such a creditor is not liable to pay any court-fee and that a creditor suing for administration does not do so on behalf of all creditors so as to treat them all as plaintiff's in a suit for accounts governed by S. 11 of this Act and liable to pay court-fees on the amount decreed to them. (Vol. 18) 1981 Mad 683 (683, 684, 687); 55 Mad 26 (DB).

(e) The following Sind case holds that such a creditor comes under explanation to S. 11 (Sind) and is liable to pay court-fee in respect of his claim. (Vol. 33) 1946 Sind 72 (73); I L R (1946) Kar 104.

[8] Person suing for recovery of estate of a deceased person as his heir—Suit cannot be treated as suit for administration merely because plaint is headed as such a suit.—Court-fee is payable according to value of the estate. (Vol. 24) 1937 Rang 455 (456); 1937 Rang L R 426 (DB).

**4. Suit for partition.**—[1] Separate court-fee is payable in respect of relief of taking accounts in a suit for partition.—Such relief is assessable to court-fee under this clause. (Vol. 23) 1936 Mad 562 (563) \* (Vol. 20) 1933 Mad 431 (432) \* (Vol. 5) 1918 Cal 159 (159) (DB).

[But see (Vol. 17) 1930 Pat 1 (6, 7); 8 Pat 818 (DB) \* (Vol. 6) 1919 Pat 403 (404).]

[2] Suit for partition of some property held by plaintiff and defendant as tenants-in-common—Defendant alleged in written statement that plaintiff was managing the property and receiving rents and that he should render accounts.—*Held* that defendant

must value relief and pay necessary court-fee. (Vol. 20) 1933 Sind 304 (304).

**5. Suit under S. 92, Civil Procedure Code.**—[1] Suit under S. 92, Civil Procedure Code, for removal of trustees and for appointment of new trustees is not one for accounts merely because plaint contains a prayer for accounts. Such a suit falls under S. 11, Art. 17 (vi). (10) 7 Ind Cas 92 (94) (DB) (Cal) \* (99) 21 All 200 (202, 203) (DB).

[But see (85) 9 Bom 22 (24) (DB).]

**6. Appeal against final decree in suit for accounts.**—Court-fee.—[1] This clause is applicable to appeals from final decree as well as to appeals from preliminary decrees in suits for accounts, whether such an appeal is by plaintiff or defendant—Hence, an *ad valorem* court-fee is payable in such cases and not a fixed court-fee under Art. 17 of Sch. II. (37) 31 Sind L R 37 (43) (DB) \* (Vol. 20) 1933 Lah 633 (634); 14 Lah 738 \* (Vol. 16) 1929 P C 147 (148); 56 Ind App 232; 10 Lah 737 (PC) \* (Vol. 9) 1922 All 228 (230); 41 All 542 \* (Vol. 16) 1929 Cal 815 (816); 57 Cal 463.

[2] Where a defendant in a suit for accounts appeals against a final decree for a definite sum against him, he must pay court-fee on such sum. (Vol. 25) 1933 Mad 435 (438); I L R (1938) Mad 598 (FB) \* (Vol. 20) 1933 Mad 330; 56 Mad 705 (DB) overruled \* (Vol. 25) 1938 Nag 527 (527, 528); I L R (1941) Nag 344 \* (Vol. 25) 1938 Rang 23 (24, 25); 1937 Rang L R 309 \* (36-43) Tax Dec (Nag) 72 (72) (DB) \* (Vol. 21) 1934 All 807 (810) \* (Vol. 21) 1934 Cal 786 (787) (DB) \* (Vol. 16) 1929 Cal 815 (817); 57 Cal 463.

[See also (Vol. 24) 1937 All 465 (466).]

[3] A plaintiff would be free to value his appeal at a lower figure than the amount of the decree against him. (Vol. 30) 1943 Mad 685 (686).

[See however (Vol. 28) 1941 Bom 242 (242); I L R (1941) Bom 477 (DB) \* (Vol. 20) 1933 Sind 322 (323); 27 Sind L R 335 (DB).

[4] Decree for certain amount passed in favour of plaintiff in suit for accounts—Appeal against decree claiming higher amount—He must pay court-fee on excess amount claimed by him. (Vol. 20) 1933 Lah 633 (634); 14 Lah 738.

**7. Appeal from preliminary decree.**—[1] Appeal from preliminary decree in a suit for accounts—Appeal is liable to an *ad valorem* court-fee under this clause and not to a fixed court-fee under Sch. II Art. 17, Cl. (iii) or (vi). (Vol. 9) 1922 All 228 (229); 44 All 542 \* (Vol. 1) 1914 Lah 507 (507); 1915 Pun Re. No. 7 (DB) \* (10) 32 All 517 (522).

[2] Different views are held as regards the question whether defendant appealing from a preliminary decree in suit for accounts is bound by plaintiff's valuation of the suit in trial Court and to adopt such valuation for purposes of the appeal.

(a) The following cases held that the defendant is bound to accept the plaintiff's valuation of the suit for the purpose of the appeal. (Vol. 25) 1938 Mad 435 (438); I L R (1938) Mad 598 (FB) \* (Vol. 4) 1917 Mad 668 (669); 39 Mad 725 (FB) \* (Vol. 14) 1927 Sind 100 (102); 21 Sind L R 377 (DB) \* (24) 79 Ind Cas 923 (924) (DB) (Sind) \* (Vol. 24) 1937 Lah 694 (696); I L R (1937) Lah 196 (DB) \* (Vol. 33) 1946 Lah 280 (290) (FB) overruling (Vol. 13) 1926 Lah 189 \* (Vol. 30) 1943 Nag 13 (16); I L R (1943) Nag 17 (DB).

(b) The following cases have held that the defendant is entitled to put his own valuation on the appeal for

S. 7 (iv) (f) (*contd.*)

purposes of court-fee in such cases. (Vol. 24) 1937 All 465 (466) \* (Vol. 12) 1925 All 787 (790, 793): 47 All 756 (DB) \* (Vol. 22) 1935 Bom 212 (213) (DB) \* (Vol. 22) 1935 Pat 396 (399, 400): 14 Pat 658 (SE) \* (Vol. 11) 1924 Pat 161 (162): 3 Pat 146 \* (Vol. 25) 1938 Rang 23 (24): 1937 Rang L R 369 \* (Vol. 18) 1931 Rang 146 (146): 9 Rang 165 (FB) \* ('36-43) Tax Dec (Nag) 24 (25) \* (Vol. 20) 1933 Nag 127 (128, 129): 29 Nag L R 34.

(3) Appeal by plaintiff against part of preliminary decree to which he took exception.—*Held* a court-fee of Rs. 10 which plaintiff appellant had paid was sufficient as regards question of interest and other questions of debit and credit were merely incidental. (Vol. 7) 1920 Lah 136 (139): 1 Lah 6 (DB).

## 8. Appeal from dismissal of suit for accounts.—

[1] Plaintiff's suit for accounts dismissed—Appeal against dismissal—He is not entitled to change valuation of his claim for purposes of court-fee in appeal. (Vol. 27) 1940 Mad 878 (879) (DB) \* (Vol. 25) 1938 Mad 887 (889): 1 L R (1938) Mad 1031 (FB) \* (Vol. 21) 1934 Lah 488 (491, 492): 15 Lah 151 (FB).

2. Appeal in mortgage suit.—[1] Suit for sale in enforcement of a mortgage—Defendant claiming that accounts must be taken under Dekkhan Agriculturists' Relief Act—Decree—Appeal by defendant against decree for certain amount in mortgage suit.—*Held* that appellant must pay court-fee computed according to full amount of decree appealed from inasmuch as appeal seeks setting aside of whole decree and remanding of case for taking accounts under Dekkhan Agriculturists' Relief Act. (Vol. 22) 1935 Bom 69 (70) (DB) \* (Vol. 32) 1945 Bom 504 (510, 511): 1 L R (1945) Bom 629 (DB).

## 10. Appeal in suit for money due on accounts.—

[1] Plaintiff sued for a certain sum of money as being due as cesses—Defendant denied his liability to pay any cesses—Court found that plaintiff was entitled to recover cesses but left it to the commissioner to determine amount due—Defendant appealed—*Held* that appellant was bound to pay court-fee according to the amount claimed by plaintiff in his plaint. (Vol. 17) 1930 Pat 605 (607).

[2] A sued B and C on bali accounts for Rs. 6,000—Court dismissed suit against B and as against C decree suit only to the extent of Rs. 4,000—A appealed and paid court-fee only on Rs. 2,000—*Held* that A would not be entitled to a decree for more than Rs. 2,000 against B. (Vol. 13) 1926 Lah 558 (559) (DB).

11. Appeal from preliminary decree in suit for money—Suit for money coming under S. 7 (i)—Court holding that defendant is liable to plaintiff but exact amount due left to be determined by Commissioner—Defendant appealing from such decree—This clause will not apply to such an appeal—Court-fee on such appeal will be payable under Sch. I Art. 1. (Vol. 18) 1931 Pat 335 (336): 10 Pat 458 \* (Vol. 17) 1930 Pat 605 (607) \* (Vol. 8) 1921 Sind 100 (100, 101): 15 Sind L R 82 (DB).

## 12. Decree in favour of Defendant—Court-fees.—

[1] Suit for accounts—Balance found in favour of defendant—Court can pass decree in his favour although he has not pleaded counter claim or set-off by his written statement.—It is sufficient if he pays court-fee on amount which is actually found due and for which decree is passed in his favour. (Vol. 20) 1933 Sind 247 (249) (DB) \* (Vol. 11) 1924 All 854 (854): 46 All 858

(DB) \* ('10) 32 All 525 (527) (DB) \* ('97) 20 Mad 418 (420) (DB) \* ('87) 14 Cal 147 (153): 13 Ind App 123 (PC) \* (Vol. 1) 1914 Sind 137 (137): 8 Sind L R 122.

[But see ('11) 10 Ind Cas 250 (253) (DB) (Lah.)]

13. Suit under S. 33, U. P. Agriculturists' Relief Act.—[1] A suit for accounting under sections 7 and 9, U. P. Debt Redemption Act, on the basis of a mortgage, cannot be stamped with Rs. 13 court-fee under S. 33 (3), Agriculturists' Relief Act, but under S. 7 (iv) (b), Court-fees Act. (Vol. 31) 1944 Oudh 59 (60).

[2] Suit under S. 33 U. P. Agriculturists' Relief Act, falls under S. 7 (iv) (f) and *ad valorem* court-fee under Art. 1 of Sch. I, Court fees Act, is payable on appeal arising out of such suit even when the defendant has not obtained a decree under S. 33 (2) of that Act.—Amending Act IX of 1937 has not effected any change. (Vol. 29) 1942 Oudh 209 (209, 210): 17 Luck 502 (DB).

[3] Suit under S. 33, U. P. Agriculturists' Relief Act, is a suit for accounts and falls under S. 7 (iv) (f). (Vol. 27) 1940 All 139 (190): 1 L R (1940) All 93 (DB) \* (Vol. 27) 1940 All 504 (506): 1 L R (1940) All 762 (FB).

[4] Appeal by plaintiff for reduction of amount adjudicated by Court in suit under S. 33—*Ad valorem* court-fee under Sch. 1, Art. 1, Court-fees Act, should be charged on amount by which reduction is sought even when defendant has not obtained a decree under S. 33 (2) of that Act. (Vol. 25) 1938 All 467 (468, 469): 1 L R (1938) All 686 (DB).

## SECTION 7 (IV-A) (MADRAS)—Note 1.

[1] Sale-deed is a document securing property and therefore a suit to set aside a sale-deed will be governed by this paragraph. (Vol. 22) 1935 Mad 863 (864): 59 Mad 240 \* (Vol. 16) 1929 Mad 668 (669, 670).

[2] Deed of release executed by a guardian of a minor by which the rights of the minor in a certain partnership and its property are transferred for consideration to others is a document securing property. (Vol. 16) 1929 Mad 668 (669, 670).

[3] Document executed by a Hindu widow in favour of an adopted son reciting that all the properties of the adoptive father were already secured to the adopted son *Held* that suit for cancellation of such document was not governed by this paragraph as the deed merely confirmed the existing rights of the adopted son. (Vol. 25) 1938 Mad 824 (826).

[4] Suit to declare a will to be a forgery and for its cancellation held not governed by this paragraph, as the will sought to be cancelled was not a document securing money or property having money value. (Vol. 16) 1929 Mad 396 (398) (DB).

[5] Mortgage instrument is a document securing money—Court-fee payable for setting aside mortgage is on the principal amount secured by it. (Vol. 22) 1935 Mad 863 (864): 59 Mad 240.

[6] Suit to set aside sale-deed and for possession of property—Court-fee payable is on market-value of the property and not artificial value prescribed in section 7 paragraph (v). (Vol. 26) 1939 Mad 462 (463): 1 L R (1939) Mad 764 (FB). (Overruling (Vol. 14) 1927 Mad 825 and (Vol. 19) 1932 Mad 605: 56 Mad 212).

[7] Some members of Malabar tarwad being dissatisfied with a partition arrangement entered into during their minority sued to have partition deed set aside so far as they were concerned. *Held* that suit

for possession of land, houses and gardens; v. In suits for the possession of land, houses and gardens—according to the value of the subject-matter; and such value shall be deemed to be—

where the subject-matter is land, and—

(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government,

or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue,

and such revenue is permanently settled—

ten times the revenue so payable :

(b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid ;

and such revenue is settled, but not permanently—

five times the revenue so payable :

(c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue,

and nett profits have arisen from the land during the year next before the date of presenting the plaint—

fifteen times such nett profits :

but where no such nett profits have arisen therefrom—

the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood :

(d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as above-mentioned—the market-value of the land :

Proviso as to Bombay Presidency ; Provided that, in the territories subject to the Governor of Bombay in Council the value of the land shall be deemed to be—

(1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government—a sum equal to five times the survey-assessment ;

(2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government—a sum equal to ten times the survey-assessment ; and

#### S. 7 (iv) (f) (contd.)

was for cancellation of the partition deed in part—Court-fee was payable on the value of plaintiff's share in the property. (Vol. 19) 1932 Mad 491 (492, 493).

[8] Order of liquidator under S. 42 (2) (b) of Co-operative Societies Act determining amount of compensation payable held not to be a decree for money within this paragraph. (Vol. 24) 1937 Mad 604 (605) : I L R (1938) Mad 63.

#### SECTION 7, PARA (V)—SYNOPSIS.

1. Scope of the paragraph.
2. Suit for possession by a mortgagee.
3. Suit for possession by tenant.
4. Suit for possession of mine.
5. Claim for possession in the alternative—Court-fees.
6. Suit for possession—Illustrative cases.
7. Mode of valuation—General.
8. "Where the subject-matter is land."
9. "Land," meaning of.
10. "Land paying revenue to Government"—Meaning

11. Lease-hold, whether land within the meaning of—Paragraph—See Notes 1, 8, 8 and 10.
12. Mode of valuation of land—Cls. (a) o (d).
13. "Estate," meaning of.
14. "Definite share."
15. "Collector's Register."
16. "Separately assessed."
17. "Revenue so payable."
18. Clause (C).
19. Clause (D).
20. Market-value.
21. Proviso.
22. "House," meaning of.
23. "Garden."
24. Suit for religious property.
25. Court-fee on appeals.
26. Court-fee on cross-objections.
27. Bengal Amendment.
28. U. P. Amendment.
29. Reductions and remissions.

- (3) where the whole or any part of the annual survey-assessment is remitted—a sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted.

*Explanation.*—The word “estate,” as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue :

for houses and (e) Where the subject-matter is a house or garden—according to the gardens ; market-value of the house or garden :

[a] See para. 8 of A. O. In view of this provision the expression “Governor of Bombay in Council” has been left unmodified.

#### PROVINCIAL AMENDMENTS.

#### ASSAM

In clause (a) of para. V for the word “ten” the word “twenty” was substituted.—*Assam Act III of 1932.*

#### BENGAL

For paragraph V the following paragraph was substituted, viz.,

“v. In suits for the possession of land, buildings or gardens—

- (a) according to the value of the subject-matter, and such value shall be deemed to be fifteen times the nett profits which have arisen from the land, building or garden during the year next before the date of presenting the plaint, or if the Court sees reason to think that such profits have been wrongly estimated, fifteen times such amount as the Court may assess as such profits or according to the market value of the land, building, or garden, whichever is lower;

- (b) if, in the opinion of the Court, such profits are not readily ascertainable or assessable, or where there are no such profits, according to the market value of the land, building or garden.

*Explanation.*—In this paragraph “building” includes a house, out-house, stable, privy, urinal, shed, hut, wall and any other such structure whether of masonry, bricks, wood, mud, metal or any other material whatever.”—*Bengal Act VII of 1935.* [2-5-1935.]

#### BIHAR

In clause (a) of S. 7 (v) for the word “ten” the word “twenty” was substituted and in cl. (b) of S. 7 (v), for the word “five” the word “ten” was substituted—*Bihar & Orissa Act II of 1922.* [21-8-1922.]

#### BOMBAY

In clauses (1), (2) and (3) of the proviso to para. (V) for the words “five”, “ten” and “ten” the words “seven and a half”, “fifteen” and “fifteen” were respectively substituted.—*Bombay Act II of 1932,* [29-3-1932.]

#### CENTRAL PROVINCES

- (1) In clause (a) of para. (V) between the words “or” and “forms part” the words “where the land” were inserted.

#### S. 7 (v) (contd.)

1. *Scope of the paragraph.*—[1] This paragraph is a general provision for court-fees in respect of suits for possession of land, houses and gardens and where there is a specific provision applicable to a case, the latter will apply on the principle of *generalia specialibus non derogant*. (Vol. 24) 1937 Mad 881 (883). (Suit for specific performance of contract of sale and possession—S. 7 (X) applies and not S. 7 (V) \* (Vol. 32) 1945 Bom 81 (81): I L R (1945) Bom 32 (DB) (Do.).

[2] Under this paragraph, the suit need not be for proprietary possession. (Vol. 18) 1931 Oudh 366 (367, 368): 6 Luck 684 (DB). (Suit by usufructuary mortgagee against prior mortgagees) \* (‘96) 1896 Pun Re No. 1, P. 1 (2) (FB). Suit by mortgagee against third person) \* (‘92) 1892 Pun Re No. 58, P. 205 (206) (FB) (Suit for possession by likha mukhi mortgagee.)

[But see (Vol. 16) 1929 Oudh 321 (321): 5 Luck 101 (DB).] (Suit by mortgagee to recover possession is not governed by S. 7 (v) but by S. 7 (ix)—that section covers suits for proprietary possession.)

[3] The paragraph applies to suits for exclusive possession as well as to suits for joint possession. (‘92) (1892) Pun Re No. 56, P. 205 (206) (FB).

[4] A suit for possession will come under this paragraph though the suit is for possession on payment of a certain sum to the defendant. (Vol. 15) 1928 Lah 852 (853).

[5] A suit for confirmation of possession simply means that if the plaintiff is found not to be in possession he must be given a decree for possession and as such comes within this paragraph. (Vol. 22) 1935 Pat 191 (191) ( (Vol. 10) 1923 Pat 137: 2 Pat 198 relied on) \* (Vol. 10) 1923 Pat 137 (138): 2 Pat 198 (DB) \* (‘11) 11 Ind Cas 882 (884) (Cal). (Suit for declaration and confirmation of possession held for recovery of possession).

[6] A suit for possession of a tank-bed or of a temple is not capable of valuation and comes under Sch. II, Art. 17 and not under this paragraph. (Vol. 21) 1934 Mad 714 (715): 58 Mad 471. (Suit for possession of tank-bed) \* (Vol. 11) 1924 Mad 19 (22): 46 Mad 782 (FB). (Suit for possession of temple).

(2) In clause (b) of paragraph (V),

(i) between the words "or" and "forms part" the words "where the land" were inserted;

(ii) for the word "five" the words "seven and a half" were substituted.—*C. P. Act XVI of 1935* [21-5-1935.]

#### MADRAS

In S. 7 (V), in cl. (a) for the word "ten" the word "twenty" was substituted; in cl. (b) for the word "five" the word "ten" was substituted and after cl. (d) the following proviso was substituted for the original proviso, viz.,

"Provided that if rules are framed under S. 3 of the Suits Valuation Act, 1887, for determining the value of land for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph."—*Madras Act V of 1922*. [30-3-1922.]

#### ORISSA

In paragraph V.

(1) in cl. (a) for the word "ten" the word "twenty" was substituted,

(2) in cl. (b) for the word "five" the word "ten" was substituted,

(3) the following proviso was inserted after the existing proviso—

"Provided further that in suits for possession of land, if rules are framed under S. 3 of the Suits Valuation Act, 1887, for determining the value for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph."

(4) The original Explanation was renumbered as Explanation I and after the Explanation so renumbered the following Explanation was added, viz.:

"Explanation II.—In this paragraph 'building' includes a house, out-house, stable, privy, animal shade, hut, wall and any other such structure whether of masonry, bricks, wood, mud, metal or any other material whatsoever."—*Orissa Act V of 1939*. [31-10-1939.]

#### PUNJAB

In para. V. cl. (b) for the word "five" the word "ten" was substituted.—*Punjab Act VI of 1928*. [12-6-1918.]

#### SIND

The amendments made in the section by the Bombay Finance Act, II of 1932 (part II) continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938. [22-3-1938.]

#### UNITED PROVINCES

For para. (v) of S. 7 the following was substituted, namely:—

"(v). In suits for the possession of land, buildings or gardens—according to the value of the subject-matter; and such value shall be deemed to be—

(1) Where the subject-matter is land, and

#### S. 7 (v) (contd.)

[7] This paragraph will apply whether or not the plaintiff claims any beneficial interest in the property sued for. (Vol. 12) 1925 Mad 804 (805). (Properties claimed as trustee.)

[See also ('12) 1912 Pun L R No. 216 Page 685 (687) (DB). (Suit for removal of defendant from management of dharmashala held to be one for possession.)]

[8] The technical rules for valuation contained in this paragraph apply only to suits for possession. It cannot be held that they are applicable whenever land has to be valued for purposes of court-fees though the claim in question may not be for possession. (Vol. 13) 1931 Mad 710 (711).

[9] A suit by a landlord for ejectment of certain fixed rate tenants comes under this paragraph, but in such a case the land itself would not be the subject-matter of the suit for the purpose of clauses (a) to (d) of the paragraph. The relief must be valued under the general words in the first clause of the paragraph and not according to the subsequent clauses. ('95) 15 All 68 (64) (DB).

[10] The subject-matter of the suit in an ejectment suit is the right to eject the defendant and the value of that right is the value at which the defendant's right to remain in the house under the licence of the plaintiff may be valued. (Vol. 14) 1927 Pat 140 (141): 5 Pat 631 (DB).

[11] A suit by a tenant to recover possession of leased land from the landlord and third persons, comes under this paragraph but the subject-matter of the suit will not be the land itself but the lease-hold interest and the court-fee on the suit should be paid according to the value of the lease-hold interest and not according to the scale mentioned in clauses (a) to (d). (Vol. 1) 1914 Cal 791 (791) (DB).

[12] In a suit for possession by a usufructuary mortgagee the value of the mortgagee interest will be the value of the suit. (Vol. 11) 1924 Oudh 163 (165, 164).

[13] Suit by tenant to recover possession from trespasser—S. 7 (v) (d) applies. (Vol. 25) 1938 Oudh 139 (139).

[14] Suit for possession of share in under-proprietary tenure—S. 7 (v) (a) applies. (Vol. 8) 1921 Oudh 110 (111): 24 Oudh Cas 29.

(a) Where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such an estate, and is recorded in the Collector's register as separately assessed with such revenue and such revenue is permanently settled—thirty times the revenue so payable;

(b) Where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid and such revenue is settled but not permanently—ten times the revenue so payable;

(c) Where the land pays no such revenue or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and net profits have arisen from the land during the three years immediately preceding the date of presenting the plaint—twenty times the annual average of such net profits;

but when no such net profits have arisen therefrom, the market value, which shall be determined by multiplying by twenty the annual average net profits of similar land for the three years immediately preceding the date of presenting the plaint;

(d) Where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and does not come under cls. (a), (b) or (c) above—

the market value of the land, which shall be determined by multiplying by fifteen the rental value of the land including assumed rent on proprietary cultivation, if any.

(II) Where the subject-matter is a building or garden—according to the market value of the building or garden as the case may be.

*Explanation.*—The word "estate" as used in this sub-section, means any land subject to the payment of revenue for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government or which, in the absence of such engagement shall have been separately assessed with revenue."—*U.P. Act XIX of 1938.* [9-1-1939.]

#### Sections 7 (v-A) and (v-B).

#### UNITED PROVINCES.

After sub-s. (V) of S. 7 the following were inserted as sub-ss. (V-A) and (V-B), namely:—

"(V-A). In suits for possession—

(1) of superior or proprietary rights where under-proprietary or sub-proprietary rights exist in the land—

according to the market value of the subject-matter,

and such value shall be determined by multiplying by fifteen the annual net profits of the superior proprietor,

(2) of under-proprietary or sub-proprietary land as such—

according to the value of the subject-matter, and such value shall be determined by multiplying by ten the annual under-proprietary or sub-proprietary rent as the case may be, recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint.

#### S. 7 (v) (contd.)

[15] S. 7 (v) (a) applies to a suit by subordinate tenure-holder. ('82) 8 Cal 192 (194, 195) (DB).

[16] In a suit for ejectment the value of the suit is the value of the rights which on his plaint plaintiff seeks to recover. ('20) 24 Cal W N clxvii (clxviii).

2. Suit for possession by a mortgagee.—[1] A suit for possession by a usufructuary mortgagee comes within this paragraph. (Vol. 18) 1931 Oudh 386 (367, 368); 6 Luck 684 (DB). (Suit against prior mortgagees) \* ('96) 1896 Pun Re No. 1 P. 1 (2) (FB). (Suit against tenants in possession) \* ('92) 1892 Pun Re No. 56 P. 205 (206) (FB) (Suit for joint possession as likha mukhi mortgagee of certain shares in wells and land is suit for possession of land).

[See also (Vol. 11) 1924 Oudh 163 (163, 164) (Suit for possession by usufructuary mortgagee—Value of mortgagee interest i.e., amount of mortgage, is market value of land for purpose of suit.)

[But see (Vol. 16) 1929 Oudh 321 (321); 5 Luck 101 (DB). (Suit for possession by usufructuary mortgagee

to whom mortgagor has failed to deliver possession does not come under this para.]

[2] This paragraph will apply to a suit by the mortgagee for possession on the ground that the mortgage has been foreclosed already. Para (ix) will not apply to such suit. ('93) 1893 Pun Re No. 20, P. 104 (105, 106) (DB). (Foreclosure under Regulation XVII of 1806) \* ('78) 1 Cal L R 473 (474) (DB). (Suit for possession brought after decree for foreclosure is obtained).

[3] A suit for enforcement of a mortgage by a decree for sale is clearly not a suit for possession of the mortgaged property. (Vol. 18) 1931 Cal 159 (159); 58 Cal 829 (DB).

3. Suit for possession by tenant.—[1] A suit for possession by a tenant will come under this paragraph if it does not fall under any other more specific provision. (Vol. 25) 1938 Oudh 139 (139). (Suit for possession by tenant against trespasser—S. 7 (v) (d) applies) \* (Vol. 5) 1913 Pat 460 (461). (Suit for possession of immovable property based on a mokarrari lease)



If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in cl. (c) of sub-s (v) of this section save that the multiple will be ten.

1 *Explanation.*—Land held by any permanent lessees shall be treated for the purpose of this sub-section, as under-proprietary or sub-proprietary land."

"(V-B). In suits for possession of land between rival tenants and by tenants against trespassers—according to the value of the subject-matter and such value shall be determined if such land is the land of—

(a) a permanent tenure-holder or a fixed rate tenant—by multiplying by twenty the annual rent recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint;

(b) an ex-proprietary or occupancy tenant—by multiplying by two such rent in case of suits for possession of land between rival tenants, and by annual rent in suits by tenants against trespassers;

(c) any other tenant—by annual rent.

If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in clause (c) of sub-s. (v) of this section save that the multiple shall be that entered in cls. (a), (b) and (c) of this sub-section according as the class of tenancy affected is governed by cls. (a) or (b) or (c) of this sub-section."

—U. P. Act XIX of 1938. [9-1-1939.]

#### Section 7 (iv) (contd.)

4. Suit for possession of mine.—[1] A suit by the lessee of a mine against the lessor and subsequent transferees for possession of the mine is a suit for possession coming under this paragraph and not a suit for a right to some benefit to arise out of land. ('12) 16 Ind Cas 963 (965) (DB) (Cal).

#### 5. Claim for possession in alternative—Court-fees.

—[1] Where the relief of possession is claimed as an alternative to a certain other relief but the court fee payable in respect of the relief of possession is less than that on the other relief then court-fee should be paid on the latter relief. (Vol. 12) 1925 Pat 193 (194) (DB). (Suit for possession of land with alternative prayer for declaration that defendant was tenant in respect of the land—Prayer for partition also made as alternative to above reliefs—*Held* that fixed fee of Rs. 15 was payable on prayer for declaration or partition as court-fee in respect of possession was only Rs. 8 As. 12) \*('91) 15 Bom 82 (84) (DB). (Suit for possession of land—Claim in alternative for award of certain sum per annum in lieu of profits of land—Court-fee is payable on latter relief which was higher).

[2] Where in a suit for accounts, the plaint contained a claim for a specific amount misappropriated by the defendant with an alternative prayer for possession and mesne-profits of the property purchased by him with that amount, it was held that court-fee was payable under this paragraph in respect of relief for possession and mesne-profits. (Vol. 24) 1937 Mad 335 (237).

#### 6. Suit for possession—Illustrative cases.—[1]

Where a person is out of possession of property to which he considers himself to be entitled and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two, his suit is one for possession bare and simple under this clause. (Vol. 25) 1938 Lah 275 (277): 1 L R (1938) Lah 240 (DB). (Suit for partition by legatee from Hindu who had already separated in status from defendant, his brother.)

[2] A obtaining possession of certain fields in execution of his mortgage decree B, lessee of mortgagor, preventing A from taking crops standing on fields—Proceedings under S. 145, Criminal P. C., started and Magistrate attaching crops, selling them and ordering sale proceeds to be made over to B, treating B as being in possession of crops—Suit by A claiming the sale

proceeds was held to be one for possession and not for mere declaration. (Vol. 14) 1927 Nag 316 (317).

[3] Where the suit is in fact to recover an estate the mere assertion that it is a suit for administration will not make it one for administration and the suit must be valued at the value of the estate. (Vol. 24) 1937 Rang 455 (456): 1937 Rang L R 426 (DB).

[4] A suit brought by certain members of a caste for the administration of property of the caste in which all the members of the caste are interested, after ejectment of persons who are in exclusive possession of it and who refuse to have it administered for the common benefit, is in substance a suit for recovery of possession. (Vol. 24) 1937 Mad 591 (593).

[5] A suit by the purchaser from a mortgagee having the right to sell the mortgaged property without the intervention of the Court for ejectment of the mortgagor is one for possession liable to stamp-duty under S. 7 (v). ('09) 1 Upp Bur Rul Mort P. 5.

[6] Where a manager of a Malabar tarwad in a suit against a member claims property as having passed to the tarwad by inheritance and alleges that the defendant's possession is adverse to the tarwad and not permissive, the suit falls under S. 7 (V) and not under S. 7 (iv) (b) or Sch. II, Art. 17 (vi). (Vol. 17) 1930 Mad 597 (599): 53 Mad 540 (DB).

[7] P, a subsequent mortgagee, of portion of house obtaining mortgage decree, purchasing portion in execution thereof and obtaining symbolical possession—D, a prior mortgagee, who had obtained mortgage decree in respect of whole house purchasing whole house at sale in execution of his decree 'subject to P's right—D in physical possession of house and refusing to allow P to enter into physical possession of his portion—Suit by P for partition of house and possession of his portion held was in truth and in fact a suit for possession against person in wrongful possession and was governed by S. 7 (v) and not by Sch. II, Art. 17B as amended in Madras. (Vol. 26) 1939 Mad 506 (507) (DB).

[8] A suit was brought for the removal of the defendant from the shebaitship of a private debutter and for the appointment of any competent person as shebait. There was a further prayer for an injunction against the defendant that he may not waste or possess the debutter properties. It was held that the object of the suit was to exclude the defendant from the management of the debutter properties and not to

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recover possession and therefore court-fee paid on the valuation of the shebait right and on the value of the relief of injunction was sufficient. (Vol. 21) 1934 Cal 250 (250, 251) (DB).

[9] Plaintiff claiming to have been appointed member and manager of school committee in place of defendant bringing suit praying, *inter alia*, that if need be he be put in possession of office of managership—Suit in respect of prayer for possession of office of managership held fell under Sch. II, Art. 17B as amended in Madras and not under Section 7 (v). (Vol. 26) 1939 Mad 776 (777, 778).

[10] A suit under S. 25 A, Sonthal Paraganas Settlement Regulation (III of 1872), for declaration that entries in Record of Rights were incorrect as plaintiff's share was not recorded in it held suit as framed was governed by Sch. II, Art. 17 (i) and (iii) and could not be treated as suit for possession on ground that question of possession was likely to arise in it. (Vol. 23) 1936 Pat 171 (172): 15 Pat 386 (DB). (For purposes of court-fee Court must look to the plaint only).

[11] Suit for declaration that plaint properties are ancestral undivided properties, that sale deed dealing with it is not binding on plaintiffs and for separate possession—Plaintiffs not even in constructive possession—Defendant claiming adversely on basis of sale deed—Suit held one for possession under S. 7 (v) and not under S. 7 (iv) (b) or S. 7 (iv) (c)—Prayer for declaration does not make any difference. S. 7 (iv-A) (Madras) has also no application, (Vol. 23) 1936 Mad 411 (412).

[12] Suit between rival managers for right to manage property of deity—Deity admitted to be owner of property—Suit is not for possession of land, buildings and garden within S. 7 (v)—Sch. II, Art. 17 applies. (Vol. 31) 1944 All 279 (281): I L R (1944) All 564 (DB).

**7. Mode of valuation—General.**—[1] The legislature has made a distinction for purposes of valuation under this paragraph between land on the one hand, and houses and gardens on the other. (Vol. 23) 1936 Cal 264 (264).

[2] Where a plaintiff claims, in the suit for possession of land, demolition of buildings erected on it, the value of the buildings need not be taken into account in valuing the suit for purposes of court-fees. ('97) 7 Mad L Jour 49 (50) (DB) \* ('82) 4 All 320 (380) (FB).

[3] Where the object of the plaintiff is to use the land of which possession is sought, for grazing purposes, court-fee on the value of the well and the buildings standing on the land need not be paid. ('03) 1903 Pun L R No. 78 P. 207 (208, 209).

[4] Trees growing on a land need not be valued separately in the suit for possession of the land on which they stand as they are included in the valuation of the land itself. (Vol. 14) 1927 Mad 1002 (1004) (DB) \* (Vol. 5) 1918 Mad 805 (807): 40 Mad 824 (DB).

[5] Mesne profits, unless past mesne profits are claimed at a certain rate, need not be valued separately. (Vol. 5) 1918 Mad 805 (807): 40 Mad 824 (DB).

[See (Vol. 17) 1930 Mad 833 (834): 54 Mad 1 (FB).]

[6] Under Madras Estates Land Act, raiyati lar held on patta in an estate cannot be used for building purposes without the consent of the landlord. would, therefore, be wrong to value such land on the value of the land as a building site on the hypothetical assumption that the landlord would be willing to allow it to be used as a building site for some *nassar*. (Vol. 20) 1933 Mad 367 (367).

[7] A suit for possession of a part of a house will be chargeable with a proportionate part of the court-fee that will be leviable in respect of a suit for the whole house. ('02) 1 Low Bur Rul 303 (306) (FB).

[8] Charts issued by the District Judge setting out minimum values of lands in different parts of the district should not be regarded as though they were themselves evidence of the value of the land, and judicial officer acting in judicial matters upon such charts would be acting without evidence. (Vol. 17) 193 Cal 65 (69): 57 Cal 587 (DB).

**8. "Where the subject-matter is land."**—[1] A mokarari lease of a definite share in a revenue-paying estate is land within the meaning of clause (a) of this paragraph. (Vol. 5) 1918 Pat 460 (461).

**9. "Land", meaning of.**—[1] The word "Land" is used in a restricted sense, *i. e.*, as distinguished from houses or gardens. ('02) 24 All 218 (225) (DB).

[2] Where the land has a house or a garden on it the subject-matter is no longer the land alone, but the land with its accretions and has to be valued as such for the purpose of court-fees even though it is revenue-paying land. ('36-43) Tax Dec (Nag) 49 (50).

**10. Land paying revenue to Government—Meaning.**—[1] A suit for possession of a definite share in an under-proprietary tenure which forms part of an estate assessed to the payment of annual revenue fall under clause (a) though the revenue in such a case may be paid by the superior proprietor and not the under proprietor. (Vol. 8) 1921 Oudh 110 (111): 24 Oudh Cas 29 \* ('82) 8 Cal 192 (194, 195) (DB).

[See also (Vol. 18) 1931 Oudh 366 (367, 368) 6 Luck 684 (DB). (Paragraph (v) applies to all suits for possession, proprietary, under-proprietory possession as tenant, etc.)]

[But see (Vol. 16) 1929 Oudh 321 (321): 5 Luck 101 (DB). (Suit for possession by mortgagee—Paragraph (v) does not apply as he does not claim proprietary possession) \* (Vol. 1) 1914 Cal 791 (791) (DB). (Clas. (a) to (d) of this paragraph do not apply to a suit for possession by a lessee as the leasehold land cannot be said to be liable to payment of revenue the obligation to pay revenue being on proprietor.)]

**11. Lease-hold, whether land within the meaning of paragraph.** See Notes 1, 3, 8 and 10.

**12. Mode of valuation of land.**—Clauses (a) to (d).—[1] The scheme of the paragraph seems to be to value land with reference to the revenue payable in respect of it wherever such valuation is possible. (Vol. 24) 1937 All 206 (206): I L R (1937) All 128 (DB).

[2] Suit for possession of paddy lands—S. 7 (v) (b) applies. (Vol. 21) 1934 Rang 313 (316) (DB).

[3] Entire holding separately assessed—S. 7 (v) (b) applies. (Vol. 11) 1924 Rang 102 (104): 1 Rang 65 (DB).

[4] Where the land is not subject to the payment of fixed annual revenue or though forming part of revenue-paying estate, does not form a definite share in

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such estate and is not separately assessed, other modes of valuation are given, viz., according to the nett profits from the land or the market-value of the land—(Cls. (c) and (d). In such cases the idea presumably is that valuation according to the revenue is not possible. (Vol. 24) 1937 All 206 (206) : I L R (1937) All 128 (DB).

13. "Estate" meaning of.—[1] A khewat khata in the United Provinces is only a separately assessed part of an estate and not in itself an estate. (Vol. 20) 1933 All 414 (415) : 55 All 531.

[But see (Vol. 24) (1937) All 206 (207) : I L R (1937) All 128 (DB) (The decision overlooks the definition of "Estate" in this paragraph.)]

14. "Definite share."—[1] The mode of valuation under this paragraph according to the annual revenue is applicable not only when the land in suit forms an entire estate but also when it forms a definite share of an estate. In such cases, the value of the suit is to be calculated according to the proportionate part of the revenue which corresponds to the fraction which the land in suit constitutes out of the whole estate. (Vol. 24) 1937 Nag 100 (100) : I L R (1937) Nag 309 \* ('08) 12 Cal W N 990 (992) (DB) \* ('06) 3 All L Jour 511 (512) \* ('81) 1881 All N 5 (5) (DB).

[2] When the land is part of an estate but separately assessed to revenue, the mode of valuation according to the revenue is applicable though the land is not a "Definite share" of an estate. ('78) 1878 Pun Re. No. 67 P. 226 (227) (DB).

[3] When the land is part of revenue-paying estate but is neither a definite share of it nor separately assessed to revenue, it is to be valued according to its market-value under clause (d) and not according to the Government revenue. (Vol. 28) 1941 Sind 154 (158) : I L R (1941) Kar 102 (DB) \* (Vol. 20) 1933 All 414 (415) : 55 All 531. (Suit for possession of fractional share of khewat khata) \* (Vol. 19) 1932 Pat 319 (321) (Suit for possession of kunjora ghatwali tenure) \* (Vol. 18) 1931 Cal 417 (419) : 54 Cal 66 (DB) \* (Vol. 10) 1923 Rang 246 (246) \* (Vol. 5) 1918 Mad 25 (26) (DB) \* (Vol. 1) 1914 Cal 442 (444) : 41 Cal 812 (DB) \* ('11) 33 All 680 (684) \* ('83) 1883 Pun Re No. 6, p. 13 (15, 16) (DB) (Suit for pre-emption) \* ('80) 1880 Pun Re No. 102, P. 248 (249) (DB).

[4] The words "definite share" in this paragraph mean an undivided land undemarcated, fraction of an estate as distinct from a defined, demarcated plot, which has been taken out of an estate. (Vol. 5) 1918 Mad 25 (26) (DB) \* (Vol. 11) 1924 Mad 646 (647) \* ('06) 3 All L Jour 511 (512, 513).

[See also (Vol. 3) 1921 Oudh 110 (111) : 24 Oudh Cas 29. (Revenue paid by superior proprietor—Still land is revenue-paying land.)]

[5] Where this section speaks of a "Definite share" in an estate as opposed to a "part" of the estate, it draws a distinction between abstract rights in an estate and the concrete or physical portion of it. The former deals with abstractions, a claim to possession of a definite share, in inchoate rights, however expressed, while the latter deals with a claim to possession of physical and defined parts of the whole estate whether actually demarcated or not. ('36-43) Tax Dec (Nag) 89 (41).

[6] In the case of a specified plot of land which is part of a revenue-paying estate, unless the land is

separately assessed to revenue, court-fee will have to be paid under clause (d) according to the market value of the land, and clauses (a) and (b) of this paragraph will not apply. (Vol. 20) 1933 Oudh 533 (534) (Suit for pre-emption.) \* (Vol. 17) 1930 Lah 182 (183) (Suit for possession of a share in a specific plot of land not separately assessed) \* (Vol. 11) 1924 Mad 646 (647) \* (Vol. 1) 1914 Cal 442 (443, 444) : 41 Cal 812 (DB) \* ('11) 33 All 680 (684) \* ('36-43) Tax Dec (Nag) 39 (41).

[7] Where the suit land is a fractional share of a part of an "estate" which is separately assessed to revenue, the court fee will have to be paid under clause (d) according to the market-value and not according to the revenue. (Vol. 14) 1927 Mad 1002 (1005, 1006) (DB) \* ('80) 1880 Pun Re No. 102, p. 248 (249) (DB).

[8] A suit for a fractional share of khewat in the United Provinces must be assessed with court-fee under Clause (d), such khewat being only a separately assessed part of an "estate" (Vol. 20) 1933 All 414 (416) : 55 All 531.

[But see (Vol. 24) 1937 All 206 (207) : I L R (1937) All 128 (DB). (The khewat in question was held to be a separate estate.)]

[9] The words "definite share" do not mean a definite share separately assessed with revenue in the Collector's register. ('08) 12 Cal W N 990 (992) (DB).

[10] Government of India Notification of 1921 bearing on clause (b) of this paragraph issued under S. 35 of this Act, in substitution of original Notification No. 4650 dated 10-9-1889, runs as follows:—

"When a part of an estate paying annual revenue to the Government under a settlement which is not permanent is recorded in the Collector's register as separately assessed with such revenue, the value of the subject-matter of a suit for the possession of . . . a fractional share of that part shall, for the purposes of the computation of the amount of the fee chargeable in the suit, be deemed not to exceed five times such portion of the revenue." A suit for a specific plot of land comprised in a separately assessed part of an estate does not come within the above Notification, so as to be governed by clause (b) as the expression "fractional share" therein can only refer to an undefined share and not to a definitely located area. ('94) 15 All 493 (496). (Suit for pre-emption of specific plots—Court-fee is payable under clause (d)) \* (Vol. 30) 1943 Pesh 96 (98) (DB) \* (Vol. 11) 1924 Mad 646 (647) \* (Vol. 5) 1918 Mad 25 (27) (DB).

[But see (Vol. 14) 1927 Mad 1002 (1006) (DB) \* (Vol. 32) 1945 Lah 15 (16) (DB). (Suit for possession of plot—Plot capable of being arithmetically worked out as fraction of property that has been assessed to land-revenue—S. 7 (v) (b) applies and not S. 7 (v) (d)).]

[11] In the United Provinces, the Government of India Notification of 1921 issued under S. 35 of this Act is not now in force. See (Vol. 20) 1933 All 414 (416) : 55 All 531.

15. "Collector's register."—[1] The expression "Collector's register" used in clauses (a) and (b) is intended to refer to the register in which the land-revenue is recorded for fiscal purposes and is maintained by the Collector. (Vol. 22) 1935 Lah 331 (332).

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[2] In the Punjab the jamabandi has been treated as the Collector's register. (Vol. 22) 1935 Lah 331 (332).

[3] In Madras the Paimash register was held not to be the Collector's register. (Vol. 11) 1924 Mad 646 (647).

**16. "Separately assessed."**—[1] "Separately assessed" means assessed separately and not as part of a whole. Hence, the mere fact that by a mathematical calculation it can be stated what the revenue is on a particular plot which forms part of a unit which is assessed to revenue, it cannot be said that the plot is separately assessed to revenue. (Vol. 4) 1917 Mad 323 (323) (DB). (Confirmed on appeal in (Vol. 5) 1918 Mad 25 (DB)).

[2] Plots forming a separate khata in themselves, though under-proprietary, must be taken to be separately assessed with Government Revenue for purposes of the Court-fees Act when they are so assessed with the rent which the khata as a whole is liable to pay to the superior proprietor. (Vol. 17) 1930 Oudh 520 (520) (DB). (Vol. 8) 1921 Oudh 110: 24 Oudh Cas 29 followed.)

**17. "Revenue so payable."**—[1] Remissions of revenue granted in any particular year cannot be taken into account in calculating the value of land for purposes of court-fees under this paragraph. The calculation should be based on the revenue fixed at the settlement. (Vol. 24) 1937 All 657 (658).

**18. Clause (C).**—[1] This clause applies to cases in which the land is exempted wholly or partially from the payment of revenue or is charged with any fixed payment in lieu of such revenue. (Vol. 30) 1943 Nag 315 (316): I L R (1943) Nag 802 \* (Vol. 1) 1914 Cal 442 (443, 444): 41 Cal 812 (DB).

[2] An izara village or alienated village is assessed under Ss. 96 and 97 of the Berar Land Revenue Code, 1928 to land revenue and is not exempt from payment of revenue. Hence, a suit for partition and separate possession of a share in such a village will fall under clause (b) and not under clause (c) of this paragraph. (Vol. 30) 1943 Nag 315 (316): I L R (1943) Nag 802.

[3] A suit for possession of inam lands which have been wrongly classed by Government as ryotwari land and in respect of which pattas have been issued may be valued by the plaintiff as ryotwari land held on patta at five times the revenue payable under clause (b). (Vol. 5) 1918 Mad 590 (591, 592) (DB). (Fact that after institution of suit, the lands are classed as inam, will not affect the question).

[4] "Such revenue" in this clause means an annual revenue payable to the Government whether fixed permanently or not. Lands subject to a fluctuating assessment based on the harvest cannot be considered as paying an annual revenue to the Government, and must, therefore, be valued under this clause. (Vol. 6) 1919 Lah 106 (107): 1919 Pun Re No. 100 (DB).

[5] The "year next before the date of presenting the plaint" means the revenue year and not the calendar year. (Vol. 22) 1935 All 642 (642).

[But see '06] 28 All 411 (413). (The expression denotes a period of 365 days reckoning backwards from the date of presentation of the plaint.)

[6] In construing the words "net profits" regard must be had to the subject-matter of the suit. When

subject-matter of suit is kudivaram right the value of that right can only be arrived at after deducting rent payable to landholder and expenses incurred in cultivation. (Vol. 33) 1946 Mad 322 (324): I L R (1946) Mad 821 (DB). ((Vol. 29) 1942 Mad 56 overruled.)

[7] The nett profits for the year preceding the presentation of the plaint cannot be excluded from consideration for purposes of court-fees on the ground that they partake of the nature of a windfall. (Vol. 27) 1940 Mad 821 (821).

[8] Where no nett profits have arisen from the land during the year next before the suit, the clause requires the Court to estimate the land with reference to the value of similar land in the neighbourhood. The mere fact that the land is "religious" does not render it incapable of valuation with reference to the value of similar land in the neighbourhood. (Vol. 7) 1920 Up Bur 7 (8): 3 Up Bur Rul 236.

**19. Clause (d).**—[1] This clause applies where the land in suit forms part of a revenue-paying estate but does not constitute a definite share of it and is not separately assessed to revenue. If the land is a definite share of a revenue-paying estate, this clause will not apply. (Vol. 24) 1937 Nag 100 (100): I L R (1937) Nag 309 \* (Vol. 6) 1919 Lah 106 (107): 1919 Pun Re No. 100 (DB) \* ('08) 12 Cal W N 990 (99) (DB).

[2] To a suit for land which is subject to a fluctuating assessment of revenue based on the harvest clause (c) and not this clause, will apply. (Vol. 6) 1919 Lah 106 (107): 1919 Pun Re No. 100 (DB).

[3] A suit for a specific plot of land forming part of an estate but not separately assessed will come under this clause and not cl. (a) or cl. (b). The valuation under this clause is to be according to the market-value of the land. (Vol. 25) 1938 Oudh 139 (139) \* (Vol. 2) 1938 Oudh 40 (41) (DB) \* (Vol. 18) 1931 Cal 41 (419): 58 Cal 66 (DB) \* (Vol. 8) 1921 Pat 466 (46) (DB). (Claim for possession of milkfat share and for direct possession of khudkasht lands—Real dispute about claim to possession of khudkash. Court-fees payable under Cl. (d) of para. (v) \* (Vol. 5) 1918 Ma 25 (26) (DB). (Suit for possession of plot for main part of survey number but not separately assessed—Court-fee is payable under clause (d) \* ('14) 25 Ind Ca 24 (24) (DB) (Lah) \* ('11) 33 All 630 (634) (Suit by reversioner to recover specific plots of land—Court-fees payable on market-value) \* ('94) 16 All 493 (496) (Suit for pre-emption) \* ('83) 1883 Pun Re No. 6, P. 1 (15, 16) (DB) (Do).

[4] In a suit for possession, the market-value of the land at the date of the suit is to be taken as the basis of valuation. (Vol. 15) 1928 Lah 852 (853).

[5] In a suit for pre-emption, the market-value at the date of the sale will be the basis of valuation. (Vol. 11) 1924 Lah 380 (381) \* (Vol. 32) 1945 Oudh 135 (138).

[6] In a suit for possession of a plot of land and for injunction for removal of buildings erected thereon the valuation must be according to the market-value of the land and the cost of the buildings need not be taken into account. ('82) 4 All 320 (329, 330) (FB).

[7] Where the suit is for possession of land as well as buildings and groves standing thereon the land must be valued under this clause and the buildings and groves under clause (e). (Vol. 25) 1938 Oudh 40 (42) (DB).

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[See (Vol. 15) 1928 Lah 852 (853) (Suit for possession of land and not of buildings on land—Market-value of land, irrespective of buildings, determines jurisdiction of Court and amount of court-fee.)]

[8] In a suit for possession as usufructuary mortgagee, the court-fee payable is on the market-value of the mortgagee interest in the property, i.e., the mortgage-money, on payment of which the property can at any time be redeemed. (Vol. 11) 1924 Oudh 183 (163, 164).

**20. Market-value.**—[1] An ancient temple devoted absolutely and in perpetuity to religious purposes has no market and therefore no market-value. A suit for recovery of possession of such a temple will not be governed by S. 7 (v) (e) but by Sch. II, Art. 17 (VI). (Vol. 25) 1938 Nag 481 (482) \* (Vol. 11) 1924 Mad 19 (21, 22) : 46 Mad 782 (FB) (25 Cal 194 : 24 Ind App 177 (PC) followed).

[2] The market-value is the value at the date of the suit. (Vol. 15) 1928 Lah 852 (853) \* (Vol. 11) 1924 Lah 880 (881).

**21. Proviso.**—[1] The proviso has been intended to provide a standard of valuation in the Bombay Presidency for all cases of suits for land. ('87) 11 Bom 541 (548) (FB) \* ('83) 1883 Bom P J 164.

[2] The word "Land" in this proviso means land surveyed and assessed by Government. The proviso will not, therefore, apply to suits for possession of inam lands which have never been surveyed and assessed by Government. In such cases court-fee is to be computed according to clause (c) of the paragraph. ('89) 1889 Bom P J 241.

[3] Where the land in suit is settled for a period not exceeding thirty years and full assessment is paid to Government, the value of the land is to be computed according to the first paragraph of the proviso. ('94) 1894 Bom P J 425 (DB) \* ('84) 1884 Bom P J 150 (DB).

[4] Proviso (3) applies to lands in respect to which the whole or any part of the survey assessment has been remitted. ('88) 1888 Bom P J 352 (DB). (Inam village held on permanent settlement and partially exempt from revenue—Proviso (3) must be applied for determining its value for purposes of court-fees) \* ('83) 1883 Bom P J 164. (Suit for recovery of land situated in talukdari village in respect of which large portion of revenue was remitted).

[5] The remission contemplated by proviso (3) need not be expressed. In suits for possession of land in a talukdari village the difference between the full survey assessment for the land and the jama payable by the talukdar should be regarded as remission within the meaning of this proviso. ('87) 11 Bom 541 (548) (FB).

[But see ('87) 11 Bom 550n (551n) (DB) (This case must be deemed to have been overruled in 11 Bom 541 (FB).]

[6] Proviso (3) will not apply to a suit for possession of land in respect of which there was a previous assessment and a remission but which is no longer existing. (1905) 20 Bom 480 (488) (DB).

[7] A suit for possession of land, situated in an inam village, between sub-holders to which the inamdar is not a party must be valued for purposes of court-fees as inam land quite regardless of the tenure under which it may be held by the actual parties to the suit. ('82) 1882 Bom P J 87.

**22. "House," meaning of.**—[1] The term "house" has not been defined by the Act. *Prima facie*, it means a building for human habitation. (Vol. 18) 1931 Sind 6 (7) (DB).

[2] In its wider meaning, "House" includes a building used for other purposes than ordinary human habitation. (Vol. 18) 1931 Sind 6 (7) (DB). (For example an elm-house, a bake-house, a brew-house, a lighthouse, a summerhouse, a work-house, a church or a temple, an eating-house, a stock exchange, a cow-house, a hen-house, a green house.)

[3] An indigo factory or a water mill comes within the meaning of the expression "House". ('02) 24 All 218 (225, 226) (DB) \* (Vol. 28) 1941 Pesh 69 (71) (DB). (24 All 218 relied on.)

[4] A suit for the recovery of a building site, on which a house was only partially built, was held to be a suit for possession of a "House" falling under clause (e). (Vol. 18) 1931 Sind 6 (7, 8) (DB) (1884 Bom P J 150 not followed; (Vol. 17) 1930 Sind 15 : 24 Sind L R 4\*relied on.)

[5] A temple building is not a "house". (Vol. 11) 1924 Mad 19 (21, 22) : 46 Mad 782 (FB). (Per Venkata Subba Rao J.).

[6] A matham used as a shelter for pious men and for keeping certain things for the temple procession, is a "house". ('36) 159 Ind Cas 636 (636) (Mad).

[7] A house includes the site on which it stands. (Vol. 28) 1941 Pesh 69 (71) (DB) \* (Vol. 18) 1931 Sind 6 (7) (DB).

[8] The fact that the land on which the house is situated is assessed to land revenue, does not affect the court-fee chargeable. (Vol. 28) 1941 Pesh 69 (71) (DB) \* ('02) 24 All 218 (225) (DB).

[9] Whether a suit is for the recovery of the "house" or the land on which it stands, must be determined by ascertaining if the substantial subject-matter of the suit is the house itself. ('02) 24 All 218 (226) (DB).

[See also (Vol. 4) 1917 Lah 377 (378) : 1917 Pun Re No. 27 (DB) (Suit to pre-empt certain share of plot of land with a garden and a bungalow thereon.)]

**23. Garden.**—[1] The word "Garden" in cl. (e) should be taken as referring primarily to a garden in the English sense, ornamental or pleasurable or vegetable. (Vol. 5) 1918 Mad 805 (806) : 40 Mad 824 (DB). (Reversing (Vol. 3) 1916 Mad 740).

[See also ('89) 12 Mad 801 (804) (FB).]

[2] A suit for possession of a field on which coconut trees stood and which was assessed to revenue was held not to be governed by clause (e) but by clause (b) of the paragraph. (Vol. 5) 1918 Mad 805 (806) : 40 Mad 824 (DB). (Reversing (Vol. 3) 1916 Mad 740.)

[3] A bagayat land paying annual revenue to Government should be valued under clause (a) and not under clause (e). ('84) 1884 Bom P J 150.

[4] The meaning of the word "Garden" is not restricted to a pleasure or vegetable garden but extend also to a fruit garden even though the land under it is assessed to revenue. ('22) 68 Ind Cas 845 (846) (Lah DB) \* (Vol. 1) 1914 Lah 388 (389) : 1914 Pun R No. 71 (DB). What kind of garden not given in report) \* ('08) 1908 Pun Re No. 146, P. 669 (67) (DB). (12 Mad 801 (FB) not followed) \* ('80) 188 Pun Re No. 33, P. 72 (72) (DB). (Suit for possession

## S. 7 (v) (contd.)

of a date garden by mortgagee is governed by S. 7 (v) (e) and not by S. 7 (x) (b)—It is not material for purposes of para. (v) that the garden is upon revenue paying land \* (Vol. 17) 1930 Sind 15 (16) : 24 Sind L R 4 (DB) (Vol. 3) 1916 Mad 740 followed).

**24. Suit for religious property.**—[1] A temple as such has no market-value and a suit for possession of a temple is chargeable with a fixed court-fee of Rs. 10 under Sch. II Art. 17 (vi). ('38) 40 Pun L R 113 (115) \* (Vol. 11) 1924 Mad 19 (22) : 46 Mad 782 (FB).

[2] It cannot be said that any property belonging to a temple and sued for as such has no market-value. Whether the property is capable of valuation or not depends on the nature of user to which it is put. Ordinarily, it is the materials and site of the temple and the buildings which are an adjunct to it that will not be capable of valuation. ('38) 40 Pun L R 113 (115).

[See also (Vol. 7) 1920 Upp Bur 7 (8) : 3 Upp Bur Rul 236. (Merely because property is religious property it cannot be said to be incapable of valuation.)]

**25. Court-fee on appeals.**—[1] Where a suit for possession is decreed and the defendant appeals from the decree, the appeal is liable to be charged with court-fees according to the scale laid down under this paragraph though the defendant is in possession and is not asking for a decree for possession in his favour. (Vol. 18) 1931 Cal 333 (335) \* (Vol. 16) 1929 Sind 161 (161) (DB) \* ('93) 16 Mad 310 (311) (DB).

[See ('06) 29 Mad 172 (173) (DB).]

[See also (Vol. 14) 1927 All 308 (308) : 49 All 398. (Land falling under para. (v) (c)—Court-fee on appeal under Cl. (c) is enough though plaintiff may have paid fee under cl. (d) ) \* (Vol. 12) 1925 Mad 805 (805) (Appellant claiming possession as trustee—Still court-fee must be paid under this paragraph.)]

[2] If the suit is dismissed and the plaintiff appeals repeating his claim for possession, the appeal will come under this paragraph. ('81) 1881 All W N 5 (5) (DB).

[See also ('12) 17 Ind Cas 270 (271), (DB) (Lah) (Suit for removal of defendant from management of dharmashala held to be for possession—Suit dismissed—Appeal by plaintiff—Same court-fee as in trial Court.)]

[3] Where the suit is decreed subject to the plaintiff paying a certain sum to the defendant and the plaintiff appeals against such condition in the decree he will have to pay *ad valorem* court-fee on the amount in dispute. (Vol. 26) 1939 Mad 49 (50) : I L R (1939) Mad 328 (DB) (Value of improvements) \* (Vol. 13) 1926 Mad 225 (226) (DB) (Do) \* (Vol. 9) 1922 Lah 440 (441) (DB) \* (Vol. 8) 1921 Lah 371 (372) \* ('12) 15 Ind Cas 746 (747) (Oudh) \* ('10) 13 Oudh Cas 62 (65) (DB).

[See however (1900) 23 Mad 84 (85) (DB). (Suit to eject defendant—Appeal by defendant—Held, even where claim for improvement is the only question raised in appeal—Appellant should not be called upon to pay court-fee other than that payable in suit for possession.)]

[4] Where a decree for possession is subject to the payment of a certain sum of money and the defendant appeals from the decree on the ground that the plaintiff was not entitled to a decree for possession at all,

court-fee on the appeal will have to be paid under this paragraph. (Vol. 12) 1925 Mad 323 (324) : 48 Mad 652 \* (Vol. 9) 1922 All 358 (360) : 44 All 629 \* ('07) 1907 Pun Re No. 39, P. 168 (170) (DB).

[5] Even where a defendant appeals against a decree for possession on the ground that the plaintiff is bound to pay a certain sum before he can recover possession, the appeal will be governed for purposes of court-fees by this clause. (Vol. 15) 1928 Mad 929 (930) (DB). (Claim for compensation as a condition precedent to plaintiffs seeking to enforce their right to eject.) \* (Vol. 1) 1914 All 273 (275) : 36 All 322 (Claim for dower debt) \* (1900) 23 Mad 84 (85) (Claim for compensation for improvements).

[6] Where a plaintiff is awarded possession but only for a limited period and he appeals against such limitation of his right, a court-fee of Rs. 10 is sufficient on the appeal as he is only in the position of a person seeking a declaratory decree. ('11) 33 All 705 (707).

[But see ('75) 24 Suth W R 454 (455).]

[7] Appeal from a decree of the Sub-Judge, passed on a reference by the Collector under the Bengal Alluvial Lands Act, S. 5—Court-fee of Rs. 20 held sufficient. (Vol. 19) 1932 Cal 47 (49) : 58 Cal 710.

[8] Suit for possession by mortgagee—Conditional decree allowing mortgagor to redeem mortgage on payment of certain sum of money passed—Appeal by mortgagee for unconditional decree—Held that court-fee was payable *ad valorem* on five times Government assessment. (Vol. 7) 1920 Oudh 308 (308).

[9] Suit for declaration of title and confirmation of possession—Court fee of Rs. 10 paid on declaration—Relief of confirmation valued at Rs. 100 and court-fee Rs. 7-8 paid thereon—Court holding value of subject-matter to be Rs. 3,000 demanding court-fee thereon—Plaint rejected on plaintiff's failure to pay additional court-fee—Appeal by plaintiff—Held court-fee on Rs. 3,000 should have been paid on appeal. (Vol. 3) 1916 Cal 276 (277) (DB).

[10] Decree for possession and mesne profits—Appeal by defendant—Court-fee on future mesne profits need not be paid. ('98) 21 Mad 372 (372) (DB).

[11] Suit for possession dismissed on ground of insufficiency of court-fee—Appeal by plaintiff—Court-fee need not be paid as on claim for possession but only on amount of court-fee in dispute. ('82) 1882 All W N 244 (244).

[12] Suit for ejectment against several defendants—Each claiming to be in possession of specific plot of land—Suit decreed—Some defendants alone appealing—Appellants not liable to pay court-fee in respect of plots claimed by non-appealing defendants. (Vol. 32) 1945 Pat 453 (455) : 24 Pat 379 (DB).

**26. Court-fee on cross-objections.**—[1] A memorandum of cross-objections is not included within the meaning of the word "suit" in S. 7 and hence cross-objections claiming possession of immovable property are not liable to be charged with court-fee under this paragraph but under Sch. I, Art. 1. (Vol. 12) 1925 All 119 (119) : 47 All 89.

[2] Suit for cancellation of sale-deed and possession—Court dismissing claim for possession but holding that as to part of consideration, viz., Rs. 100, there was no legal necessity and giving relief as to such amount—Appeal by plaintiff—Cross-objections by defendant against that part of decree which related to Rs. 100, held liable to *ad valorem* court-fee on amount involved, viz., Rs. 100. (Vol. 11) 1924 All 175 (175) : 45 All 537.

vi. In suits to enforce a right of pre-emption—according to the value (computed to enforce a right of in accordance with paragraph v of this section) of the land, house or pre-emption; garden in respect of which the right is the claimed :

### PROVINCIAL AMENDMENTS.

#### BENGAL

For paragraph (vi) the following paragraph was substituted :—

“(vi). In suits to enforce a right of pre-emption—according to the market value of the land, building or garden in respect of which the right is claimed.

*Explanation.*—In this paragraph “building” has the same meaning as in para. V.”

—Bengal Act VII of 1935. [2-5-1935.]

#### UNITED PROVINCES

In sub-s. (vi) of S. 7 the word “building” was substituted for the word “house.”

—U. P. Act XIX of 1939. [9-1-1939.]

### Section 7 (vi-A)

#### BENGAL

After paragraph (vi) the following paragraph was inserted :

“(viA). In suits for partition and separation of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff has been excluded from possession of the property of which he claims to be a coparcener or co-owner according to the market value of the share in respect of which the suit is instituted.”—

Bengal Act VII of 1935. [2-5-1935.]

#### ORISSA

After paragraph (VI) the following paragraph was inserted, namely :

“(viA.) In suits for partition and separate possession of a share of joint family property or of joint property or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff alleges that he has been excluded from possession of the property of which he claims to be a coparcener or co-owner—according to the market value of the share in respect of which the suit is instituted.

*Explanation.* :—The word “possession” for the purposes of this paragraph includes constructive possession.”

—Orissa Act V of 1939. [31-10-1939.]

#### S. 7 (v) (contd.)

27. Bengal Amendment.—[1] If the Court has reason to think that the amount of nett profits given by the plaintiff has been wrongly estimated then the Court has to ascertain (i) the nett profits of the land, building or garden as the case may be in the year immediately preceding the presentation of the plaint, and also (ii) its market value. If the nett profits are not readily ascertainable or assessable or where there are no such profits the Court has only to ascertain the market-value of the land building or garden under clause (b) of the paragraph. But where they are readily ascertainable or assessable the Court is bound to direct inquiry under both the heads (i) and (ii) and demand additional court fee on the basis of the lower of the two figures arrived at in such inquiry. In such a case the Court cannot merely ascertain the amount of nett profits and assess court-fee on fifteen times such profits without determining the market-value. (Vol. 27) 1940 Cal 488 (440, 441) : 1 L R (1940) 2 Cal 450 (DB).

28. U.P. Amendment.—[1] The test laid down in S. 7 (V) (i) (D) for determining the market-value of the land. (viz.), multiplying by fifteen the rental value of the land is not applicable where there is no evidence of the rental value. In such cases the market-value must be determined in any other proper manner. (Vol. 32) 1945 Oudh 135 (137).

29. Reductions and remissions.—[1] The Madras Government Order No. 5791 of 17th May 1943 does not

apply to a suit by persons who claim to be trustees of certain trust-property against the defendant who puts forward the same claim which is not conceded by the plaintiffs. (Vol. 32) 1945 Mad 102 (103) : 1 L R (1945) Mad 584 (DB).

### Section 7 Para (vi)—Note 1.

[1] Plaintiff cannot in suit for pre-emption put a tentative value on property sought to be pre-empted and pay court-fees on that basis. (12) 1912 Pun W R No. 170 Page 458 (462) : 1912 Pun Re No. 85 (DB).

[2] Subject-matter of suit for pre-emption being land paying revenue—Valuation for purposes of court-fees is to be made in accordance with para (v) on revenue assessed and not according to consideration for sale. (Vol. 20) 1933 Lah 767 (768) (DB) \* (Vol. 6) 1919 Lah 79 (80) : 1919 Pun Re No. 15 (DB).

[3] Suit for pre-emption in respect of sale of equity of redemption in certain property—Court-fee must be paid according to para. (v) on market value of the property which is subject of mortgage and not according to amount of consideration for sale of equity of redemption. (10) 32 All 19 (24) (FB) \* (03) 1903 Pun L R No. 123 p. 356 (356, 357) (DB) \* (Vol. 32) 1945 Oudh 135 (138).

[4] Suit for pre-emption of zamindari share and grove—Grove not appurtenant to zamindari—Court-fee is also payable on value of grove in addition to value of zamindari share. (07) 4 All L Jour 405 (404) (DB).



**UNITED PROVINCES**

After sub-s. (vi) of S. 7, the following sub-section was *inserted*, as sub-s. (vi-A), namely:—

“(viA). In suits for partition—

according to one-quarter of the value of the plaintiff's share of the property,

and according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a coparcener or co-owner, and his claim to be a coparcener or co-owner on such date is denied.

*Explanation*:—The value of the property for the purposes of this sub-section shall be the market value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-s. (V), (V-A) or (V-B) as the case may be.”

—U. P. Act XIX of 1938. [9-1-1939]

for interest of assignee of land-revenue;

vii. In suits for the interest of an assignee of land-revenue—fifteen times his nett profits as such for the year next before the date of presenting the plaint:

to set aside an attachment; was attached:

viii. In suits to set aside an attachment of land or of an interest in land or revenue—according to the amount for which the land or interest

Provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest:

**S. 7 (vi) (contd.)**

[5] Vendee making improvements in good faith on property purchased before institution of suit by pre-emptor—Latter standing by without taking any steps to prevent such improvements which are carried out with his knowledge—Value of improvements should also be taken into account in addition to value of property for purposes of court-fees. (Vol. 24) 1937 Lah 239 (240, 241) \* ('12) 1912 Pun L R No. 184 Page 580 (582).

[6] Suit for pre-emption—Court-fee required to be paid according to market-value of property—*Held* that value is to be determined with reference to time when right is claimed, i.e., date of suit and not date of sale. ('46) 1946 Oudh W N (H. C.) 166 (169) (DB).

[7] Suits for pre-emption in which court-fee is payable on market-value of the property—*Held* that market-value at the time of sale and not at the time of suit is to be taken into consideration in calculating court-fees. (Vol. 11) 1924 Lah 380 (381) \* (Vol. 32) 1945 Oudh 135 (138).

[8] Suit for pre-emption—Court finding (that market-value of property is different from that stated in plaint)—It is improper for Court to hold up decision on question of court-fees until end of suit and incorporate it in decree. (Vol. 25) 1938 Lah 311 (312).

[9] Suit for pre-emption—Court-fee to be paid according to market value of property—Market-value is to be decided upon some evidence—Recitals in sale deed as to purchase price cannot be evidence against plaintiff. ('46) 1946 Oudh W N (H C) 166 (169) (DB).

[10] Decree for pre-emption appealed from—Right to pre-empt attacked in appeal—Real object of appellant being to get value of property enhanced—Court-fee on appeal is to be paid according to value of property under this paragraph. (Vol. 31) 1944 All 88 (84): I L R (1944) All 181 \* ('36-43) Tax Dec (Nag) 43 (46) \* (Vol. 21) 1934 Lah 424 (425) \* (Vol. 16) 1929 Lah 190 (191): 9 Lah 563 (DB) \* ('13) 1913 Pun L R No. 240 page 800 (803, 804) (FB): 1913 Pun Re. No. 76 (FB) \* ('84) 6 All 488 (490, 491) (DB).

[See (Vol. 31) 1944 Oudh 276 (277) \* ('36-43) Tax Dec (Nag) 6 (6)].

[11] When dispute raised by appeal relates solely to amount to be paid by pre-emptor, it is the amount in dispute that will determine value of appeal for purposes of Court-fees. (Vol. 16) 1929 Oudh 240 (240) (DB) \* (Vol. 3) 1916 Lah 208 (209): 1916 Pun Re. No. 14 (DB) \* ('13) 1913 Pun L R No. 240 page 800 (803, 804) (FB): 1913 Pun Re No. 76 (FB). (Overruling (1900) 1900 Pun Re. No. 92 (DB) \* ('84) 6 All 488 (491) (DB).)

[12] Pre-emption suit—Pre-emption sought in respect of five villages—Right of pre-emption refused in respect of three villages but granted in respect of two villages on payment of a certain sum—Plaintiff pre-emptor appealed from decree claiming a right of pre-emption in respect of three villages and also disputed amount of pre-emption price in respect of other villages—*Held* that appeal being divisible into two parts, court-fee was payable on five times Government revenue on three villages in respect of which right of pre-emption was refused and *ad valorem* court-fee was payable on amount sought to be reduced in respect of other two villages. (Vol. 5) 1918 All 232 (233): 40 All 353.

**Section 7 para (viii)—Note 1.**

[1] Suit to set aside attachment without preferring objection under O. 21 R. 58 C P C.—Property attached being land or interest in land—This paragraph applies. (1894) 6 All 466 (467, 468) (DB).

[2] Claim under O. 21 R. 58—Claim dismissed—Suit under O. 21 R. 63—Suit is governed by Sch. II Art. 17 (i). ('08) 35 Cal 202 (206): 35 Ind App 22 (PC).

[3] Suit to set aside a summary attachment by a Collector under Bombay Act I of 1865 held to be governed by this paragraph. ('77) 1 Bom 352 (357) (DB).

[4] Suit which is in terms to set aside a sale on the ground that an attachment is not binding on the plaintiff is virtually a suit to set aside an attachment. ('04) 14 Mad L Jour 144 (144) (DB) \* ('94) 4 Mad L Jour 183 (189) (DB).

[5] The word “value” in the proviso to the paragraph must be construed in the same way as in the previous paragraphs of the section. Where the attached land is one in the Bombay Presidency, held on settlement for a period not exceeding thirty years and paying full assessment to Government, the value will be deemed to be a sum equal to five times the *average assessed* ment. ('77) 1 Bom 352 (357) (DB).



## PROVINCIAL AMENDMENT.

## UNITED PROVINCES

For sub-section (viii) of section 7 the following sub-section was *substituted*, namely :

## S. 7 ix (contd.)

[6] Decree for redemption—Compromise in appeal increasing amount—Suit by transferee from mortgagor to avoid compromise decree and for recovery of property—Not one for redemption. (Vol. 22) 1935 Mad 671 (672).

3. Mode of valuation—General.—[1] In all suits governed by this paragraph, the court-fee is payable according to the amount of principal money expressed to be secured by the instrument of the mortgage. (Vol. 18) 1931 Oudh 366 (368): 6 Luck 684 (DB) \* ('87) 11 Bom 591 (595) (DB) \* ('69) 5 Bom H C R (AC) 153 (155) (FB).

4. Mode of valuation in suits for redemption.—[1] In a suit for redemption the court-fee payable under this paragraph is according to the principal money expressed to be secured by the instrument of mortgage. (Vol. 13) 1926 Mad 667 (667) \* ('91) 14 Mad 480 (483).

[2] Even if the original debt has been considerably reduced by the payments made by the mortgagor prior to the institution of the redemption suit, the suit will be valued according to the principal money expressed in the deed of mortgage. ('91) 14 Mad 480 (483).

[See also (Vol. 7) 1920 Nag 139 (140).]

[3] Mortgagee not paying whole but only a portion of mortgage consideration—Mortgagor suing to recover property mortgaged.—It is a suit for redemption of property and court-fee is payable on whole consideration as expressed in the deed. ('02) 1 Low Bur Rul 96 (97) \* ('97) 1 Cal W N 670 (671) (DB).

[4] Principal amount expressed in a deed of mortgage including a certain amount of paddy valued at a certain rate—It is the rate expressed in the deed and not the rate prevailing at the time of the institution of the suit that determines the "principal amount" in assessing court-fee payable in the suit for redeeming that mortgage. (Vol. 12) 1925 Mad 1254 (1254).

[5] More than one mortgage in respect of the same property—Mortgagor suing to redeem it—Court-fee must be calculated upon sum total of principal money payable under all the deeds and not on the separate sums due under each deed, as all the deeds provide only one cause of action. ('04) 7 Oudh Cas 152 (157) (DB) (Section 17 does not apply to such a case.)

[6] An additional prayer for recovery of a certain sum by way of damages or arrears of rent in a suit for redemption does not change the nature of the suit and the court-fee is payable on the principal amount only even when such a prayer is included. (Vol. 19) 1932 Mad 217 (217) \* (Vol. 13) 1926 Mad 764 (765). ((Vol. 13) 1926 Mad 542 reversed.)

[But see ('93) 16 Mad 415 (418) (DB).]

[7] Amount spent on improvements by mortgagee under kanom deed not to be taken into account in assessing court-fee in suit for redeeming kanom. ('82) 5 Mad 284 (286) (FB).

[8] On account of purchase of portion of equity of redemption by mortgagee, mortgage-debt *pro tanto* extinguished and integrity of mortgage broken—Some of the mortgagors becoming entitled to recover a portion only of the mortgaged property—In a suit for redemption of such portion, "the principal money expressed to be secured" on which court-fee for the suit is to be calculated under this paragraph must be taken to be the proportionate amount of the debt for which the portion sought to be redeemed would be liable. (Vol. 5) 1918

Oudh 25 (27) \* ('86) 8 All 438 (441, 442) (FB) \* ('82) 6 Bom 324 (325).

5. Court-fee in appeals from a suit for redemption or foreclosure.—[1] Suit for redemption or foreclosure dismissed by trial Court—Plaintiff appeals against the decree—Subject-matter in dispute does not change its nature in appeal and is governed by this paragraph. ('36-43) Tax Dec (Nag) 115 (118) \* (Vol. 18) 1931 Lah 633 (633) \* (Vol. 9) 1922 Oudh 82 (84): 25 Oudh Cas 30 (DB) \* (Vol. 6) 1919 Oudh 98 (101): 22 Oudh Cas 289 \* ('93) 16 Mad 326 (327) (DB) \* ('82) 1882 Bom P J 106 (DB).

[But see (Vol. 12) 1925 All 734 (735): 47 All 926.]

[2] Suit for redemption or foreclosure decreed—Defendant appeals therefrom, challenging plaintiff's right to redeem or foreclose—Subject-matter in appeal is the same as in the suit and the court-fee payable is on the principal amount under this paragraph, and not on the amount decreed. ('36-43) Tax Dec (Nag) 115 (118) \* (Vol. 18) 1931 Lah 633 (633) \* (Vol. 18) 1931 Oudh 353 (354) (DB) \* (Vol. 9) 1922 Oudh 82 (84): 25 Oudh Cas 30 (DB) \* ('13) 9 Nag L R 86 (88) \* ('10) 6 Nag L R 164 (167).

[See (Vol. 28) 1941 All 357 (358): 1 L R (1941) All 469 \* (Vol. 24) 1937 Nag 6 (8).]

[But see (Vol. 1) 1914 All 520 (520): 36 All 40 (FB) \* ('06) 33 Cal 1133 (1149) (DB).]

[3] In the following case decree was passed in a foreclosure suit for a certain amount in default of payment of which within a certain time the property was to be foreclosed. Defendant appealed denying plaintiff's right to foreclose on the ground that he was not liable to pay any portion of the sum decreed. Held that suit had changed its nature in appeal and had become a suit to avoid payment of a specified sum and as such the court-fee payable was to be calculated *ad valorem* on the amount of the decree under Sch. I, Art. 1. (Vol. 9) 1922 Oudh 82 (84): 25 Oudh Cas 30 (DB).

[4] Suit to redeem or foreclose decree—Plaintiff or defendant in appeal merely challenging amount to be paid or received without any question about right to redeem or to foreclose being raised—Court-fee payable in appeal will be *ad valorem* on additional amount claimed by mortgagee-appellant or on amount sought to be reduced by the mortgagor-appellant. (Vol. 30) 1943 Mad 146 (147): 1 L R (1943) Mad 819 \* (Vol. 24) 1937 Nag 6 (8) \* (Vol. 18) 1931 Lah 631 (633) \* (Vol. 9) 1922 Oudh 82 (84): 25 Oudh Cas 30 (DB) \* (Vol. 6) 1919 Oudh 98 (101): 22 Oudh Cas 289 \* (Vol. 2) 1915 Nag 48 (49): 11 Nag L R 83 (DB) \* (Vol. 17) 1930 Lah 601 (601) (DB) \* (Vol. 13) 1926 Mad 225 (226) (DB) \* ('08) 30 All 547 (548, 549) \* (Vol. 32) 1945 Bom 504 (510): 1 L R (1945) Bom 629 (DB) \* (Vol. 33) 1946 Nag 160 (160).

[But see ('09) 12 Oudh Cas 130 (132) (DB) \* ('90) 13 All 94 (97) \* (Vol. 33) 1946 All 303 (303): 1 L R (1946) All 359 (DB) \* ('91) 1891 Bom P J 218 \* ('86) 10 Bom 44n (44n).

[5] Appeal against redemption decree—Appellant claiming certain minimum amount as due to him on redemption without limiting maximum—Court-fee paid on minimum—There is no valuation at all. (Vol. 33) 1946 All 304 (304): 1 L R (1946) All 409 (DB).

[6] Dispute in appeal by mortgagee against decree in a redemption suit was as to plaintiff's right to redeem mortgage and not as to amount payable—Held in view of amendment of S. 2 (iv) in United Provinces by which 'suit' includes 'appeal,' court-fee was payable on

for specific performance;

x. In suits for specific performance—

(a) of a contract of sale—according to the amount of the consideration :

between land-lord  
and tenant.

xi. In the following suits between landlord and tenant:—

- (a) for the delivery by a tenant of the counterpart of a lease,
- (b) to enhance the rent of a tenant having a right of occupancy,
- (c) for the delivery by a landlord of a lease,
- a (cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy,
- (d) to contest a notice of ejectment,
- (e) to recover the occupancy of b [immovable property] from which a tenant has been illegally ejected by the landlord, and
- (f) for abatement of rent—

according to the amount of the rent of the b [immovable property] to which the suit refers, payable for the year next before the date of presenting the plaint.

[<sup>a</sup>] Inserted by the Court-fees (Amendment) Act, 1905 (6 [VI] of 1905), S. 2 (1).

[b] Substituted by S. 2 (2), *ibid*, for "land."

### 3. 7 (xi) (contd.)

[2] A suit for specific performance of a contract to grant a lease comes under this paragraph. (Vol. 8) 1921 Cal 84 (85) \* ('12) 15 Ind Cas 46 (48, 49) (DB) (Cal).

[3] Contract for transfer of land in consideration partly of money and partly of other land belonging to transferee held to be contract of sale. Contract of exchange held to be covered by provision as to contract of sale. (Vol. 10) 1923 Lah 456 (457, 458).

[4] Memorandum of appeal in suit to enforce contract of exchange—Held that suit was governed neither by S. 7 (x), clause (a) but by Sch. I, Art I as memorandum of appeal in question was not otherwise provided for. (Vol. 31) 1944 Mad 252 (253).

[5] Suit by vendor for recovery of amount agreed on as consideration in which he declares his willingness to perform his part of contract by executing proper conveyance of the property will come under this paragraph. (Vol. 6) 1919 Mad 304 (304) (DB).

[6] Suit to have sale-deed executed and completed or for recovery of sale deed already executed is suit for specific performance of contract of sale, though there is no prayer for possession of property sold. (Vol. 11) 1924 Lah 439 (440): 5 Lah 75 (DB).

[7] Mortgagor contracting with mortgagee that on default in paying mortgage-money within certain time he would execute conveyance of the property to mortgagee—Latter suing for specific performance of the contract—Amount that will be due on mortgage is ascertainable and court-fee will have to be paid on such amount. (Vol. 30) 1943 Mad 872 (873).

[8] Plaintiff praying that Court should give effect to certain arrangement he has entered into by which certain properties are to be conveyed to him, but in the plaint desiring that only some of those properties should be conveyed and possession of such properties should be delivered—Suit will have to be valued on consideration mentioned in original arrangement, as Court will, in any event, have to declare the original arrangement and on that basis only will be able to give any relief to plaintiff. (Vol. 24) 1937 Mad 831 (832, 833).

[9] Different views are held as to Court-fee payable on suit for specific performance of a contract of sale and for possession of property sold.

[a] Such a suit falls under this paragraph (Vol. 32) 1945 Bom 81 (82): I L R (1945) Bom 82 (DB) \*

(Vol. 24) 1937 Mad 831 (833) \* (Vol. 11) 1924 Mad 360 (361): 47 Mad 150 (DB) \* (Vol. 11) 1924 Lah 439 (440): 5 Lah 75 (DB) \* (Vol. 15) 1928 Lah 635 (635) \* (Vol. 3) 1916 All 228 (228): 38 All 292.

[b] Such suit falls under para (v). (Vol. 16) 1929 Pat 642 (642) \* (Vol. 5) 1918 Lah 323 (323) \* ('11) 11 Ind Cas 228 (229) (DB) (Cal).

[c] In such cases the court-fee should be paid on the two reliefs separately, unless the contract itself provides for delivery of possession as well as execution of sale-deed. (Vol. 7) 1920 Oudh 167 (169): 23 Oudh Cas 388 \* (Vol. 32) 1945 Bom 81 (81, 82): I L R (1945) Bom 82 (DB).

[10] Suit for possession against seller on basis of a completed sale is not one for specific performance within the meaning of this paragraph although the suit contains a prayer that defendant may be ordered to execute and have registered a sale deed. (Vol. 7) 1920 Lah 72 (72).

[11] Suit by lessee to be put in possession of leasehold property will not come under this paragraph but will come under para (v). (Vol. 20) 1933 Oudh 363 (365) \* ('08) 1908 All W N 201 (202).

[But see (Vol. 24) 1937 Sind 93 (93) (DB).]

[12] Suit directed against third person not a party to the contract—Suit as against him would be only for possession. (Vol. 26) 1939 Mad 360 (361): I L R (1939) Mad 367 (SB).

[13] Suit for possession by usufructuary mortgagee who has been subsequently dispossessed is clearly not one for specific performance. ('80) 1880 Pun Re No. 53, p. 72 (72) (DB).

[14] If plaintiff files an award with the plaint and prays that it be filed and enforced, the suit is for specific performance of an award. ('09) 4 Ind Cas 815 (816) (DB) (Upp Bur).

### Section 7 Para (XI)—Note 1.

[1] A suit for commutation of grain rent into money rent of equal value does not fall under this clause. (Vol. 11) 1924 Mad 623 (624) (DB).

[2] "A tenant having right of occupancy" does not include a person having a superior interest. A tenure-holder in Bengal is a person having a superior interest and a suit for enhancement of rent against him is not governed by clause (b) of S. 7 (xi). (Vol. 21) 1934 Cal 674 (678): 61 Cal 513.

PROVINCIAL AMENDMENT.

UNITED PROVINCES

8. The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant.

[a] See now the Land Acquisition Act, 1894 (1 [I] of 1894).

#### PROVINCIAL AMENDMENTS.

##### UNITED PROVINCES

The following words were *inserted* between the words "public purposes" and shall be computed," viz.,

"or against an award made by a tribunal constituted under the United Provinces Town Improvement Act or any other similar statute."  
—U. P. Act XIX of 1938. [9-1-1939.]

#### Sections 8-A to 8-F.

##### BENGAL

After S. 8 the following sections were *inserted*. viz:—

"8-A. In every suit in which an *ad valorem* court-fee is payable under this Act on the plaint, the plaintiff shall file with the plaint a statement of particulars of the subject-matter of the suit and his own valuation thereof unless such particulars and the valuation are contained in the plaint. The statement shall be in such form and shall contain such particulars as may be prescribed by the Provincial Government by notification in the *Official Gazette*. In every such suit the plaintiff shall also, if the Court so directs, file a duplicate copy of the plaint and of the said statement.

"8-B. (1) In every suit in which a court-fee is payable under this Act on the plaint or memorandum of appeal the Court shall, a [on the date fixed for the appearance of the opposite party or as soon as may be hereafter] and in every case before proceeding to deliver judgment, record a finding whether a sufficient court-fee has been paid.

(2) If the Court records a finding that an insufficient court-fee has been paid on the plaint or memorandum of appeal the Court shall,

- (a) stay all further proceedings in the suit until it has determined the proper amount of such court-fee payable and the plaintiff or the appellant, as the case may be, has paid such amount or until the date referred to in clause (b), as the case may be:

Provided that if the plaintiff or appellant gives, within such time as the Court may allow, security, to the satisfaction of the Court, for the payment of any additional amount for which he may be found liable, the Court may proceed with the suit,

- (b) fix a date before which the plaintiff or appellant shall pay the amount of court-fee due from him, as determined by the Court under cl. (a).

##### S. 7 (xi) (*contd.*)

[21] The clause is not confined to suits by ryots with occupancy rights. (Vol. 21) 1934 Cal 674 (677): 61 Cal 513.

[22] Tenant suing for possession after determination of question of title—Suit is governed by S. 7 (v) and not by this clause. (Vol. 13) 1926 Pat 251 (253): 5 Pat 208.

[But see ('86-43) Tax Dec (Nag) 96 (98, 99).]

#### SECTION 8—SYNOPSIS.

1. Local amendment (U.P.).
2. Scope.
3. "Order".
4. Appeal against order relating to compensation.—Schedule II, Article 17 (iv), whether applies.

5. Appeals arising under Land Acquisition Act—Section 8, whether restricted to appeals from awards only.
6. Appeal by one of the claimants who is awarded nothing.
7. Court-fee in appeals relating to apportionment of compensation.
8. Court-fee, whether payable on additional payment under Section 23 (2) of the Land Acquisition Act.
9. Appeal by Government.
10. Orders relating to compensation—Illustrative cases.
11. Amount that can be awarded by the Appellate Court.

1. Local amendment (U.P.).—[1] The section applies to an appeal against the decision of the Improvement Trust Tribunal. (Vol. 26) 1939 All 127 (130): I L R (1939) All 142.

(5) If the plaintiff or appellant fails to give the security referred to in cl. (a) of sub-s. (2) or to pay

“8-F, If in the result of inquiry under S. 8-C the Court finds that the subject-matter of the suit has been undervalued the Court may order the party responsible for the under-valuation to pay all or any part of the costs of the inquiry.

If in the result of such inquiry the Court finds that the subject-matter of the suit has not been under valued the Court may, in its discretion, order that all or any part of such costs shall be paid by the Provincial Government or by any party to the suit at whose instance the inquiry has been undertaken, and if any amount exceeding the proper amount of fee has been paid shall refund the excess amount so paid.”

—Bengal Act VII of 1935. [2-5-1935.]

S. 8 (contd.)

[2] For the applicability of this section what is essential is that the order appealed against must relate to compensation and it is immaterial whether the order amounts to an award or not. (Vol. 22) 1935 Lah 448 (449): 17 Lah 122 (DB) \* (Vol. 13) 1926 Lah 343 (344).

[But see (Vol. 16) 1929 Mad 223 (226) (DB).]

**6. Appeal by one of the claimants who is awarded nothing.**—[1] Appeal by one of several claimants who claimed a share in the compensation but was awarded nothing at all in the lower Court—*Held*, this section applies to such appeal. (Vol. 18) 1931 Lah 343 (343) \* (Vol. 13) 1926 Lah 343 (343, 344) \* (Vol. 19) 1932 Cal 346 (347): 59 Cal 528.

[But see (Vol. 16) 1929 Mad 223 (226) (DB). The court-fee must be paid under Art. 1 of Sch. 1.]

**7. Court-fee in appeals relating to apportionment of compensation.**—[1] Appeal from an order apportioning compensation among several claimants by a claimant claiming more compensation—The proper court-fee is that payable under this section. (Vol. 22) 1935 Lah 448 (449): 17 Lah 122 (DB).

[2] Compensation divided between claimant and Government—Appellant claimant appealing from order praying for more amount than was awarded to him paying only two rupees as court-fee under Sch. II, Art. 11—Appellant alleging that the appeal was one relating to apportionment—*Held* that the appeal did not relate to apportionment and the proper court-fee was an *ad valorem* one under this section. (Vol. 8) 1921 Bom 325 (325): 45 Bom 277 (DB).

**8. Court-fee, whether payable on additional payment under section 23 (2) of the Land Acquisition Act.**—[1] Where a person being dissatisfied with the amount of compensation awarded to him under S. 18, Land Acquisition Act, wants to appeal, insisting in case of his success that not only the excess market value but also 15 per cent of the same should be decreed in his favour, he must pay court-fees not only on the excess market value but also on 15 per cent thereon. (Vol. 17) 1930 Mad 45 (47): 53 Mad 48.

[But see (Vol. 13) 1926 Lah 509 (510) (DB).]

**9. Appeal by Government.**—[1] The section applies to an appeal by Government seeking a reduction of the amount of compensation awarded. (Vol. 26) 1939 All 127 (130): 1 L R (1939) All 142 \* (Vol. 14) 1927 Cal 45 (45) (DB) \* (Vol. 11) 1924 Mad 489 (490).

[But see (Vol. 19) 1932 Oudh 224 (224): 8 Luck 85 (DB) \* (12) 1912 Pan L R (Sapp) No. 17 Page 54 (57): 1913 Pan Re No. 57 (DB).]

[2] Appeal by Government seeking a reduction of the amount of compensation awarded—Government appellant must pay *ad valorem* court-fee on the amount of compensation in dispute. (Vol. 26) 1939 All 127 (130): 1 L R (1939) All 142 \* (Vol. 19) 1932 Oudh 224 (224): 8 Luck 85 (DB). (Sch. I, Art. 1 applies.) \* (Vol. 15) 1928 Rang 197 (198): 6 Rang 281 (DB). (If S. 8 is not applicable, provision of Sch. I, Art. 1 must be applied) \* (Vol. 14) 1927 Cal 45 (45, 46) (DB) \* (Vol. 11) 1924 Mad 489 (490). (Sch. I, Art. 1 applies).

**10. Orders relating to compensation—Illustrative cases.**—[1] On acquisition of property District Judge ordering compensation to be invested in Government Promissory Notes and allowing only interest to claimant—Claimant filing appeal against order paying court-fee under Sch. II, Art 17 (vi)—*Held* that court-fee must be paid under this section. (12) 39 Cal 906 (913, 914) (DB).

[2] Land Acquisition proceedings—Claim by reversioner that compensation money should not be paid to alienee from Hindu Widow as the alienation was not binding upon him—Prayer for investment of money under S. 32, Land Acquisition Act—Claim disallowed—Appeal by reversioner—*Held* that it was not governed by this section. (Vol. 22) 1935 Cal 243 (244): 62 Cal 331.

[See also (Vol. 19) 1932 Mad 438 (439): 55 Mad 641 (DB).]

[3] Land acquisition proceedings—Certain reversioners objecting that whole compensation money should not be paid over to Hindu Widow—District Judge disallowing objection—Appeal by reversioners—*Held* that appeal should have been stamped with *ad valorem* court-fee. (99) 21 All 354 (355) (DB).

**11. Amount that can be awarded by the Appellate Court.**—[1] The Court of appeal cannot pass a decree for a sum in excess of the amount claimed and on which the court-fee has been paid even if it finds that the appellant is entitled to a higher amount. (08) 30 Cal 501 (502) (DB) \* (08) 30 Cal 516 (520) (DB). (Unless before the judgment is pronounced, an amendment of the memorandum of appeal is allowed and the additional court-fee is paid.)

#### SECTION 8 A—8 F. (Bengal).

[1] The object in inserting these sections is to supply the omission in the Act of the provision for Court's power to reject plaint in case of undervaluation. (37) 1 L R (1937) 2 Cal 501 (507) (DB).

[2] The powers of a Court under these sections are much wider and more specific than those under Ss. 9 and 10. (37) 1 L R (1937) 2 Cal 501 (507) (DB).



## ORISSA

After S. 8 the following section was inserted as section S-A :

*Statement of particulars of subject-matters of suit and plaintiff's valuation thereof.*

"S-A. In every suit in which an *ad valorem* court-fee is payable under this Act on the plaint, the plaintiff shall file with the plaint a statement of particulars of the subject-matter of the suit and his own valuation thereof unless such particulars and the valuation are contained in the plaint. The statement shall be in such form and shall contain such particulars as may be prescribed by the Provincial Government by notification in the Gazette. In every such suit the plaintiff shall also, if the Court so directs, file a duplicate copy of the plaint and of the said statement."

—Orissa Act V of 1939. [31-10-1939.]

9. If the Court sees reason to think that the annual nett profits or the market value of any such land, house or garden as is mentioned in section 7, paragraphs 5 and 6, have or has been wrongly estimated, the Court may, for the purpose of computing the fee payable in any suit therein mentioned, issue a commission to any proper person directing him to make such local or other investigation as may be necessary, and to report thereon to the Court.

## PROVINCIAL AMENDMENTS.

## BENGAL

Section 9 was repealed so far as the Province of Bengal is concerned, by Bengal Act VII of 1935.

[2-5-1935.]

## UNITED PROVINCES

In the beginning of the section the following sentence was added, viz.,

"In every suit the plaintiff shall file with the plaint a statement in such form as may be prescribed for the purpose, of particulars and valuation of the subject-matter of the suit, unless such particulars and valuation are contained in the plaint itself."

—U. P. Act XIX of 1933, [9-1-1939.]

## S. 8-A—8-F (contd.)

[3] Section 8-B casts a duty, upon the Court to record a finding whether a sufficient court-fee has been paid and, in case of insufficiency, to dismiss the suit on failure of the party to make up the deficiency. (Vol. 27) 1940 Cal 451 (454) : 1 L R (1940) 2 Cal 166 (DB).

[4] Under Section 8-C, it is the duty of Court, even in cases falling under S. 7 (iv), to revise plaintiff's valuation where there is a reason to suppose that the relief sought has been wrongly valued. (Vol. 28) 1941 Cal 509 (511) (DB) \* (Vol. 27) 1940 Cal 482 (483) : 1 L R (1940) 1 Cal 409 \* (Vol. 27) 1940 Cal 451 (452) : 1 L R (1940) 2 Cal 166 (DB).

[5] Suit under section 7 (iv) (c)—Court can raise valuation—But this power cannot be exercised unless reasonable standards for such valuation are laid down by rules framed under S. 9, Suits Valuation Act. (Vol. 26) 1939 Cal 627 (627) (DB).

[6] Where some objective standard of valuation is possible, the Court should act under section 8-C. (Vol. 25) 1938 Cal 161 (162) \* (Vol. 24) 1937 Cal 748 (749) : 1 L R (1938) 1 Cal 196.

[7] The objective standard of valuation should ordinarily be regarded as the value of the benefit which the plaintiff seeks to obtain if he succeeds in his suit. (Vol. 27) 1940 Cal 580 (580) : 1 L R (1940) 2 Cal 33 \* (Vol. 26) 1939 Cal 748 (744) : 1 L R (1939) 2 Cal 20.

[8] Where there does not exist an objective standard of valuation the Court should accept plaintiff's valuation

as correct. (Vol. 26) 1939 Cal 278 (279) (DB) \* (Vol. 26) 1939 Cal 265 (266) (DB).

## SECTION 9—Note 1.

[1] Court should hold inquiry itself, but where this cannot be conveniently done, it may issue commission. ('07) 29 All 749 (756) (FB) \* ('71) 6 Beng L R App 12 (13) (DB).

[2] Court may issue commission where it is alleged that plaintiff has overvalued property. ('70) 5 Beng L R App 6 (7) (DB).

[3] Section applies only to suits and not to appeals. ('90) 12 All 129 (147) (FB) \* (Vol. 16) 1929 Cal 717 (719) : 57 Cal 360 (DB).

[But see (Vol. 17) 1930 Cal 65 (67) : 57 Cal 587 (DB).]

[4] Inquiry under this section may be held at any stage of suit. ('08) 1908 Pun Re. No. 12, P 124 (126) (FB) \* ('98) 1893 Pun Re. No. 3, p 30 (36) (DB) \* ('60) 2 Mad 308 (309) (DB).

[5] Court is not bound to accept Commissioner's report. ('71) 7 Beng L R 664n (665n) (DB).

[6] Court must come to judicial decision on basis of report. (Vol. 17) 1930 Cal 65 (67) : 57 Cal 587 (DB).

[7] Commission not ordered at instance of plaintiff—Plaintiff cannot be made to deposit costs of commission. (Vol. 17) 1930 Cal 65 (68) : 57 Cal 587 (DB).

10. i. If in the result of any investigation the Court finds that the nett profits or Procedure where nett market-value have or has been wrongly estimated, the Court, if the estimation has been excessive, may in its discretion refund the excess paid as such profits or market-value wrongly estimated. fee : but, if the estimation has been insufficient, the Court shall require the plaintiff to pay so much additional fee as would have been payable had the said market-value or nett profits been rightly estimated.

ii. In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

\* [ \* \* \* \* ]

[a] Clause (iii) was *repealed* by the Amending Act, 1891 (12 [XII] of 1891). The clause ran as follows:—

“Section 180 of the Code of Civil Procedure shall be construed as if the words ‘the market-value of any property or’ were inserted after the word ‘ascertaining’ and as if the words ‘or annual nett profits’ were inserted after the word ‘damages’.”

### PROVINCIAL AMENDMENTS.

#### ASSAM

For clause (ii) the following clause was *substituted*, viz.,

“ii. In such case—

- (a) the suit shall be stayed until the additional fee is paid and if the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed; and whether the additional fee is or is not paid,
- (b) the Court may, if it is of opinion that the estimation has been grossly insufficient, further order that the expenses of the commission, or such portion thereof as the Court may think reasonable, be paid by the party in fault to the Government, and the order so made shall have the force and effect of a decree passed by the Court.”

—Assam Act III of 1932. [27-4-1932.]

#### BENGAL

Section 10 was *repealed* so far as the Province of Bengal is concerned by Bengal Act VII of 1935.

[2-5-1935.]

### SECTION 10—SYNOPSIS.

1. Scope of the section.
2. “Such investigation.”
3. This section and O. 7 R. 11, Civil Procedure Code.
4. Valuation exceeding pecuniary jurisdiction.
5. Time fixed for payment of deficit fee—Computation of time.
6. Extension of time fixed.
7. Order calling for deficit court-fee incorporated in decree.
8. Effect of dismissal of suit.
9. Appeal against dismissal of suit.

1. *Scope of the section.*—[1] Court has discretion to refund excess fee paid by plaintiff, *See* (Vol. 24) 1937 Lah 239 (240, 241), (Court-fee should be paid on value of site plus costs of improvements made thereon),

[2] *Claim underestimated*—Adequate Court-fee not paid—Court must stay suit and fix time within which deficit court-fee is to be paid. (‘07) 20 All 749 (764, 765) (FB). (Without any regard to fact whether that be time within or beyond period of limitation prescribed for suit).

2. “Such investigation.”—Words “such investigation” in sub-s. (i) mean investigation held by Court or Commissioner appointed by Court under preceding

section and do not restrict operation of this section to those cases where investigation is held by Commissioner. (‘07) 29 All 749 (756) (FB).

3. *This section and O. 7, R 11, Civil Procedure Code.*—[1] Order under sub s. (ii) of this section will amount to decree and not to *res judicata* and fresh suit on same cause of action will not be barred. (‘90) 12 All 129 (148) (FB).

[2] O. 7 R. 11, Civil P.C. and S. 10 Court-fees Act. apply to different stages of suit: former applying before registration of plaint and latter applying after registration of plaint. (Vol. 7) 1920 Pat 656 (660): 4 Pat L Jour 703 (DB) \* (‘05) 27 All 197 (199) (DB) \* (‘80) 2 Mad 308 (309) (DB).

[3] *See also* A.I.R. Commentaries on Civil P. C. 4th (1944) Edition, O. 7 R. 11, Note 10.

4. *Valuation exceeding pecuniary jurisdiction.*—[1] If valuation determined by Court after investigation exceeds pecuniary jurisdiction of Court, Court must return plaint for presentation to proper Court. (Vol. 20) 1933 Nag 313 (313): 29 Nag L R 367 \* (Vol. 18) 1931 Mad 69 (70). (Held decision in (Vol. 11) 1924 Mad 646 was not correct) \* (‘29) 57 Mad L Jour 33 (33) (N R.C.) \* (Vol. 14) 1927 Bom 257 (258): 51 Bom 236 (DB) \* (‘85) 8 Mad 62 (63) (DB):

**11.** In suits for mesne profits or for immovable property and mesne profits, or for an account, if the profits or amount decreed are or is in excess of the profits claimed or the amount at which the plaintiff valued the relief sought, the decree shall not be executed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits or amount so decreed shall have been paid to the proper officer.

Where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the further execution of the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

#### S. 10 (contd.)

[But see (Vol. 11) 1924 Mad 646 (647 648).]

**5. Time fixed for payment of deficit fee.—**Computation of time.—[1] Plaintiff ordered to pay deficit court-fee within a week—Plaintiff held entitled to full seven days. ('12) 13 Ind Cas 900 (901) (DB) (Cal).

**6. Extension of time fixed.—**[1] Extension of time for payment of deficit court-fee may be granted before or after expiration of time fixed. ('97) 19 All 240 (243) (DB).

**7. Order calling for deficit court-fee incorporated in decree.—**[1] To hold up decision on question of court-fee till end of suit and incorporate order in decree passed in suit is improper. (Vol. 25) 1938 Lah 311 (312).

**8. Effect of dismissal of suit.—**[1] Suit dismissed under sub-s. (ii) of this section—Dismissal does not operate as *res judicata*, to bar subsequent suit by plaintiff on same cause of action. ('11) 35 Bom 88 (41) (DB) \* (86) 8 All 282 (287) (DB).

**9. Appeal against dismissal of suit.—**[1] Valuation of appeal on dismissal of suit under this section would be valuation determined by Court and not plaintiff valuation. (Vol. 25) 1938 Lah (311) (312).

[But see (Vol. 13) 1926 Cal 427 (427) (DB).]

#### SECTION 11—SYNOPSIS.

1. Scope and applicability.
2. Points of difference between para 1 and para 2.
3. Mode of enforcing payment of additional court-fee under the section.
4. Giving of time for payment of court-fee under this section.
5. Amount of court-fee payable under this section.
6. Court-fees in suits for mesne profits—General.
7. Court-fee on future mesne profits.
8. Suit for administration.
9. Suits on mortgage.
10. Madras Amendment.

**1. Scope and applicability.—**[1] This section furnishes exceptions to the rule that the plaintiff is only entitled to amount claimed by him in plaint. (Vol. 8) 1921 Oudh 108 (109): 24 Oudh Cas 209.

[2] This section provides for making up of deficiency of court-fees in case tentative valuation is eventually found to fall short of real amount for which decree is passed (Vol. 21) 1934 Lah 545 (548): 15 Lah 512 (FB) \* (Vol. 21) 1934 Lah 488 (491, 492): 15 Lah 151 (FB) \* (Vol. 5) 1918 Cal 895 (896): 45 Cal 634 (DB) \* (Vol. 5) 1918 Cal 159 (159) (DB) \* (Vol. 2) 1915 Bom 59 (60): 39 Bom 545 (DB) \* ('02) 25 Mad 543 (544) (DB) \* ('85) 9 Bom 22 (24) (DB).

[See (Vol. 16) 1929 Pat 626 (630) (DB) \* ('04) 16 All 286 (288, 289) (DB).]

[3] Cases under this section would be cases in which insufficiently stamped plaint is received or filed or used owing to mistake or inadvertence of Court. ('90) 12 All 129 (147) (FB) (*Obiter*).

[4] Suit for accounts or mesne profits dismissed—Plaintiff appeals. This section will apply to appeal. (Vol. 16) 1929 PC 147 (148): 10 Lah 737: 56 Ind App 232 (PC).

[See also (Vol. 21) 1934 Lah 545 (548): 15 Lah 512 (FB) (Amount determined as due by appellate Court becomes value of suit for jurisdiction as well as court-fee.)]

[But see ('90) 12 All 129 (147) (FB) (*Obiter*) \* (86-43) Tax Dec (Nag) 75 (76) (DB).]

[5] Section does not apply to appeal by defendant against preliminary decree in suit for accounts. (Vol. 24) 1937 Lah 694 (696): 1 L R (1937) Lah 196 (DB).

[6] The section does not apply to any suit not specified therein. (Vol. 25) 1938 Cal 785 (787, 788) (DB) \* (Vol. 9) 1922 Pat 59 (60) (DB) \* ('07) 17 Mad L Jour 625 (626) (DB).

[7] Recovery of additional court-fee under this section does not depend on existence of any direction in decree in that behalf. (Vol. 25) 1938 Mad 787 (788): 57 Mad 303 (DB).

[8] Executing Court can determine whether additional court-fee should be borne by decree-holder or can be recovered by him from judgment-debtor as costs of execution. (Vol. 30) 1943 Mad 145 (146) (DB) (Plaintiff entitled to recover extra court-fee as costs by further execution) \* (Vol. 20) 1933 Mad 787 (788): 57 Mad 303 (DB).

## PROVINCIAL AMENDMENTS.

## BENGAL

For the original section the following section was *substituted*, viz.:

"11. Where, in any suit for mesne profits or for land and mesne profits or for an account, the fee which would have been payable, if the suit had comprised the whole of the relief to which the Court finds the plaintiff to be entitled exceeds the fee actually paid, the Court shall require the plaintiff to pay an additional fee equal to the amount of the excess, and if such additional fee is not paid within such time as the Court may fix, the suit, or if a decree has previously been passed therein, so much of the claim as has not been so decreed shall be dismissed:

Provided that, where the additional fee is payable in respect of a portion of the claim which can be relinquished that portion only shall be dismissed."

—*Bengal Act VII of 1935.* [2-5-1935.]

## MADRAS

For the second paragraph of the section the following paragraph was *substituted*, viz:

"Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment.

Where a decree directs an inquiry as to mesne profits from the institution of the suit and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

—*Madras Act V of 1922.* [30-3-1922.]

## ORISSA

Same as that of Madras.

—*Orissa Act V of 1939.* [31-10-1939.]

## IND

For the second paragraph the following was *substituted*, viz:

"In every such suit the difference, if any, between the fee actually paid and the fee which would have been payable if the suit had comprised the whole of the profits or amount found due shall, on judgment being signed, be leviable from the plaintiff whether he applies or does not apply for the execution of the decree, and upon the certificate of a Judge of the Court in which such suit was pending be recoverable by any Collector as an arrear of land revenue.

*Explanation.*—For the purpose of this section 'plaintiff' shall include any party to a suit to whom any profits or amount are or is found to be due."

—*Sind Act X of 1939.* [26-4-1939.]

## UNITED PROVINCES

Same as that of Madras.

—*U. P. Act XIX of 1938.* [9-1-1939.]

## S. 11 (contd.)

[9] Proceedings under O. 20 R. 12 Civil P C. — S. 11 part 2 has no application. (Vol. 33) 1946 Sind 58 (60): 1 L R (1945) Kar 313.

## 2. Points of difference between para 1 and para. 2.—

[1] Para. 2 of this section has no application unless amount of mesne profits has been left to be ascertained in execution proceedings, while para. 1 will not apply in respect of mesne profits left to be ascertained in execution proceedings. (Vol. 7) 1920 Mad 970 (972) DB) \* (Vol. 33) 1946 Sind 58 (60): 1 L R (1945) Kar 313.

[2] Under para 1, Court cannot fix time for payment of additional court-fee and if any time is fixed and plaintiff does not pay it within such time but pays afterwards, Court cannot refuse to execute decree. (Vol.

7) 1920 Mad 970 (972) (DB) \* (197) 50 Mad 32 (34) (DB).

[3] Under para 2, Court must fix reasonable time for payment of extra court-fee and if it is not paid within such time Court is to dismiss suit. (Vol. 24) 1937 P C 163 (165): 64 Ind App 191: 1 L R (1937) Lah 502: 31 Sind L R 367 (PC).

[4] No time fixed for payment of court-fee—Application for execution made on payment of additional court-fee will not be barred though previous application was dismissed on ground of non-payment of additional fee. (194) 1 All L Jour 350 (352) (DB).

3. Mode of enforcing payment of additional court-fee under the section.—[1] Decree for possession and mesne profits.—Bar of execution will apply only in

## S. 11 (contd.)

respect of mesne profits and not in respect of recovery of possession. (Vol. 18) 1931 Mad 717 (720) 54 Mad 980 (DB) \* ('88) 12 Bom 98 (100) (DB).

[2] Mesne profits ascertained in suit—Court can only refuse to execute decree till additional court-fee is paid and not dismiss suit. (Vol. 7) 1920 Mad 970 (972) (DB) (Under S. 11, Court-fees, Act, in case of suit for partition and mesne profits, term "decree" should be taken to refer to final, and not interim decree in suit.

[3] Procedure of dismissing suit for non payment of court-fees is not applicable to suits for accounts even where amount due has been left to be determined in execution proceedings. (Vol. 24) 1937 P C 163 (165): 1 L R (1937) Lah 502: 64 Ind App 191: 31 Sind L R 367 (PC).

[4] No special procedure is necessary for dismissal for default of payment of additional court-fee if parties have notice of such claim. (Vol. 3) 1916 Mad 224 (226) (DB).

[5] Suit dismissed under provisions of para 2—Subsequent application for recovery of mesne profits will be barred. ('97) 24 Cal 173 (176) (DB).

[6] Several reliefs including that of mesne profits granted in suit. Word "suit" in second paragraph of this section means only that part of suit which relates to mesne profits. ('97) 24 Cal 174 (176) (DB) \* ('88) 12 Bom 98 (100) (DB).

[7] Court is not required to postpone passing or drawing up of decree till court-fee is paid. (Vol. 29) 1942 Pat 410 (412): 21 Pat 366 (DB).

[But see (Vol. 20) 1933 Mad 330 (331): 56 Mad 705 (DB).]

4. Giving of time for payment of court-fee under this section.—[1] Court can enlarge time fixed under para 2. ('07) 30 Mad 32 (34) (DB).

[2] Time can be enlarged even after time originally fixed under para 2 has expired. ('11) 10 Ind Cas 268 (269) (DB) (Cal).

[3] Power to enlarge time exists under this section itself apart from S. 148 Civil P. C. ('11) 10 Ind Cas 268 (269) (DB) (Cal).

[4] Time for payment of court-fee contained in decree—Court can extend such time without any amendment of decree. ('07) 30 Mad 32 (34) (DB).

[5] Appellate Court cannot extend time fixed by lower Court. (Vol. 3) 1916 Mad 224 (227) (DB).

## 5. Amount of court-fee payable under this section.—

[1] Court-fee to be paid under this section is difference between the fee paid and the fee payable on amount decreed or all profits. (Vol. 22) 1935 Lah 40 (41) \* (Vol. 16) 1929 Lah 753 (756): 11 Lah 325 (DB). (Determination of amount of court-fee cannot be left at the option of plaintiff.) \* (Vol. 7) 1920 Low Bur 94 (95): 10 Low Bur Rul 276 \* ('95) 8 C. P. L. R. 86 (88).

[2] Plaintiff is entitled to credit for court-fee already paid by him. ('98) 1 Oudh Cas 8 (9) (DB).

## 6. Court-fees in suits for mesne profits—General.—

[1] Plaintiff should not be required to pay additional court-fee before Court passes decree for higher amount in his favour than that claimed by him in plaint. (Vol. 8) 1921 Oudh 108 (109): 24 Oudh Cas 209.

[See also (Vol. 18) 1931 All 538 (539) (DB).]

[2] Decree directing ascertainment of amount of mesne profits in subsequent proceedings—Plaintiff can claim in such proceedings higher amount than that claimed by him in plaint. (Vol. 8) 1921 Oudh 108 (109): 24 Oudh Cas 209 \* ('88) 9 Cal 112 (115, 116) (DB) (Plaintiff not estopped by his previous statements).

[3] Plaintiff had means of knowing exact amount due to him but deliberately put low figure in plaint—He cannot claim full amount ascertained to be due notwithstanding his willingness to pay extra court-fee under this section. ('81) 8 Cal 472 (475) (DB).

[4] Extra court-fee cannot be claimed until amount of mesne profits has been actually ascertained. (Vol. 17) 1930 Rang 246 (246) (DB) \* ('28) 108 Ind Cas 801 (801) (Pat).

[5] Extra court-fee cannot be claimed at time when plaintiff makes application for ascertainment of mesne profits claiming higher amount than that stated in plaint. (Vol. 22) 1935 All 206 (206) (DB) \* (Vol. 13) 1926 Pat 218 (224): 5 Pat 361 (FB).

[6] Court-fee becomes payable after final decree and before execution. (Vol. 13) 1926 Pat 218 (224): 5 Pat 361 (FB).

[7] In suit for partition plaintiff does not pray for mesne profits—Court awards mesne profits to each sharer in proportion to his share—Defendant who is given share applies for execution of decree—He is not bound to pay any court-fees under this section. ('06) 29 Bom 79 (81) (DB).

7. Court-fee on future mesne profits.—[1] No court-fee need be paid at the outset in respect of mesne profits expected to accrue after institution of suit till delivery of possession though suit may include claim for such mesne profits. (Vol. 17) 1930 Rang 246 (246) (DB) \* (Vol. 13) 1926 Pat 218 (223, 225, 226, 228): 5 Pat 361 (FB) \* (Vol. 33) 1946 Oudh 59 (60) (DB) \* (Vol. 7) 1920 Low Bur 94 (95): 10 Low Bur Rul 276 \* (Vol. 2) 1915 Cal 352 (354): 43 Cal 650 (DB).

[See (Vol. 1) 1914 Cal 958 (960) (DB). (Plaint regarding future mesne profits returned for presentation to proper Court, after delivery of possession—Plaint presented in latter Court—Claim no longer regarding future profits—Court-fee payable).]

[But see (Vol. 23) 1941 Cal 1 (12, 13) (DB).]

[2] Court can levy extra court-fee under this section in respect of future mesne profits decreed under O. 20 R. 12. (Vol. 25) 1938 Mad 727 (730): 1 L R (1938) Mad 1050 (DB). (Claim for mesne profits, in suit, past or future—S. 11 (1) would apply to the same if decree is passed in respect of future mesne profits) \* (Vol. 17) 1930 Rang 246 (246) (DB) \* (Vol. 33) 1946 Sind 19 (20): 1 L R (1945) Kar 310.

[3] Suit for account of rents—Relief not valued should be deemed to be valued at zero and Court-fee

**12. i.** Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

**ii.** But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section 10, paragraph ii, shall apply.

#### PROVINCIAL AMENDMENTS.

##### BENGAL

In paragraph (ii) for the words and figures " and the provisions of section 10, paragraph (ii), shall apply " the following shall be substituted, viz :

" and thereafter—

(a) If the party required to pay is the appellant or petitioner, the provisions of sub-sections (2) and (3) of section 8-B shall, so far as may be, apply :

(b) if the party required to pay is the respondent or the opposite party, the provisions of sub-section (2) of section 8-B shall, so far as may be, apply, and, if such party fails to pay the fee required before the date fixed by the Court, the Court shall recover the amount of such fee from him as a public demand :

*Explanation.*—For the purposes of this section a question relating to the classification of any suit for the purpose of section 7 shall not be deemed to be a question relating to valuation."

—Bengal Act VII of 1935. [2-5-1935.]

##### S. 11 (contd.)

would be payable under this section, on amount found due from date of suit. (Vol. 33) 1946 Sind 58 (61, 62) : I L R (1945) Kar 313 \* (Vol. 13) 1926 Pat 218 (224) : 5 Pat 361 (FB) \* (Vol. 7) 1920 Low Bur 94 (95) : 10 Low Bur Rul 276 \* (07) 34 Cal 954 (968) (FB).

**8. Suit for administration.**—[1] See notes on S. 7 (iv) (f).

**9. Suits on mortgage.**—[1] In suit for sale in enforcement of mortgage Court decrees larger sum than that claimed by plaintiff—Latter is not bound to pay any additional court-fee before enforcing decree. (Vol. 21) 1934 Pat 571 (573) : 14 Pat 4 (SB). (Overruling (Vol. 3) 1922 Pat 387 : 1 Pat 19 (DB)) \* (Vol. 9) 1922 Pat 59 (60) (DB).

[2] In suit for redemption of mortgage plaintiff is not bound to pay any court-fee in respect of surplus profits decreed to him. (Vol. 16) 1929 Nag 1 (2) : 24 Nag I R 197 (DB).

**10. Madras Amendment.**—[1] In case of past as well as future mesne profits if final decree is straightaway passed, para 1 of this section will apply and final decree shall not be executed until excess court-fee is paid. (Vol. 25) 1938 Mad 727 (729, 730) : I L R (1938) Mad 1050 (DB).

[2] Decree awards future mesne profits—No court-fee is payable before final decree is passed after enquiry into such profits. (Vol. 24) 1937 Mad 46 (48) : I L R (1937) Mad 284 (DB).

##### SECTION 12—SYNOPSIS.

1. Scope and object.
2. Applicability to Chartered High Court.
3. "Every question relating to valuation".
4. Bengal amendment.
5. "Fees chargeable under this chapter".
6. "Plaint or memorandum of appeal".
7. Power of Court in which suit or appeal is filed with regard to court-fee.
8. Court not having jurisdiction—Effect as to court-fee.
9. "Decision", what constitutes.
10. Finality of decision under sub-section (i).
11. Order as to court-fee—Appealability of.
12. Revision against orders as to court-fee.
13. Reference to High Court.
14. Deficiency of court-fee in lower Court—Power of Court of Appeal or Revision.
15. Order as to Court-fees—Alteration by same Court.
16. Finality of order under sub-section (ii).
17. Objection as to court-fee when to be taken.
18. Estoppel on question of court-fees.
19. Admission regarding court-fee.
20. Compromise on question of court-fee.
21. Government's right to be heard as regards court-fees payable.

## ORISSA

For paragraph (ii) the following paragraph was substituted, viz.:

"(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, it shall—

(a) in any case in which the decision is to the detriment of revenue, require the party by whom such fee has been paid, to pay so much additional fee as would have been payable had the question been rightly decided and thereafter—

(i) if the party required to pay is the appellant or petitioner, the appeal or petition shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the appeal or petition shall be dismissed;

(ii) if the party required to pay is the respondent or the opposite party, the Court shall fix a date before which such party shall pay the amount of court-fee due from him and if such party fails to pay the fee required before the date fixed by the Court, the Court shall recover the amount of such fee from him as if it were an arrear of land revenue. Where the Court considers that the amount of such fee should be paid to the respondent or the opposite party by the appellant or the petitioner, as the case may be, the Court may provide for such payment in the order as to cost in the said appeal or petition; and

(b) in any case in which the decision is that any excess fee has been levied, direct the refund of so much excess fee to the party who paid it as would not have been payable had the question been rightly decided.

*Explanation.*—For the purposes of this section a question relating to the classification of any suit in regard to section 7 shall not be deemed to be a question relating to valuation."

—Orissa Act V of 1939. [31-10-1939.]

## UNITED PROVINCES

For sub-section (ii) the following sub-section was substituted, viz. :—

"(ii). But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay, within such time as may be fixed by it, so much additional fee as would have been payable had the question been rightly decided. If such additional fee is not paid within the time fixed and the defaulter is the appellant, the appeal shall be dismissed, but if the defaulter is the respondent, the Court shall inform the Collector who shall recover the deficiency as if it were an arrear of land revenue."

—U. P. Act XIX of 1938. [9-1-1939.]

## 8. 12 (contd.)

1. Scope and object.—[1] The section has no application where the valuation is for jurisdiction (Vol. 6) 1919 Mad 95 (94) \* (Vol. 5) 1918 Lah 116 (117) \* (1912) 16 Cal L Jour 371 (373) (DB) \* ('74) 12 Beng L R 115n (115n) (DB). (Decision as to valuation of subject-matter in suit for purposes of jurisdiction is not final under this section).

[2] The appellate Court is not bound by the trial Court's valuation of the suit. ('82) 6 Bom 302 (303).

[3] The section is clearly designed in the interest of revenue as is evident from the fact that while it makes a decision as to valuation final if it is adverse to the litigant, it allows the decision to be interfered with if it is against the Crown. (Vol. 5) 1918 P C 188 (191): 43 Bom 507: 46 Ind App 24 (PC).

2. Applicability to Chartered High Court.—[1] The section does not apply to court-fees chargeable in Chartered High Court—But such High Court can interfere with decision of lower Court as regards court-fees payable in lower Court—Authority to interfere is with the

Bench of the High Court and not with the Taxing Officer therein. ('86-43) Tax Dec (Nag) 61 (64) \* ('86-45) Tax Dec (Nag) 85 (36) \* (Vol. 22) 1935 All 817 (818): 58 All 146 (FB) (Per Bennet J. in order of reference) \* (Vol. 21) 1934 Rang 283 (269): 12 Rang 335: (Vol. 12) 1925 Pat 392 (386, 397): 4 Pat 336 (FB).

[But see (Vol. 12) 1925 All 184 (184) (Taxing Officer has authority with regard to fees payable in the lower Court).]

3. "Every question relating to valuation".—[1] The words "every question relating to valuation" refer only to the actual assessment or appraisal of the value of a suit or appeal apart from any question as to whether the court-fee is to depend on the value of the suit or appeal or as to the principle according to which such value is to be assessed. (Vol. 18) 1931 Bom 254 (235) (DB) \* (Vol. 12) 1925 Nag 435 (435) \* (Vol. 11) 1924 Cal 731 (733): 51 Cal 216 (DB) (Dispute involving root questions of principle as to nature of suit and retroactive operation of statutes—Appeal is competent) \* (Vol. 8) 1919 Tab 225 (331, 332): 1919 Pan Re No.

S. 12 (*contd.*)

16 (FB) \* (Vol. 6) 1919 Owdh 98 (101): 22 Owdh Cas 289. (There is a distinction between a case where the valuation depends merely on a question of fact and one where it depends on a question of law—S. 12 does not bar an appeal in the latter case. ('12; 6 Sind L R 72 (75) (DB).)

[2] The question under what category a suit or appeal falls for purposes of court-fees is not within the purview of the section. (Vol. 29) 1942 Mad 502 (503) \* (Vol. 28) 1941 Cal 518 (519, 520) (DB) \* (Vol. 25) 1938 Nag 481 (482, 483) \* (Vol. 23) 1936 Bom 166 (166) \* (Vol. 18) 1931 Bom 234 (235) (DB) \* (Vol. 12) 1925 Nag 435 (435) \* (Vol. 12) 1925 Pat 392 (398): 4 Pat 336 (FB) \* (Vol. 6) 1919 Lau 323 (331, 332): 1919 Pun Re. No. 16 (FB) \* ('12) 6 Sind L R 72 (75) (DB) \* (1912) 16 Cal L Jour 371 (374) (DB) \* (1900) 1900 All W N 90 (92) (DB) \* ('94) 4 Mad L Jour 183 (188) (FB).

[But see (Vol. 24) 1937 Mad 81 (83, 84): I L R (1937) Mad 275 (FB) \* (1899) 11 All 91 (93) (FB) (Obiter) \* (1896) 10 Bom 610 (616) (FB).]

[3] The section does not cover questions as to the applicability of a particular provision of the Court-fees Act to a suit or appeal. (Vol. 11) 1924 Pat 673 (677): 3 Pat 930 (DB) \* ('03) 27 Bom 140 (143) (DB) \* ('78) 19 South W R 214 (214) (DB).

[4] Questions as to the construction of a particular provision with reference to a suit or appeal are not within the section. ('06) 23 All 411 (413) \* ('95) 1895 Pun Re. No. 56, p. 283 (288) (DB).

[5] The question whether a suit is chargeable with a fixed court-fee or with an *ad valorem* court-fee is not within the purview of the section. ('94) 18 Bom 209 (211) (DB). \*

[See ('75) 23 South W R 296 (297).]

[6] The question under what paragraph of S. 7A suit will fall is not within the section. (Vol. 12) 1925 Nag 435 (435) \* (1912) 16 Cal L Jour 375 (377) (DB) \* ('12) 6 Sind L R 72 (75) (DB) \* ('99) 23 Bom 486 (488) (DB) \* ('78) 1878 Pun Re. No. 67, p. 226 (227).

[7] The question whether S. 17 of the Act applies to a suit is not one within the section. ('91) 15 Bom 82 (83) (DB).

[See ('96) 23 Cal 723 (729) (FB).]

[8] Where a suit is chargeable with court-fees computed according to the market-value of the property or to the annual income from the property, the question as to what is the market-value of the property or the annual income from the property is one relating to valuation within the meaning of the section. (Vol. 27) 1940 Cal 438 (441): I L R (1940) 2 Cal 450 (DB).

[9] In cases under S. 7 (iv) where court-fee is payable according to the amount at which the relief sought is valued in the plaint, it is the duty of the Court to decide if the valuation is correct. (Vol. 22) 1935 All 849 (849) (DB) \* ('13) 40 Cal 615 (618) (DB).

[10] The Court should record evidence and decide the matter of valuation on sufficient and proper material. (Vol. 7) 1920 Sind 92 (94): 14 Sind L R 137 (DB).

[11] Enquiry made and decision arrived at by trial Court—Decision based on evidence and good reasons—Finding of trial Court cannot be disturbed. (Vol. 22) 1935 All 849 (849, 850) (DB).

4. Bengal amendment.—[1] The explanation gives statutory recognition to the view that the words "every question relating to valuation" refer only to the actual assessment or appraisal of the value of a suit or appeal and the section has no application when the question for decision is as to under what category a suit or appeal falls for purposes of court-fees. (Vol. 28) 1941 Cal 518 (520) (DB) \* (Vol. 27) 1940 Cal 451 (453): I L R (1940) 2 Cal 166 (DB).

5. "Fees chargeable under this chapter."—[1] The section does not apply to court fees payable in a Chartered High Court. (Vol. 22) 1935 Pat 396 (397): 14 Pat 658 (SB) \* (Vol. 12) 1925 Pat 392 (396, 397): 4 Pat 336 (FB). (High Court cannot interfere under S. 12 (ii) with decision of Taxing Officer as to court-fee on appeal filed in High Court).

6. "Plaint or memorandum of appeal."—[1] The section applies to a written statement claiming a set off. (Vol. 23) 1936 Cal 277 (278) (DB) \* (Vol. 18) 1926 Bom 343 (344) (DB).

7. Power of Court in which suit or appeal is filed, with regard to court-fee.—[1] The question of valuation is a preliminary one and must be decided by the Court before proceeding with the trial. (Vol. 18) 1926 Cal 427 (427) (DB).

[2] The question of valuation can be decided at any stage of the suit. (Vol. 22) 1935 Mad 569 (571): 53 Mad 1051 \* (Vol. 33) 1946 Mad 433 (433, 484).

[3] The power can be exercised even after remand by the appellate Court. (Vol. 22) 1935 Mad 569 (571): 53 Mad 1051.

[4] Where the question of valuation cannot be decided without further inquiry, the proper procedure is to register the plaint, hold an enquiry and determine the fee payable. (Vol. 17) 1930 Cal 65 (66): 57 Cal 587 (DB).

8. Court not having jurisdiction—Effect as to court-fee.—[1] The Court having no jurisdiction over the suit cannot ask the plaintiff to pay deficit court-fee before returning the plaint. (Vol. 20) 1933 Nag 312 (313): 29 Nag L R 367 \* (Vol. 19) 1931 Mad 69 (70) \* (Vol. 18) 1931 Mad 67 (69) (DB).

[2] The Court having no jurisdiction over suit cannot dismiss the suit for non-payment of deficit court-fee. (Vol. 20) 1933 Nag 312 (313): 29 Nag L R 367 \* (Vol. 14) 1927 Bom 257 (258, 259): 51 Bom 236 (DB).

[3] Where the plaint is returned for presentation to the proper Court, the plaintiff can take advantage of the court-fee paid on the previously filed plaint and



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can pay the deficit court-fee in the Court to which the plaint is re-presented. (Vol. 14) 1927 Bom 257 (253, 259); 51 Bom 236 (113) \* (Vol. 11) 1924 Pat 694 (695); 3 Pat 815 (DB) \* ('70) 5 Beng L R (App) 15 (16) (DB).

9. "Decision", what constitutes.—[1] No formal or express decision is necessary for the purpose of constituting a "decision" under sub-s. (i). (Vol. 14) 1927 Cal 775 (775) (DB).

[2] The decision may be implied in the circumstances of a case. ('95) 1895 Pun Re No. 96, p. 455 (DB).

[3] The question of valuation need not be distinctly raised and decided by the Court in order that there may be said to be a "decision" on valuation. (Vol. 22) 1935 Lah 698 (710) (DB) \* (Vol. 13) 1926 Mad 96 (97) (DB) \* ('81) 7 Cal 343 (350, 351) (DB).

[But see (Vol. 4) 1917 Low Bur 179 (180) (DB) \* ('74) 22 Suth W R 433 (434) (DB).]

[4] The very fact that the Court has accepted a plaint or memorandum of appeal and disposed of it will amount to a decision that the court-fee paid is sufficient. (Vol. 27) 1940 Mad 383 (384); 1 L R (1940) Mad 646 (D.) \* (Vol. 33) 1946 Mad 483 (483, 484) \* (Vol. 26) 1939 Sind 279 (280, 281); 1 L R (1939) Kar 469 (DB) (In revision, High Court can levy additional fee in such a case) \* ('13) 21 Ind Cas 943 (944) (DB) (al) \* ('12) 1912 Pun W R No. 136 Page 361 (364); 1912 Pun Re No. 109 (FB) ((1901) 1901 Pun Re No. 13 and 1884 Pun Re No. 115 overruled).

[5] Different views are held as to whether a mere *ex parte* decision by the Court, at the time of admitting a plaint or memorandum of appeal, that the court-fee paid is sufficient is a "decision" entitled to finality under Sub-s. (i) :—

[a] Such *ex parte* decision is not a decision as contemplated by sub-s. (i) (Vol. 29) 1942 Oudh 385 (386) \* (Vol. 28) 1941 Nag 217 (219); 1 L R (1942) Nag 588 (20 All 11 and (Vol. 20) 1935 Pat 234; 12 Pat 394 followed) \* ('98) 20 All 11 (16) (FB).

[b] Decision given only on hearing the plaintiff's or appellant's advocate and without hearing the other side would be entitled to finality. (Vol. 28) 1941 Mad 626 (627, 628) (The only essential thing is that the Court should apply its mind to the questions at issue in arriving at the true calculation of the court-fee) \* (Vol. 23) 1935 Mad 927 (928).

[c] The mere filing of a plaint or memorandum of appeal by the ministerial officer would amount to a decision by the Court that the court-fee paid is sufficient. (Vol. 13) 1926 Mad 96 (99) (DB).

[6] A decision in order to come under sub-s. (i) must have been arrived at for the purpose of court-fees and not incidentally while deciding the question of jurisdiction. (Vol. 5) 1918 Lah 116 (117).

[7] Court ordering plaintiff to pay proper court-fee by making up the deficit. Suit tried on plaintiff's

undertaking to pay.—Suit decided in favour of plaintiff—Plaintiff appealing only on point of costs without making up deficit. Appellate Court cannot ask the plaintiff under S. 12 (ii) to make up the deficit. In such cases plaintiff's appeal should not be heard unless he makes up the deficit by complying with the order of the Court. (Vol. 11) 1924 Cal 933 (955) (DB).

10. Finality of decision under Sub-section (i).—[1] The term "final" in this section has the same meaning as in S. 5. ('90) 12 All 129 (152) (FB).

[2] 'Final' means conclusive. (Vol. 24) 1937 Mad 46 (51); 1 L R (1937) Mad 284 (DB).

[3] There is an exception to the finality conferred by sub-s. (i) provided for by sub-s. (ii) (Vol. 22) 1935 Cal 338 (339) (DB) \* (Vol. 14) 1927 Bom 643 (646); 52 Bom 61 (DB) \* (Vol. 2) 1915 Mad 271 (272) (DB).

11. Order as to court-fee. Appealability of.—[1] An order assessing the court fee on a plaint or memorandum of appeal or assessing the value of a suit or appeal for purposes of court-fee is not appealable. (Vol. 30) 1943 Nag 315 (317); 1 L R (1943) Nag 802 \* (Vol. 28) 1936 Cal 784 (785) (DB) \* (Vol. 14) 1927 Lah 775 (776) (DB) \* (Vol. 1) 1914 Lah 153 (153); 1914 Pun Re No. 80 (DB).

[2] Order as to court-fee falling under sub-s. (i) — Order is not open to challenge in appeal from decree unless decision of Court is detrimental to public revenue. (Vol. 22) 1935 Cal 338 (339) (DB) \* ('94) 18 Bom 209 (211) (DB).

[3] Where order does not fall under sub-s. (i) it can always be challenged in appeal. ('87) 1887 Bom P J 86 (DB) (Question whether suit admits of valuation — Appeal lies against an order of dismissal).

[4] Court-fee on letters of administration.—District Court granting refund holding that S. 19-D applied — Collector appealing on the ground that S. 19-D did not apply.—Held that appeal would have lain if Collector had been party to order but that in this case he was not a party and so the appeal did not lie.—But the High Court in the exercise of its extraordinary jurisdiction interfered with the order as the District Judge had acted without jurisdiction. ('08) 27 Bom 140 (143) (DB).

[5] On the question of appealability of the order rejecting plaint for insufficiency of court-fee, the following different views are held :

[a] Order will not be open to challenge by the appellate Court if the decision merely relates to the assessment of the value of the suit. (Vol. 6) 1919 Pat 270 (275); 4 Pat L Jour 57 (DB).

[b] Where the decision of the Court is not concerned merely with the appraisal of value of the suit but relates to its classification for purposes of court-fees, the decision will be open to attack in appeal. (Vol. 6) 1919 Pat 270 (275); 4 Pat L Jour 57 (DB) \* ('94) 4 Mad L Jour 183 (183) (FB) \* ('93) 17 Bom 56 (60) (DB).

[See also (Vol. 8) 1919 Pat 527 (527) (DB).]

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[c] Notwithstanding the provision as to finality in the section the decision of the trial Court as to valuation can be challenged in appeal. ('10) 5 Ind Cas 18 (19) (DB) (Cal).

[See ('81) 6 Cal 249 (250) (DB).]

[See also (Vol. 24) 1937 Mad 81 (84): I L R (1937) Mad 275 (FB).]

[d] The decision of the trial Court as to the sufficiency of court-fee is not open to challenge at all. ('85) 9 Bom 355 (357) (DB) \* ('78) 2 Bom 219 (224) (DB).

[6] The fact that the decision of trial Court regarding court-fee is not open to attack in appeal will not make the case one in which no appeal lies. (Vol. 1) 1914 Lah 153 (153-155): 1914 Pun Re No. 80 (DB) \* (1889) 11 All 91 (93) (FB).

[7] Order rejecting plaint for failure to pay additional Court-fee is such a complete and final determination of the rights of the parties that there is no room in any appeal from such order for the proposition that the subject-matter in appeal is not the same as the subject-matter in the original suit and same court fee is payable on the appeal as on plaint. (Vol. 22) 1935 Nag 83 (86) (FB).

[8] Plaint rejected for undervaluation—Plaintiff appealing and putting same value on appeal as on plaint—Appeal cannot be rejected as insufficiently stamped without investigating true value of suit property. (Vol. 13) 1926 Cal 427 (427) (DB).

[9] Order rejecting the plaint amounts to a decree and the memorandum of appeal from that decree must bear *ad valorem* court-fee. (Vol. 8) 1921 Lah 43 (43) (DB).

12. Revision against orders as to court-fee.—[1] The duty of fixing the court-fee is cast by law on the trial Court and the trial Courts' decision is ordinarily final. (Vol. 29) 1942 Mad 445 (446).

[2] In a revision against an order on an application for attachment before judgment or temporary injunction, the subject-matter of the suit is not before the High Court and the High Court cannot interfere with the decision of the lower Court in regard to the court-fee in the suit. (Vol. 24) 1937 Mad 325 (326).

[See also ('37) 172 Ind Cas 212 (213) (Pat).]

[3] Where the decision of the lower Court relates to the classification of the suit for purposes of court-fee and not merely to the actual assessment of the value of the suit for purposes of court-fees, the decision can be questioned by the High Court when the suit goes before it in revision. (Vol. 28) 1941 Cal 518 (519, 520) \* (Vol. 12) 1925 Mad 713 (714) \* (Vol. 11) 1924 Pat 673 (677): 3 Pat 930 (DB) \* ('10) 5 Ind Cas 141 (142) (DB) (Cal).

[See (Vol. 20) 1933 Mad 367 (367).]

[4] Where the decision relates only to the assessment of the value of the suit, it is not liable to be questioned in revision before the High Court, unless the decision is detrimental to the public revenue. (Vol. 27) 1940 Mad 821 (821) \* (Vol. 26) 1939 Sind 279 (280): I L R (1939) Kar 469 (DB) \* (Vol. 33) 1946 Nag 160 (161) \* (Vol. 11) 1924 Pat 673 (675): 3 Pat 930 (DB).

[But see (Vol. 28) 1941 Cal 509 (511, 512) (DB). (Where the only question is one of valuation, an appeal being excluded under S. 12 (i), the remedy of revision is open, though the revisional power should be exercised only in a proper case) \* ('86) 10 Bom 610 (616) (FB)].

[5] An order as to court-fee which is unfavourable to the plaintiff is open to revision. (Vol. 21) 1934 Oudh 212 (213) (DB) \* (Vol. 29) 1942 Mad 585 (585) \* (Vol. 29) 1942 Pat 60 (62): 20 Pat 780 (DB) \* (Vol. 25) 1938 Nag 122 (126): I L R (1938) Nag 106 (FB) \* (Vol. 25) 1938 Pat 22 (25): 18 Pat 766 (FB) \* (Vol. 22) 1935 Cal 279 (280): 62 Cal 417 (DB) \* (Vol. 20) 1933 All 350 (351, 352): 55 All 274 (DB) \* (Vol. 16) 1929 Mad 398 (397) (DB).

[See (Vol. 30) 1943 Nag 315 (317): I L R (1943) Nag 802] \*

[But see (Vol. 29) 1942 Pesh 23 (24) (Order requiring payment of more court-fee is merely an interlocutory order and does not amount to the decision of a case). (Vol. 26) 1939 Mad 380 (382) \* ('37) I L R (1937) Lah 430 (432) \* (Vol. 21) 1934 All 620 (622): 57 All 17 (FB) \* ('13) 1913 Pun L R No. 115 Page 416 (417). \* (Vol. 25) 1938 Lah 80 (81): I L R (1938) Lah 377 (The plaintiff having another remedy open to him, that of appeal—The remedy by way of revision is not open to him (Vol. 6) 1919 Cal 840 (841) (DB) \* ('12) 1912 Pun L R No 212 page 675 (676): 1912 Pun Re No. 69 (DB) \* ('02) 5 Oudh Cas 319 (320).]

[6] (a) Where the order as to court-fee is favourable to the plaintiff, it has been held that an application for revision will not lie. (Vol. 30) 1943 Nag 315 (317): I L R (1943) Nag 802 \* (Vol. 28) 1941 Cal 518 (520) (DB) \* (Vol. 25) 1938 Nag 122 (126): I L R (1938) Nag 106 (FB) \* (Vol. 25) 1938 Pat 22 (25): 18 Pat 766 (FB) \* (Vol. 20) 1933 Mad 506 (508): 56 Mad 744 (DB) \* (Vol. 12) 1925 Cal 814 (816) (DB).

[6] (b) An order as to court-fee, though favourable to the plaintiff, will be open to revision if the order involves a decision as to valuation for jurisdiction also and results in the case being held to be triable by a Court which, if the decision had been otherwise, would not have jurisdiction to try the suit. (Vol. 27) 1940 Mad 821 (822) \* (Vol. 26) 1938 Cal 161 (161) \* (Vol. 23) 1936 Mad 411 (411, 412):

[See however (Vol. 22) 1935 Pat 191 (192) (Erroneous decision as to valuation and incidentally raising the question of court-fee is not revisable).]

[7] Appeal dismissed for failure to pay additional court-fees called for—Revision lies. (Vol. 23) 1936 Pesh 140 (141).

[8] Application to sue as pauper being refused, date was fixed before which plaintiff was directed to pay court-fee—Court-fee not paid but request to extend

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time was made—Request not granted and plaint rejected—Appeal from this order dismissed on ground that appeal was from order refusing to extend time—*Held*, the appeal was from order rejecting plaint and the order dismissing appeal was revisable. (Vol. 16) 1929 Lah 125 (125).

[9] Suit being under-valued plaintiff asked to amend valuation and pay additional court-fees—Application by plaintiff to sue *in forma pauperis* disallowed and plaint rejected—Plaintiff filed revision against order refusing to allow him to continue suit *in forma pauperis*—*Held*, the order disallowing the plaintiff's application to continue suit *in forma pauperis* had become merged in the order rejecting plaint and that the latter order was appealable as a decree, and the application for revision was not maintainable. (Vol. 12) 1925 Lah 191 (192).

[10] Order of a Court refusing to adjourn a case in order to enable a party to pay court-fee—No revision lies against it. (Vol. 10) 1923 All 118 (119): 45 All 218 (DB).

13. Reference to High Court.—[1] Court in which an appeal is filed cannot refer the question as to the proper court-fee payable on such appeal to the High Court Order 46 Rule 1 of the Civil Procedure Code does not contemplate a reference on such a point. ('06) 1906 All W N 180 (180) (DB).

[2] A Subordinate Judge has no jurisdiction to refer a doubtful question of court-fees payable on a copy of a receipt, to the High Court similar to the power under S. 60 of the Indian Stamp Act. ('03) 27 Bom 150 (154) (SB).

14. Deficiency of court-fee in lower Court—Power of Court of appeal or revision.—[1] The appellate Court has a general power to call upon a party to make good the deficient court-fee chargeable in the lower Court. (Vol. 9) 1922 Pat 284 (286): 1 Pat 471 (DB) \* ('80) 2 All 682 (684) (FB) (Power of High Court to require parties to pay additional court-fees in respect of documents presented to lower Courts is not limited to S. 12 (ii) and the High Court has full power of interference under S. 28 quite outside chapters II and III).

[See (Vol. 16) 1929 P C 147 (148): 10 Lah 737: 56 Ind App 232 (PC).]

[2] Whether the question involved is one of valuation on which the lower Court has pronounced a particular decision or of the category of the suit for purposes of court-fees, if the full court-fee has not been paid in the lower Court, the appellate Court has clear authority to interfere and require the deficit to be made up. (41) 16 Luck 526 (528) (DB) \* (Vol. 24) 1937 Mad 81

(84): 1 L R (1937) Mad 275 (FB) \* (Vol. 23) 1936 Cal 277 (278) (DB) \* (Vol. 13) 1936 Bom 343 (344) (DB).

[3] It is the duty of the appellate Court to see that proper court-fees are paid not only in regard to the proceeding before itself but also with regard to the proceeding in the lower Court. (Vol. 29) 1943 Bom 151 (151) (DB) \* (Vol. 17) 1930 Cal 686 (689, 690): 58 Cal 281 \* (Vol. 5) 1918 Pat 623 (624): 3 Pat L Jour 101 (DB).

[4] Unless the appeal has been admitted or registered by the Court the case or matter cannot be said to be before the Court in such a shape as to give it jurisdiction to pass any order under the section. (Vol. 17) 1930 Cal 65 (68): 57 Cal 587 (DB) \* (Vol. 14) 1927 Cal 775 (775) (FB) \* (Vol. 8) 1921 Pat 83 (99): 6 Pat L Jour 293 (DB) \* (Vol. 7) 1920 Pat 827 (828): 5 Pat L Jour 508 (DB) \* ('92) 15 Mad 181 (132) (DB) \* ('91) 1 Mad L Jour 528 (529) (DB).

[5] Sub-S. (ii) cannot be held to empower a Court of appeal to which an appeal has been wrongly presented to pass orders for the payment of the additional fees therein alluded to. ('92) 1892 Pun Re No. 86, p. 299 (300) (DB).

[6] Appeal relating only to a part of the subject-matter of the suit—*Held* that the appellate Court has power to levy additional court-fee in respect of the suit in the lower Court. ('36) 63 Cal 720 (725).

[But see (Vol. 25) 1938 Mad 278 (279): 1 L R (1938) Mad 309 (DB) (Appellate Court acting under S. 12 (ii) can realise the deficit court-fee only in respect of that part which is under appeal).]

[7] Where a plaintiff files cross-objections but fails to pay the proper court-fees thereon and subsequently appeals to the High Court from the decree allowing the defendant's appeal but does not file any appeal against the dismissal of the cross-objections, the High Court held, has inherent power to refuse to entertain the second appeal till the proper court-fees on the cross-objections have been paid. (Vol. 9) 1922 Pat 284 (286): 1 Pat 471 (DB). (15 Mad 181 Distinguished.)

[8] Once an appeal has been disposed of, the appellate Court is *functus officio* and cannot call for the payment of any deficiency in court-fees payable in the lower Court. (Vol. 26) 1939 Sind 279 (280): 1 L R (1939) Kar 469 (DB) \* (Vol. 33) 1946 Sind 58 (60): 1 L R (1945) Kar 313 \* ('36-43) Tax Dec (Nag) 124 (125) \* (Vol. 20) 1933 Lah 208 (208) \* (Vol. 19) 1932 All 316 (317) \* (Vol. 16) 1929 Oudh 483 (483): 5 Luck 229 \* (Vol. 12) 1925 Lah 181 (181) \* (Vol. 6) 1919 Pat 9 (10): 4 Pat L Jour 472 (FB) \* (Vol. 3) 1916 Low Bur 58 (59) (DB).

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[9] Provisions regarding the levy of additional court-fees apply only to pending cases. (Vol. 3) 1916 Low Bur 58 (59) (DB) \* (Vol. 22) 1935 Lah 75 (76) \* (Vol. 20) 1935 Mad 321 (321) \* (Vol. 16) 1929 Oudh 483 (483) : 5 Luck 229 (DB) \* (Vol. 6) 1919 Cal 194 (194) : 46 Cal 520 (DB) \* (Vol. 6) 1919 Pat 9 (10) : 4 Pat L Jour 472 (FB) \* ('85) 7 All 528 (532) (DB).

[10] Where the appellate Court considers that plaintiff has not paid proper fee in the trial Court, the hearing of the appeal must be stayed and if the deficit is not made up within the time allowed, the appeal and suit must both be dismissed. (Vol. 5) 1918 Pat 210 (211) : 3 Pat L Jour 443 \* ('98) 20 All 362 (364) \* ('95) 18 Mad 415 (417) (DB).

[See (Vol. 24) 1937 All 280 (281, 282) : I L R (1937) All 484 : (The appellate Court had no power to reject the memorandum of appeal properly stamped under O. 7, R. 11 (c) and R. 12 on the ground that the court-fee (included in the costs) on the plaint was not paid by the pauper).]

[11] Where the defaulting plaintiff is the respondent in the appeal the appellate Court can refuse to hear his counsel till the deficit is made up. (Vol. 16) 1929 All 577 (577) : 51 All 886 (DB).

[12] Different views are held as to whether the appellate Court should dismiss the suit of the plaintiff-respondent in the lower Court on the ground of his failure to make up the deficit :

(a) Where deficit is not made up within time allowed, defaulting plaintiff-respondents' suit in the lower Court may be dismissed. (Vol. 27) 1940 Mad 674 (675) \* (Vol. 7) 1920 Pat 656 (659) : 4 Pat L Jour 708 (DB) \* (Vol. 7) 1920 Oudh 167 (169) : 22 Oudh Cas 388 \* ('13) 1913 Pun L R No. 235 page 734 (738) (DB).

[But see ('92) 15 Mad 288 (289) (DB) (The order of the appellate Court dismissing plaintiff's suit while the defendant's appeal was pending was irregular).]

(b) Failure to pay the proper court-fee in the lower Court is only an irregularity not affecting the merits of the case or the jurisdiction of the Court and cannot be made a ground for reversing the decree passed by the lower Court in favour of the defaulter. (Vol. 12) 1925 Rang 65 (67) : 2 Rang 462 \* (1903) 6 Oudh Cas 185 (189) \* (1902) 29 Cal 651 (654) (DB) \* (1880) -2 All 889 (890, 891) (DB).

(c) The provisions of S. 10 (ii) are incapable of application. The proper procedure in such cases is not to dismiss the respondents' suit or appeal in the lower Court but to stay the issuing of the decree of the appellate Court, if any, in the plaintiff-respondents' favour. ('06) 23 All 270 (272) (FB). (1905 All W N 277 overruled) \* (Vol. 5) 1913 Pat 210 (211) : 3 Pat L Jour 443.

[But see (Vol. 29) 1942 Bom 151 (152) (DB). (Sub-S (ii) is not confined to appeals by the plaintiffs but applies even if the defendant is the appellant).]

[13] Where the failure to make good the deficit is not wilful, the Court may accept the deficit court-fee even after the expiry of the time given. ('76) (1876) Pun Re No. 84 p. 169 (170) (DB).

[14] The appellate Court cannot order the attachment of property for recovery of deficit court-fee. (Vol. 19) 1932 All 316 (317).

[15] The power of interference under sub-s. (ii) in cases of insufficiency of court-fee is conferred on a Court of revision. (Vol. 2) 1915 Cal 622 (623) (DB).

**15. Order as to court-fees—Alteration by same Court.**—[1] Where a Court has passed a judicial order fixing the valuation of a suit or appeal for purposes of court fees, it is not open to the same Court to vary or re-open it afterwards. (Vol. 28) 1941 Mad 626 (627, 628) \* ('38) 2 Mad L Jour 647 (647, 648).

[2] An order under Sub-s. (i) can be altered on an application for review. (Vol. 23) 1936 Pesh 213 (214) \* (Vol. 12) 1925 Pat 47 (47, 48) : 3 Pat 654 (DB) \* (Vol. 11) 1924 Pat 673 (673) : 3 Pat 950 (DB).

[3] A finding as to the value of the property in suit for purposes of court-fees does not preclude the same Court from afterwards coming to the conclusion that it has no jurisdiction to try the suit on the ground that on a proper valuation of the property the suit would go beyond its pecuniary jurisdiction. (Vol. 29) 1942 Mad 502 (503).

**16. Finality of order under sub-section (ii).**—[1] An order passed under sub-s. (ii) can be reconsidered by the Court of appeal, reference or revision by which it was passed. (Vol. 28) 1941 Mad 626 (627).

**17. Objection as to court-fee when to be taken.**—[1] An objection as to insufficiency of court-fee paid on the plaint or memorandum of appeal can be raised at any time before the case is finally disposed of by the Court. (Vol. 20) 1933 Pat 234 (235) : 12 Pat 694.

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[2] An objection as to under-valuation will not be precluded under sub-s. (ii) from being raised before the appellate Court. (Vol. 20) 1933 Pat 234 (235): 12 Pat 694.

[See also (Vol. 13) 1926 Bom 343 (344) (DB)].

[3] Where the question requires further inquiry for its decision, it will not be allowed to be raised for the first time in appeal or second appeal. (Vol. 12) 1925 Lah 241 (241) (DB). (Second appeal).

[See also (91) 13 All 580 (580) (DB).]

[4] Though in practice a party is permitted to raise an objection that proper court-fee has not been paid by his opponent, he has no legal right to raise such a plea, his function being merely to assist the Court in coming to a proper decision. (Vol. 22) 1935 Mad 927 (928).

[5] Where an appeal is against a decree which does not contain direction ordering plaintiff to make good deficiency in court-fee, omission to include in memorandum of appeal ground expressly challenging finding on question of court-fee is immaterial. (Vol. 17) 1930 All 445 (444): 52 All 56.

[6] Suit for possession—Through his mistake in calculation plaintiff paying less court-fee but making good deficiency as soon as mistake was discovered, though after limitation—Suit decreed—In appeal defendant contending that suit was barred by limitation as deficit court-fee was paid after limitation—Held, plea should have been raised in the Court of first instance and Court must be deemed to have decided question adversely to defendant. (97) 19 All 165 (168) (DB).

18. Estoppel on question of court-fees.—A party who acquiesces in an erroneous decision of the Court on the question of court-fees is not precluded by his conduct from contesting that decision subsequently if, on reflection, he finds that he has acted in injudicious manner in acquiescing in that erroneous decision. (Vol. 11) 1924 Nag 105 (107). (Suit for partition brought on a stamp of Rs. 10—Acting on allegations in defence Court holding it to be a suit for ejectment and calling upon plaintiff to pay *ad valorem* court-fee—Plaintiff thereupon applying for permission to sue *in forma pauperis*—Permission refused—In appeal by plaintiff appellate Court holding that suit was for partition and court-fee of Rs. 10 was sufficient) \* (11) 38 Cal 681 (686) (DB).

[2] The mere fact that defendant does not raise objection in the trial Court does not create any estoppel against him and preclude him from contending in appeal that the court-fee paid by the plaintiff was unnecessarily high. (Vol. 14) 1927 All 308 (308): 49 All 398.

[3] Where the court-fee on the plaint is raised on the contention of the defendant himself in the trial Court, the defendant in appeal by him cannot be allowed to reduce the court fee on the memorandum of appeal because it suits his own purpose to do so. (Vol. 20) 1933 Nag 362 (364).

[4] Where on the objection of the defendant as to insufficiency of court-fee on the plaint an issue is framed by the trial Court and is decided in plaintiff's favour and the defendant, accepting the decision of the trial Court, pays the same Court-fee on his memorandum of appeal in the lower appellate Court without impeaching the correctness of the finding of the trial Court, he cannot raise the objection again in the second appeal by the plaintiff. (Vol. 4) 1917 Lah 386 (387) (DB).

[5] Where objection as to insufficiency of court-fee on plaint is raised by the defendant in his written statement but no issue is directed to the question and the defendant in his appeal pays the same court-fee on the memorandum of appeal without raising any objection in the appeal, he cannot raise the question again in the lower Court after the appellate Court remands the case for re-trial. (07) 6 Cal L Jour 651 (658) (DB).

[6] Where objection was raised for the first time in second appeal that in suit for ejectment of tenant stamped under S. 7 (xi) (cc), plaintiff should not have been granted a decree on basis of title it was held that in the circumstances of the case the question could not be reopened. (Vol. 14) 1927 Nag 321 (322).

19. Admission regarding court-fees.—[1] An admission by a party on a question of computation of court-fee is not conclusive against him. (Vol. 15) 1928 Cal 55 (56) (DB).

[2] An erroneous admission by the counsel of an appellant that the appeal was understamped does not bind him. (Vol. 16) 1929 Lah 979 (980) (DB).

20. Compromise on question of court-fee.—[1] There cannot be any question of compromise between the parties and the Court on the subject of court-fee (Vol. 20) 1933 Lah 905 (908): 14 Lah 553 (DB) (Obiter).

21. Government's right to be heard as regards court-fees payable.—[1] The question of court-fee is important from the point of view of Government as it concerns the revenue. (Vol. 18) 1931 All 659 (659) (DB).

[2] Government has no right to be heard before an order is made as regards the proper court-fee payable. (Vol. 22) 1935 Mad 927 (928).

[3] Court, if it thinks proper, may give the Government pleader an opportunity to be heard in a particular case. (See (1910) 12 Cal L Jour 211 (218) (DB).)

**13.** If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be remanded in appeal, or if a suit is remanded in appeal, on any of the grounds mentioned in section 351 of the same Code for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

Provided that if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall not authorize the appellant to receive back more than so much fee as would have been originally payable on the part or parts of such subject-matter in respect whereof the suit has been remanded.

[a] See now Act V of 1908.

[b] See now Act V of 1908. Sch I, O. 41, R. 23.

### PROVINCIAL AMENDMENT

#### S. 13-A.

##### N.-W. F. P.

After S. 13 the following section was added, namely:—

"13-A. If the Court of the Judicial Commissioner on an application presented to it for the exercise of its jurisdiction under section 34 of the North-West Frontier Province Courts Regulation, 1931, sets aside or modifies a decree or order of the Court below, or remands the case for a fresh decision, the Court of the Judicial Commissioner may grant to the applicant a certificate authorizing him to receive back from the collector the full amount of fee or such part thereof as the Court having regard to the circumstances of the case may think fit".

—N.-W. F. P. Act I of 1947, S. 2. [17-1-1947].

#### SECTION 13—Synopsis.

1. Scope.
2. Inherent power to refund court-fees.
3. Remand under inherent power—Refund of court-fees.
4. Remand under O. 41 R. 23, Civil Procedure Code—Refund of court-fees.
5. Partial remand—Proportionate refund of court-fee.
6. Return of plaint for presentation to proper Court.
7. Rejection of plaint or appeal for deficiency of court-fee—Power to refund court-fee already paid.
8. Withdrawal of suit or appeal.
9. Refund of court-fees in High Court.
10. Excess court-fees paid in Lower Court—Credit in appellate Court.
11. U. P. Amendment.
12. Setting aside of execution sale—Refund of poundage-fee.
13. Court-fee on application for refund.
14. Loss of certificate under section.
15. Use of wrong stamps.

**1. Scope.**—[1] Appellate Court under this section is required to issue certificate authorising appellant to receive back from revenue authorities court-fee paid on memorandum of appeal. (Vol 22) 1935 Bom 69 (70) (DB) \* (Vol 21) 1934 Lah 941 (942) \* (Vol 16) 1929 Lah 145 (146) \* (13) 21 Ind Cas 866 (867) (DB) (Cal).

[2] High Court cannot order refund of court-fees paid in lower appellate Court. (Vol 25) 1938 Mad 479 (482) (DB) (Remand in Letters Patent Appeal—No certificate for refund of court-fee paid on memorandum of appeal in second appeal or first appeal can

be granted) \* (Vol 21) 1934 All 106 (107): 56 All 526 (SB).

[3] Section does not authorise refunding of court-fees paid on memorandum of cross-objections. (198) 1898 Bom P. J. 72 (DB).

[4] In execution, decree-holder praying for attachment of movables and paying custody fees—Decree-holder not proceeding with execution case and praying for refund of amount—Fee could be refunded. (Vol 24) 1937 Cal 86 (88): 1 L R (1937) 1 Cal 624 (DB).

[5] Order for adding court-fees on appeal to costs payable by respondent is not contemplated by this section. (1912) 15 Cal L Jour 658 (660) (DB).

**2. Inherent power to refund court-fees.**—[1] Excess court-fee paid by mistake or otherwise—Courts have inherent power, *ex debito justitiae*, to order refund of such court-fees. (Vol 30) 1943 Bom 50 (52): 1 L R (1943) Bom 25 (DB) \* (Vol 29) 1942 Cal 539 (542): 1 L R (1942) 2 Cal 253 \* (Vol 27) 1940 Mad 208 (209) \* (Vol 23) 1936 Cal 347 (348) (DB) \* (Vol 23) 1936 Rang 208 (210): 14 Rang 173 (FB) \* (Vol 22) 1935 All 455 (456) \* (Vol 20) 1933 Lah 351 (351) (DB) \* (Vol 19) 1932 Mad 488 (489): 55 Mad 641 (DB) \* (Vol 17) 1930 All 471 (471): 52 All 546 (DB) \* (Vol 15) 1928 Pat 35 (36): 6 Pat 599 (DB) \* (28) 107 Ind Cas 825 (825) (DB) (Pat) \* (Vol 14) 1927 Sind 192 (192) \* (Vol 12) 1925 Oudh 89 (42) (DB).

[See (Vol 24) 1937 Cal 86 (88): 1 L R (1937) 1 Cal 624 (DB).]

[But see (Vol 7) 1920 All 54 (55) (DB).]

[2] No question of excess court-fee having been paid—Court has inherent power to order refund if necessary for ends of justice. (Vol 23) 1936 Lah 301 (304) \* (Vol 21) 1934 Cal 615 (616) (DB) \* (Vol 20) 1933 Oudh 170 (170): 7 Luck 588 (DB) \* (Vol 33) 1946 Oudh 9 (10) (DB).

**Section 13 (contd.)**

[See also Note 3].

[But see (Vol 27) 1940 Mad 451 (452) (DB) \* (Vol 24) 1937 All 505 (506) (DB) \* (Vol 23) 1936 Rang 208 (210): 14 Rang 173 (FB) \* (Vol 22) 1935 Cal 707 (709) (DB) \* (Vol 22) 1935 Pesh 8 (10) (DB) \* (Vol 21) 1934 Mad 566 (566): 57 Mad 1028 (DB) \* (Vol 15) 1928 Pat 35 (36): 6 Pat 599 (DB) \* (14) 7 Low Bur Rul 90 (92) (DB).]

[3] In the absence of express statutory provisions, certificate issued under this section is only of recommendatory force and revenue authorities are not bound to grant refund. (Vol 23) 1936 Rang 352 (353) \* (Vol 21) 1934 Mad 84 (84): 57 Mad 542 \* (Vol 20) 1933 Lah 351 (351) (DB) \* (Vol 19) 1932 Mad 438 (439): 55 Mad 611 (DB).

[But see (Vol 23) 1936 Rang 208 (211): 14 Rang 173 (FB) \* (Vol 22) 1935 Cal 707 (709) (DB).]

[4] Pauper suit—Defendant ordered by trial Court to pay court-fees—On appeal order reversed and plaintiff ordered to pay court-fee—Defendant claiming interest from plaintiff—Court has discretion under Civil P.C.S. 151 to award interest. (Vol 24) 1937 Mad 178 (179) (DB).

**3. Remand under inherent power—Refund of court-fees.**—[1] Court has no inherent power to order refund of court-fees paid on memorandum of appeal where remand order is not based on any of the grounds mentioned under O. 41 R. 23. (Vol 24) 1937 Nag 268 (269): I L R (1937) Nag 519 \* (Vol 23) 1936 Rang 208 (210): 14 Rang 173 (FB) (overruling (Vol 18) 1926 Rang 129: 4 Rang 66) \* (Vol 22) 1935 Pesh 8 (10) \* (Vol 20) 1933 Pesh 101 (101) (DB) \* (Vol 14) 1927 Lah 886 (886) \* (Vol 3) 1916 Nag 17 (18): 12 Nag L R 126.

[But see (Vol 26) 1939 Lah 257 (258) \* (Vol 20) 1933 Lah 135 (135) \* (Vol 24) 1937 All 284 (285).]

[2] If remand can be deemed to have been made under O. 41 R. 23, appellant would be entitled to refund of court-fees even though Court erroneously purports to act under s. 151. (Vol 21) 1934 Mad 643 (643, 644).

**4. Remand under O. 41 R. 23, Civil Procedure Code—Refund of court-fees.**—[1] Suit remanded for fresh trial under O. 41 R. 23—Appellate Court must order refund of court-fees paid on memorandum of appeal. (Vol 24) 1937 All 465 (466) \* (Vol 20) 1933 Lah 47 (48) \* (Vol 2) 1915 Low Bur 70 (71): 8 Low Bur Rul 155 \* (Vol 32) 1945 Mad 351 (352).

[2] Provision for refund of court-fees under this section is mandatory. (Vol 20) 1933 Lah 135 (135) \* (Vol 17) 1930 Lah 441 (442) \* (Vol 18) 1926 Nag 265 (267) \* (Vol 5) 1918 Bom 157 (157, 158): 42 Bom 863 (DB) (Refusal to grant such a certificate is a material irregularity within the meaning of S. 115 Civil P. Code).

[3] Order of remand not under O. 41 R. 23—Section will not apply. (27) 1927 Mad W N 761 (763, 764) (DB) \* (Vol 5) 1918 Pat 260 (261): 3 Pat L Jour 116 (DB).

[4] As to whether Court can order refund of court-fees in above cases, see Note 3.

[5] Refusal to order refund under this section indicates that remand is not under O. 41 R. 23. (Vol 19) 1932 Lah 311 (311).

[6] This section applies to remand under O. 41 R. 23 by High Court in second appeal. (Vol 19) 1932 All 641 (642): 54 All 1081 \* (Vol 19) 1932 All 550 (551): 54 All 523 (DB).

[7] Words "memorandum of appeal" in this section refer to memorandum of appeal to Court which orders remand. (Vol 21) 1934 All 106 (107): 56 All 526 (FB).

**5. Partial remand—Proportionate refund of court-fee.**—[1] Order of remand covers part of subject-matter of suit—Appellant can have refund in respect of only proportionate part of court-fee. (Vol 27) 1940 Nag 349 (351): I L R (1940) Nag 538 (DB).

[2] Decision of lower Court set aside by appellate Court regarding some of respondents and suit remanded to that extent while decision affirmed regarding others—Appellant cannot have refund of any court-fees. (Vol 4) 1917 All 814 (814, 815).

[3] Appeal directed against some of defendants in first Court allowed against all of them—Whole case remanded—Appellant can have refund of court-fees originally payable on part of subject-matter. (Vol 19) 1932 All 550 (551): 51 All 523 (DB).

[4] Appeal directed against set of defendants exonerated by decree—Remaining defendants joined as *pro forma* defendants—Appeal allowed and case remanded against exonerated defendants—Appellant can have refund of court-fee paid on memorandum of appeal. (Vol 21) 1934 All 106 (107): 56 All 526 (SB).

**6. Return of plaint for presentation to proper Court.**—[1] Plaint returned under O. 7 R. 10 of Civil P C for presentation to proper Court—Plaintiff is not bound to pay fresh court-fee in latter Court if he has paid full court-fee on plaint at the time of its original presentation. (Vol 18) 1926 Cal 355 (356) (DB). Plaint returned for presentation to proper Court—After return but before re-presentation amendment in court-fees Act increasing court-fee—Plaintiff will be credited with amount already paid as court-fee and will have to pay only deficit \* (12) 35 Mad 567 (572, 573) (FB) \* (84) 8 Bom 313 (317) (FB).

[2] Plaint re-presented in another Court—Such Court can take objection to insufficiency of court-fee though former Court did not take any such objection. (Vol 18) 1931 Pat 39 (40).

**7. Rejection of plaint or appeal for deficiency of court-fee—Power to refund court-fee already paid.**—[1] Court cannot while dismissing suit or appeal for insufficiency of court-fee or when rejecting plaint or appeal for insufficiency of court-fee, order refund of court-fee already paid. (Vol 24) 1937 All 505 (506) (DB) \* (Vol 15) 1928 Pat 29 (30): 6 Pat 602 (DB).

[But see (Vol 10) 1928 Pat 600 (600) (DB).]

[2] Plaint rejected for non-payment of deficit court-fee—Plaintiff filing review application and tendering deficit court-fee along with it—Review

**14.** Where an application for a review of judgment is presented on or after the ninetieth day from the date of the decree, the Court, unless the delay was caused by the applicant's laches, may, in its discretion, grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day.

[a] See the Code of Civil Procedure, 1908 (Act V of 1908), Section 114 and the First Schedule, O. 47.

[b]. See Sch. I, Arts. 4 and 5 of this Act.

**15.** Where an application for a review of judgment is admitted, and where, on the re-hearing, the Court reverses or modifies its former decision on the ground of mistake in law or fact, the applicant shall be entitled to a certificate from the Court authorizing him to receive back from the Collector so much of the fee paid on the [application] as exceeds the fee payable on any other application to such Court under the second schedule to this Act, No. 1, clause (b) or clause (d).

But nothing in the former part of this section shall entitle the applicant to such certificate where the reversal or modification is due, wholly or in part, to fresh evidence which might have been produced at the original hearing.

[a] The word "application" was substituted for the original words "plaint or memorandum of appeal" by the Court-fees Amendment Act (20 [XX] of 1870) S. 1.

### Section 13 (contd.)

application rejected—Plaintiff held entitled to refund of deficit court-fee and Court could grant certificate for refund under inherent powers though ss. 13, 14 and 15 did not apply. (Vol 29) 1942 Mad 316 (317).

**8. Withdrawal of suit or appeal.**—[1] Court cannot order refund of court-fees in cases of withdrawal of suit or appeal. (Vol 25) 1938 Mad 67 (67) (DB) \* (Vol 21) 1934 Mad 566 (567): 57 Mad 1028 (DB).

[See also (Vol 21) 1934 All 989 (990).]

[But see (Vol 21) 1934 Cal 615 (616) (DB) \* (Vol 20) 1938 Oudh 170 (170): 7 Luck 588 (DB).]

**9. Refund of Court-fees in High Court.**—[1] Court cannot direct refund of additional court-fee paid on demand by taxing officer of Court. (Vol 13) 1926 Pat 147 (148) (DB) \* ('07) 1907 Pun Re. No. 39 p. 168 (170) \* (Vol 11) 1924 Pat 310 (311): 2 Pat 919 (DB).

[See however (Vol 17) 1930 Pat 495 (496) (DB).]

**10. Excess court-fee paid in lower Court—Credit in appellate Court.**—[1] Excess court-fee paid in suit in lower Court—Credit for such excess may be allowed in appeal to plaintiff-appellant by Appellate Court. ('86) 1886 All W N 228 (228).

**11. U.P. Amendment.**—[1] Suit for declaration of ownership to property not in possession of defendant—*Ad valorem* fee ordered to be paid and made good by plaintiff—In appeal excess court-fee ordered to be refunded. (Vol 29) 1942 Oudh 58 (60): 17 Luck 145 (DB).

**12 Settling aside of execution sale—Refund of poundage-fee.**—[1] Execution sale set aside by Court—Decree-holder cannot obtain order for refund of poundage-fee paid by him—Court may give him certificate for refund and leave it to Revenue-author-

ities to comply with it. (Vol 21) 1934 Mad 409 (410).

**13. Court-fee on application for refund.**—[1] Application for refund of court-fee under this section falls under S. 19 and no court-fee is chargeable on it. (Vol 19) 1932 All 590 (591): 54 All 790.

**14. Loss of certificate under section.**—[1] Original certificate for refund lost—Duplicate should be given under inherent power. (Vol 31) 1944 Mad 56 (56) (DB).

**15. Use of wrong stamps.**—[1] Plaint sufficiently but incorrectly stamped—Proper stamp affixed within time allowed—Application to Court for return of stamps—Trial Court held could not return stamps but should give certificate for presenting to Collector. (Vol 21) 1934 Nag 263 (264): 31 Nag L R 82.

[2] Decree drawn up by mistake on court-fee stamp—Non-judicial stamp can be directed to be filed under inherent power but application for refund should be made to Collector. (1910) 12 Cal L Jour 324 (327) (DB).

### SECTION 14—Note 1.

[1] Applicability of Article 4 is not affected by the fact that delay in filing application for review of judgment on or after the 90th day is not due to laches of applicant. (Vol 22) 1935 Nag 164 (165): 31 Nag L R 260 \* (1912) 15 Cal L Jour 505 (506) (DB).

[2] If application is presented on or after 90th day full court-fee must be paid in first instance and then only Court can consider whether refund should be ordered. ('86) 9 Mad 134 (137) (DB) \* ('82) 9 Cal L R 479 (480) (DB).

[But see (Vol 11) 1924 Cal 994 (995) (DB).]

### SECTION 15—Note 1.

[1] Grant of refund of court-fees under this section is obligatory on Court. See (Vol 3) 1916 L J 350 (351) (DB).



**16.** [Additoinal fee where respondent takes objection to unappealed part of decree.] [*Repealed by the Code of Civil Procedure, 1908 (Act 5 [V] of 1908).*]

**17.** Where a suit embraces two or more distinct subjects, the plaint or memorandum Multifarious suits. of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

Nothing in the former part of this section shall be deemed to affect the power conferred by the Code of Civil Procedure, section 9

[a] See now Code of Civil Procedure (Act V of 1908), Sch. I, Order 2 Rule 6.

### PROVINCIAL AMENDMENTS.

#### BENGAL

For S. 17 the following section was substituted, viz.:

"17. (1) In any suit in which two or more separate and distinct causes of action are joined and separate and distinct reliefs are sought in respect of each, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaints or memoranda of appeal would be chargeable under this Act in separate suits instituted in respect of each such cause of action:

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, 1908, to order separate trials.

(2) Where more reliefs than one based on the same cause of action are sought either jointly or in the alternative, the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

—Bengal Act VII of 1935. [2-5-1935.]

#### BIHAR AND ORISSA

After the words "of appeal" in both places where they occur, the words, "or of cross-objection" were inserted.

—Bihar and Orissa Act II of 1922. [21-8-1922.]

[2] Court-fees on petition are leviable on value of entire claim in suits and not on value of relief sought for in review proceedings. (Vol 17) 1930 Cal 631 (632); 57 Cal 679 (DB) (Policy of Legislature is to put clog on possible *mala fide* application for review) \* (199) 31 All 291 (800) \* (78) 1898 All W N 212 (212).

[3] Mere fact that application for review is treated as one falling under S. 151 Civil P. C. instead of under O. 47, R. 1 of that Code will not make this section inapplicable. (Vol 11) 1924 Cal 1054 (1055) (The powers exercisable under these provisions are not mutually exclusive.)

[4] Names of some of defendants exonerated from liability included in decree—Court can amend decree and under its inherent power can order refund of court-fees on application for review although this section does not apply. (Vol 10) 1929 Rang 158 (160); 7 Rang 88 (DB).

[5] This section applies to applications for review in Chartered High Court. (Vol 12) 1925 Pat 392 (396); 4 Pat 336 (FB).

[6] Delay of six months in making application for refund of court-fees does not bar grant of such refund. (Vol 19) 1932 Pat 86 (88); 10 Pat 649 (DB).

### SECTION 17—Synopsis.

1. Scope and applicability of section.
2. "Distinct subjects," Meaning of.
3. Suit for alternative reliefs.
4. Suit seeking more than one relief—Court-fee.
5. Court-fee on appeals.
6. Maximum fee payable.
7. Suits for declaration.
8. Suits relating to mortgage.
9. Suits on several promissory notes, bonds, etc.
10. Suit for possession and mesne profits.
11. Balance due on khata, suit for.
12. Suit for specific performance and possession.
13. Suit for partition.
14. Value for jurisdiction.
15. "Distinct subjects" Illustrative cases—Miscellaneous.
16. Paragraph 2.

## CENTRAL PROVINCES AND BERAR

For S. 17 the following section was substituted, viz:

"17. (1) In any suit in which two or more separate and distinct causes of action are joined and separate and distinct reliefs are sought in respect of each, the plaintiff shall be chargeable with the aggregate amount of the fees with which the plaintiffs would be chargeable under this Act if separate suits were instituted in respect of each such cause of action:

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure, 1908, or the same Code as applied to Berar, to order separate trials.

(2) Where more reliefs than one based on the same cause of action are sought jointly in any suit, the plaintiff shall be chargeable with the aggregate amount of the fees with which the plaintiffs would be chargeable under this Act if separate suits were instituted in respect of each such relief.

Provided that if a relief is sought only as ancillary to the main relief the plaintiff shall be chargeable only in respect of the main relief.

(3) Where more reliefs than one based on the same cause of action are sought in the alternative in any suit, the plaintiff shall be chargeable with the largest of the fees with which the plaintiffs would be chargeable under this Act if separate suits were instituted in respect of each such relief.

(4) The provisions of this section shall apply *mutatis mutandis* to appeals and cross-objections."

—Central Provinces and Berar Act IX of 1941. [30-4-1941.]

## UNITED PROVINCES

For S. 17 the following section was substituted, viz:

"17. (1) In any suit in which two or more separate and distinct causes of action are joined, the plaintiff or memorandum of appeal shall be chargeable with the aggregate amount of the fees with which the plaintiffs or memoranda of appeal would be chargeable under this Act if separate suits were instituted in respect of each such cause of action:

Provided that nothing in this sub-section shall be deemed to affect any power conferred by or under the Code of Civil Procedure to order separate trials.

(2) When more reliefs than one based on the same cause of action are sought in the alternative the fee shall be paid according to the value of the relief in respect of which the largest fee is payable."

—United Provinces Act XIX of 1933. [3-1-1933.]

**1. Scope and applicability of section.**—[1] Suit comprising distinct subjects and coming under this section—Each relief should be valued and court-fee on each relief should be calculated separately as if suit was collection of so many different suits. (Vol 20) 1933 Mad 178 (178) (DB) (Test is what is amount that would be payable had separate plaintiffs been filed) \* ('88) 12 Bom 98 (100) (DB).

[2] Provisions of this section are not controlled by those of S. 7. (Vol 9) 1922 Pat 359 (360): 4 Pat L Jour 195 (DB) (Suit for possession and mesne profits—S. 17 does not apply) \* ('10) 5 Low Bur Rul 94 (100) (FB).

[3] Section 6 is controlled by this section. (Vol 20) 1933 Mad 178 (179) (DB).

[4] Object of section is to prevent loss to revenue owing to separate causes of action being combined in one suit. ('10) 1910 Pun L R No. 56 Page 142 (144): 1910 Pun Re No. 41 (DB) \* ('95) 1895 Pun Re No. 96 page 455 (460) (DB).

[5] Section only applies to suits though it applies to plaintiffs and memoranda of appeals in suits. (Vol 27) 1940 Oudh 243 (244): 15 Luck 395 (DB) \* (Vol 20) 1933 Sind 343 (344): 27 Sind L R 312 (Section 17 does not apply to applications and appeals from orders passed on applications) \* ('96) 23 Cal 723 (729, 730) (FB).

**2. "Distinct subjects," Meaning of.**—[1] Expression "subject" in this section has been defined in several different ways.

(a) Matter dealt with in suit. See (Vol 15) 1928 Pat 274 (276): 7 Pat 402 \* (Vol 11) 1924 Pat 77 (80): 2 Pat 874 (DB) \* ('77) 1 All 552 (554) (FB).

(b) Matter involving controversy in suit. (Vol 29) 1942 Oudh 412 (418) (DB) \* (Vol 15) 1928 Pat 274 (276): 7 Pat 402 \* ('81) 3 All 131 (133) (DB) \* ('77) 1 All 552 (553) (FB) (Suit brought for recovery of inheritance is not one embracing distinct subjects although inheritance may consist of distinct properties.)

(c) Cause of action. (Vol 30) 1943 Pat 356 (357): 22 Pat 275 \* (Vol 32) 1945 Pat 421 (424): 24 Pat 334 (DB) (Suit for possession of some properties sold by private sale and some in execution of mortgage decree—S. 17 does not apply—"Subject" means cause of action.) \* (Vol 28) 1941 Rang 95 (96): 1940 Rang L R 767 \* (Vol 27) 1940 Oudh 243 (244): 15 Luck 395 (DB) (Section applies where several causes of action are joined against same defendant or defendants jointly.) \* ('86) 63 Cal 720 (722) (DB) \* (Vol 20) 1933 Lah 332 (338) \* ('30) 1930 Mad W N 753 (758) (If for purposes of C. P. C. a suit comprises one cause of action it cannot be deemed to embrace two distinct causes of action for purposes of court-fee.) \* ('10) 5 Low Bur Rul 94 (98, 100) (FB) \* ('04) 7 Oudh Gas 152 (157) (DB) \* ('95) 1895 Pun Re No. 96, p. 455 (458) (DB) \* ('80) 2 All 632 (635, 636) (FB) \* ('80) 2 All 676 (679, 680) (FB).

(d) One cause of action may embrace two or more distinct subjects. (Vol 22) 1935 Cal 573 (576): 63

Cal 163 (DB) (27 All 136 and 16 All 401 dissented \* (Vol 9) 1922 Pat 359; 4 Pat L Jour 195 (DB) partly dissented from) \* (Vol 30) 1913 Pat 355 (356).

(e) Suit including more than one cause of action does not necessarily embrace two or more distinct subjects. (Vol 17) 1930 Mad 833 (834); 54 Mad 1 (FB).

[But see (Vol 2) 1915 Mad 912 (913, 914); 38 Mad 829 (FB).]

[2] For meaning of cause of action see A I R Commentaries on Civil P. C. 4th (1914) Edition S. 20 and O. 2, R. 2.

[3] Separate causes of action will not be test for treating claims based on them as distinct subjects. ('82) 8 Cal 533 (595) (FB).

[4] Test as to whether different suits could have been brought in respect of reliefs sought is not decisive and in spite of the fact that different suits could have been brought, subjects might not be distinct. (Vol 25) 1938 Mad 241 (242) (DB).

[5] Suit comprising several "subjects"—Mere fact that reliefs claimed in respect of each are of same kind will not take case out of purview of this section. (Vol 22) 1935 Cal 573 (573); 63 Cal 163 (DB) \* (Vol 33) 1946 Mad 162 (163).

[6] Mere fact that several persons are and can be joined as co-plaintiffs in same suit under O. I. R. 1 of Code does not show that suit embraces only one subject. (Vol 22) 1935 Cal 573 (574); 63 Cal 163 (DB).

[7] *C. P. and Berar amendment*.—This section is applicable *mutatis mutandis* to appeals and cross objections under the amendment in the Central Provinces and Berar. ('86-88) Txx Dec (Nag) 110 (112).

[8] *U. P. Amendment*.—This section is inapplicable to a suit for possession and mesne profits and separate court-fee is not chargeable. (Vol 29) 1912 Oudh 412 (413) (DB).

**3. Suit for alternative reliefs.**—[1] Cause of action same—Fact that several reliefs are sought, cumulatively or in alternative, will not attract application of this section. (Vol 29) 1942 Mad 744 (744) \* ('42) 1942 Nag L Jour 352 (352) (Suit for specific performance of agreement to sell consideration being discharge of mortgage debt—Alternative prayer for decree on mortgage. Case is governed by proviso to S. 17 (2) as amended in C. P. (Vol 25) 1938 Lah 566 (567) \* (Vol 25) 1938 Mad 241 (242) (DB) \* ('88) 40 Pun L R 38 (84) \* (Vol 17) 1930 Nag 55 (56) \* (Vol 11) 1924 Lah 494 (495); 5 Lah 114 (DB).

[See ('91) 15 Bom 82 (83) (DB).]

[But see ('77) 1 All 552 (553, 554) (FB).]

[2] Suit including two or more distinct causes of action—Fact that reliefs in respect of different causes of action are sought not cumulatively but in alternative will not prevent applicability of section (Vol 11) 1924 Nag 169 (171) \* (Vol 5) 1918 Nag 264 (267) \* ('08) 11 Oudh Cas 178 (174) (DB) \* ('07) 30 Mad 61 (64) (DB) \* ('07) 20 All 155 (158) (DB) \* ('95) 1895 Pun Re No. 96 p. 455 (460) (DB).

[But see (Vol 4) 1917 Pat 150 (150) \* ('91) 15 Bom 82 (83) (DB).]

[3] Cause of action same—Reliefs claimed in alternative—Court-fee payable in respect of relief carrying highest court-fee will be court-fee for suit. (Vo 26) 1939 Mad 536 (538) (DB) \* ('38) 10 Pun L R 3; (34) \* (Vol 19) 1932 Mad 158 (160); 55 Mad 336 (Vo 13) 1926 Lah 467 (468) (DB) \* (Vol 12) 1925 Pat 19; (194) (DB) \* (Vol 9) 1922 Oudh 82 (84); 25 Oudh Cas 30 (DB) \* (Vol 4) 1917 Pat 150 (150) \* ('13) 16 Oudh Cas 354 (357) \* ('91) 15 Bom 82 (83) (DB) \* ('82) 6 Bom 302 (303).

**4. Suit seeking more than one relief—Court fee.**—[1] Under this section and in other cases court-fee for suit is to be calculated according to reliefs sought therein. (Vol 23) 1936 All 874 (875) (DB) \* (Vol 22) 1935 Mad 346 (347) \* (Vol 22) 1935 Mad 313 (314).

[2] Court-fee for substantive relief would cover for ancillary relief. (Vol 23) 1936 All 874 (875) (DB) \* (Vol 23) 1936 Bom 353 (356) (DB) \* (Vol 20) 1933 Mad 93 (93, 94) \* (Vol 18) 1931 Mad 479 (479) \* (Vol 16) 1929 Nag 1 (2); 24 Nag L R 197 (DB) Suit for redemption—Surplus profits claimed—Court-fee is only payable under S. 7 (ix) \* (Vol 7) 1920 Lah 7 (72) \* ('08) 35 Cal 202 (203); 35 Ind App 22 (PC) \* ('85) 9 Bom 20 (22) (DB).

**5. Court-fee on appeals.**—[1] Court-fee payable in appeal embracing two or more distinct subject would be total of fees calculated with respect to each "subjects" separately. (Vol 22) 1935 Lah 605 (606) (DB) \* (Vol 5) 1918 All 232 (233); 40 All 333 \* (Vo 31) 1944 Pat 387 (388); 23 Pat 675 (DB).

[See (Vol 22) 1935 Posh 8 (10) (DB).]

[See also ('90) 12 All 129 (163) (FB).]

[2] Separate appeals filed by different parties against same decree—Separate court-fee is payable on each appeal. (Vol 6) 1919 Lah 450 (451); 1919 Pun Re No. 91 (DB).

[See also (Vol 8) 1921 All 335 (336); 43 All 56.]

[3] No Court-fee is ordinarily payable in respect of costs awarded by lower Court when appeal is filed against decree (Vol 14) 1927 Sind 251 (252); 23 Sind L R 277 (DB) \* (Vol 8) 1921 Cal 55 (57) \* (Vol 31) 1944 Pat 387 (387); 23 Pat 675 (DB).

[4] Appeal making award of costs—distinct matter of contest and specifically directed against order as to costs—Court-fee must be paid in respect of such costs. (Vol 27) 1940 Oudh 182 (183); 15 Luck 332 (DB) (Amount of costs must be included in amount on which court-fee is to be calculated) \* (Vol 21) 1934 Lah 739 (739) \* (Vol 5) 1918 Pat 210 (211); 3 Pat L Jour 443 \* ('03) 6 Oudh Cas 135 (139) \* ('96) 19 Mad 350 (354) (DB) \* ('93) 1893 Bom P J 52 (52, 53).

[5] Court has inherent power to consolidate appeals in proper cases. (Vol 5) 1918 Mad 368 (369) \* ('18) 40 Cal 955 (959, 960) (DB) \* ('06) 33 Cal 927 (932) (DB).

[6] Appeals consolidated—Each appeal must be assessed with separate court-fee. (Vol 17) 1930 Mad 376 (379); 58 Mad 248 (FB) (Overruling (Vol 15) 1928 Mad 468) \* (Vol 16) 1929 Cal 135 (136) (DB) \* ('02) 25 Cal 140 (147) (DB).

**18** When the first or only examination of a person who complains of the offence of wrongful confinement, or of wrongful restraint, or of any offence other than an offence for which police-officers may arrest without a warrant, and who has not already presented a petition on which a fee has been levied under this Act, is reduced to writing under the provisions of the Code of Criminal Procedure, the complainant shall pay a fee of eight annas, unless the Court thinks fit to remit such payment.

[a] See now the Code of Criminal Procedure (Act V of 1898), S. 8.

### PROVINCIAL AMENDMENTS

#### ASSAM

For the words "a fee of eight annas" the words "a fee of one rupee" were substituted.

—Assam Act XIV of 1936. [2-12-1936.]

#### Section 17 (contd.)

**6. Maximum fee payable.**—[1] Rule in this section must be held subject to proviso at the end of Art 1, Sch. I of the Act. ('81) 3 All 108 (109, 110, 111, 112) (FB) \* ('01) 29 Cal 140 (147, 148) (DB).

**7. Suits for declaration.**—[1] Several declarations sought in suit each on basis of distinct cause of action—Separate court-fee must be paid in respect of each declaration sought. (Vol 29) 1942 Oudh 58 (60): 17 Luck 145 (DB) \* (Vol 27) 1940 Pat 158 (159): 18 Pat 756 (DB) \* ('95) 18 Mad 459 (460) (DB) \* (Vol 22) 1935 Mad 419 (420): 58 Mad 821 \* (Vol 22) 1935 Sind 129 (131) \* (Vol 10) 1923 All 806 (807) \* (Vol 6) 1919 Pat 479 (480): 4 Pat L Jour 297 \* (Vol 3) 1916 Lah 21 (21): 1916 Pun Re No. 87 (DB).

[2] Declarations based on same cause of action—This section will not apply. (Vol 20) 1933 Lah 382 (383) \* (Vol 17) 1930 Cal 686 (687): 58 Cal 281.

**8. Suits relating to mortgage.**—[1] Suit brought to recover money due on different mortgages executed by same mortgagor in plaintiff's favour is one which embraces distinct subjects and court-fee must be calculated separately in respect of each mortgage under this section. (Vol 28) 1941 Rang 95 (96): 1940 Rang L R 767 \* ('36) 68 Cal 720 (722) (DB) \* (Vol 22) 1935 Mad 262 (262) \* (Vol 11) 1924 Pat 77 (80): 2 Pat 874 (DB) \* (Vol 7) 1920 Pat 105 (105) \* ('04) 31 Cal 75 (77) (DB) \* ('04) 7 Oudh Cas 152 (154) (DB).

[See however (Vol 30) 1943 Lah 275 (277): ILR (1944) Lah 24 (FB).

[2] Section 67-A of Transfer of Property Act does not control or affect operation of this section. (Vol 28) 1941 Rang 95 (96): 1940 Rang L R 767 \* ('36) 68 Cal 720 (722) (DB) \* (Vol 22) 1935 Mad 262 (262).

[3] Two mortgages executed in favour of person in lieu of five promissory notes—Suit on mortgages embraces two subjects and not five for purpose of this section. (Vol 22) 1935 Mad 262 (262).

[4] Single mortgage executed by debtor in favour of several creditors, specifying amount due to each—Suit to enforce mortgage does not embrace distinct subjects. (Vol 19) 1932 Mad 737 (738).

[5] Suit for redemption of mortgage and surplus profits embraces one subject and one court-fee is payable on such suit. (Vol 28) 1941 Mad 115 (116) \* (Vol 24) 1937 Nag 295 (298): I L R (1937) Nag 49 (FB) \* (Vol 18) 1931 Mad 479 (479) \* (Vol 10) 1923 All 61 (262): 45 All 154 (DB) \* ('07) 29 All 471 (475)

\* (DB) '10) Oudh Cas 32 (33) \* (Vol 20) 1933 Pat 625 (625).

[6] Suit for redemption of mortgage furnishes one cause of action though suit includes original mortgage as well as deeds of further charge ('04) 7 Oudh Cas 152 (156) (DB).

[7] Suit for redemption of kanom and for arrears of rent is suit embracing two distinct subjects. ('93) 16 Mad 415 (417, 418) (DB).

**9. Suit on several promissory notes, bonds, etc.**—[1] Suit for recovery of money due on different promissory notes executed by defendant embraces distinct subjects within meaning of this section. (Vol 20) 1933 Mad 178 (178) (DB) \* ('10) 5 Low Bur Rul 94 (98, 100) (FB) (Expression 'distinct subjects' is equivalent to 'distinct causes of action'.)

[2] Suit on different hundis is governed by this section and separate court-fee is payable in respect of each hundi. ('87) 9 All 252 (253) (DB) (Each hundi affords a separate cause of action).

[3] Plaintiff sues for three separate deposits—Suit embraces three distinct subjects, although suit is preceded by single demand for all deposits. (Vol 18) 1931 Mad 712 (712, 713).

[4] In suit on promissory note claim based on original obligation sought to be added—Plaintiff must pay fresh court-fee. (Vol 18) 1931 Mad 593 (594).

#### 10. Suit for possession and mesne profits.

[1] Suit for possession and mesne profits does not embrace distinct subjects within meaning of this section. (Vol 29) 1942 Oudh 412 (413) (DB). (Vide U.P. Amendment.) \* (Vol 17) 1930 Mad 883 (884) 54 Mad 7 (FB) \* (Vol 9) 1922 Pat 359 (361): 4 Pat L Jour 195 (DB) \* ('94) 16 All 401 (408, 409) \* ('82) 8 Cal 593 (596, 597) (FB).

[But see (Vol 29) 1942 Cal 40 (41).]

[2] Suit for possession of house and compensation for use and occupation or arrears of rent is suit embracing distinct subjects. ('80) 2 All 682 (685, 686) (FB).

[But see (Vol 4) 1917 Low Bur 123 (124): 8 Low Bur Rul 529].

**11. Balance due on khata, suit for.**—[1] Suit for balance due on khata—Court-fee is not payable on each item in khata but only on total amount due. (Vol 9) 1922 Bom (376, 377): 46 Bom 142 (FB).

**BENGAL**

Same as that of Assam.

—Bengal Act IV of 1922. [29-8-19]

**BIHAR**

For the words "a fee of eight annas" the words "a fee of twelve annas" were substituted.

—Bihar and Orissa Act II of 1922. [21-8-19]

**MADRAS**

For the words "eight annas" the words "one rupee" were substituted.

—Madras Act V of 1922. [30-8-19]

**ORISSA**

Same as that of Madras.

—Orissa Act V of 1939. [31-10-19]

**PUNJAB**

Same as that of Madras.

—Punjab Act VII of 19

**UNITED PROVINCES**

For the words "eight annas" the words "twelve annas" were substituted.

United Provinces Act II of 1936. [2-4-19]

**Section 17 (contd.)**

**12. Suit for specific performance and possession.**—[1] Suit for specific performance of contract of sale and possession does not embrace distinct subjects within meaning of this section. (Vol 11) 1924 Mad 360 (362) : 47 Mad 150 (DB).

[See also (Vol 15) 1928 Lah 635 (635) ((Vol 7) 1920 Lah 72 \* (Vol 5) 1918 Lah 823 dissented from.)]

[But see (Vol 7) 1920 Oudh 167 (168) : 23 Oudh Cas 388 (14 Cal L Jour 159 dissented from.)]

**13. Suit for partition.**—[1] Suit for joint possession and partition embraces two distinct subjects for purpose of this section. (Vol 11) 1924 Pat 558 (559) : 3 Pat 618 (DB) \* (Vol 32) 1945 Sind 11 (20) : ILR (1944) Kar 325 \* Vol 20) 1933 Mul 431 (432) \* (Vol 17) 1930 Pat 1 (7) : 8 Pat 818 (DB) (Suit by junior member against karta for partition and for account—Suit is governed by Sch II Art 17 (vi) and no court-fee is payable for the relief of account.)

**14. Value for jurisdiction.**—[1] Value for purposes of jurisdiction is quite irrespective of value for purposes of court-fees under S. 17. (10) 1910 Pun R No. 56 p 142 (144) : 1910 Pun R No. 41 (DB).

**15. "Distinct subjects"—Illustrative cases.**—[1] *Distinct subjects.*—Co-sharer landlord sued for his share of rent making other co-sharer *pro forma* defendant—Defendant co-sharer prayed that he be added as plaintiff and decree for his share be also granted—Claims of both co-sharers held distinct subjects within S. 17. (Vol 30) 1943 Pat 356 (357) : 22 Pat 275.

[2] Suit by reversioner for declaration that settlement deed executed by last male holder was not binding on him and also for specific performance of agreement executed by last male holder—*Held*, separate court-fees were payable. (Vol 25) 1938 Mad 241 (242) (DB).

[3] Suit by 78 persons for declaration that each plaintiff has raiyati-jote interest in one out of 78 plots of land and for declaration that compromise decree is not binding on them, held to be suit embracing 78 distinct subjects. (Vol 22) 1935 Cal 673 (575) :

[4] Suit by creditor against principal debtor and several persons who guaranteed amount, by separate promissory notes or mortgages is suit embracing distinct subjects. (Vol 2) 1915 Low Bur 97 (93) : 8 Low I Rul 219 (FB).

[5] *Subjects not distinct.*—Administration suit Prayer for declaring will void and for order that property be handed over to executor.—Suit does not embrace distinct subjects. (Vol 23) 1936 Bom 3 (356) (DB).

[6] In mortgage suit minor defendants—Guardian entered into compromise and preliminary and final decree passed—Minor filed suit to set aside compromise, preliminary and final decrees—*Held* suit did not embrace distinct subjects. (Vol 19) 1932 All 4 (487) : 54 All 812 (FB).

[7] Suit by land-holder against ryots under S. 1 Madras Estates Land Act, for enhancement of rent Ground for enhancement same for all—Suit does not comprise "distinct subjects." (Vol 19) 1932 Mad 6 (668, 669).

[8] Suit for possession against different persons possession of different parcels of land on allegation that land belonged to plaintiff and defendants in conspiracy with each other have dispossessed plaintiff is suit on single cause of action. (Vol 15) 1928 P 274 (276) : 7 Pat 402 (DB).

[9] Suit to recover losses in respect of seven consignments against Railway Company—One notice given—*Held* suit does not embrace distinct subjects (Vol 11) 1924 Pat 596 (597) (DB).

[10] Suit for pre-emption of two village shares sold under one sale—There is only one cause of action. (10) 27 All 186 (189) (DB).

[11] Suit for profits for several years—Court-fee payable on aggregate amount and not separately on profits of each year. (85) 7 All 761 (769) (DB).

**16. Paragraph 2.**—[1] Second paragraph of this section seeks to safeguard power conferred on Cou by O. 2, R. 6 and to prevent first paragraph from being construed as intended to restrict this power (10) 5 Low Bur Rul 24 (27 1904) (1904) \* (1904) 22 11.

Exemption of certain documents.

19. Nothing contained in this Act shall render the following documents chargeable with any fee :—

- i. Power-of-attorney to institute or defend a suit when executed by an officer, warrant-officer, non-commissioned officer or private of Her Majesty's army not in civil employment.
- ii. *[Repealed by the Amending Act, 1891 (12 [XII] of 1891)].*
- iii. Written statements called for by the Court after the first hearing of a suit.
- iv. *[Repealed by the Cantonments Act, 1889 (13 [XIII] of 1889).]*
- v. Plaints in suits tried by a Village Munsifs in the Presidency of Fort St. George.
- vi. Plaints and processes in suits before District Panchayats in the same Presidency.
- vii. Plaints in suits before Collectors under Madras Regulation XII of 1816.
- viii. Probate of a will, letters of administration, and, save as regards debts and securities, a certificate under Bombay Regulation VIII of 1827, where the amount or value of the property in respect of which the probate or letters or certificate shall be granted does not exceed one thousand rupees.
- ix. Application or petition to a Collector or other officer making a settlement of land-revenue, or to a Board of Revenue, or a Commissioner of Revenue, relating to matters connected with the assessment of land or the ascertainment of rights thereto or interests therein, if presented previous to the final confirmation of such settlement.
- x. Application relating to a supply for irrigation of water belonging to Government.
- xi. Application for leave to extend cultivation, or to relinquish land, when presented to an officer of land-revenue by a person holding, under direct engagement with Government, land of which the revenue is settled, but not permanently.
- xii. Application for service of notice of relinquishment of land or of enhancement of rent.
- xiii. Written authority to an agent to distrain.
- xiv. First application (other than a petition containing a criminal charge or information) for the summons of a witness or other person to attend either to give evidence or to produce a document or in respect of the production or filing of an exhibit not being an affidavit made for the immediate purpose of being produced in Court.
- xv. Bail-bonds in criminal cases, recognizances to prosecute or give evidence, and recognizances for personal appearance or otherwise.
- xvi. Petition, application, charge or information respecting any offence when presented, made or laid to or before a Police-officer, or to or before the Heads of Villages or the Village Police in the territories respectively subject to the Governors in Council of Madras and Bombay.
- xvii. Petition by a prisoner, or other person in duress or under restraint of any Court or its officers.
- xviii. Complaint of a public servant (as defined in the Indian Penal Code), a municipal officer, or an officer or servant of a Railway Company.
- xix. Application for permission to cut timber in Government forests, or otherwise relating to such forests.
- xx. Application for the payment of money due by Government to the applicant.
- xxi. Petition of appeal against the chaukidari assessment under Act No. XX of 1856, or against any municipal tax.

- xxii. Applications for compensation under any law for the time being in force relating to the acquisition of property for public purposes.
- xxiii. Petitions presented to the Special Commissioner appointed under Bengal Act No. II of 1869 (to ascertain, regulate and record certain tenures in Chota Nagpur.)
- xxiv. [Petitions under the Indian Christian Marriage Act, 1872, sections 45 and 48.]
- [a] See the Madras Village Courts Act, 1889 (Madras Act I of 1889).
- [b] *Substituted* for the original words and figures "and certificate mentioned in the First Schedule to this Act annexed, No. 12," by the Succession Certificate Act, 1889 (7 [VII] of 1889) S. 18 (2).
- [c] See Madras Regulations XI of 1816 and IV of 1821, S. 6.
- [d] See Bombay Village Police Act, 1867 (Bombay Act VIII of 1867), Ss. 14, 15 and 16.
- [e] The Bengal Chaukidari Act, 1856.
- [f] See now the Land Acquisition Act, 1894 (1 of 1894).
- [g] The Chota Nagpur Tenures Act, 1869.
- [h] *Substituted* by the Indian Christian Marriage Act, 1872 (15 [XV] of 1872) S. 2, for the original clause "Petitions under the 14th and 15th of Victoria, Ch. 40 (*An Act for marriages in India*), S. 5, or under Act No. V of 1852, S. 9."

### PROVINCIAL AMENDMENTS

#### ASSAM

In item VIII of the section, for the words "one thousand rupees" the words "two thousand rupees" were substituted.

—Assam Act XIV of 1936. [2-12-1936.]

#### BENGAL

In item VIII for the words "one thousand rupees" the words "two thousand rupees" were substituted.

—Bengal Act IV of 1922. [29-3-1922.]

In paragraph 1 after the words "power of attorney" the words "or other written authority" were inserted; and after paragraph XXIV the following paragraph was added, viz:

"xxv. Petitions of appeal by servants of the Crown or a Court of Wards against orders of dismissal, reduction or suspension; copies of such orders filed with such appeals and applications for obtaining such copies."

—Bengal Act VII of 1935. [2-5-1935.]

#### BIHAR AND ORISSA

In item VIII for the words "one thousand rupees" the words "two thousand rupees" were substituted.

—Bihar and Orissa Act II of 1922. [21-8-1922.]

#### UNITED PROVINCES

For clause (iii) the following clause was substituted, viz:

"(iii). Written statement not being one mentioned in Art 2-A, Sch I, nor one containing a counter-claim, set-off, or a prayer other than a prayer for instalments or relating to costs of the suit."

—U. P. Act XIX of 1938. [9-1-1939.]

### SECTION 19—Synopsis.

1. Government, whether exempt from liability to pay Court-fee.

2. Clause (i).

3. Clause (iii).

4. Clause (viii).

5. Clause (xvii).

6. Clause (xviii).

7. Clause (xx).

1. Government, whether exempt from liability to pay court-fee.—The Government when a party to a litigation has to pay court-fees in the same way as any other party. (1902) 25 Mad 457 (457) (DB).

2. Clause (i).—[1] A vakalatnama or muktarnama is a kind of power-of-attorney and hence the exemption under this clause will apply to a vakalatnama or muktarnama executed by any person mentioned in the clause for the purpose of instituting or defending a suit. (Vol 24) 1937 Nag 65 (66); I L R (1937) Nag 494 \* (Vol 18) 1926 Pat 246 (247); 5 Pat 255.

3. Clause (iii).—[1] The clause applies to written statements filed in miscellaneous cases. (Vol 21) 1934 All 382 (383); 56 All 747 (Written statements filed in answer to an application by Official Liquidator of a company to set aside transfers as fraudulent).

[2] A written objection to an award made in a pending suit does not come under this clause and requires court-fee under Art 1 (b) Sch II. Such a document is an "application" within Sch II, Art 1. (Vol 15) 1928 Sind 87 (88); 28 Sind L R 91 (DB).

**Section 19 (contd.)**

[3] As there is no express provision for the levy of court-fee on written statements filed at or before the first hearing of the suit after the repeal of S. 120. Civil P. C., 1859, no court-fee is now chargeable on them and it cannot be inferred that because S. 19 (iii) exempts written statements filed after the first hearing, written statements filed at or before the first hearing require court-fee. ('88) 12 Cal L R 366 (369, 370) (DB) \* ('81) 5 Bom 400 (402, 409) (DB).

[4] A written statement pleading a set-off or counter-claim is chargeable with *ad valorem* court-fee under Art 1 of Sch I (as amended in 1908). If a claim made in the written statement does not amount to a set-off or counter claim it will not be chargeable with any court-fee. (Vol 28) 1941 Nag 138 (140): I L R (1941) Nag 194 (DB) (Suit on mortgage—Subsequent mortgagee claiming to be allowed to pay off prior mortgage and to have decree in his favour for combined amounts of two mortgages—No court-fee is payable on the claim under the subsequent mortgage inasmuch as claim is neither set-off nor counter-claim.) \* (Vol 24) 1937 Lah 62 (62) (Plea in written statement that mutual claims of plaintiff and defendant had been adjusted is not plea of set-off and no court-fee is payable on written statement.) \* (Vol 20) 1938 Sind 247 (249) (DB) (Suit for accounts—It is not incumbent on defendant to pay court-fee on written statement filed by him claiming decree for such sum as may be found due to him on settlement of accounts.)

[5] A defendant in a partition suit asking for separation of his share in his written statement is not required to pay any court-fee. (Vol 28) 1941 Sind 50 (67): I L R (1940) Kar 534 \* (Vol 23) 1936 Lah 1 (4): 16 Lah 901 (DB) \* (Vol 19) 1932 Mad 722 (723): 55 Mad 975 (DB) \* (Vol 13) 1926 Pat 154 (156) (DB) (23 Bom 188 and 23 Bom 184 distinguished) \* ('05) 29 Bom 79 (81) (DB).

[But see ('99) 23 Bom 184 (186) (DB).]

[6] Partition suit by co-tenant—Defendant in his written statement pleading that plaintiff should give account of rents which he recovered in capacity as manager of property—Defendant held must value relief and pay necessary court-fee on it. (Vol 20) 1938 Sind 304 (304, 305).

**4. Clause (viii).—**[1] The amount or value of the property contemplated by this clause is the net value obtained by deducting the value of the debts and expenses referred to in annexure B of Sch III from the gross value of the assets to be disclosed in annexure A of the same schedule. Consequently, no court-fee will be chargeable when such net value of the property does not exceed one thousand rupees. (Vol 5) 1918 All 306 (307): 40 All 279 (DB) \* (Vol 8) 1916 Cal 543 (545) (18 Suth W R 153 distinguished; 17 Cal W N 21 dissented from) \* (Vol 1) 1914 Low Bur 247 (248): 7 Low Bur Rul 359 (DB) (Gross value exceeding Rs. 16,000—Net value only Rs. 540—No court-fee.)

[See (Vol 1) 1914 Cal 40 (45) \* (Vol 1) 1914 Low Bur 245 (246): 7 Low Bur Rul 356 (DB) (Word 'value' in Art 11, Sch I means net value; and net value of estate should alone be taxed.)]

[But see ('12) 17 Cal W N 21 (24, 25) (DB)  
Held that no court-fee contained

plated by this clause as well as Sch. I, Art. 11 applies only when gross value does not exceed Rs. 1,000 though court-fee is payable on net value in cases where gross value exceeds Rs. 1,000.]]

[2] Sole executor under will applying for probate in respect of house devised to him by the testator and in respect of which a suit for possession by testator was pending—Mere right of action, in respect of house held was devised by testator—Such right could not be value in money—Case held was not provided for by Act and value of property for purpose of application might fairly be taken not to exceed Rs. 1,000. ('96) 23 Cal 577 (579) (DB).

[See ('01) 24 Mad 241 (242) (DB) (Petitioner was directed on termination of suits referred to in petition to file in Court statement showing result of the suit.)]

**5. Clause (xvii).—**[1] Petition mentioned in the clause must be one in respect of, or connected with, or arising out of the matter in connexion with which petitioner is in prison, duress or under restraint. Prisoner or person in duress or under restraint wishing to file civil suit or appeal against decree passed in such suit is not exempt under this clause and cannot file the suit or appeal without paying necessary court-fee required under the Act. (Vol 29) 1942 All 45 (46): I L R (1941) All 793.

[2] An application by a prisoner for setting aside the order of acquittal of the opposite parties and for their being convicted and sentenced according to law does not fall within the clause as it does not ask for any relief affecting him in his capacity as a prisoner. (Vol 28) 1936 All 318 (318): 58 All 871: 37 Cr L Jour 566.

[3] S. 19 (xvii) cannot be interpreted as applying to criminal matters alone. Where a judgment-debtor, while in custody applied, under Chap xx, Civil P.C. to be declared insolvent and on the application being refused by lower Court appealed against the order, it was held that the case was governed by this clause and the memorandum of appeal was exempt from court-fee. ('84) 10 Cal 61 (62).

[4] The petition, in order to be exempt from court-fee under this clause, must have been filed when the petitioner is actually in prison, duress or under restraint. A petition written when the petitioner is in prison, duress or under restraint but filed when he is not in prison, duress or under restraint will not be exempt under this clause. (Vol 29) 1942 All 45 (46): I L R (1941) All 793.

[5] A petition filed by an advocate or counsel on behalf of a prisoner is a petition "by a prisoner" within the meaning of this clause. (Vol 29) 1942 Pesh 50 (50) (Revision application by prisoner presented through counsel.) \* (Vol 17) 1930 All 261 (262): 52 All 542 (The fact that it was an adjournment application made by the counsel for his personal convenience is immaterial.) \* (Vol 11) 1924 Rang 160 (160): 1 Rang 510 (Petition of appeal or revision.) \* (Vol 9) 1922 Upp Bur 14 (15): 4 Upp Bur Rul 72 (Application for bail.) \* (Vol 5) 1918 Nag 125 (126): 14 Nag LR 77 (Petition of appeal.) \* ('84) 10 Cal 61 (62) (Appeal).

**6. Clause (xviii).—**[1] A complaint by an official in an official capacity does not require court-fee stamp. (Vol 17) 1930 All 820 (821): 58 All 208: 32 Cri L Jour 306.



CHAPTER III A.<sup>a</sup>

## PROBATES, LETTERS OF ADMINISTRATION AND CERTIFICATES OF ADMINISTRATION

**19-A.** Where any person on applying for the probate of a will or letters of administration has estimated the property of the deceased to be of a court-fee has been greater value than the same has afterwards proved to be, and has paid, consequently paid too high a court-fee thereon, if, within six months after the true value of the property has been ascertained, such person produces the probate or letters to the Chief Controlling Revenue-authority <sup>b</sup>[for the local area] in which the probate or letters has or have been granted,

and delivers to such Authority a particular inventory and valuation of the property of the deceased, verified by affidavit or affirmation,

and if such Authority is satisfied that a greater fee was paid on the probate or letters than the law required,

the said Authority may—

- (a) cancel the stamp on the probate or letters if such stamp has not been already cancelled;
- (b) substitute another stamp for denoting the court-fee which should have been paid thereon; and
- (c) make an allowance for the difference between them as in the case of spoiled stamps, or repay the same in money, at his discretion.

[a] Chapter III-A was inserted by the Probate and Administration Act, 1875 (13 [XIII] of 1875) S. 6.

[b] Substituted for "of the Province" by the Court-fees (Amendment) Act, 1901 (10 [X] of 1901), S. 347.

## PROVINCIAL AMENDMENT

## UNITED PROVINCES

At the end of clause (c) the following matter was inserted after substituting a comma for the fullstop,

"after deducting one anna for each rupee or fraction thereof."

—U. P. Act XIX of 1938. [9-1-1939.]

**19-B.** Whenever it is proved to the satisfaction of such Authority that an executor or administrator has paid debts due from the deceased to such an amount as, being deducted out of the amount or value of the estate reduces the same to a sum which, if it had been the whole gross, amount or value of the estate, would have occasioned a less court-fee to be paid on the probate or letters of administration granted in respect of such estate than has been actually paid thereon under this Act,

such Authority may return the difference, provided the same be claimed within three years after the date of such probate or letters.

But when, by reason of any legal proceeding, the debts due from the deceased have not been ascertained and paid, or his effects have not been recovered and made available, and in consequence thereof the executor or administrator is prevented from claiming the return of such difference within the said term of three years, the said Authority may allow such further time for making the claim as may appear to be reasonable under the circumstances.

## Section 19 (contd.)

[2] A complaint brought by a Municipal Officer is also exempted. It has been held that no process fee is leviable on a complaint made by the Municipal Officer. ('98) 16 Mad 428 (424) (DB).

**7. Clause (xx).—**[1] An application for refund of court-fees under S. 18 of the Act is covered by this clause and no court-fee is chargeable on such application. (Vol 15) 1982 All 590 (591) : 54 All 790.

[2] An application to the High Court for refund of money deposited in the Court towards costs of preparation of paper book of a Privy Council appeal is not an application for payment of money due by Government to the applicant within the meaning of

this clause and hence is not exempt from payment of court-fee. (Vol 10) 1923 Cal 599 (600) (DB).

## SECTION 19-A—Note 1.

[1] Where the property to be valued is a debt the applicant is not bound to value it at its face value but is entitled to state what he considers to be the fair value of it (according to the chances of its recovery, etc.) and to apply on that basis. If the Revenue authority is not satisfied with the estimate he can deal with the matter under S. 19 H. If too low a value is placed on the debt, further duty must be paid under S. 19E and if too high a value is placed on it part of the duty must be refunded under S. 19A—This applies to a judgment-debt also. (Vol 18) 1981 Bom 417 (420) : 54 Bom 844.

**19-C.** Whenever a[\*] a grant of probate or letters administration has been or is made in respect of the whole of the property belonging to an estate, and the full fee chargeable under this Act has been or is paid thereon, no fee shall be chargeable under the same Act when a like grant is made in respect of the whole or any part of the same property belonging to the same estate.

Whenever such a grant has been or is made in respect of any property forming part of an estate, the amount of fees then actually paid under this Act shall be deducted when a like grant is made in respect of property belonging to the same estate, identical with or including the property to which the former grant relates.

[a] The word "such" was *repealed* by the Amending Act, 1891 (12 [XII] of 1891).

#### Section 19-A (contd.)

[2] The court-fee is chargeable on the value of the estate as at the date of application. Subsequent changes in value do not alter the amount of fee payable. ('12) 14 Ind Cas 804 (806) (Burma).

#### SECTION 19-C—Synopsis.

1. Scope.
2. Increase in value of property or scale of fees—Applicability of this section.
3. Illustrative cases.
4. "Full fee chargeable under this Act has been paid"
5. "Same property belonging to the same estate."
6. Power of appointment.

1. **Scope.**—[1] The section was enacted to provide for avoidance of payment of court-fees over again in cases, in which after a grant of probate or letters of administration on payment of the full fee prescribed, a fresh grant of probate or letters of administration becomes necessary, e.g. where probate is revoked. (Vol 7) 1920 Pat 273 (274) : 5 Pat L Jour 36 (DB).

[2] The principle on which the relief is granted under the section is that at the time of the fresh grant there is no new succession or devolution of the estate. (Vol 3) 1916 Cal 290 (292) : 43 Cal 625 (DB).

[3] The law in England is also the same and no stamp duty is payable on subsequent grants. See (Vol 3) 1916 Cal 290 (292) : 43 Cal 625 (DB).

2. **Increase in value of property or scale of fees—Applicability of this section.**—[1] Where proper court-fee has been once paid, no additional fee is payable at the time of the subsequent grant, even though the value of the property has increased or the scale of fees payable has been enhanced during the interval. ('08) 4 Low Bur Rul 255 (255) \* (Vol 3) 1916 Cal 290 (291) : 43 Cal 625 (DB).

3. **Illustrative cases.**—[1] The section is wide in terms and applies to all cases where a subsequent grant has to be made after full court-fee has been paid at the time of a previous grant. (Vol 12) 1925 Rang 217 (217, 218) : 3 Rang 90 (DB) \* (Vol 7) 1920 Pat 273 (274) : 5 Pat L Jour 36 (DB).

[2] When there are several executors and probate is granted first to one on payment of full fee and then to another, no fresh court-fee is payable at the time of the second grant. ('71) 15 Smith W R 496 (496)

[3] No fresh fee is payable on a subsequent application for letters of administration *de bonis non*. (Vol 12) 1925 Rang 217 (217, 218) : 3 Rang 90 (DB) \* (Vol 7) 1920 Pat 273 (274) : 5 Pat L Jour 36 (DB).

[4] No fresh court-fee is payable when the first grant is annulled or revoked and a fresh grant is made. ('07) 1 Sind L R 177 (178) \* ('02) 1902 Pun Re. No. 1 p. 1 (2) (DB) \* ('71) 6 Beng L R (App) 139 (140).

[5] When first application for letters of administration in respect of part of property is made by a creditor and then a subsequent application in respect of the whole of the property is made by the Administrator-General, in computing the fee payable on the second application, fee paid on the first application by the creditor is to be deducted. ('71) 8 Beng L R (App) 43 (44).

4. **"Full fee chargeable under this Act has been paid."**—[1] This section applies only when the first and the subsequent grants have been made after the Court-fees Act has come into force and *ad valorem* fee has been paid at the time of the previous grant under the Court-fees Act. (Vol 12) 1925 Rang 217 (218) : 3 Rang 90 (DB) \* (Vol 3) 1916 Cal 290 (291) : 43 Cal 625 (DB).

[2] Where the fee paid on the previous application was not *ad valorem* but a fixed fee, under the law then in force and the second application is made after the Court-fees Act came into force, no relief against payment of *ad valorem* court-fee under the Act can be granted under this section. (Vol 12) 1925 Rang 217 (218) : 3 Rang 90 (DB) \* ('78) 3 Cal 733 (735) \* ('71) 6 Beng L R (App) 137 (138).

[3] The fact that duty has been paid in England cannot be a ground for claiming exemption under the section as the fee paid in England is not a "fee chargeable under this Act." ('76) 1 Cal 168 (174) (DB) \* ('79) 4 Cal 725 (726).

5. **"Same property belonging to the same estate."**—[1] When the first and subsequent grants are in respect of succession to different deceased persons, full court-fee is payable on both the grants though the grants may relate to the same property. (Vol 7) 1920 Pat 273 (274) : 5 Pat L Jour 36 (DB).

6. **Power of appointment.**—[1] A by will giving general power of appointment to B over Rs. 7,000.—On A's death, his will proved and probate-fee paid on Rs. 7,000—B executed will in which she exercised power of appointment and died—B's executor applying for probate of her will—Power of appointment created by A's will is "property" within Sec 1, Art 11—S. 19 C does not apply. ('02) 25 Mad 515 (515, 517)

**19-D.** The probate of the will or the letters of administration of the effects of any

Probates declared valid as to trust-property though not covered by court-fee.

person deceased heretofore or hereafter granted shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any moveable or immovable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a court-fee was paid on such probate or letters of administration.

**19-E.** Where any person on applying for probate or letters of administration has

Provision for case where too low a court-fee has been paid on probates, etc.

estimated the estate of the deceased to be of less value than the same has afterwards proved to be, and has in consequence paid too low a court-fee thereon, the Chief Controlling Revenue authority [for the local area] in which the probate or letters has or have been granted may, on the value of the estate of the deceased being verified by affidavit or affirmation, cause the probate or letters of administration to be duly stamped on payment of the full court-fee which ought to have been originally paid thereon in respect of such value and of the further penalty, if the probate or letters is or are produced within one year from the date of grant, of five times, or, if it or they is or are produced after one year from such date, of twenty times, such proper court-fee, without any deduction of the court-fee originally paid on such probate or letters:

**SECTION 19-D—Note 1.**

[1] Retrospective effect was given to the Financial Resolution No. 2001 of 1871 remitting court-fees in respect of probates or letters of administration from 1st April 1870 by a Government Notification of 1872. ('05) 29 Bom 161 (167) (DB).

[2] No stamp duty is payable on probates or letters of administration in respect of property to which the deceased was entitled as a trustee. (75) 14 Bom L R 184 (186) (Hindu lady succeeding to her father's property for the estate of a Hindu daughter—On the application by her sons for letters of administration. Held on her death the grand-father's estate became in the hands of her representatives trust property in respect of which no duty was payable.) \* (73) 11 Bom L R App 39 (40) (One of two brothers, joint in estate, dying unmarried leaving the other brother as heir held court-fee was payable on share of deceased brother but surviving brother's share should be treated as trust property and be exempted from duty.)

[3] The exemption does not extend to property held in trust beneficially or with general power to confer a beneficial interest. (Vol 29) 1942 Lah 173 (176): I L R (1942) Lah 717 (FB) \* ('05) 29 Bom 161 (167) (DB).

[4] Where the probate or letters of administration concern trust property alone, there can be no exemption from court-fee. (Vol 22) 1935 All 449 (450): 57 All 881 (DB) \* ('08) 27 Bom 140 (143, 144) (DB).

[But see (Vol 29) 1942 Lah 173 (178): I L R (1942) Lah 717 \* ('05) 29 Bom 161 (169) (DB).]

[5] Different views are held as to whether joint family property standing in sole name of manager is trust property so as to be exempt from probate or administration duty under the section.

[4] The section applies to such a case. (Vol 11) 1924 Bom 228 (229): 48 Bom 75 (FB) (Overruling (Vol 2) 1915 Bom 18: 39 Bom 245.) \* ('96) 28 Cal 980 (983) (DB) \* (Vol 29) 1942 Lah 173 (178): I L R (1942) Lah 717 (FB).

[See (Vol 12) 1925 Cal 1201 (1204, 1205): 52 Cal 871 (DB).]

[1] Court-fee is payable on the value of the share which the deceased would have got if the property

had been divided just before his death. (Vol 14) 1927 Mad 1101 (1101) (DB) \* ('10) 33 Mad 93 (96, 100) (FB).

[c] Full court-fee is payable in such a case (Vol 22) 1935 All 449 (450): 57 All 881 (DB) \* (Vol 26) 1939 Pat 126 (129): 17 Pat 512 (DB) \* (Vol 7) 1920 Pat 153 (154): 5 Pat L Jour 510.

[6] A bequeathed his property to his wife B and sons of his nephew C and D jointly. B was to manage the property during her life-time and after her death C and D were to take possession. On the death of B, C and D applied for limited letters of administration and claimed exemption from court-fee. It was held that the will did not constitute B trustee for C and D and they were not entitled to exemption from payment of court-fees. (Vol 15) 1928 Bom 55 (56, 57): 52 Bom 188 (DB).

[7] A invested money in the post-office in the name of his minor son B. On the death of the minor, A claimed that the money was held "in trust not beneficially or with general power to confer a beneficial interest" and therefore no court-fee was payable on the letters of administration. He stated that the money was his own and was invested in the minor's name in order to escape payment of income-tax. It was held that he could not be heard to say so and was liable to pay court-fee in respect of the money. (Vol 22) 1935 Cal 509 (511): 62 Cal 114.

[8] A by his will appointed his senior widow as the sole executrix and it was provided that the junior widow would get an annuity of Rs. 50 every month. The senior widow on applying for probate claimed that she was entitled to deduct from the gross value of the estate the capitalized value of the annuity, as she held it in trust for the junior widow under the will. It was held that the senior widow could not claim exemption from duty. (Vol 4) 1917 Pat 98 (99): 2 Pat L Jour 611 (DB) (Trust created by the will of a testator are not exempted from the payment of probate duty.)

**SECTION 19 E—Note 1.**

[1] For this section to be applicable the estimated value of the property of the deceased given by the person applying for probate or letters should be less than what the value has

Provided that, if the application be made within six months after the ascertainment of the true value of the estate and the discovery that too low a court-fee was at first paid on the probate or letters, and if the said Authority is satisfied that such fee was paid in consequence of a mistake or of its not being known at the time that some particular part of the estate belonged to the deceased, and without any intention of fraud or to delay the payment of the proper court-fee, the said Authority may remit the said penalty, and cause the probate or letters to be duly stamped on payment only of the sum wanting to make up the fee which should have been at first paid thereon.

[a] *Substituted* for "of the Province" by the Court-fees (Amendment) Act, 1901 (10 [X] of 1901), S. 3 (1).

**19-F.** In case of letters of administration on which too low a court-fee has been paid at first, the said Authority shall not cause the same to be duly stamped in manner aforesaid until the administrator has given such security to the Court by which the letters of administration have been granted as ought by law to have been given on the granting thereof in case the full value of the estate of the deceased had been then ascertained.

**19-G.** Where too low a court-fee has been paid on any probate or letters of administration in consequence of any mistake, or of its not being known at the time that some particular part of the estate belonged to the deceased, if any executor or administrator acting under such probate or letters does not, within six months b[ \* \* \* ] after the discovery of the mistake or of any effects not known at the time to have belonged to the deceased, apply to the said Authority and pay what is wanting to make up the court-fee which ought to have been paid at first on such probate or letters, he shall forfeit the sum of one thousand rupees and also a further sum at the rate of ten rupees per cent. on the amount of the sum wanting to make up the proper court-fee.

[a] As to recovery of penalties or forfeitures under S. 19 G, *See* section 19 J.

[b] The words and figures "after the first day of April 1875, or" were *repealed* by the Amending Act, 1891 (12 [XII] of 1891).

#### PROVINCIAL AMENDMENT

#### SECTION 19-GG ASSAM

After S. 19G the following new section was *inserted* as S. 19GG viz:—

"19-GG. Notwithstanding anything contained in this or any other Act, no probate or letters of administration heretofore or hereafter granted by any Court outside the limits of the Province of Assam shall operate to confer upon the grantee any title to immovable property in Assam of which he did not obtain possession prior to the 1st January 1937, unless he holds a certificate from the Chief Controlling Revenue Authority of Assam that he has paid the court-fee due on such probate or letters of administration in respect of the full value of such property".  
—*Assam Act XIV of 1936. [2-12-1936]*

#### Section 19-E (contd.)

afterwards been proved to be in the enquiry under S. 19 H. (Vol 8) 1916 Cal 797 (799) : 48 Cal 280 (DB).

[2] Where there is no application on the part of the person who has taken out probate or letters and produces the same to be duly stamped, the section will not apply. (Vol 5) 1916 Cal 797 (799) : 48 Cal 280 (DB) \* ('96) 1896 Bom P J 751.

[3] The "mistake" may be either of fact or of law. (Vol 28) 1936 Sind 150 (153) : 90 Sind L R 201 (DB) (Case under S. 19-G. which uses identical expression.)

[But see (Vol 15) 1928 Lah 947 (949).]

[4] The duty of determining whether or not too low a court-fee has been paid and what is the penalty to be levied, is imposed by the Legislature on the Chief Revenue "authority." ('96) 1896 Bom P J 751.

[5] Civil Court has no jurisdiction to review decision of Revenue authority on the ground that the valuation had been incorrectly made or that the discretion in the imposition of the penalty had been erroneously exercised. (Vol 3) 1916 Cal 797 (799) : 48 Cal 280 (DB) \* ('96) 1896 Bom P J 751.

[6] Where the action of the Revenue authority is *ultra vires* or where he has not followed the procedure prescribed by the statute, which is the source of his authority, there is no enforceable claim which a Civil Court is bound to recognize. (Vol 8) 1916 Cal 797 (799) : 48 Cal 280 (DB) (Collector calling upon petitioner to amend valuation under S. 19 H (3)—Petitioner disputing correctness of assessment by Collector—Penalty imposed by Board of Revenue purporting to act under S. 19 E, without moving probate Court for enquiry under S. 19 H (4), is *ultra vires* and Civil Court can interfere.

#### SECTION 19-G—Note 1.

[1] Word "mistake" used in this section has same meaning as in S. 19-E. (Vol 15) 1928 Lah 947 (949).

Notice of applications for probate or letters of administration to be given to Revenue-authorities and procedure thereon.

<sup>a</sup>[19-H. (1) Where an application for probate or letters of administration is made to any Court other than a High Court, the Court shall cause notice of the application to be given to the Collector.]

(2) Where such an application as aforesaid is made to a High Court, the High Court shall cause notice of the application to be given to the Chief Controlling Revenue-authority <sup>b</sup>[for the local area in which the High Court is situated].

(3) The Collector within the local limits of whose revenue jurisdiction the property of the deceased or any part thereof is, may at any time inspect or cause to be inspected, and take or cause to be taken copies of, the record of any case in which application for probate or letters of administration has been made; and if, on such inspection or otherwise, he is of opinion that the petitioner has under-estimated the value of the property of the deceased, the Collector may, if he thinks fit, require the attendance of the petitioner (either in person or by agent) and take evidence and inquire into the matter in such manner as he may think fit, and, if he is still of opinion that the value of the property has been under-estimated, may require the petitioner to amend the valuation.

(4) If the petitioner does not amend the valuation to the satisfaction of the Collector, the Collector may move the Court before which the application for probate or letters of administration was made, to hold an enquiry into the true value of the property:

Provided that no such motion shall be made after the expiration of six months from the date of the exhibition of the inventory required by section 277 of the *Indian Succession Act, 1865*, or, as the case may be, by section 98 of the *Probate and Administration Act, 1881*.

(5) The Court, when so moved as aforesaid, shall hold, or cause to be held, an enquiry accordingly, and shall record a finding as to the true value, as near as may be, at which the property of the deceased should have been estimated. The Collector shall be deemed to be a party to the inquiry.

(6) For the purposes of any such inquiry, the Court or person authorized by the Court to hold the inquiry may examine the petitioner for probate or letters of administration on oath (whether in person or by commission), and may take such further evidence as may be produced to prove the true value of the property. The person authorized as aforesaid to hold the inquiry shall return to the Court the evidence taken by him and report the result of the inquiry, and such report and the evidence so taken shall be evidence in the proceeding, and the Court may record a finding in accordance with the report, unless it is satisfied that it is erroneous.

(7) The finding of the Court recorded under sub-section (5) shall be final, but shall not bar the entertainment and disposal by the Chief Controlling Revenue-authority of any application under section 19 E.

(8) The <sup>d</sup>[Provincial Government] may make rules for the guidance of Collectors in the exercise of the powers conferred by sub-section (3).]

[a] Section 19 H was inserted by the Court-fees Amendment Act, 1899 (11 of 1899) S. 2. The original S. 19 H was repealed by Act VIII of 1890, S. 2 and Sch.

[b] Substituted for "of the Provinces" by the Court-fees Amendment Act, 1901 (X of 1901), S. 3 (2).

[c] See now the Indian Succession Act, 1925 (39 [XXXIX] of 1925).

[d] Substituted by A.O. for "Local Government".

#### SECTION 19-H—Note 1.

[1] Object of this section is to safeguard revenue and not to delay grant of probate or letters. (28) 32 Cal W N 799 (804) \* (Vol 12) 1925 Cal 1201 (1208); 52 Cal 871 (DB).

[2] Court is not required to undertake investigation to check valuation. (28) 32 Cal W N 799 (802, 808).

[3] In moving Court for inquiry Collector should make out case upon definite facts. (Vol 8) 1916 Cal 797 (799); 43 Cal 220 (DB) \* (92) 6 Cal W N 898 (908).

## PROVINCIAL AMENDMENT

## UNITED PROVINCES

(1) The following proviso was *substituted* for the existing proviso to sub-s. (4):—

“Provided that no such motion shall be made after the expiration of one year from the date of the exhibition of the inventory required by S. 317 of the Indian Succession Act”.

(2) Sub-section (8) was *deleted*.

—U. P. Act XIX of 1933. [9-1-1939].

**a[19-I.]** (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation.

(2) The grant of probate or letters of administration shall not be delayed by reason of any motion made by the Collector under section 19-H, sub-section (4).]

[a] *Inserted* by the Court-fees Amendment Act, 1899 (11 [XI] of 1899), S. 2.

**Section 19-H (contd.)**

[4] Erroneous exemption of any part of property on ground of its being trust property will be ‘under-estimation’ of value of property within meaning of this section. (Vol 22) 1935 Cal 509 (510): 62 Cal 114.

[5] Subject to power of Collector to take action under this section, Taxing Officer’s certificate will be conclusive on point as to whether correct duty has been paid. (Vol 22) 1935 Cal 509 (510): 62 Cal 114.

[6] Claim made that part of property in regard to which probate or letters of administration are applied for, is trust property—Taxing Officer should refer matter to Chief Justice under S. 5. (Vol 22) 1935 Cal 509 (510): 62 Cal 114.

[7] Starting point of limitation under proviso to Sub-S. (4) is lodging of inventory *as required by Statute*. (‘14) 41 Cal 556 (566): 40 Ind App 236 (P C).

[8] It would be duty of Court if possible and if circumstances permit, to hold inquiry itself and to save further expenses to parties. (‘02) 6 Cal W N 898 (899).

[9] Act does not specify in what way or by whom expense in connexion with enquiry under sub-s. (5), should be met. (Vol 10) 1923 Cal 406 (407): 50 Cal 239 (DB) \* (‘02) 6 Cal W N 898 (899).

[10] Finding of Court of inquiry recorded under sub-s. (5) is not appealable though revision lies. (Vol 12) 1925 Cal 357 (359) (DB).

[11] Petition for review of finding granted—Order set aside in revision. (Vol 11) 1924 Cal 774 (775, 776): 51 Cal 70 (DB).

**SECTION 19-I—Synopsis.**

1. **Scope.**
2. **Section is retrospective.**
3. **Applicability to High Court.**
4. **Application in forma pauperis.**
5. **Liability for court-fee, if depends on necessity of probate or letters.**
6. **Court-fee on application for probate.**
7. **Grant of letters to administrator pendente lite.**

8. **Valuation of property and payment of fees.**
9. **Date of valuation is date of application.**
10. **“The Court is satisfied.....valuation”.**
11. **Probate or letters in respect of portion of estate.**
12. **Property situate in different provinces of British India or both in India, and abroad.**
13. **Non-compliance with section—Power of appellate Court.**
14. **Court not prevented from hearing application.**
15. **Sub-section (2).**
16. **Appeal from order passed in probate or letters of administration proceedings.**

1. **Scope.**—[1] Section is mandatory. (‘87) 2 Mad L Jour 899 (900).

[2] Court must be satisfied that fee mentioned in Sch I, Art 11 has been paid on Valuation of property in form set forth in Sch III. (Vol 25) 1938 Mad 486 (488) \* (Vol 12) 1925 Cal 1201 (1203): 52 Cal 87 (DB) \* (Vol 11) 1924 Cal 987 (988) (DB).

[3] Valuation may be filed and fees may be paid even after application is made. (Vol 30) 1943 Cal 19 (21): I L R. (1942) 2 Cal 194 \* (‘11) 14 Oudh Cas 14 (22) (DB).

[4] Court-fee on probates or letters of administration is payable under this section and not under S. 6 (1913) 17 Cal W N 21 (24) (DB).

[But see (Vol 22) 1935 All 449 (450) (DB).]

2. **Section is retrospective.**—[1] This section lays down procedure only and hence operates retrospectively. (1900) 1900 Pun Re No. 26 P. 91 (91, 92) (DB).

3. **Applicability to High Court.**—[1] Taxing Officer’s decision that no duty is payable is final under S. 5 and cannot be reviewed under S. 19-I by Judge in Chambers when application for grant is laid before him in ordinary course of non-contentious business. (Vol 12) 1925 Cal 1201 (1204): 52 Cal 871 (DB).

## PROVINCIAL AMENDMENT

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For Sub-section (1) the following sub-section was substituted, viz:—

"(1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court, in the form set forth in the third schedule, a valuation, according to the market rates current on the date of the application of all the assets and liabilities of the deceased in British India at the time of the latter's death, and the Court is satisfied that the fee mentioned in Article 11 of the first schedule has been paid on such valuation.

*Explanation.*—If at the time of his death, the deceased was a member of a joint Hindu family governed by the Mitakshara Law, such portion of the assets and liabilities of the family as would have been allotted to the deceased in a partition made immediately before his death, shall be deemed to be the assets and liabilities of the deceased within the meaning of this sub-section."

—U. P. Act XIX of 1938. [9-1-1939.]

## Section 19-I (contd.)

**4. Application in forma pauperis.**—[1] Application for grant of probate or letters of administration made—Court can entertain application *in forma pauperis* and make further order granting probate or letters of administration to applicant without payment of any duty by him under Sch I, Art 11. (Vol 25) 1938 Mad 486 (488).

**5. Liability for court fee, if depends on necessity of probate or letters.**—[1] Liability to pay fee prescribed by Sch I Art 11 does not depend upon whether obtaining of probate or letters of administration is necessary but upon fact of probate or letters of administration having been applied for in respect to property. (Vol 22) 1935 All 449 (450): 57 All 881 (DB).

**6. Court-fee on application for probate.**—[1] Court-fee is charged on probate and not on application for or order granting probate. (Vol 32) 1945 Bom 1 (3) (DB).

**7. Grant of letters to administrator pendente lite.**—[1] Proceedings pending for grant of letters of administration—Application made for appointment of administrator *pendente lite*—Court-fees must be paid on such appointment. (Vol 13) 1926 Rang 89 (90) (DB).

**8. Valuation of property and payment of fees.**—[1] Net total after deduction of total of items in Annexure B from that in Annexure A is valuation on which fee mentioned in Sch I Art 11 is to be paid. (Vol 29) 1942 Lah 173 (176): I L R (1942) Lah 717 (FB).

[2] Property which deceased gifted away to petitioner is not required to be set forth in Annexure A. (Vol 21) 1934 Oudh 72 (74): 9 Luck 370 (DB).

[3] Death of husband—Burmese Buddhist wife applying for letters of administration—She must pay duty only on other half which belonged to her husband. (Vol 6) 1919 Low Bur 118 (118).

[4] Government and Railway Provident Fund money is not liable to duty, when application for letters of administration is made in respect of estate of deceased. (Vol 15) 1928 Rang 312 (313): 6 Rang 558.

[5] Money vested in nominee is not liable to duty. (Vol 17) 1930 Cal 252 (253) (DB). (Nominee cannot be compelled to take out letters of administration—Railway Company—Employer can only insist on proof of identity.) (Vol 18) 1926 Nag 306 (307) \* (Vol 12) 1925 Nag 108 (108).

[6] If Railway company refuses to pay money to nominee without production of letters of administration or probate it may be mentioned among assets of deceased but no fee will be payable thereon. (Vol 12) 1925 Nag 108 (108).

[See also (Vol 17) 1930 Cal 252 (253) (DB) (Provident fund mentioned—It cannot be held to have been included as "assets" of the deceased).]

[But see (Vol 17) 1930 Oudh 145 (147): 5 Luck 712 (FB) \* (Vol 26) 1939 Sind 52 (57): I L R (1939) Kar 359 (Nominee cannot get succession certificate in respect of amount without payment of court-fee).]

[7] Person not dependant or nominee—Provident fund money over Rs. 5,000—He can get money only by producing probate, letters of administration or succession certificate and has to pay fee on amount of fund when applying for probate, etc. (Vol 20) 1933 Sind 101 (101): 26 Sind L R 429.

[8] Private provident fund—Money does not vest in dependant or nominee of depositor or subscriber—Private company creating fund does not hold it as trustee for dependant or nominee—Court-fee is payable on probate or letters of administration. (Vol 16) 1928 Rang 312 (313): 6 Rang 558.

[9] Judgment-debt need not be valued at its face value but value may be put on it according to chances of recovering it. (Vol 18) 1931 Bom 419 (420): 55 Bom 844.

[10] Widow applied for certificate of administration—Objection raised that sum of money secured on bond in name of widow belonged to estate of deceased—Widow denied this—Held until contrary was proved fee should be paid on valuation of estate excluding bond-debt. ('80) 5 Cal L R 368 (369) (DB).

[11] Mere fact that property is subject of litigation will not in itself make it impossible for value of property being assessed for purpose of duty on probate or letters of administration. ('01) 24 Mad 241 (242) (DB).

[12] Deceased's estate worth Rs. 125 and chose in action claiming Rs. 17,000—Petitioner assessing under Rs. 1,000—Probate or letters of administration may be issued without payment of fee as provided by S. 19 (VIII). ('01) 24 Mad 241 (242) (DB) \* ('96) 23 Cal 577 (579) (DB).

[13] A person by will conveyed property in trust for A for life and thereafter for such person as A should appoint and A exercised such power by his will—Property in which A had only life-interest with

a[19-J. [1] Any excess fee found to be payable on an inquiry held under section Recovery of penalties, 19-H, sub-section (6), and any penalty or forfeiture under section 19-G, may, on the certificate of the Chief Controlling Revenue-authority, be recovered from the executor or administrator as if it were an arrear of land-revenue by any Collector in any part of British India.

[2] The Chief Controlling Revenue-authority may remit the whole or any part of any such penalty or forfeiture as aforesaid, or any part of any penalty under section 19E or of any court-fee under section 19E in excess of the full court-fee which ought to have been paid.]

[a] Inserted by the Court-fees Amendment Act, 1899 (11 [XI] of 1899) s. 2.

### Section 19-I (contd.)

general power of appointment is not "property" within meaning of Sch I. Art 11 and is not liable to probate duty. (Vol 20) 1938 Cal 924 (925, 926): 60 Cal 1016.

[But see ('02) 25 Mad 515 (518).]

[14] No duty is payable in respect of membership card of association. (Vol 29) 1942 Bom 33 (34).

[15] Petitioner stated amount of assets which he expected to realize. Mere fact that he is prepared to allow other persons to retain and administer amount recovered by them before grant of probate does not entitle him to evade duty in respect of latter amount and duty must be paid on entire sum. (Vol 18) 1931 Lah 310 (312): 12 Lah 584 (DB).

[16] Petitioner can deduct amount of debts due from deceased from gross value of estate. (Vol 3) 1916 Cal 543 (545) \* (Vol 1) 1914 Cal 40 (44).

[17] Court-fee mentioned in section is to be calculated according to law in force on date of grant and not that in force on the date of the application. (Vol 31) 1944 All 119 (120): 1 L R (1944) All 229. (DB) \* (Vol 14) 1927 Bom 643 (643): 52 Bom 61 (DB) \* (Vol 32) 1945 Pat 361 (362): 24 Pat 171 \* (Vol 32) 1945 Pat 86 (86): 23 Pat 672.

[But see (Vol 11) 1924 Cal 987 (988) (DB) \* (Vol 32) 1945 Bom 1 (5) (DB).]

### 9. Date of valuation is date of application.—

[1] Value of property of deceased for purposes of calculation of court-fees under Sch I, Art 11 is its value at date of application for probate or letters of administration and not its value at time of death of deceased. (Vol 20) 1938 Lah 936 (937, 938): 14 Lah 526 \* (Vol 8) 1921 Pat 206 (208): 6 Pat L Jour 411 (DB).

[2] Subsequent changes in value of property do not alter amount of fee payable. (12) 14 Ind Cas 804 (804, 807) (Bur).

### 10. "The Court is satisfied .....valuation."

[1] Court cannot check correctness of valuation. (28) 82 Cal W. N. 799 (802, 808) \* (Vol 12) 1925 Cal 1201 (1208): 52 Cal 871 (DB).

[2] Question whether property is or is not trust property and was or was not rightly included in Annexure B of valuation filed by petitioner falls under this section and must be decided by Court before granting probate or letters of administration. (Vol 26) 1939 Pat 126 (127): 17 Pat 542 \* (Vol 15) 1928 Lah 947 (949).

11. Probate or letters in respect of portion of estate.—[1] Application for probate or letters relates to portion of estate—Valuation and court-fee need not be in respect of whole estate. (Vol 12) 1925 Lah 493 (493).

[2] Testator appointing 20 sole executors—Widow and daughters in possession of substantial portion of property—Probate held cannot be granted to executors in respect of portion only and they are liable to pay

court-fee on entire value of estate. (Vol 30) 1943 Oudh 151 (154) (DB).

### 12. Property situate in different provinces of British India or both in India and abroad.—

[1] Court-fee is to be calculated according to rates prevailing in Province in which probate or letters is or are granted. (Vol 11) 1924 Cal 115 (117): 50 Cal 597:

[2] Testator leaves property in India and in foreign country—No court-fee is leviable in respect of property outside British India ('97) 21 Bom 139 (149) \* ('02) 1902 Pun Re No. 51, p 190 (191).

[3] Partner in company having head office in London and branch office in Bombay died in England—Probate of his will obtained in England—Application for letters of administration made in Bombay—Held no duty payable on value of his share in British India as business was carried on in London. ('97) 21 Bom 673 (680).

13. Non-compliance with section—Power of appellate Court.—[1] Application for probate not in proper form made and granted—Previous proceedings are not nullity—Judge can allow petitioner to make good defects. (Vol 23) 1936 Sind 150 (153): 30 Sind L R 201 (DB).

14. Court not prevented from hearing application.—[1] This section does not say that Court shall not try application until conditions are fulfilled. (Vol 30) 1943 Cal 19 (21): 1 L R (1942) 2 Cal 194 \* (11) 14 Oudh Cas 14 (22) (DB).

15. Sub-section (2).—Fee chargeable under sub-s. (1) of this section may subsequently be revised as result of motion made by Collector. (Vol 20) 1933 Lah 986 (988): 14 Lah 526.

[2] Executor cannot be compelled to pay probate duty until Collector has finished his work with regard to valuation of property. (Vol 16) 1929 Cal 733 (734) (DB).

[3] Grant cannot be delayed on ground that there was no motion made by Collector. (Vol 5) 1918 Cal 510 (511) (DB).

16. Appeal from order passed in probate or letters of administration proceedings.—[1] Different views are held as to provisions applicable to appeal from order passed in probate or administration proceedings.

[a] Sch II, Art 17 (VI) applies. (13) 35 All 448 (450) (DB).

[b] Sch II, Art I applies. (1911) 21 Mad L Jour 481 (482) (DB) and (1892) 16 Bom 408 \* ((1896) 23 Cal 723 relied on.)

[c] Sch II, Art 11 applies. (Vol 25) 1938 Rang 141 (145): 1938 Rang L R 72.

### SECTION 19-J—Note 1.

[1] Sub-section (1) of this section does not refer to penalties imposed under S. 19-E of the Act. (Vol 8) 1916 Cal 797 (799): 43 Cal 230 (DB).

[2] Costs of inquiry under S. 19-H cannot be recovered from petitioner under this section. (Vol 10) 1923 Cal 406 (407): 50 Cal 239 (DB).



Sections 6 and 28 not to apply to probates or letters of administration.

[19-K. Nothing in section 6 or section 28 shall apply to probates or letters of administration.]

a] Inserted by the Court-fee Amendment Act, 1899 (11 [XII] of 1899), s. 2.

#### CHAPTER IV. PROCESS-FEES.

Rules as to costs of process.

20. The High Court shall, as soon as may be, make rules as to the following matters:—

- i. The fees chargeable for serving and executing processes issued by such Court in its appellate jurisdiction, and by the other Civil and Revenue Courts established within the local limits of such jurisdiction;
- ii. the fees chargeable for serving and executing processes issued by the Criminal Courts established within such limits in the case of offences other than offences for which police officers may arrest without a warrant; and
- iii. the remuneration of the peons and all other persons employed by leave of a Court in the service or execution of processes.

The High Court may from time to time alter and add to the rules so made.

All such rules, alterations and additions shall, after being confirmed by the Provincial Government, be published in the Official Gazette, and shall thereupon have the force of law.

Until such rules shall be so made and published, the fees now leviable for serving and executing processes shall continue to be levied, and shall be deemed to be fees leviable under this Act.

[a] Substituted by A.O. for "Local Government."

[b] The words "and sanctioned by the Governor-General of India in Council" were omitted the Devolution Act, 1920 [38 [XXVIII] of 1920], s. 2 and Sch. I.

[c] Substituted by A.O. for "local official Gazette."

#### PROVINCIAL AMENDMENTS

##### PUNJAB

The words "and revenue" occurring between the words "civil" and "Courts," in item one of the section were *repealed*.  
—*Punjab Land Revenue Act XVII of 1887*. [23-9-1887.]

##### UNITED PROVINCES

For the existing heading of Chap. IV the heading "Power to make Rules" was *substituted*.

For S. 20 the following section was *substituted*, viz.:

*Power of High Court*—20. The High Court may make rules to provide for or regulate all or any of the following matters, viz.:

- (a) the fees payable for serving and executing processes issued by such Court in its appellate jurisdiction and by the Civil and Criminal Courts established within the local limits of such jurisdiction;
- (b) the remuneration of persons employed by the Courts mentioned in clause (a) in the service or execution of processes;
- (c) the fixing by District and Sessions Judges and District Magistrates of the number of process-servers necessary to be employed for the service and execution of processes issued from their respective Courts and Courts subordinate thereto; and
- (d) the display in each Court of a table in the English and Vernacular languages showing the fees payable for the service and execution of processes.

All such rules shall be subject to the confirmation of the Provincial Government and on such confirmation shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.—

—*U. P. Act XIX of 1938*. [10-1-1939.]

#### SECTION 20—Note 1.

[1] The Court of a Special Judge under the Bengal Tenancy Act is a Civil Court within the meaning of the section. (Vol 18) 1931 Cal 572 (573): 58 Cal 995. (In appeals before the special Judge, process-fee for notices on respondents should be paid according to the scale laid down in the High Court Rules framed under the section. Rule 65 of the rules framed by the Government under S. 189 of the Bengal Tenancy Act is not applicable to such a case.)

[2] Custody fees in respect of movables attached in execution proceedings are covered by the section. (Vol 24) 1937 Cal 86 (87): ILR (1937) 1 Cal 624 (DB).

[3] A commission to make a local investigation is not a process within the meaning of the section. ('90) 17 Cal 281 (284) (DB).

[4] Poundage-fees are process-fees levied under rules made under the section. (Vol 11) 1927 Bom 17 (18,19) (DB).

[5] An order issued by the Court for the sale of property in its custody during the pendency of the suit either by the process establishment or by officer specially appointed under R. 197 (Madras Civil Rules of Practice) is a process within this section—Sale is chargeable with poundage—Fixing of remuneration for the person conducting sale does not excuse payment of poundage-fee. (Vol 32) 1915 Mad 238 (286): ILR (1915) Mad 816.

[6] The High Court has no power to relax or remit the process-fees prescribed under the Rules made under this section. Order 48 Rule 1 of the Civil Procedure Code gives no such power. (Vol 17) 1930 Mad 881 (882): 58 Mad 262 (FB) \* (Vol 11) 1927 Pat 318 (318) ('90) 26 Cal 124 (125, 126) (DB).

## SECTION 20A.

## N.-W.F.P.

Add after S. 20 the following, namely—

“20 A. Exemption for certain processes—(1) Notwithstanding any thing contained in the preceding section or in the rules made thereunder, no fees shall be charged for serving and executing processes on behalf of the prosecution in any criminal proceedings taken on information presented or complaint made by a public officer acting in his official capacity.

(2) The Provincial Government may by notification determine what persons shall be deemed to be public officers for the purpose of the preceding sub-section.”

—*The Court Fees (N.-W. F. P. Amendment) Act, 1942 N.-W. F. P. Act 8 [VIII] of 1942 S. 2. [15-11-1942]*

## PUNJAB

The following section was added as section 20-A after section 20 :

“20-A. (1) Notwithstanding anything contained in the preceding section or in the rules made thereunder, no fees shall be charged for serving and executing processes on behalf of—

(a) the prosecution in any criminal proceedings taken on information presented or complaint made by a public officer acting in his official capacity, and

(b) a liquidator or an arbitrator appointed under the provisions of the Co-operative Societies Act, 1912.]

(2) The Provincial Government may by notification determine what persons shall be deemed to be public officers for the purpose of the preceding sub-section.”—*Punjab Act IV of 1939. [24-4-1939.]* The portions in square brackets in sub-section (1) were added by *Punjab Act I of 1942. [24-2-1942.]*

**21.** A table in the English and Vernacular languages, showing the fees chargeable Tables of process for such service and execution, shall be exposed to view in a conspicuous part of each Court.

## PROVINCIAL AMENDMENT

## UNITED PROVINCES

For s. 21 the following section was substituted:

“21. (1) The Chief Controlling Revenue Authority may, with the previous sanction of the Provincial Government, make rules consistent with this Act to provide for or regulate all or any of the following matters, viz :

(a) the fees chargeable for serving and executing processes issued by the Chief Controlling Revenue Authority and by the Revenue Courts established within the local limits of its jurisdiction;

(b) the remuneration of the persons necessary to be employed for the service and execution of such processes;

(c) the fixing by Collectors of the number of persons necessary to be employed for the service and execution of such processes;

(d) the guidance of Collectors in the exercise of the powers conferred on them by sub-s. (iii) of s. 19H;

(e) the supply of stamps to be used under this Act;

(f) the number of stamps to be used for denoting any fee chargeable under this Act;

(g) the keeping of accounts of all stamps used under this Act;

(h) the circumstances under which stamps may be held to be damaged or spoiled;

(i) the circumstances in which and the manner in which allowance for used, damaged or spoiled stamps may be made; and

(j) the regulation of the sale of stamps to be used under this Act, the person by whom alone such stamps may be sold, and the duties and remuneration of such persons:

Provided that, in the case of stamps used under s. 3 in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

(1-A) The Provincial Government may make rules to carry out generally the purposes of this Act.

[2] All rules made under this section shall be published in the Official Gazette and on such publication, shall have effect as if enacted in this Act.”—*U. P. Act XIX of 1938. [9-1-1939.]* Sub-section (1-A) was added by—*U. P. Act IX of 1941. [19-6-1941.]*

Number of peons in District and subordinate Courts.

**22.** Subject to rules to be made by the High Court and approved by the <sup>b</sup>[Provincial Government] <sup>c</sup>[\* \* \*],

every District Judge and every Magistrate of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court and each of the Courts subordinate thereto,

and for the purposes of this section, every Court of Small Causes established under <sup>d</sup>Act No. XI of 1865 (to consolidate and amend the law relating to Mufassal small Cause Courts of Small Causes beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature) shall be deemed to be subordinate to the Court of the District Judge.

[a] See different Local Rules and Orders.

[b] Substituted by A. O. for "Local Government."

[c] The words "and the Governor-General of India in Council" were omitted by the Devolution Act, 1920 (38 [XXXVIII] of 1920), s. 2 and Sch. 1.

[d] See now the Provincial Small Cause Courts Act, 1887 (9 [IX] of 1887) S. 2 (c).

#### PROVINCIAL AMENDMENT

##### UNITED PROVINCES

Section 22 was repealed.

—United Provinces Act XIX of 1918. [9-1-1939.]

**23.** Subject to rules\* to be framed by the Chief Controlling Revenue-authority and approved by the <sup>b</sup>[Provincial Government], <sup>c</sup>[\* \* \*] every officer performing the functions of a Collector of a District shall fix, and may from time to time alter, the number of peons necessary to be employed for the service and execution of processes issued out of his Court or the Courts subordinate to him.

[a] See different Local Rules and Orders.

[b] Substituted by A. O. for "Local Government".

[c] The words "and the Governor-General of India in Council" were omitted by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. 1.

#### PROVINCIAL AMENDMENTS

##### PUNJAB

This section was repealed so far as the province of the Punjab was concerned.

—Punjab Land Revenue Act XVII of 1887. [23-9-1887.]

##### UNITED PROVINCES

This section was repealed.

—United Provinces Act XIX of 1918. [9-1-1939.]

[24. Process served under this Chapter to be held to be process within meaning of Code of Civil Procedure] Repealed by the Repealing and Amending Act, 1891 (12 [XII] of 1891).

### CHAPTER V.

#### OF THE MODE OF LEVYING FEES.

#### PROVINCIAL AMENDMENT

##### Section 24 A

##### UNITED PROVINCES.

The following section was inserted as S. 24A at the beginning of Chap. V, viz.:—

"24A. The levy of fees under this Act shall be under the general control and superintendence of the Chief Controlling Revenue Authority, who may be assisted in their supervision and Inspectorate of thereof by the Chief Inspector of Stamps and by as many inspectors of Stamps as the Provincial Government may appoint in this behalf or by any other subordinate agency appointed for the purpose.

The Chief Inspector of Stamps and Inspectors of Stamps shall have access to all records, and shall be furnished with all such information as may be required by them for the performance of their duties under this Act."

—U. P. Act XIX of 1938. [9-1-1939.]

#### SECTION 22—Note 1.

[1] The number of peons to be employed for the service and execution of processes is fixed by the District Judge and the remuneration is settled by the High Court. (1895) 22 Cal 596 (607) (DB).

[2] The Act distinctly contemplates that the peons are to be employed, not only for the service of summons, notices or orders, but for the execution of the processes, such as warrants of arrest, or of attachment and distress. (1895) 22 Cal 596 (607) (DB).

Collection of fees by stamps.

**25.** All fees referred to in section 3 or chargeable under this Act shall be collected by stamps.

**26.** The stamps used to denote any fees chargeable under this Act shall be impressed or adhesive, or partly impressed and partly adhesive, as the <sup>a</sup>[Appropriate Government] may, by notification in the <sup>b</sup>[Official Gazette] from time to time direct.<sup>c</sup>

[a] *Substituted* by A.O. for "Local Government" which had been substituted for "Governor-General of India in Council" by the Devolution Act, 1920 (XXXVIII of 1920), S. 2 and Sch. I.

[b] *Substituted* by A. O. for "local official Gazette" which had been substituted for "Gazette of India" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.

[c] *See* Gazette of India, 1883, Pt. I, page 189.

Rules for supply, number, renewal and keeping accounts of stamps.

**27.** The <sup>a</sup>[Appropriate Government] may, from time to time, make rules<sup>b</sup> for regulating—

(a) the supply of stamps to be used under this Act;

(b) the number of stamps to be used for denoting any fee chargeable under this Act;

(c) the renewal of damaged or spoiled stamps; and

(d) the keeping accounts of all stamps used under this Act;

Provided that, in the case of stamps used under section 3 in a High Court, such rules shall be made with the concurrence of the Chief Justice of such Court.

All such rules shall be published in the <sup>c</sup>[Official Gazette,] and shall thereupon have the force of law.

[a] *Substituted* by A. O. for "Local Government". For definition of "Appropriate Government" *See* Section 1A.

[b] *See* different Local Rules and Orders.

[c] *Substituted* by A. O. for "local official Gazette."

## PROVINCIAL AMENDMENT

### UNITED PROVINCES

This section was *repealed*.

—U. P. Act XIX of 1938. [9-1-1939.]

#### SECTION 25—Note 1.

[1] Payment of court-fees made in the form of money—Such payment was treated as equivalent to the payment of court-fees. (Vol 15) 1928 Pat 29 (30): 6 Pat 602 (DB) \* ('69) 3 Beng L R (App) 72 (73) (DB).

[2] Where there is a dispute as to the amount of court-fee payable on an appeal to the High Court, the Taxing Officer has no power to order the appellant to deposit in Court, as a condition precedent to the hearing of the appeal, a sum equal to the amount admitted by the appellant to be payable as court-fee. (Vol 15) 1928 Pat 29 (30): 6 Pat 602 (DB).

#### SECTION 26—Note 1.

[1] The Government has no power to require that the stamps should bear the words "court-fees". Such a requisition, if not complied with, will not invalidate the stamp. ('95) 19 Bom 145 (149) (DB).

#### SECTION 27—Note 1.

[1] Under the section Government is given power to make rules, inter alia, as to the number of stamps to be used to denote a particular amount of court-fee. ('71) 16 Suth W R 153 (153) (DB).

[2] The use of stamps which are not of the correct denomination according to rules made by Government under the section will not be sufficient

compliance with the provisions of the Act as to the payment of court-fees and the document in question must be treated as not stamped. (Vol 18) 1931 Nag 94 (95): 26 Nag L R 263 \* (Vol 18) 1931 Pat 39 (40)

[3] The Court may give time for the rectification of the defect. (Vol 18) 1931 Nag 94 (95): 26 Nag L R 263.

[4] Where stamps of the required denominations are not available, stamps of lower denomination may be used. (Vol 24) 1937 Mad 266 (267) \* ('71) 16 Suth W R 152 (152) (DB).

[See also (Vol 18) 1931 Pat 113 (113) (Certificate from one stamp vendor not sufficient—Plaintiff should try to get requisite stamp from other vendors in the locality). \* (Vol 18) 1931 Pat 39 (39). (Held that in this case the proper stamp for the plaint as it was originally filed was of a value above that which licensed stamp vendors were permitted to sell at the place and that the petitioners ought to have obtained it from the treasury.)]

[5] Stamps of wrong denomination used originally—Stamps of correct denomination supplied subsequently—Original stamps cannot be returned to the party nor has the Court power to order a refund of court-fees—But Court can issue certificate in favour of the party which he may use in applying to the Revenue authorities for a refund. (Vol 21) 1934 Nag 263 (263, 264): 31 Nag L R 82 \* (Vol 18) 1931 Pat 113 (114) \* (Vol 18) 1931 Pat 39 (40).

Stamping documents inadvertently received.

**28.** No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

But, if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order, that such document be stamped as he may direct; and, on such document being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance.

#### Section 27 (contd.)

[6] Where a plaint which does not bear stamps of the proper denomination is returned for presentation to the proper Court under O. 7 R. 10 of the Civil Procedure Code and is re-presented in such Court, the fact that the Court which returned the plaint did not raise any objection as regards the stamps does not preclude the Court of re-presentation from taking such objection. (Vol 18) 1931 Pat 99 (40).

[7] The words "for use in the High Court only" impressed on the back of court-fee stamps do not invalidate the stamps if used in the lower Courts. (Vol 18) 1926 Pat 408 (408).

#### SECTION 28—Synopsis.

1. Scope.
2. Failure to pay proper court-fee—Effect.
3. "Properly stamped".
4. "Mistake or inadvertence".
5. Payment of deficit court-fee under the section—Effect.
6. Stage at which deficit court-fee may be ordered to be paid.
7. Power to appellate Court to require payment of deficient court-fee in lower Court.
8. Court of revision—Power of.
9. Giving of time for paying court-fees.
10. Memorandum of appeal, rejection of, as insufficiently stamped.
11. Mode of recovery of court-fees.

1. **Scope.**—[1] The section does not apply to probates or letters of administration. (Vol 12) 1925 Cal 1201 (1208): 52 Cal 871 (DB).

2. **Failure to pay proper court-fee—Effect.**—[1] Where a plaint or other document requiring court-fee has not been properly stamped the Court cannot dispose of the matter on the merits (Vol 4) 1927 Low Bur 179 (180).

[See also ('12) 15 Ind Cas 526 (528) (Oudh) (Defendant claiming set-off but no court-fee paid—Set-off cannot be allowed).]

[2] Where a decree is passed in a suit instituted on an insufficiently stamped plaint, the decree will not be void. (Vol 15) 1928 Lah 221 (223).

[3] Where the Court finds it has no jurisdiction to entertain the suit, there is no objection to its returning the plaint under O. 7 R. 10 of the Civil Procedure Code for presentation to the proper Court although the full court-fee has not been paid. (Vol 18) 1931 Mad 69 (70, 71) \* ('29) 57 Mad L Jour 38 (38) (NRC) (It is not proper for a Court to ask the plaintiff to pay deficit court-fee and to reject the plaint on failure to pay the same.)

[4] Different views are held as to whether the failure to pay proper court-fee makes the suit one not instituted for purposes of limitation.

[a] The validity of a suit for purposes of limitation is not affected by the fact that sufficient court-fee on the plaint is not paid at the time of its presentation. (Vol 24) 1937 Pat 550 (552, 553): 16 Pat 600 (SB) \* ('04) 32 Mad 305 (306, 307) (FB) \* ('05) 27 All 197 (199, 200) (DB).

[b] The presentation of a plaint which is not properly stamped is not a valid presentation for purposes of limitation. (36) 9 R M 208 (208) (DB) \* ('26) 96 Ind Cas 433 (435) (DB) (Cal) \* (Vol 7) 1920 Lah 24 (24) \* ('90) 12 All 129 (142) (FB).

[See also ('87) 39 Pun L R 502 (503).]

3. **"Properly stamped."**—[1] Unless the proper stamps are used to denote the court-fees, the document will not be properly stamped within the meaning of the section. \* (Vol 21) 1934 Nag 263 (264): 31 Nag L R 82 \* (Vol 18) 1931 Pat 113 (113, 114) \* ('02) 6 Cal W N 785 (786).

4. **"Mistake or inadvertence."**—[1] Mistake is not mere forgetfulness. It is a slip, made not by design but by mischance. ('07) 29 All 749 (768) (FB).

[2] A mistake of law is a mistake within the meaning of the section. ('02) 25 Mad 380 (382, 383): 24 Mad 331 (DB).

[3] A mistake or inadvertence on the part of the Court or its officers is within the section. ('02) 1902 All W N 153 (153) (DB) \* ('01) 1901 All W N 21 (21) (DB).

[4] The mistake may, in its origin be the mistake of the plaintiff, but by the time the plaint has been registered the mistake becomes that of the Court or its officers. ('07) 29 All 749 (762) (FB).

[See also ('07) 29 All 382 (384, 385) (FB).]

5. **Payment of deficit court-fee under the section—Effect.**—[1] On deficit court-fee being made up under the orders of the Court, the plaint or other document in question and every proceeding relative thereto is rendered as valid as if it had been properly stamped in the first instance. (Vol 18) 1931 Rang 38 (38): 8 Rang 538 (DB) \* ('07) 1907 Pun Re No. 123 p. 600 (607) (DB) \* ('79) 2 All 682 (685) (FB).

[2] Where the Court once exercises its discretion and allows the deficit court-fee to be made up, it cannot go back on its own order subsequently. ('07) 1907 Pun Re No. 123 p. 600 (608, 607) (DB) \* ('02) 1902 All W N 153 (158) (DB).

[3] Where the deficit court-fee is paid within the time fixed by the Court or enlarged by it, the suit or other proceeding will not be barred by limitation although at the time when the deficit court-fee is paid the period of limitation has expired. ('07) 1907 Pun Re No. 123, p. 600 (607) (DB).

**Section 28 (contd.)**

**6. Stage at which deficit court-fee may be ordered to be paid.**—[1] The appellate Court can accept deficit court-fee ('02) 25 Mad 380 (382, 383): 4 Mad 331 (DB).

[2] Action under the section can be taken after the dismissal of an appeal. (Vol 30) 1943 Pat 102 (104): 1 Pat 720.

[3] To record findings on all issues and after dismissing suit on merits, to require payment of additional court-fee is illegal and contrary to correct procedure. (Vol 25) 1938 Lah 311 (312) \* (Vol 22) 935 Lah 75 (76).

[See also (Vol 8) 1921 Pat 88 (89): 6 Pat L Jour 93 (FB). Appellate Court—Question of court-fee in lower Court—Ordinarily question must be decided as a preliminary point—But Court has discretion to postpone decision.]

[4] Once the case has been disposed of, the Court becomes *functus officio* and has no longer any jurisdiction to require the payment of any Court-fees. (Vol 26) 1939 Sind 279 (280): ILR (1939) Kar 69 (DB) \* (Vol 20) 1933 Lah 208 (208) \* (Vol 20) 933 Mad 321 (321) \* (Vol 12) 1925 Lah 181 (181).

[See also (Vol 6) 1919 Cal 194 (194): 46 Cal 520 (DB) \* (Vol 19) 1932 All 316 (317).]

[But see ('85) 7 All 528 (532, 534) (DB).]

[5] Where a Court finds after the hearing of a case that a larger amount is due to the plaintiff or appellant than what he has paid court-fee for, the proper course for the Court is to post the case for orders and to require the party to pay additional court-fees and then only to pronounce judgment. (Vol 20) 1933 Mad 330 (331): 56 Mad 705 (DB).

[6] After pronouncing judgment the Court has no power to call upon a party to pay deficit court-fees. (Vol 25) 1938 All 546 (548) \* (Vol 19) 1932 Pat 228 (231): 11 Pat 532 (DB).

[See also ('03) 30 Cal 516 (519) (DB).]

[7] On objection by the Stamp Reporter, an appellant was ordered to pay *ad valorem* court-fee on his memorandum of appeal and to raise the question of sufficiency of court-fee at the hearing of the appeal. The additional court-fee was deposited. But the case was heard and disposed of and decree passed without the question of court-fee being raised. Hereafter, the appellant applied for refund of the amount deposited. It was held that the Court was bound to consider the question of sufficiency of court-fee on the appeal. (1913) 18 Cal L Jour 133 (136) (DB).

[8] The expiry of limitation for the proceeding is no bar to the acceptance of court-fee. ('02) 25 Mad 30 (392, 393): 24 Mad 331 (DB).

[9] Where a plaint is rejected for non-payment of sufficient court-fees within the time granted by the court and a fresh plaint is thereupon presented, the court can treat the court-fee already paid as part of the court-fee necessary for the fresh plaint. (Vol 22) 935 All 985 (986).

**7. Power of appellate Court to require payment of deficient court-fee in lower Court.**—[1] Where an insufficiently stamped document has been filed upon in the lower Court and the appellate

Court discovers the mistake when the appeal is filed, it cannot be said that the document is received, etc. by mistake or inadvertence in the appellate Court. (Vol 14) 1927 Cal 775 (775) (DB).

[2] Under S. 149 of the Civil Procedure Code, the appellate Court's power is wider and is not limited to the cases contemplated by S. 12 (ii) or by the second paragraph of this section. (Vol 17) 1930 Cal 787 (793, 794): 58 Cal 474 (DB) \* (Vol 8) 1921 Pat 88 (89): 6 Pat L Jour 293 (FB).

[See also A. I. R. Commentaries on the Civil Procedure Code, 4th (1944) Edn., Notes on S. 149.]

[3] The powers under O. 7 R. 11 of the Civil Procedure Code can be exercised by the appellate Court. (Vol 8) 1921 Pat 88 (90): 6 Pat L Jour 293 (FB).

[See also A. I. R. Commentaries on the Civil Procedure Code 4th (1944) Edn., O. 7 R. 11 Note 2.]

**8. Court of revision—Power of.**—[1] It has been held that a Court of Revision has power to require payment of court-fees that ought to have been paid in the lower Court. (Vol 2) 1915 Cal 701 (702) (DB) (Suit under Bengal Tenancy Act S. 106—Settlement Officer while acting under revisional powers under S. 108, Bengal Tenancy Act, can require deficit court-fee on plaint to be made up.)

**9. Giving of time for paying court-fees.**—[1] Where a case falls under either S. 10 (ii) of this Act or O. 7 R. 11, Civil P. C., the litigant will be entitled as of right to some time for making up deficiency in court-fee, notwithstanding the fact that under this section the Court is not bound to allow such time but has a discretion in the matter. (Vol 25) 1938 Mad 542 (543) \* (Vol 4) 1917 Lah 377 (378): 1917 Pun Re No. 27 (DB) \* ('88) 1888 Pun Re No. 156 p. 417 (418) (DB).

[See also ('07) 29 All 749 (761, 762) (FB).]

[2] Court has a discretion to allow time to an appellant to make up deficiency in court-fee on the memorandum of appeal. (Vol 28) 1941 Nag 220 (221): ILR (1941) Nag 467 (DB) \* (Vol 16) 1929 P C 147 (148): 56 Ind App 232: 10 Lah 737 (P C).

[3] The Court has power to enlarge the time originally fixed for payment of court-fee. ('09) 2 Ind Cas 1 (2) (Cal) \* ('04) 81 Cal 75 (78) (DB).

**10. Memorandum of appeal, rejection of, as insufficiently stamped.**—[1] A memorandum of appeal, insufficiently stamped, need not be dismissed *in toto*—But a decree cannot be passed for more than the amount for which court-fees has been paid. ('88) 40 Pun L R 123 (123) (DB) \* (Vol 18) 1931 Lah 237 (238) (DB).

[2] It is open to a single Judge to decline to receive the document which is insufficiently stamped on the ground that he cannot receive it—But where the document has been received and has been accepted as having been properly presented, a single Judge should not reject the document later on, on the ground of insufficiency of court-fees, unless the matter were within the jurisdiction of a single judge—If a Division Bench alone can reject the appeal on the ground of insufficiency of court-fees then the matter should be laid before such a Division Bench. (Vol 22) 1935 All 620 (625): 57 All 983 (FB).

## PROVINCIAL AMENDMENT

## Section 28A

## CENTRAL PROVINCES AND BERAR

After S. 28 the following section was inserted as S. 28-A, viz:—

"28A. (1) if, on examination of the records of civil, criminal or revenue case which has been disposed of, a public officer finds that the fee payable under the Act or the rules made there-  
*Recovery of deficient or unpaid Court-fees.* under on any document filed, exhibited or recorded therein has not been paid or has been insufficiently paid, he shall report the fact to the presiding officer of the Court or to the revenue officer concerned.

(2) Such presiding officer or revenue officer, after satisfying himself on the correctness of such report, shall record a provisional finding that the proper fee has not been paid and determine the amount of the fee payable and the person from whom the fee or the difference thereof, if any, shall be recoverable.

(3) After recording a finding under sub-s. (2), the presiding officer or the revenue officer shall issue a notice to the person referred to in that sub-section to show cause why he should not be ordered to pay the fee determined thereunder, and, if sufficient cause is not shown, the presiding officer or revenue officer shall confirm the finding and make an order requiring such person to pay the proper fee before a date to be specified in that notice.

(4) If such person fails to pay the fee in accordance with the notice issued under sub-s. (3), it shall, on the certificate of such presiding officer or revenue officer, be recoverable as an arrear of land revenue."

C. P. Act IV of 1938. [17-1-1938.]

29. Where any such document is amended in order merely to correct a mistake  
*Amended document.* and to make it conform to the original intention of the parties, it shall not be necessary to impose a fresh stamp.

30. No document requiring a stamp under this Act shall be filed or acted upon in  
*Cancellation of* in any proceeding in Court or office until the stamp has been stamps. cancelled.

Such officer as the Court or the head of the office may from time to time appoint shall, on receiving any such document, forthwith effect such cancellation by punching out the figure-head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed.

## PROVINCIAL AMENDMENT

## Section 30A

## UNITED PROVINCES

After S. 30 the following section was inserted:—

"30A. Where allowance is made in this Act for damaged or spoiled stamps or where refund is permitted on the strength of certificate granted by a Court, the Collector may, on the application of the holder of the same and after satisfying himself about the genuineness of the certificate or the stamps produced, give in lieu thereof the same amount or value in stamps of the same or any other description or if the applicant desires, the same amount or value in money, provided that in the latter case a deduction shall be made of one anna for each rupee or fraction thereof. No such deduction shall, however, be made where refund is claimed in respect of court-fee paid in pursuance of an order of the Court which has been varied or reversed in appeal."

—U. P. Act XIX of 1938. [9-1-1939.]

## Section 28 (contd.)

11. *Mode of recovery of court-fees.*—[1] Ordinarily, the Court has no power to order the recovery of court-fees by attachment of the property of the defaulter or other process in execution proceedings. (Vol 21) 1934 All 989 (990) \* (Vol. 19) 1932 All 316 (317) \* (Vol. 6) 1919 Cal 194 (194): 46 Cal 520 (DB).

[But see (Vol 21) 1934 Oudh 396 (398).]

## SECTION 28A (C. P. and Berar)—Note 1.

[1] Where a second appeal is dismissed in default the only Court which can act under this section is the lower appellate Court and not the High Court. ('86-48) Tax Dec (Nag) 124 (125).

## SECTION 29—Note 1.

[1] Where the document is an entirely fresh document the section does not apply. ('92) 1892 Pun Re No 182 p. 442 (444) (DB).

## SECTION 30—Note 1.

[1] Where a plaint is returned for presentation to the proper Court and is re-presented to such Court,

no fresh court-fee need be paid. (Vol 11) 1927 Bom 257 (257): 51 Bom 236 (DB) \* (Vol 13) 1926 Cal 355 (356) (DB) \* ('12) 35 Mad 567 (573) (FB) \* ('84) 8 Bom 313 (317) (FB). (Overruling ('89) 7 Bom 487 \* ('84) 1884 Pun Re No. 91 p. 263 (264) (DB).

[2] Where the plaintiff on return of plaint amends it by striking out one of the reliefs and re-presents it to the same Court the fact that the court-fee stamps had been cancelled by the Court originally does not make the plaint one on unstamped document when re-presented. (Vol 18) 1931 Mad 8 (10).

[3] Endorsement on Stamp of date of issue and name of purchaser is not cancellation of stamp. (Vol 32) 1945 Bom 1 (4) (DB).

[4] Practice in Bombay Testamentary Registry enabling petitioner for probate to recant upto actual cancellation of Stamps and ask for return of stamps—The practice of Testamentary Registry retaining petition taken on file and original will and returning stamps is supported by long usage only; unless at a subsequent date a fresh application for probate is made, the will remains unproved. (Vol 32) 1945 Bom 1 (4) (DB).

## CHAPTER VI.

## MISCELLANEOUS.

**31.** [Repayment of fees paid on applications to Criminal Court.] Repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923 S. 163.)

**32.** [Amendment of Act VIII of 1859 and Act IX of 1891]. Repealed by the Repealing and Amending Act, 1891 (12 [XII] of 1891.)

**33.** Whenever the filing or exhibition in a Criminal Court of a document in respect of which the proper fee has not been paid, is, in the opinion of the presiding Judge, necessary to prevent a failure of justice, nothing contained in section 4 or section 6 shall be deemed to prohibit such filing or exhibition.

**34.** (1) The <sup>b</sup>[Appropriate Government] may from time to time make rules for Sale of stamps. regulating the sale of stamps to be used under this Act, the persons by whom alone such sale is to be conducted, and the duties and remuneration of such persons.

(2) All such rules shall be published in the <sup>d</sup>[Official Gazette,] and shall thereupon have the force of law.

(3) Any person appointed to sell stamps who disobeys any rule made under this section, and any person not so appointed who sells or offers for sale any stamp, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

[a] *Substituted* for the original section by the Amending Act, 1891 (12 [XII] of 1891).

[b] *Substituted* by A. O. for "Local Government." For definition of "Appropriate Government see section 1A.

[c] *See* different Local Rules and Orders.

[d] *Substituted* by A. O. for "local official Gazette."

## PROVINCIAL AMENDMENTS

## UNITED PROVINCES

For section 34 the following section was *substituted*, viz:—

"34. Any person appointed to sell stamps who disobeys any rule made under this Act and any person not so appointed who sells or offers for sale any stamps, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees or with both."

—*United Provinces Act XIX of 1938.* [9-1-1939.]

## SECTION 34A

## BENGAL

After S. 34 the following section was *inserted*:

"34A. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired."

—*Bengal Act VII of 1935.* [2-5-1935.]

## SECTION 34—Note 1.

[1] A sale of court-fee stamps by a person who has not been licensed to do so is an offence. ('01) 24 Mad 19 (321) (DB). (A thief also can be guilty of this offence).

[2] A gift of court-fee stamps by a person who has purchased them but who has no use for them is not prohibited. ('11) 1911 Pun L R No. 253 page 989 (44) (DB).

[3] To establish a charge of an offence under the section it is necessary for the prosecution to identify the stamps alleged to have been wrongfully sold. (Vol 25) 1938 Cal 195 (201) (DB).

[4] Where a mukhtear who had purchased a court-fee stamp for a client transferred it to another client who had agreed to return another stamp of equal in exchange, it was held that there was no sale and so, no offence had been committed. (Vol 18) 1931 Lah 337 (338) \* ('08) 30 Cal 921 (922) (DB).



**35.** The <sup>a</sup> [Appropriate Government] may, from time to time by notification in the <sup>b</sup> [Official Gazette] reduce or remit, in the whole or in any part of the territories under its administration, all or any of the fees mentioned in the first and second schedules to this Act annexed, and may in like manner cancel or vary such order.

- [a] *Substituted* by A. O. for "Local Government" which had been substituted for the "Governor-General of India in Council" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), s. 2 and Sch I.
- [b] *See* General Statutory Rules and Orders and for notification by the Chief Commissioner of Delhi, *see* Gazette of India, 1921 Pt. II, p. 343.
- [c] *Substituted* by A. O. for "local official Gazette" which had been substituted for "Gazette of India" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), s. 2 and Sch I.
- [d] *Substituted* for "British India" by the Devolution Act, 1920 (38 [XXXVIII] of 1920), s. 2 and Sch I.

### PROVINCIAL AMENDMENT

#### BENGAL

For section 35 the following section was *substituted*, viz:—

"35. (1) The Appropriate Government may, from time to time, subject to such conditions or restrictions as it may think fit to impose, by notification in the *Official Gazette*, suspend the payment of or reduce or remit, in the whole of Bengal or in any part thereof, all or any of the fees mentioned in the first and second schedules to this Act annexed and may in like manner cancel or vary such order.

(2) The appropriate Government may, from time to time by rules, prescribe the manner in which any fee the payment of which is suspended under sub-s. (1) may be realized and for this purpose direct that such fee may be recovered as a public demand."

—*Bengal Act VII of 1935*. [2-5-1935]

#### ORISSA

For section 35 the following section was *substituted*, viz:—

"35. (1) The Provincial Government may from time to time subject to such conditions or restrictions as it may think fit to impose, by notification in the *Gazette* suspend the payment of or reduce or remit, in the whole of Orissa or in any part thereof, all or any of the fees mentioned in Schedules I and II to this Act annexed and may in like manner cancel or vary such order.

(2) The Provincial Government may from time to time by rules prescribe the manner in which any fee the payment of which is suspended under sub-s. (1) may be realized and for this purpose direct that such fee may be recovered as if it were an arrear of land revenue."

—*Orissa Act V of 1939*. [31-10-1939]

**36.** Nothing in Chapters II and V of this Act applies to the commission payable to the Accountant General of the High Court at Fort William, or to the fees which any officer of a High Court is allowed to receive in addition to a fixed salary.

*Saving of fees to certain officers of High Courts.*

#### SECTION 35—Note 1.

[1] Order under O 21 R 50 (2) and (3) of the Civil P O granting leave to execute a decree against any person on the ground that he is a partner—An appeal from such order falls under Act 1 of Sch 1 Court-fees Act and not under cl. (5) of Bombay Government Notification No 590, dated 16-9-1921 issued under S. 85. (Vol 26) 1939 Sind 161 (161): ILR (1939) Kar 589 (FB).

[2] An appellant, in an appeal from an order in execution reducing the rate of interest payable under

a decree, must pay *ad valorem* court-fee on the difference between the amount claimed by him in the appeal and that awarded to him in the executing Court. (Vol 7) 1920 Pat 376 (377): 5 Pat L Jour 285.

[3] Madras Government order No. 5791 dated 17th May 1943 made in exercise of powers conferred by this section, does not apply to a suit by persons who claim to be trustees of certain trust property against the defendants who put forward the same claim and the plaintiffs do not concede that the defendants have any right to be trustees. (Vol 82) 1945 Mad 102 (103): ILR (1945) Mad 584 (DB).

## COURT-FEES ACT—SCHEDULE I.

[Note :—In Bihar, Bombay, Central Provinces and Berar, Orissa and the United Provinces the fees leviable under the Court-fees Act, 1870, have been increased by way of **surcharge** ; see Bihar Act IX of 1943, Bombay Act XV of 1943, C. P. & Berar Act III of 1947, Orissa Act IV of 1945 and U. P. Act VIII of 1943. The text of these Acts is reproduced in an Appendix given at the end of Schedule III of the Court-fees Act.]

*Ad valorem fees.*

Number.		Proper Fee.
1. Plaint a [written statement pleading a set off or counter claim] or memo- randum of appeal (not other- wise provid- ed for in this Act) b [or of cross-objec- tion] present- ed to any Civil or Re- venue Court except those mentioned in section 3. <sup>b</sup>	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Five rupees.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Fifteen rupees.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Twenty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Twenty rupees.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Twenty-five rupees.
	Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be three thousand rupees.	

[a] Inserted by the Code of Civil Procedure (Act V of 1908), S. 155 and Sch. IV.

[b] To ascertain the proper fee leviable on the institution of a suit, *See* the table annexed to this Schedule.

## PROVINCIAL AMENDMENTS

## ASSAM

For Article 1 the following article was *substituted*, viz., :—

"1. Plaint, written state- ment pleading a set off or	When the amount or value of the subject-matter in dispute does not exceed seventy-five rupees, for every five rupees or part thereof of such amount or value	Six annas.
	and When such amount or value exceeds seventy five rupees, for every five	Eight annas.

counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.

rupees or part thereof in excess of seventy-five rupees, up to one hundred rupees	
and	
When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one hundred and fifty rupees	One rupee ten annas.
and	
When such amount or value exceeds one hundred and fifty rupees, for every ten rupees, or part thereof, up to one thousand rupees	One rupee two annas.
and	
When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to seven thousand five hundred rupees	Seven rupees eight annas.
and	
When such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees	Fifteen rupees.
and	
When such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees	Twenty-two rupees eight annas.
and	
When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees	Thirty rupees
and	
When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Thirty-seven rupees eight annas.
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees."	

—Assam Act XIV of 1936, [3-12-1936.]

## BENGAL

The following article was substituted for Article 1.

1. "Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.	
When the amount or value of the subject-matter in dispute does not exceed seventy-five rupees, for every five rupees or part thereof of such amount or value,	Six annas.
and	
When such amount or value exceeds seventy-five rupees, for every five rupees or part thereof, in excess of seventy-five rupees, up to one hundred rupees,	Eight annas.
and	
When such amount or value exceeds one hundred rupees; for every ten rupees, or part thereof, in excess of one hundred rupees up to one hundred and fifty rupees,	One rupee two annas.
When such amount or value exceeds one hundred and fifty rupees, for every ten rupees, or part thereof, up to one thousand rupees,	One rupee two annas.
and	
When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to seven thousand five hundred rupees,	Seven rupees eight annas.
and	
When such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees, or part thereof, in excess of seven thousand five hundred rupees up to ten thousand rupees,	Fifteen rupees.
and	
When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees,	Twenty-two rupees eight annas.
and	

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to fifty thousand rupees,

Thirty rupees.

and

When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees:

Thirty seven rupees eight annas.

Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees."

—Bengal Court-fees (Amendment) Act IV of 1922. [29-3-1922.]

## BIHAR

- (1) For the entry in the first column the following entry was substituted :

"1. Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal or of cross-objection, not otherwise provided for in this Act, presented to any Civil or Revenue Court except those mentioned in section 3."

- (2) For the "proper fees" set out in the third column of Sch. I and shown opposite Art. 1 below, the proper fees shown against them in the second column (below) were substituted,

Art. 1. "Proper fees" set out in Schedule I of the Principal Act. Proper fees to be substituted.

Twelve annas	...	...	One rupee.
Five rupees	...	...	Seven rupees and eight annas.
Ten rupees	...	...	Fifteen rupees.
Fifteen rupees	...	...	Twenty-two rupees and eight annas.
Twenty rupees	...	...	Thirty rupees.
Twenty-five rupees	...	...	Thirty-seven rupees and eight annas.

- (3) The proviso in Art. I was omitted.

—Bihar & Orissa Act II of 1922. [21-8-1922.]

- (4) After the entries in the second column against Art. 1 the following proviso was added, viz.:

"Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees."

—Bihar Act XVII of 1939. [2-11-1939.]

## BOMBAY

For Article 1 the following article was substituted :

"1. Plaint, written statement pleading a set off or counter - claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.

When the amount or value of the subject-matter in dispute does not exceed five rupees.

Six annas.

When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.

Six annas.

When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.

Twelve annas.

When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.

Five rupees.

When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.

Fifteen rupees.

When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.

Twenty-two rupees and eight annas.

When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.

Thirty rupees.

When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.

Thirty rupees.

When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.

Thirty rupees.

Provided that the maximum fee leviable on a plaint of memorandum of appeal shall be ten thousand rupees."

—Bombay Finance Act II of 1932. [30-3-1932]

## CENTRAL PROVINCES

(1) Before the word "presented" in the first column the words "in any suit between landlord and tenant for an arrear of rent" were inserted.

—C. P. Act XVI of 1935. [21-5-1935.]

(2) In the first column of Art. 1 the words "or of cross-objection" were omitted.

—C. P. & Berar Act IX of 1941. [30-4-1941.]

## MADRAS

Following article was substituted for Art. 1

"1. Plaint, or written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Eight annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Nine annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to one thousand rupees.	One rupee two annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Seven rupees eight annas.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees, or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees eight annas.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Thirty rupees.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Thirty rupees.

—Madras Act V of 1922. [30-3-1922.]

## ORISSA

For Article 1 the following Article was substituted, viz:—

"(1) Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees, or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees, or part thereof, in excess of one hundred rupees, up to five hundred rupees.	One rupee.
	When such amount or value exceeds five hundred rupees, for every ten rupees, or part thereof, in excess of five hundred rupees up to one thousand rupees.	One rupee two annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees, or part thereof, in excess of one thousand rupees, up to seven thousand five hundred rupees.	Seven rupees eight annas.
	When such amount or value exceeds seven thousand five hundred rupees, for every two hundred and fifty rupees, or part thereof, in excess of seven thousand five hundred rupees, up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees, or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty-two rupees eight annas.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.

{	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees, or part thereof, in excess of thirty thousand rupees, up to fifty thousand rupees.	Thirty rupees.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees, or part thereof, in excess of fifty thousand rupees.	Thirty-seven rupees eight annas."

—Orissa Court-fees (Amendment) Act V of 1939. [31-10-1939]

## PUNJAB

(1) For Art. 1 the following Article was substituted, viz:—

"1. Plaint, written statement, pleading, a set-off or counter claim or memorandum of appeal (not otherwise provided for in this Act) or of cross-objection presented to any Civil or Revenue Court except those mentioned in section 3.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, but does not exceed five hundred rupees, for every five rupees or part thereof in excess of five rupees up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, but does not exceed five hundred rupees, for every ten rupees or part thereof in excess of one hundred rupees up to five hundred rupees.	Twelve annas.
	When such amount or value exceeds five hundred rupees, for every ten rupees or part thereof up to one thousand rupees.	One rupee two annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof in excess of one thousand rupees up to five thousand rupees.	Seven rupees eight annas.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees or part thereof in excess of five thousand rupees up to ten thousand rupees.	Fifteen rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof in excess of ten thousand rupees up to twenty thousand rupees.	Twenty-two rupees eight annas.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees or part thereof in excess of twenty thousand rupees up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees, for every two thousand rupees or part thereof in excess of thirty thousand rupees up to fifty thousand rupees.	Thirty rupees.
	When such amount or value exceeds fifty thousand rupees for every five thousand rupees, or part thereof in excess of fifty thousand rupees.	Thirty rupees."

(2) The proviso as to the maximum after the ninth entry in the second column was omitted.

—Court-fees (Punjab Amendment) Act, VII of 1922. [23-11-1922.]

## SIND

The amendments made in the article by the Bombay Finance Act II of 1932 continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

## UNITED PROVINCES

(1) In Art. 1 for the entries in the second and third columns the following entries were substituted:—

"When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
When such amount or value exceeds five rupees, for every five rupees or part thereof in excess of five rupees, up to one hundred rupees.	Six annas.
When such amount or value exceeds one hundred rupees, for every ten rupees or part thereof in excess of one hundred rupees, up to three hundred rupees.	Twelve annas.
When such amount or value exceeds three hundred rupees, for every ten rupees or part thereof in excess of three hundred rupees, up to five hundred rupees.	Fourteen annas.
When such amount or value exceeds five hundred rupees, for every ten rupees or part thereof in excess of five hundred rupees, up to one thousand rupees.	One rupee four annas.
When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof in excess of one thousand rupees up to five thousand rupees.	Seven rupees eight annas.
When such amount or value exceeds five thousand rupees for every two hundred and fifty rupees or part thereof in excess of five thousand rupees up to ten thousand rupees.	Fifteen rupees.

When such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof in excess of ten thousand rupees up to twenty thousand rupees.	Twenty-two rupees eight annas.
When such amount or value exceeds twenty thousand rupees, for every one thousand rupees or part thereof in excess of twenty thousand rupees, up to thirty thousand rupees.	Thirty rupees.
When such amount or value exceeds thirty thousand rupees, for every two thousand rupees or part thereof in excess of thirty thousand rupees, up to fifty thousand rupees.	Thirty rupees.
When such amount or value exceeds fifty thousand rupees, for every five thousand rupees or part thereof in excess of fifty thousand rupees.	Thirty-seven rupees eight annas.
Provided that the maximum fee leviable on a plaint or memorandum of appeal shall be ten thousand rupees."	

—U.P. Acts II of 1936 and XIX of 1938. [9-1-1939]

(2) The words "or of a cross-objection" in the first column were omitted by

—U. P. Act XIX of 1938. [9-1-1939.]

#### Article 1-A

#### CENTRAL PROVINCES

After Article 1 the following article was inserted :

"1-A. Plaint, written statement pleading a set-off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) a [***] presented to any Civil or Revenue Court except those mentioned in S. 3 in suits other than those provided for in Article 1.	When the amount or value of the subject-matter in dispute does not exceed five rupees.	Six annas.
	When such amount or value exceeds five rupees, for every five rupees or part thereof, in excess of five rupees, up to one hundred rupees.	Six annas.
	When such amount or value exceeds one hundred rupees, for every ten rupees or part thereof, in excess of one hundred rupees, up to one thousand rupees.	Twelve annas.
	When such amount or value exceeds one thousand rupees, for every one hundred rupees or part thereof, in excess of one thousand rupees, up to five thousand rupees.	Six rupees.
	When such amount or value exceeds five thousand rupees, for every two hundred rupees or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Ten rupees.
	When such amount or value exceeds ten thousand rupees, for every five hundred rupees or part thereof, in excess of ten thousand rupees, up to twenty thousand rupees.	Twenty rupees.
	When such amount or value exceeds twenty thousand rupees, for every one thousand rupees, or part thereof, in excess of twenty thousand rupees up to thirty thousand rupees.	Thirty rupees.
	When such amount or value exceeds thirty thousand rupees for every two thousand rupees or part thereof, in excess of thirty thousand rupees up to fifty thousand rupees.	Thirty rupees.
	When such amount or value exceeds fifty thousand rupees, for every five thousand rupees or part thereof, in excess of fifty thousand rupees:	Thirty rupees.
Provided that the maximum fee leviable shall not exceed five thousand rupees."		

—C. P. Act XVI of 1935. [21-5-1935.]

[a] The words "or of cross-objection" were omitted by

—C. P. Act IX of 1941. [30-4-1941.]

#### Schedule 1 Article 1—Synopsis.

1. Scope,
2. Written statement pleading set-off or counter-claim.
3. "Not otherwise provided for in this Act."
4. Memorandum of cross-objections.
5. Cross-objection as to costs.
6. Valuation of appeal—General.
7. Appeal from conditional decree—Valuation of.

8. Appeal from final decree in suit relating to mortgage.
9. Appeal against personal decree for balance against mortgagor.
10. Appeal by one of several plaintiffs or defendants.
11. Subsequent interest.
12. Appeal as to costs.
13. Appeal from order.
14. Order rejecting plaint or dismissing suit for insufficiency of court-fee—Appeal from.

15. Appeal against order under O. 21, R. 50.
16. Award.
17. Appeal seeking to exonerate or make liable property.
18. Decree against several persons—Appeal by one seeking exoneration.
19. Lower Court exonerating a party from liability—Appeal seeking to make him liable.
20. Separate appeals arising from same suit.
21. Appeal relating to priority of claims against same debtor.
22. Proviso.

**1. Scope.**—[1] The article will not apply unless the fee is made leviable by some provision in the body of the Act (Vol 28) 1941 Nag 129 (180) (S. 4, Court-fees Act does not apply to an appeal from decree passed by District Judge under S. 14 CP Local Fund Audit Act—No *ad valorem* fee leviable on such appeal.)

[2] Where there are any specific rules in the body of the Act as to the mode of valuing the subject-matter of a suit, the valuation must be made according to such rules for the purpose of this article. (Vol 11) 1924 Pat 582 (585): 3 Pat 640.

[3] Where a special mode of computing the value of the subject-matter is prescribed in the Act the value should be calculated accordingly for the levy of court-fee under this article. (Vol 24) 1937 Mad 46 (49, 50): ILR (1937) Mad 284 (DB) \* (Vol 11) 1924 Pat 582 (585, 586): 3 Pat 640.

[4] This article applies to an appeal from a subordinate Court to a chartered High Court even though the words "except those mentioned in S. 3" obviously seem to exclude such appeal from Court-fee. (Vol 12) 1925 Pat 892 (894): 4 Pat 336 (FB) \* (Vol 33) 1946 Lah 280 (281) (FB) (*Obiter*).

[5] The words "from a decree" do not occur in this article after the words "memorandum of appeal" and hence the application of this article cannot be restricted to an appeal from a decree. (Vol 26) 1939 All 127 (129): ILR (1939) All 142.

[6] Appeal filed in High Court under the Gujarat Talukdars Act (IV of 1888)—This article does not apply—Such an appeal is an application within Sch II, Art 1. ('92) 16 Bom 408 (413) (DB).

[7] Suit to surcharge and falsify accounts already furnished and to recover specific sums—Suit is not for accounts—Plaintiff must value and pay *ad valorem* court-fee on basis of specific sums. (Vol 33) 1946 Mad 136 (137).

**2. Written statement, pleading set-off or counter-claim.**—[1] This article applies to written statement, pleading a legal set-off as well as an equitable set-off without distinction. (Vol 30) 1943 Bom 227 (228) \* (Vol 30) 1943 Nag 314 (314): ILR 1944 Nag 260 \* (Vol 27) 1940 Nag 177 (178): ILR (1941) Nag 753 \* (Vol 26) 1939 Cal 415 (416) (DB) \* (Vol 25) 1938 All 522 (523) \* (Vol 23) 1936 Nag 222 (222): ILR (1937) Nag 99 \* (Vol 22) 1935 Mad 115 (115): 58 Mad 338 (DB) \* (Vol 20) 1933 Mad 203 (204).

[But see (Vol 24) 1937 Lah 73 (75) (DB) (Article applies only when legal set-off is claimed—No Court-fee necessary for a claim for equitable set-off.) \* (Vol 21) 1934 All 115 (117) (Do) \* (Vol 17) 1930 All 875 (876) (DB) (Do) \* (Vol 1) 1914 Bom 299 (299): 38 Bom 631 (DB) (Do).]

[2] Court-fee is payable on the full amount sought to be set-off. (Vol 27) 1940 Nag 177 (178): ILR (1941) Nag 273 \* (Vol 22) 1935 Pat 110 (111) (DB) \* (Vol 10) 1923 All 118 (119): 45 All 218 (DB).

[But see (Vol 14) 1927 Nag 74 (75).]

[3] The Court cannot go into the question of set-off unless the proper court-fee has been paid. (Vol 4) 1917 Low Bur 179 (180) (DB) \* (Vol 30) 1943 Nag 314 (314): ILR (1944) Nag 260.

[4] No claim in excess of the amount on which court-fee is paid should be decided. (Vol 30) 1943 Nag 314 (314, 315): ILR (1944) Nag 260.

[5] In the following cases court-fee was held not necessary on the written statement:

(a) Adjustment. (Vol 24) 1937 Lah 62 (62) ((1908) Pun Re No. 85 relied on.)

(b) Payment. (Vol 17) 1930 Oudh 140 (141): 5 Luck 621 \* ('10) 12 Cal L Jour 351 (355) (DB) (Claim for deduction under S. 108, Cl (f), T. P. Act, for sum spent for repairs is not set-off.)

(c) Defendant pleading in a suit for accounts that money would be due to him and asking for decree for that balance. (Vol 1) 1914 Sind 137 (138): 8 Sind L R 124.

(d) Where there is no counter-claim but only claims as to items in the particular account. (Vol 20) 1933 Mad 353 (353).

(e) Written statement not asking for cross-relief. (Vol 27) 1940 Rang 300 (303): 1940 Rang L R 529.

[6] In a suit for profits by a cosharer against lambardar, the defendant's claim for half share of money kept with plaintiff by a third person is a counter-claim chargeable with court-fee. (Vol 17) 1930 Oudh 140 (141): 5 Luck 621.

[7] Award in arbitration pending suit—Defendant claiming set-off of amount due under the award should pay court-fee on the claim. (Vol 12) 1925 Sind 266 (268): 18 Sind L R 111 (DB).

**3. "Not otherwise provided for in this Act".**—[1] An appeal from an order of a lower Appellate Court on an application under S. 9, Bengal Act VI of 1862, not being otherwise provided for by the Court-fees Act, may be admitted on 6 annas stamp. ('70) 14 Suth W R 21 (22).

[2] This article will not apply to suit or appeal coming under Sch II Art 17. (Vol 28) 1941 Lah 123 (125): ILR (1941) Lah 234 (FB).

[3] The words "not otherwise provided for" refer to provisions fixing court-fee for a particular matter. ('81) 3 All 108 (109, 110, 111, 112) (FB). (Article applies to a case coming under S. 17).

[4] Suits falling under one of the clauses of S. 7—Court-fee to be computed in accordance with it. (Vol 6) 1919 Lah 363 (364): 1919 Pun Re No. 61 (DB)



## Sch. I Art. I. (contd.)

**4. Memorandum of cross-objections.**—[1] Where this provision is applicable, the court-fee on the cross-objections cannot be charged under any other provision of the Act. (Vol 17) 1930 Mad 22 (24) \* (Vol 11) 1924 All 175 (175) : 45 All 537 \* (Vol 6) 1919 Cal 620 (622) (DB) \* (Vol 3) 1916 Bom 150 (151) : 40 Bom 541 (DB) \* (Vol 8) 1921 Cal 55 (56) (DB).

[2] Decree appealed from one in favour of respondent—Objections to the findings alone but not to the decree, are not cross-objections liable to court-fee. (Vol 24) 1937 Oudh 512 (512) (DB) \* (Vol 9) 1922 All 280 (280) : 44 All 577 (DB) (Even if the decree is sought to be supported on ground other than that taken by the trial Court.) \* (Vol 9) 1922 Pat 483 (484) : 1 Pat 258 \* (Vol 1) 1917 All 158 (158).

[3] Cross-objection claiming arrears of maintenance for a period prior to suit and for enhancement of rate of maintenance after the date of decree—Court-fee on cross-objection must be paid *ad valorem* on the amount of arrears and on the second relief on ten times the annual amount of enhancement under S. 7 (ii). ('36-43) Tax Dec (Nag) 76 (77, 78).

[4] Manager of Math filing suit—Removed after decree—Successor filing appeal—Preliminary objection to maintainability of appeal dismissed—Second respondent not preferring appeal against order raising the same objection in second appeal—Held *ad valorem* fee should be paid on the objection. ('36-43) Tax Dec (Nag) 9 (10).

[5] Suit for possession and mesne profits—Future mesne profits refused—On defendant's appeal plaintiff claiming future mesne profits in his cross-objection—Held, no court-fee was payable on the claim for future mesne profits. (Vol 24) 1937 Mad 46 (49, 50) : ILR (1937) Mad 284 (DB).

[6] Cross-objections in appeals arising out of redemption suits must be stamped *ad valorem* on the amount by which the decretal amount is sought to be reduced. (Vol 21) 1934 Oudh 246 (251) : 9 Luck 657 (DB).

[7] Suit under S. 92, C. P. C.—Decree against defendant trustee for refund of Rs. 6,000—Plaintiff appealing on other grounds against decree—Defendant filing cross-objection seeking to set aside decree for Rs. 6,000—Defendant must pay court-fee on Rs. 6,000. (Vol 8) 1916 Bom 150 (151) : 40 Bom 541 (DB).

[8] Decree for foreclosure awarding future interest till payment—In plaintiff's appeal defendant filing cross-objection—Held, where the amount declared due at the date of decree could be ascertained from the judgment and decree, that should be the value of the cross-objection and future interest need not be taken into account. (Vol 1) 1914 All 520 (521) : 36 All 40 (FB).

[9] Even where the subject-matter in dispute in the cross-objections is not capable of valuation and is covered by Art. 17 of Sch. II or the appeal in which the objection is filed is governed by Art. 17,

the cross-objection must bear *ad valorem* fee under this article. (Vol 20) 1933 Oudh 528 (529) : 9 Luck 406 (DB) \* ('36) 11 Luck 79 (81) (DB) \* ('37) 39 Pun L R 586 (589) \* (Vol 12) 1925 All 119 (119) : 47 All 89 \* (Vol 5) 1918 All 135 (136) : 40 All 93 \* (Vol 5) 1918 Pat 115 (115) : 3 Pat L Jour 197.

[But see (Vol 21) 1931 All 728 (729) : 57 All 151 \* (Vol 17) 1930 Lah 579 (588) : 11 Lah 503 (DB).]

[10] Cross-objection relating to a claim to the possession of revenue-paying land must be valued according to the jurisdictional value and not under S. 7 (v) as the section does not apply to cross-objection. (Vol 12) 1925 All 119 (119) : 17 All 89 (Following (Vol 11) 1924 All 175 : 45 All 537).

[See however ('36-43) Tax Dec (Nag) 76 (77, 78)]

**5. Cross-objection as to costs.**—[1] Cross-objections relating to costs are assessable with court-fee under this article. (Vol 17) 1930 All 832 (834) : 52 All 1020 \* (Vol 13) 1926 Lah 645 (649) (DB) \* (Vol 16) 1929 Pat 286 (287) : 8 Pat 543 \* (Vol 26) 1939 Rang 375 (376) : 1939 Rang L R 474 \* (Vol 12) 1925 Rang 115 (116) : 2 Rang 637 (DB).

[But see (Vol 8) 1921 Cal 55 (58) \* ('33) 1933 All W N 55 (55, 56) (FB).]

**6. Valuation of appeal—General.**—[1] Where the subject-matter in appeal coincides with the subject-matter in the suit, the value of the appeal for purposes of court-fee will be the same as that of the suit. (Vol 11) 1924 Lah 530 (530) : 5 Lah 137 (DB).

[See ('36-43) Tax Dec (Nag) 120 (123) (Whole suit dismissed—Subject-matter in plaintiff's appeal is the same.) \* (Vol 28) 1941 All 295 (297) (Suit decreed—Subject-matter in defendant's appeal is the same.) \* (Vol 16) 1929 Sind 161 (161) (DB) (Do) \* (Vol 1) 1914 All 273 (275) : 36 All 322 (Suit for possession—Defendant questioning title claiming retention of possession till her dower was paid—In appeal the subject-matter is the property and not the dower debt.)

[2] Where the subject-matter is different, the value of the appeal for purposes of court-fee will be different. \* (Vol 25) 1938 Mad 498 (499) : ILR (1938) Mad 961 (DB) \* (Vol 28) 1936 Lah 935 (936) \* (Vol 22) 1935 Nag 83 (86) (FB) \* (Vol 14) 1927 Pat 123 (125) : 6 Pat 17.

[3] Where the appellant reduces his claim or withdraws from the contest in respect of portion, the value of the appeal will be reduced to a proportionate extent. ('86-43) Tax Dec (Nag) 47 (49) \* (Vol 16) 1929 All 308 (309) (DB) \* (Vol 14) 1927 Lah 549 (549).

[4] Defendant appealing against a decree for possession of land or houses and claiming dismissal of the suit must pay court-fee on the value of the appeal as determined under S. 7 (v). (Vol 18) 1931 Cal 888 (885) \* (Vol 12) 1925 Mad 323 (324) : 48 Mad 652 \* (Vol 9) 1922 All 358 (359) : 44 All 622.

[5] In an appeal of which the subject-matter is a claim to the possession of land, the trees standing on the land need not be separately valued. (Vol 14) 1927 Mad 1002 (1004) (DB).

**Sch. I Art. I (contd.)****7. Appeal from conditional decree—Valuation of.—**[1] Decree for relief sought conditional upon payment of money—Value of subject-matter in appeal against condition being sum of money ordered to be paid—*Ad valorem* court-fee payable. (Vol 27) 1940 Mad 955 (955, 956) (Suit for possession.)

\* (Vol 7) 1920 Oudh 308 (308, (Do) \* (Vol 7) 1920 Pat 222 (222): 5 Pat L Jour 455 \* ('09) 31 All 265 (270) (Suit for foreclosure—Decree conditional on redemption of prior mortgage) \* ('87) 1887 Bom P J 464 (465) \* ('84) 1884 Pun Re No. 33, p. 83 (85) (FB) (Sch. II Art. 17 (vi) does not apply.) \* (Vol 8) 1921 Lah 371 (372) (Suit for possession-decree for redemption) \* (Vol 32) 1945 Bom 504 (509): ILR (1945) Bom 629 (DB) \* (Vol 38) 1946 Nag 160 (160) (Relief reduction of amount.) \* (Vol 26) 1939 Mad 49 (50): ILR (1939) Mad 328 (DB).

[See however (Vol 11) 1924 Lah 530 (530): 5 Lah 187 (DB) \* ('11) 33 All 705 (707).]

[2] Decree for possession conditional upon payment of money—Value of defendants appeal against the decree for possession is the value of the suit in the trial Court. (Vol 27) 1940 Mad 955 (955) \* (Vol 15) 1928 Mad 929 (929) (DB) \* (Vol 3) 1916 Lah 15 (17): 1916 Pun Re No. 25 (DB) (Even where defendant asks for enhancement of money in the alternative.)

[3] If the dispute in the appeal against a decree for possession conditional upon payment of a sum of money is confined to the amount payable by the plaintiff, such amount will determine the value of the appeal. (Vol 12) 1925 Mad 323 (324): 48 Mad 652.

[See however (1900) 23 Mad 84 (85) (DB).]

[4] Decree for possession conditional upon defendant's failure to pay specified amount before a date—Value of plaintiff's appeal is the same as in the suit. (Vol 7) 1920 Oudh 308 (308).

[5] In a suit for possession defendant denied plaintiff's title and claimed payment of dower debt—Suit decreed without any direction for payment—Appeal by defendant—*Held*, court-fee payable was the same as in the suit—Additional court-fee for claim for dower was not payable. (Vol 1) 1914 All 278 (275): 36 All 322.

**8. Appeal from final decree in suit relating to mortgage.—**[1] An appeal from a final decree in a mortgage suit is chargeable with an *ad valorem* fee under this article. (Vol 7) 1920 Bom 101 (101) \* (Vol 6) 1919 Pat 425 (425) \* ('13) 35 All 476 (478) (FB).

[See however (Vol 25) 1938 Nag 409 (411): ILR (1938) Nag 423 (FB) (Order refusing to grant time for payment of money and final decree—Appeal against the decree on the ground that time ought to have been allowed—No dispute as to amount—Sch. II Art. 17 (VI) applies.) \* ('36-43) Tax Dec (Nag) 58 (54, 55).]

**9. Appeal against personal decree for balance against mortgagor.—**[1] An appeal from a personal decree against the mortgagor under O. 34, R. 6, Civil P. C. is chargeable with an *ad valorem* court-fee under this article. ('35) 62 Cal 568 (569) \* (Vol 11) 1924 All 292 (293) (DB) \* (Vol 8) 1916 All 357 (358)

\* (Vol 2) 1915 Oudh 122 (123): 18 Oudh Cas 121 \* (Vol 32) 1945 Mad 425 (425, 426) (Merely because in one application orders were prayed for an assignment of the decree under O. 21, R. 16 and for personal decree under O. 34, R. 6 the defendant could not be permitted to file a civil miscellaneous appeal and pay the lessor court-fee.)

[2] The fact that an appeal by the mortgagor against the preliminary decree for sale, on which he has paid *ad valorem* fee is pending will not affect the question of court-fee payable on an appeal from the personal decree. ('35) 62 Cal 568 (569).

[3] Preliminary decree permitting mortgagee to apply for personal decree against mortgagor for balance due after sale—*Ad valorem* court-fee should be taxed—After sale balance due is the value of appeal—Otherwise value is conjectural. (Vol 21) 1934 Mad 230 (231): 57 Mad 632 (DB).

**10. Appeal by one of several plaintiffs or defendants.—**[1] One of several plaintiffs or defendants appealing against the whole decree—Court-fee is payable on the whole appeal and not merely for his share of liability. ('07) 4 All L Jour 130 (131) \* ('93) 15 All 112 (115) (DB).

[2] The following are the views on the question whether court-fee is leviable in Appeal in respect of interest subsequent to institution of suit:

**11. Subsequent interest.—**[1] No court-fee is payable on a plaint in respect of interest accruing after the institution of the suit. (Vol 24) 1937 Nag 6 (8, 9) \* (Vol 21) 1934 Pat 571 (573): 14 Pat 4 (SB) (Overruling on this point (Vol 9) 1922 Pat 387: 1 Pat 19 and (Vol 7) 1920 Pat 376: 5 Pat L Jour 235 by implication).

[2] The following are the views on the question whether court-fee is leviable in Appeal in respect of interest subsequent to institution of suit:

(a) A plaintiff-appellant claiming future interest is bound to pay on the appeal court-fee on the amount of interest claimed up to the date of the presentation of the appeal. (Vol 24) 1937 Nag 6 (8, 9) \* ('36-43) Tax Dec (Nag) 12 (16) (But not on future interest beyond that date.) \* (Vol 6) 1919 Oudh 305 (305): 22 Oudh Cas 1.

(b) Plaintiff's claim as to interest from institution of suit till realization refused—Appeal claiming same—*Ad valorem* court-fee on the interest calculated up to the date fixed for redemption—As regards interest accruing subsequently till realization, Court-fee of Rs. 10 is payable under Sch. II Art. 17 (vi) (Vol 30) 1943 Lah 275 (280, 281): ILR (1944) Lah 24 (FB) \* (Vol 32) 1945 Pat 145 (146): 23 Pat 905 (*Ad valorem* court-fee on *pendente lite* interest).

(c) Mortgage decree allowing interest up to date fixed for redemption—Appeal claiming interest up to realization—The proper court-fee is Rs. 10 under Sch. II Art. 17 (vi). (Vol 30) 1943 Lah 275 (280): ILR (1944) Lah 24 (FB) \* ('05) 27 All 559 (561) (DB).

(d) In an appeal by the debtor, if the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment, the court-fee on the appeal should be computed according to the decretal amount including the interest up to the decree, but no court-fee need be paid in regard to the interest accruing subsequently. (Vol 17) 1930 Oudh 323 (329): 6 Luck 84 (DB).

**Sch. I Art. I. (contd.)**

(e) Mortgage decree passed awarding interest up to date fixed for redemption—Defendant appealing from the decree—Court-fee on the appeal must be paid in respect of it. (13) 35 All 94 (98) (DB).

[See (Vol 24) 1937 Nag 6 (8, 9) (Mortgage decree for amount including interest from date of suit till date of payment—Defendant appealing seeking to reduce redemption amount without disputing the claim as to future interest—*Held*, court-fee was payable on difference between amount decreed and amount alleged to be due.)]

(f) A defendant appealing against a decree granting future interest is not bound to pay court-fee on the interest after the institution of the suit. (Vol 21) 1934 All 805 (807); 57 All 71 (DB).

(g) A plaintiff-appellant who claims interest from the institution of the suit is not bound to pay court-fee on such interest. (Vol 14) 1927 Pat 230 (230) (DB) \* (Vol 9) 1922 Pat 386 (387); 6 Pat L Jour 676 (DB) (17 Bom 41 followed) \* (1900) 10 Mad L Jour 144 (145) (DB).

[3] When appeal is by defendant and future interest has been determined and entered in the decree, plaintiff is bound to pay additional court-fee on the sum of interest so added in the decree—Plaintiff cannot execute decree till he pays additional court-fee. (Vol 10) 1923 Pat 28 (28).

**12. Appeal as to costs.**—[1] Ordinarily no court-fee is payable on an appeal in respect of costs. (Vol 22) 1935 Lah 379 (381) (DB) \* (Vol 21) 1931 Lah 739 (739).

[See (Vol 29) 1942 Mad 535 (538): ILR (1942) Mad 618 (DB).]

[2] Distinct relief in respect of costs sought in appeal—Value of such relief should be included in determining value of appeal. (Vol 24) 1937 Nag 95 (96) (Obiter) \* (Vol 21) 1934 Lah 739 (739) \* (Vol 5) 1918 Pat 210 (211); 3 Pat L Jour 443 \* (Vol 21) 1934 All 805 (807); 57 All 71 (No specific ground taken as to costs—Court-fee on costs not payable.) \* (Vol 32) 1945 Pat 818 (819); 24 Pat 100 \* ('09) 12 Oudh Cas 171 (174, 175) \* ('08) 6 Oudh Cas 135 (139) \* ('96) 19 Mad 350 (354) (DB).

[See also S. 7 (General)—Note "Court-fee on costs" and S. 11—Note "Court-fee on appeals."]

**13. Appeal from order.**—[1] The following have been held to be orders having the force of decree and an appeal therefrom chargeable with court-fee under this Article:

(a) Order determining liability of garnishee under O. 21, R. 68 (Patna). (Vol 30) 1943 Pat 280 (280); 22 Pat 278.

(b) Order amending decree under S. 14 U. P. Encumbered Estates Act. (Vol 28) 1941 Oudh 269 (270); 16 Luck 658 (DB).

(c) Simple money decrees passed under S. 14 U. P. Encumbered Estates Act. (Vol 25) 1938 All 97 (98): ILR (1938) All 280.

(d) Appeal under S. 23 of U. P. Agriculturists Relief Act on an order passed to deposit larger amount in application filed under S. 12 of the Act. (Vol 25) 1938 All 14 (15): ILR (1937) All 949 (DB).

(e) Order in execution against garnishee under O. 21, R. 16 Civil P. C. (Vol 33) 1916 Sind 116 (1: ILR (1916) Kar 122 (DB).

[2] Appeal under S. 15, U. P. Encumbered Estates Act, from decision on two issues framed in a credit claim case under S. 11 of that Act—Court-fee payable is under Art. 11 of Sch. II and not *ad valorem* (Vol 28) 1941 Oudh 60 (61); 16 Luck 153 (DB).

[3] Appeal from decree of Special Judge on application under S. 4 U. P. Encumbered Estates Act, 1 praying for decree for additional amount against landlord—*Ad valorem* Court-fee on additional amount must be paid under Sch. I, Art. 1—Art. 11 or II Schedule II is not applicable. (Vol 33) 1916 Oudh (61): 20 Luck 535.

[4] *Ad valorem* court-fee is payable on an appeal against order rejecting an application to make a *fi* decree. (Vol 32) 1945 Nag 68 (68, 69) (DB).

**14. Order rejecting plaint or dismissing as for insufficiency of court-fee—Appeal from.**

[1] An appeal from an order rejecting a plaint or dismissing a suit for insufficiency of court-fee, can come under Sch. II Art. 11 as an appeal from order. (Vol 16) 1929 Pat 615 (616) (DB) \* (Vol 1921 Lah 13 (43) (DB).

[2] The following views are held as to how to appeal against an order rejecting a plaint or dismissing suit for insufficiency of court-fee, should valued:—

(a) Value of the appeal is the difference between court-fee paid and demanded. (Vol 26) 1933 Pat 5 (572); 18 Pat 323 (DB) \* ('39) 1939 Nag L Jour (32) \* (Vol 25) 1938 Mad 438 (439): ILR (1938) Ma 981 (DB) \* ('82) 1882 All WN 214 (214) (DB).

(b) Value of the appeal is the value in the suit (Vol 22) 1935 Nag 83 (86, 89) (PB) (Appellate Com should hear parties before admitting appeal on the question of valuation and determine it.) \* (Vol 11) 1929 Pat 615 (616) (DB) (Court-fee paid on the plaint should be paid.) \* (Vol 14) 1927 Nag 256 (258) (Value of the suit as determined by trial Court is the value of the appeal.) \* (Vol 8) 1921 Lah 13 (43) (DB).

[3] Appeal not disputing the court-fee payable but on the ground that time should have been allowed for payment thereof—Sch. II Art. 17 (vi) applies. ('36-43) Tax Dec (Nag) 42 (43) \* ('36-43) Tax Dec (Nag) 8 (8).

**15. Appeal against order under O. 21 R. 50.**

—[1] *Ad valorem* court-fee under this article is payable on the subject-matter in dispute in the appeal against an order passed under O. 21, R. 50 Civil P.C. (Vol 26) 1939 Sind 161 (163, 164): ILR (1939) Kar 589 (PB) \* \* (Vol 20) 1933 Cal 546 (547): 60 Cal 538 \* (Vol 21) 1934 Lah 958 (960): 15 Lah 893 (DB) \* (Vol 17) 1930 Sind 255 (256): 25 Sind LR 25 (DB) \* (Vol 4) 1917 Low Bur 179 (179): 8 Low Bur RL 800 (DB).

[2] The subject-matter in dispute against an order under O. 21 R. 50 Civil P.C. on appeal is the amount for which the person proceeded against is sought to be made liable. (Vol 21) 1931 Lah 958 (960): 15 Lah 893 (DB).

2. Plaintiff a[\* \* \*] in a suit for possession under b[the Specific Relief Act, 1877, section 9]. . . . A fee of one-half the amount prescribed in the foregoing scale.

[a] The words "or memorandum of appeal" were repealed by the Court-fees (Amendment) Act, (1870 20 [XX] of 1870).

[b] Substituted for "Act No. XIV of 1859 (to provide of the limitation of suits)," by the Amending Act, (1891 12 [XII] of 1891).

#### Sch. I Art. I (contd.)

**16. Award.**—[1] In the absence of any other provision which is more directly applicable to an appeal from a decree on an award court-fee will be payable under this article on the value of appeal. (36-48) Tax Dec (Nag) 47 (48, 49) \* (Vol 13) 1926 Lah 403 (403) \* ('07) 4 All L Jour 595 (597).

**17. Appeal seeking to exonerate or make liable property.**—[1] Property made liable for decretal amount—*Ad valorem* court-fee on the value of property or amount decreed whichever is less should be paid on the appeal to get a release from the liability. (Vol 25) 1938 Pesh 38 (38, 39) (DB) \* (Vol 20) 1933 All 45 (46); 54 All 553 \* (Vol 13) 1926 Lah 408 (408); 7 Lah 215 (DB) \* (Vol 23) 1936 Lah 179 (180) (DB). (Mortgage decree making property in the hands of the defendant liable for the amount.) \* (Vol 15) 1928 Nag 316 (318, 319); 24 Nag LR 142 (Do) \* (Vol 5) 1918 Oudh 348 (348) (Do) \* ('87) 10 Mad 187 (189) (DB) (Do).

[See (Vol 8) 1916 Lah 151 (151); 1916 Pun Re No. 11 (DB) (Appeal seeking to remove charge *Ad valorem* court-fee on the amount of the charge.)]

[2] Where the mortgage decree exonerates certain property from liability under decree and plaintiff appeals from the decree seeking to make that property liable under the decree, he should pay *ad valorem* fee on the value of property or the value of the liability exonerated. (Vol 29) 1942 Mad 152 (153) \* (Vol 8) 1921 Oudh 237 (237); 24 Oudh Cas 295 \* (Vol 1) 1914 Oudh 396 (397); 17 Oudh Cas 90 \* ('07) 30 Mad 96 (98) (FB).

[See also (Vol 19) 1932 All 406 (407); 54 All 608 (Suit for dower debt—Suit decreed against first defendant personally only—His personal property made liable—Appeal to make assets in the hands of other defendants liable—*Ad valorem* fee on the dower debt to be paid as court-fee.)]

[3] Value of the property on which liability for decretal amount is imposed is to be ascertained according to the market-value and not by applying the rules laid down in para. (v) of Section 7. (Vol 18) 1931 Mad 710 (711).

**18. Decree against several persons—Appeal by one seeking exoneration.**—[1] Decree against father and sons on mortgage by the former as karta—Appeal by sons disputing their liability—*Ad valorem* fee on the decretal amount and not on their shares of that amount should be paid. (Vol 7) 1920 Pat 642 (648).

[See however (Vol 21) 1934 Lah 865 (866) (DB) (Sons seeking to avoid their personal liability only—Court-fee of Rs. 10 is sufficient.)]

[2] Appeal against a personal decree against co-trustees on a pro-note executed by them—A trustee should bear *ad valorem* court-fee on the decretal amount. (Vol 28) 1941 Mad 313 (314).

**19. Lower Court exonerating a party from liability—Appeal seeking to make him liable.**—

[1] Decree against some of several defendants—Plaintiff's appeal for getting other defendants also liable for amount decreed—*Ad valorem* court-fee on the amount decreed must be paid. (Vol 10) 1923 Lah 185 (186) (DB) \* (Vol 9) 1922 Bom 172 (173); 46 Bom 840 (DB) \* ('12) 16 Ind Cas 777 (778); 1912 Pun Re No. 86 (DB) \* ('99) 12 C P L R 43 (44).

**20. Separate appeals arising from same suit.**—[1] Defendants entitled to file joint appeal filing separate appeals—Each must bear full court-fee. (Vol 6) 1919 Lah 450 (454); 1918 Pun Re. No. 91 (DB) \* (1900) 33 Oudh Cas 163 (164) (DB).

[2] Where two distinct and separate appeals arise out of the same suit, full court-fee must be paid on each appeal. (Vol 8) 1921 All 395 (396); 43 All 56.

**21. Appeal relating to priority of claims against same debtor.**—[1] Suit for sale on mortgage—Appeal by prior mortgagee whose claim for priority negatived—*Ad valorem* court-fee on the amount of his mortgagee should be paid. (Vol 19) 1932 All 221 (222); 54 All 347.

[2] Decree directing sale subject to prior charge—Appeal to get rid of the priority—*Ad valorem* court-fee on the amount of that charge should be paid. (Vol 6) 1919 Pat 233 (234); 4 Pat L Jour 323.

[3] Appeal to exonerate property which was security for debentures from liability to satisfy decretal amount—Court-fee payable is on the value of debentures or decretal debt whichever is less. (Vol 20) 1933 All 45 (46); 54 All 553 (Article 17 (iii) of Sch. II does not apply.)

**22. Proviso.**—[1] The proviso applies even to cases where the plaint or memorandum of appeal comprises 'distinct subjects' within the meaning of S. 17. ('02) 29 Cal 140 (147, 148) (DB) \* ('81) 3 All 108 (110, 111, 112) (FB).

[2] Though the proviso only mentions the plaint and memorandum of appeal expressly, it is also applicable to written statements pleading a set-off or counter-claim. (Vol 17) 1930 Oudh 140 (141); 5 Luck 621.

#### Schedule 1 Article 2—Note I.

[1] Suit based on title and not on dispossession under S. 9, Specific Relief Act—This article will not apply and full court-fee will have to be paid. ('94) 1894 Bom P J 346 (DB).

#### Schedule 1 Article 2 (Madras Amendment)—Note I.

[1] Suit brought on basis of two promissory notes claiming two sums of Rs. 600 and Rs. 400 respectively—Claim for Rs. 600 held governed by Sch. I, Art. 1 and that for Rs. 400 by this article as amended in Madras and not by Art. 1. (Vol 20) 1933 Mad 178 (178) (DB).

6. Copy or translation of a judgment or order not being, or having the force of, a decree.	When such judgment or order is passed by any Civil Court other than a High Court, or by the presiding officer of any Revenue Court or Office, or by any other Judicial or Executive Authority—	
	(a)—If the amount or value of the subject-matter is fifty or less than fifty rupees.	Four annas.
	(b)—If such amount or value exceeds fifty rupees.	Eight annas.
	When such judgment or order is passed by a High Court.	One rupee.

## PROVINCIAL AMENDMENTS

## ASSAM

In the third column of the article for the words "four annas" opposite cl. (a) in the second column the words "six annas" were substituted and for the words "eight annas" opposite the first item in cl. (b) in the second column the words "twelve annas" were substituted and for the words "one rupee" opposite the second item in that clause the words "one rupee eight annas" were substituted.

—*Assam Act XIV of 1936.* [2-12-1936.]

## BENGAL

In the third column for the words "four annas" opposite cl. (a) in the second column the words "six annas" were substituted, for the words "eight annas" opposite the first item in cl. (b) in the second column, the words "twelve annas" were substituted and for the words "one rupee" opposite the second item in that clause, the words "one rupee eight annas" were substituted.

—*Bengal Court-fees (Amendment) Act IV of 1922.* [29-3-1922.]

## BIHAR

"Six annas", "twelve annas", "one rupee and eight annas" were respectively substituted for "four annas", "eight annas" and "one rupee" shown as "proper fees" against Art. 6.

—*Bihar and Orissa Court-fees (Amendment) Act II of 1922.* [21-8-1922.]

## CENTRAL PROVINCES

In the third column for the words "four annas" opposite cl. (a) the words "six annas" and for the words "eight annas" opposite cl. (b) the words "twelve annas" were substituted.

—*Court-fees (C. P. Amendment) Act XVI of 1935.* [21-5-1935.]

## MADRAS

The words "six annas", "twelve annas" and "one rupee eight annas" were respectively substituted for the words "four annas", "eight annas" and "one rupee" shown as proper fees in the third column against the article.

—*Madras Court-fees (Amendment) Act V of 1922.* [30-3-1922; 17-1-1922.]

## ORISSA

In the third column the words "six annas", "twelve annas" and "one rupee eight annas" were respectively substituted for the words "four annas", "eight annas" and "one rupee."

—*Orissa Court-fees (Amendment) Act V of 1939.* [31-10-1939.]

## UNITED PROVINCES

For the words "four annas", "eight annas" and "one rupee" in the third column the words "six annas", "twelve annas" and "one rupee eight annas" were respectively substituted.

—*U. P. Court-fees (Amendment) Act II of 1936.* [2-1-1936.]

## Article 6-A

## MADRAS

Article 6A was inserted, viz.—

"6A. Copy or translation of a judgment or order of a | . . . . | Eight annas." criminal Court

—*Madras Act V of 1922.* [30-3-1922; 17-1-1922.]

7. Copy of a decree or order having the force of a decree.	When such decree or order is made by any Civil Court other than a High Court, or by any Revenue Court—	
	(a)—If the amount or value of the subject-matter of the suit wherein such decree or order is made is fifty or less than fifty rupees.	Eight annas.
	(b)—If such amount or value exceeds fifty rupees.	One rupee.
	When such decree or order is made by a High Court.	Four rupees.

## Schedule 1 Articles 6 and 7—Note 1.

[1] Notes of judgment furnished to parties under the Rules of Practice for the guidance of Small Cause Courts are copies of decrees and require a stamp under Art. 7. ('71) 6 Mad HCR (App) (23 24).

[2] Execution of Privy Council decree—Printing charges allowed as costs by Privy Council—Sub-Judge in execution refusing to include in costs printing charges—Appeal—Copy of Sub-Judge's order must be stamped under Art. 7. (Vol 24) 1937 Fesh 3 (4) (DB).

## PROVINCIAL AMENDMENTS

## CENTRAL PROVINCES

In the third column for the words "eight annas" opposite clause (a) the words "twelve annas" and for the words "one rupee" opposite clause (b) the words "one rupee and eight annas" were substituted.

—Court-fees (C. P. Amendment) Act XVI of 1935. [21-5-1935.]

## ORISSA

For Art. 7 the following article was substituted, viz.,

7. "Copy of decree or order having the force of a decree.	When such decree or order is made by a Munsif's Court or a Court of Small Causes, or a Revenue Court—	
	(a) if the amount or value of the subject-matter of the suit wherein such decree or order is made does not exceed one hundred rupees:	Eight annas.
	(b) if such amount or value exceeds one hundred rupees but does not exceed one thousand rupees;	One rupee.
	(c) if such amount or value exceeds one thousand rupees.	One rupee eight annas.
	When such decree or order is made by the Court of a District Judge or of a Subordinate Judge.	Three rupees.
	When such decree or order is made by a High Court.	Three rupees if the amount or value of the subject-matter of the suit wherein such decree or order is made does not exceed one thousand rupees; six rupees if such amount or value exceeds one thousand rupees."

—Orissa Court-fees (Amendment) Act V of 1939. [31-10-1939.]

## UNITED PROVINCES

For the words "eight annas" and "one rupee" in the third column the words "twelve annas" and "one rupee and eight annas" were respectively substituted.

—U. P. Act II of 1936. [2-4-1936.]

8. Copy of any document liable to stamp-duty under the Indian Stamp Act, 1879, <sup>a</sup> when left by any party to a suit or proceeding in place of the original withdrawn.	(a)—When the stamp duty chargeable on the original does not exceed eight annas.	The amount of the duty chargeable on the original.
	(b)—In any other case.	Eight annas.

[a] See now the Indian Stamp Act, 1899 (2 [II] of 1899).

## Sch. I Arts. 6 and 7 (contd.)

[3] Where the filing of copies of any judgment, decree or order is essential for the presentation of a valid appeal, the want of proper stamps on such copies would invalidate the appeal and the subsequent payment of deficit court-fees after the expiry of limitation for the appeal will not be sufficient to avoid the bar of limitation. (Vol 22) 1935 Lah 124 (125) \* (Vol 21) 1934 Lah 272 (273).

[4] Where the Deputy Registrar, whose duty is to see that all documents presented in the High Court are duly stamped, accepts copies of judgments and decrees filed with an application for leave to appeal to Privy Council under S. 81(2), Government of Burma Act, which have not been stamped as required by Arts. 6 to 9, Court-fees Act, it is an implied decision that the copies are in order and when an objection is raised that it is not in order the appli-

cant is entitled to time to furnish the necessary stamps. (Vol 28) 1941 Rang 294 (295) (DB).

## Schedule I Article 8—Note 1.

[1] Copies of entries in account books, etc., furnished under O. 13 R. 5 of the Civil Procedure Code need not bear any court-fee. ('87) 11 Bom 526 (527, 528) (FB) (Copies of entries in account books.) \* ('08) 27 Bom 150 (154) (SB) (Copies of entries in receipt books.) \* ('02) 26 Bom 522 (525) (SB) (Copy or extract from an entry in an account book.) \* ('91) 15 Bom 687 (689, 690) (SB).

[2] Where a suit is instituted through an agent holding a duly stamped power-of-attorney and the power-of-attorney is produced in Court for verification and then returned, the copy of the power-of-attorney which is left on the record in its place need not be stamped with any court-fee. (Vol 5) 1918 Lah 113 (113A) 1918 Pnn Ra No. 9 (DB).

## PROVINCIAL AMENDMENTS

## ASSAM

For the figures "1870" in the first column the figures "1899" were substituted.

—Assam Act XIV of 1936. [2-12-1936.]

## BENGAL

For the figures "1870" in the first column the figures "1899" were substituted.

—Court-fees Bengal Second (Amendment) Act XI of 1935. [5-5-1935.]

## BIHAR AND ORISSA

The entry "one and a half times the amount of the duty chargeable on the original" was substituted for the entry "the amount of the duty chargeable on the original" and "twelve annas" were substituted for "eight annas" shown as proper fee against Art 8.

—Bihar and Orissa Court-fees (Amendment) Act II of 1922. [21-8-1922.]

## BOMBAY

For Art. 8 the following article was substituted.

8. Copy of any document liable to stamp- (a) When the stamp-duty The amount of the duty  
duty under the Indian Stamp Act, 1899, when chargeable on the ori- chargeable on the original.  
left by any party to a suit or proceeding in place ginal does not exceed  
of the original withdrawn. one rupee.

(b) In any other case. One rupee.

—Bombay Finance Act II of 1932. [30-3-1932.]

## MADRAS

For the figures "1870" in the first column the figures "1899" were substituted.

—Madras Act V of 1922.

## SIND

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

## UNITED PROVINCES

For the words "eight annas" in the third column the words "twelve annas" were substituted.

—United Provinces Act II of 1936. [2-1-1936.]

## Article 8A

## UNITED PROVINCES

Between Arts. 8 and 9 the following article was inserted as Art 8A, viz:

"8A. A Copy of a power of attorney when filed in any ... Twelve  
suit or proceedings. annas."

—United Provinces Act XIX of 1938. [9-1-1939.]

9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or copy of any account, statement, report or the like, taken out of any Civil or Criminal or Revenue Court or Office, or from the office of any chief officer charged with the executive administration of a Division.

For every three hundred and sixty words or fraction of three hundred and sixty words. Eight annas.

## PROVINCIAL AMENDMENTS

## BIHAR

Words "Twelve annas" were substituted for the words "Eight annas" in the third column.

—Bihar and Orissa Act II of 1922. [21-8-1922.]

## ORISSA

Same as that Bihar.—Orissa Act V of 1939. [31-10-1939.]

10. [Repealed by the Guardians and Wards Act, 1890 (8 [VIII] of 1890).]

Schedule 1 Article 9—Note 1.

[1] The article does not authorise the levy of any

search fee. (Vol 15) 1928 Mad 870 (870): 51  
Mad 599.

11. Probate of a will or letters of administration with or without will annexed.	<p>b[When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, but does not exceed ten thousand rupees.</p> <p>When such amount or value exceeds ten thousand rupees but does not exceed fifty thousand rupees.</p> <p>When such amount or value exceeds fifty thousand rupees. Provided that when, after the grant of a certificate under the Succession Certificate Act, 1889, or under the Regulation of the Bombay Code No. VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant.</p>	<p>Two per centum on such amount or value.</p> <p>Two and one-half per centum on such amount or value</p> <p>Three per centum on such amount or value.]</p>
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[a] Substituted by the Succession Certificate Act, 1889 (7 [VII] of 1889), S. 13 (1).

[b] Substituted by the Court-fees (Amendment) Act, 1910 (7 [VII] of 1910), S. 2 (4).

#### PROVINCIAL AMENDMENTS

#### ASSAM

(1) For the entries above the proviso in the second column and for the entries in the third column the following were substituted, viz:—

"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees on such amount or value up to ten thousand rupees	two per centum.
and When such amount or value exceeds ten thousand rupees on the portion of such amount or value which is in excess of ten thousand rupees up to fifty thousand rupees	three per centum.
and When such amount or value exceeds fifty thousand rupees on the portion of such amount or value which is in excess of fifty thousand rupees up to a lakh of rupees	four per centum
and When such amount or value exceeds a lakh of rupees on the portion of such amount or value which is in excess of a lakh of rupees up to two lakhs and fifty thousand rupees.	five per centum.
and When such amount or value exceeds two lakhs and fifty thousand rupees on the portion of such amount or value which is in excess of two lakhs and fifty thousand rupees up to three lakhs of rupees	five and a half per centum.
and When such amount or value exceeds three lakhs of rupees on the portion of such amount or value which is in excess of three lakhs of rupees up to four lakhs of rupees	six per centum.
and When such amount or value exceeds four lakhs of rupees on the portion of such amount or value which is in excess of four lakhs of rupees up to five lakhs of rupees	six and a half per centum.
and When such amount or value exceeds five lakhs of rupees on the portion of such amount or value which is in excess of five lakhs of rupees.	seven per centum."

(2) In the proviso for the words and figures, "the Succession Certificate Act, 1889," the words and figures "the Indian Succession Act, 1925," were substituted. *Assam Act XIV of 1936. [2-12-1936.]*

#### Schedule I Article 11—Note 1.

[1] Grant of probate or letters of administration contemplated in Sch. I, Art. 11 is Grant under Ss. 276 and 278 of Indian Succession Act of 1925 (Ss. 62 and 64 of Probate and Administration Act.) (Vol 8) 1921 Pat 206 (214): 6 Pat L Jour 411 (DB) (Property in Bengal and Bihar—Probate obtained in Bengal—Subsequent application in Bihar under S. 228, Succession Act—*Held*, valuation of assets at date of prior application should be accepted for court-fee purposes and if sufficient court-fee was paid on it, no separate fee was required on subsequent application.)

[2] Court-fees chargeable under this article are in no sense a death duty, and are only payable if probate is taken out. (Vol 82) 1945 Bom 1 (3) (DB).

[3] "Amount or value of the property" under this article means net value. (Vol 29) 1942 Lah 173-(176): ILR (1942) Lah 717 (FB) \* (Vol 3) 1916 Cal 543 (545) \* (Vol 1) 1914 Cal 40 (45) \* (Vol 1) 1914 Low Bur 245 (246): 7 Low Bur Rul 356 (DB).

[4] Figure arrived at by calculating fee on gross value of estate and also on debts due from estate and then deducting latter from former would not be correct. (Vol 1) 1914 Cal 40 (44).

[5] Gross value of estate exceeding Rs. 1,000 but liabilities reducing net value to less than Rs. 1,000—Fee should be paid on gross value. (19) 45 Ind Cas 621 (622) (DB) (Cal).



**BENGAL**

The article as amended by the various amending Acts runs as follows :

" 11. Probate of a will or letters of administration with or without will annexed.	a When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees c [on such amount or value up to ten thousand rupees]	Two per centum *
	and	
	When such amount or value exceeds ten thousand rupees d * * * e [on the portion] of such amount or value which is in excess of ten thousand rupees f [up to fifty thousand rupees]	Three per centum *
	and	
	When such amount or value exceeds fifty thousand rupees g * * * e [on the portion] of such amount or value which is in excess of fifty thousand rupees h [up to a lakh of rupees]	Four per centum *
	and	
	When such amount or value exceeds a lakh of rupees e [on the portion] of such amount or value which is in excess of a lakh of rupees i [up to two lakhs and fifty thousand rupees]	Five per centum *
	j [and	
	When such amount or value exceeds two lakhs and fifty thousand rupees on the portion of such amount or value which is in excess of two lakhs and fifty thousand rupees up to three lakhs of rupees	Five and half per centum
	and	
	When such amount or value exceeds three lakhs of rupees on the portion of such amount or value which is in excess of three lakhs of rupees up to four lakhs of rupees	Six per centum
	and	
	When such amount or value exceeds four lakhs of rupees on the portion of such amount or value which is in excess of four lakhs of rupees up to five lakhs of rupees	Six and half per centum
	and	
	When such amount or value exceeds five lakhs of rupees on the portion of such amount or value which is in excess of five lakhs of rupees :	Seven per centum
	Provided that when, after the grant of certificate under k [the Indian Succession Act, 1925] or under the Regulation of Bombay Code, No. VIII of 1827, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant."	

[a] The first four entries in the second and the third columns were substituted for the old entries b S. 7 of the Bengal Court-fees (Amendment) Act, 1922 (Bengal Act IV of 1922).

[b] The words "on such amount or value" were repealed by S. 3 of the Bengal Court-fees (Amendment No. II) Act, 1922 (Bengal Act VI of 1922).

[c] Substituted for the words "but does not exceed ten thousand rupees" by S. 3, *ibid.*

[d] The words "but does not exceed fifty thousand rupees" by S. 3, *ibid.*

[e] Substituted for the words "for the portion" by S. 3, *ibid.*

[f] These words were added by S. 3, *ibid.*

[g] The words "but does not exceed a lakh of rupees" were repealed by S. 3, *ibid.*

[h] These words were added by S. 3, *ibid.*

[i] Inserted by S. 4 (a) of the Court-fees (Bengal Second Amendment) Act 1935 (Bengal Act XI of 1935).

[j] These words in the square brackets in the second and third columns of the article were inserted b Section 4 (b), *ibid.*

[k] Substituted for the words and figure "the Succession Certificate Act, 1889" by S. 4 (c), *ibid.*

**BIHAR AND ORISSA**

For the entries above the proviso in the second and the entries in the third column the following were substituted, viz. :

"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two thousand rupees, on such amount or value up to ten thousand rupees	Two per centum
and	
when such amount or value exceeds ten thousand rupees, on the portion of such amount or value which is in excess of ten thousand rupees up to fifty thousand rupees	Three per centum
and	
when such amount or value exceeds fifty thousand rupees, on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees	Four per centum
and	
when such amount or value exceeds a lakh of rupees for the portion of such amount or value which is in excess of one lakh of rupees.	Five per centum."

— Bihar & Orissa Act II of 1932. [21-8-1932]

**BOMBAY**

For Art. 11 the following article was *substituted* :

"11. Probate of a will or letters of administration with or without will annexed.	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees, on the part of the amount or value in excess of one thousand rupees, up to ten thousand rupees.	Two per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds ten thousand rupees, on the part of the amount or value in excess of ten thousand rupees, up to fifty thousand rupees.	Three per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds fifty thousand rupees, on the part of the amount or value in excess of fifty thousand rupees, up to one lakh of rupees.	Four per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one lakh of rupees, on the part of the amount or value in excess of one lakh of rupees, up to two lakhs of rupees.	Four and a half per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two lakhs of rupees, on the part of the amount or value in excess of two lakhs of rupees, up to two lakhs and fifty thousand rupees.	Five per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds two lakhs and fifty thousand rupees, on the part of the amount or value in excess of two lakhs and fifty thousand rupees, up to three lakhs of rupees.	Five and a half per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds three lakhs of rupees, on the part of the amount or value in excess of three lakhs of rupees, up to up to four lakhs of rupees.	Six per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds four lakhs of rupees, on the part of the amount or value in excess of four lakhs of rupees, up to five lakhs of rupees.	Six and a half per centum.
	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds five lakhs of rupees, on the part of the amount or value in excess of five lakhs of rupees:	Seven per centum.
	Provided that when, after the grant of a certificate under Part X of the Indian Succession Act, 1925, or under Bombay Regulation, VIII of 1927, in respect of any property included in an estate, a grant of probate or letters of administration is made in respect of the same estate, the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant."	

—*Bombay Finance Act II of 1932.* [30-3-1932.]

**CENTRAL PROVINCES**

For Art. 11 and the entries in the second and the third columns thereof the following article and entries were *substituted* :—

"11. Probate of a will or letters of administration with or without will annexed.	When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees but does not exceed five thousand rupees.	Two per centum on such amount or value.
	When such amount or value exceeds five thousand rupees but does not exceed ten thousand rupees.	One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees.
	When such amount or value exceeds ten thousand rupees.	Two hundred and fifty rupees plus three per centum on the amount or value in excess of ten thousand rupees.
	Provided that when after the grant of a certificate under Part X of the Indian Succession Act, 1925 or under Bombay Regulation VIII of 1927 in respect of any property included in an estate a grant of probate or letters of administration is made in respect of the same estate the fee payable in respect of the latter grant shall be reduced by the amount of the fee paid in respect of the former grant."	

—*C. P. Act XVI of 1935.* [21-5-1935.]

**MADRAS**

For the entries above the proviso in the second column and the entries in the third column the following were substituted :—

When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees but does not exceed five thousand rupees.	Two per centum on such amount or value.
When such amount or value exceeds five thousand rupees.	Three per centum on such amount or value."

—Madras Act V of 1922. [30-3-1922 ; 17-1-1922.]

**SIND**

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

**UNITED PROVINCES**

For the entries above the proviso in the second column and the entries in the third column, the following were substituted :—

"When the amount or value of the property in respect of which the grant of probate or letters is made exceeds one thousand rupees but does not exceed ten thousand rupees.	Two per centum on such amount or value.
When such amount or value exceeds ten thousand rupees but does not exceed fifty thousand rupees.	Two and a half per centum on such amount or value.
When such amount or value exceeds fifty thousand rupees but does not exceed one lakh of rupees.	Three per centum on such amount or value.
When such amount or value exceeds one lakh of rupees on the portion of such amount or value which is in excess of a lakh of rupees up to two lakhs of rupees.	Four per centum.
When such amount or value exceeds two lakhs of rupees on the portion of such amount or value which is in excess of two lakhs of rupees up to three lakhs of rupees.	Five per centum.
When such amount or value exceeds three lakhs of rupees on the portion of such amount or value which is in excess of three lakhs of rupees up to four lakhs rupees.	Six per centum.
When such amount or value exceeds four lakhs rupees on the portion of such amount or value which is in excess of four lakhs of rupees up to five lakhs of rupees; and	Six and a half per centum.
When such amount or value exceeds five lakhs of rupees on the portion of such amount or value which is in excess of five lakhs of rupees.	Seven per centum."

—U. P. Act XIX of 1938. [9-1-1939.]

a[12. Certificate under the Succession Certificate Act, 1889.	In any case.	Two per centum on the amount or value of any debt or security specified in the certificate under section 8 of the Act, and three per centum on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act.
		<i>Note.</i> —(1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.
		(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained.]

[a] Substituted by the Succession Certificate Act, 1889 (7 [VII] of 1889), section 13 (i).

**Schedule 1 Article 12—Note 1.**

[1] Words "amount or value of any debt or security" in this article refer to individual debts and individual securities and not aggregate of debts and securities and court-fees in respect of certificate of

succession must be calculated according to amount of each individual item and not according to total amount of such items. (Vol 21) 1934 Oudh 41 (415); 10 Luck 195 (DB)\* (Vol 27) 1940 Nag 46 (401)\* (Vol 32) 1945 Pat 318 (819,320); 24 Pat 16 (As amended by Bihar and Orissa Act 2 of 1922).

## PROVINCIAL AMENDMENTS

## ASSAM

For Article 12 the following article was substituted:—

"12. Certificate under the Indian Succession Act, 1925.	When the amount or value of any debt or security specified in the certificate under S. 374 of the Act exceeds one thousand rupees and	Two per centum on the first ten thousand rupees. Three per centum on the next forty thousand rupees. Four per centum on the next fifty thousand rupees. Five per centum on the next one lakh and fifty thousand rupees. Five and half per centum on the next fifty thousand rupees. Six per centum on the next one lakh rupees. Six and half per centum on the next one lakh rupees and Seven per centum on the remainder of such amount or value.
	When the aggregate amount or value of any debts or securities specified in the certificate and of any debts or securities to which the certificate has been extended under S. 376 of the Act exceeds one thousand rupees.	In respect of such portion of the aggregate amount or value as consists of the amount or value of the debts or securities so specified the fee herein before provided in that behalf in this article and Three per centum on such portion of the first ten thousand rupees. Four and half per centum on such portion of the next forty thousand rupees. Six per centum on such portion of the next fifty thousand rupees. Seven and half per centum on such portion of the next one lakh and fifty thousand rupees. Eight and a quarter per centum on such portion of the next fifty thousand rupees. Nine per centum on such portion of the next one lakh rupees. Nine and three quarters per centum on such portion of the next one lakh rupees and Ten and half per centum on such portion of the remainder of such aggregate amount or value as consists of the amount or value of debts or securities to which the certificate has been extended. Note.—(1) The amount of a debt is its amount including interest on the day on which the inclusion of the debt in the certificate is applied for so far as such amount can be ascertained. (2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act and where such a power has been so conferred whether the power is for the receiving of interest or dividends on or for the negotiation or transfer of the security, or for both purposes the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for so far as such value can be ascertained."

*Assam Act XIV of 1936. [2-12-1936.]*

## BENGAL

For Art. 12 the following article was substituted, viz.,

"12. Certificate under the Indian Succession Act, 1925.	When the amount or value of any debt or security specified under S. 374 of the Act exceeds one thousand rupees, and	Two per centum on the first ten thousand rupees, three per centum on the next forty thousand rupees, four per centum on the next fifty thousand rupees, and five per centum on the next one lakh and fifty thousand rupees, five and a half per centum on the next fifty thousand rupees, six per centum on the next one lakh of rupees, six and a half per centum on the next one lakh of rupees and seven per centum on the remainder of such amount or value
	When the aggregate amount or value of any debts or securities	In respect of such portion of the aggregate amount or value as consists of the amount or value of debts or securities so specified, the fee hereinbefore provided in that behalf in this article; and three per centum on such portion of the first ten thousand rupees,

## Sch. 1 Art. 12 (contd.)

[2] In Assam, Bengal and Central Provinces court-fee is not payable upto one thousand but when aggregate amount or value of debts or securities specified in certificate exceeds Rs. 1,000 or when their aggregate amount or value in original certificate and of the debts to which certificate is extended exceeds rupees 1,000 Court-fee is payable. See (Vol 21) Cal 38 (39): 60 Cal 1262 (DB).

[But see (Vol 27) 1940 Nag 400 (401) (Not good law—Article amended subsequently.)]

[3] If after filing of application law is changed and court-fee is increased applicant must pay additional fee. (Vol 28) 1936 All 309 (811): 58 All 752 (DB).

[4] Succession certificate issued on payment of fees mentioned in this article—Another application for issue of succession certificate made in respect of same debt—Fresh court-fee has to be paid on second certificate. (Vol 4) 1917 Cal 390 (381) (DB).

specified in the certificate and of any debts or securities to which the certificate has been extended under S. 376 of the Act exceeds one thousand rupees.	four and a half per centum on such portion of the next forty thousand rupees. six per centum on such portion of the next fifty thousand rupees, and seven and a half per centum on such portion of the next one lakh and fifty thousand rupees, eight and a quarter per centum on such portion of the next fifty thousand rupees, nine per centum on such portion of the next one lakh of rupees, nine and three quarters per centum on such portion of the next one lakh of rupees, and ten and a half per centum on such portion of the remainder of such aggregate amount or value as consists of the amount or value of debts or securities to which the certificate has been extended.
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*Note.*—(1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for, so far as such amount can be ascertained.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security, or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained."

—*Court-fees (Bengal Second Amendment) Act VI of 1935.* [5-5-1935.]

## BIHAR AND ORISSA

For the entry in the second column and for the first paragraph in the third column the following were substituted, viz.,

"When the amount or value of any debt or security specified in the certificate under section 8 of the Act exceeds one thousand rupees on such amount or value up to ten thousand rupees, and When such amount or value exceeds ten thousand rupees on the portion of such amount or value which is in excess of ten thousand rupees, up to fifty thousand rupees and When such amount or value exceeds fifty thousand rupees on the portion of such amount or value which is in excess of fifty thousand rupees up to one lakh of rupees, and When such amount or value exceeds a lakh of rupees on the portion of such amount or value which is in excess of one lakh of rupees.	Two per centum and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, three per centum.  Three per centum and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, four and a half per centum.  Four per centum and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, six per centum.  Five per centum and on the amount or value of any debt or security to which the certificate is extended under section 10 of the Act, seven and a half per centum."
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—*Bihar and Orissa Court-fees (Amendment) Act (II of 1922).* [21-8-1922]

## BOMBAY

"12. Certificate under Part X of the Indian Succession Act, 1925. The fee leviable in the case of a probate (Art. 11) on the amount or value of any debt or security specified in the certificate under S. 374 of the Act, and one and a half times this fee on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.

*Note.*—(1) The amount of a debt is its amount, including interest on the day on which the inclusion of the debt in the certificate is applied for so far as such amount can be ascertained.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest or dividends on, or for the negotiation or transfer of the security or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for, so far as such value can be ascertained."

—*Bombay Finance Act II of 1932.* [30-3-1932.]

## CENTRAL PROVINCES

For Art. 12 and the entries in the second and third column thereof the following article and entries were substituted :

"12. Certificate under Part X of the Indian Succession Act, 1925, (XXXIX of 1925).	When the total amount or value of the debts or securities specified in the certificate under S. 374 of the Act exceeds one thousand rupees but does not exceed five thousand rupees.	Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
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When such amount or value exceeds five thousand rupees but does not exceed ten thousand rupees.	One hundred rupees plus two and a half per centum on the amount or value in excess of five thousand rupees and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
When such amount or value exceeds ten thousand rupees.	Two hundred and fifty rupees plus three per centum on the amount or value in excess of ten thousand rupees and seven and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act."

—C. P. Acts XVI of 1935 [21-5-1935] and XVI of 1940. [6-12-1940.]

### MADRAS

"12. Certificate under the Succession Certificate Act, 1889.	When the amount or value of any debt or security specified in the certificate under S. 8 of the Act does not exceed five thousand rupees.	Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.
	When such amount or value exceeds five thousand rupees.	Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 10 of the Act.

*Note.*—(1) The amount of a debt is its amount including interest on the day on which the inclusion of the debt in the certificate is applied for so far as such amount can be ascertained.

(2) Whether or not any power with respect to a security specified in a certificate has been conferred under the Act; and where such a power has been so conferred, whether the power is for the receiving of interest of dividends on, or for the negotiation or transfer of the security or for both purposes, the value of the security is its market-value on the day on which the inclusion of the security in the certificate is applied for so far as such value can be ascertained.

—*Madras Court-fees (Amendment) Act V of 1922.* [30-8-1922; 17-4-1922.]

### SIND

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

### UNITED PROVINCES

For the entries in the first and second columns and for the first paragraph in the third column, the following was substituted.

"12. Succession certificate under the Indian Succession Act, 1925.	When the amount or value of the debt or security or the aggregate amount of the debts or securities specified in the certificate under Section 374 of the Act does not exceed twenty thousand rupees;	Two per centum on such amount or value and three per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
	When such amount or value exceeds twenty thousand rupees but does not exceed fifty thousand rupees, on the portion of such amount or value which is in excess of twenty thousand rupees;	Two and a half per centum on such amount or value, and three and a three-quarters per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
	When such amount or value exceeds fifty thousand rupees but does not exceed a lakh of rupees, on the portion of such amount or value which is in excess of fifty thousand rupees;	Three per centum on such amount or value and four and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
	When such amount or value exceeds a lakh of rupees but does not exceed two lakhs of rupees, on the portion of such amount or value which is in excess of a lakh of rupees;	Four per centum on such amount or value and six per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
	When such amount or value exceeds two lakhs of rupees but does not exceed three lakhs of rupees, on the portion of such amount or value which is in excess of two lakhs of rupees;	Five per centum on such amount or value and seven and half per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.

When such amount or value exceeds three lakhs of rupees but does not exceed four lakhs of rupees, on the portion of such amount or value which is in excess of three lakhs of rupees;	Six per centum on such amount or value and nine per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
When such amount or value exceeds four lakhs of rupees but does not exceed five lakhs of rupees, on the portion of such amount or value which is in excess of four lakhs of rupees;	Six and a half per centum on such amount or value and eight and a quarter per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act.
When such amount or value exceeds five lakhs of rupees, on the portion of such amount or value which is in excess of five lakhs of rupees.	Seven per centum on such amount or value and ten and a half per centum on the amount or value of any debt or security to which the certificate is extended under S. 376 of the Act."

[C. P. Act XIX of 1938. [9-1-1939.]

**12A.** Certificate under Regulation of the Bombay Code, No. VIII of 1827.

(1) As regards debts and securities.	The same fee as would be payable in respect of a certificate under the Succession Certificate Act, 1889, or in respect of an extension of such a certificate, as the case may be.
(2) As regards other property in respect of which the certificate is granted—	
When the amount or value of such property exceeds one thousand rupees, but does not exceed ten thousand rupees.	Two per centum on such amount or value.
When such amount or value exceeds ten thousand rupees, but does not exceed fifty thousand rupees.	Two and one-half per centum on such amount or value.
When such amount or value exceeds fifty thousand rupees.	Three per centum on such amount or value.

(a) *Substituted* by the Succession Certificate Act, 1889 (I [VII] of 1889), Section 13 (a).  
(b) *Substituted* by the Court-fees (Amendment) Act, 1910 (7 [VII] of 1910), S. 2 (ii).

**PROVINCIAL AMENDMENTS**

**BOMBAY**

For Article 12A the following article was *substituted*, viz:

2A. Certificate under Bombay Regulation, VIII of 1827. The fee payable in case of a probate (Art. 11) on the amount or value of the property in respect of the certificate or an extension of such certificate as the case may be."

—*Bombay Act II of 1932* [30-3-1932].

**ANDRAS**

Omitted by *Madras Act I of 1922*. [30-3-1922; 17-4-1922.]

**INDIA**

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of section 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

[13. Application to the High Court of Judicature at Lahore for the exercise of jurisdiction under section 44 of the Punjab Courts Act, 1918 or to the Court of the Financial Commissioner of the Punjab for the exercise of its revisional jurisdiction under section 84 of the Punjab Tenancy Act, 1887.	When the amount or value of the subject-matter in dispute does not exceed twenty-five rupees.	Two rupees.
	When such amount or value exceeds twenty-five rupees.	The fee leviable on a memorandum of appeal.]

**Schedule 1 Article 13 (Punjab Amendment)—Note 1.**

[1] Value of subject-matter in dispute in application for revision against order refusing to file and in arbitration out of court exceeding Rs. 25—application is chargeable with court-fee payable on bond from order under Sch. II, Art. 11. (Vol 16) 9 Lah 367 (368) (DB).

[2] Revision from order refusing to set aside award made in pending suit—Court-fee of Rs. 1 held sufficient—*Ad valorem* court-fee not necessary. (Vol 16) 1929 Lah 369 (369, 370) (1911 Pun L R No. 4 dissented.)

[3] Revision against decree in partition suit passed in accordance with award—Award attacked regarding mode of partition—Court-fee of Rs. 10 under Art. 17 held sufficient. (13) 1913 Pun L R No. 1 page 1 (4) (DB).

[a] *Inserted originally by Punjab Courts Act, 1884 (XVIII of 1884), S. 71, as amended by the Punjab Courts Act, (XXV of 1899), S. 6. Article 13 was repealed in Punjab by S. 5 of the Punjab Courts (Amendment) Act, 1912 (Punjab Act I of 1912), and in the North-West Frontier Province by the Third Schedule of the North-West Frontier Province Law and Justice Regulation, 1901 (Regulation VII of 1901); but it has since been revived for both areas in its present form by the Court-fees (Punjab Amendment) Act, 1922 (Punjab Act (7 [VII] of 1922).*

14. *[Repealed by A. O.]*

15. *Repealed by the Repealing and Amending Act, 1923 (11 [XI] of 1923) s. 3 and Sch. II.]*

TABLE OF RATES OF AD VALOREM FEES LEVIABLE ON THE INSTITUTION OF SUITS.

When the amount or value of the sub- ject-matter exceeds	But does not exceed	Proper Fee.	When the amount or value of the sub- ject-matter exceeds	But does not exceed	Proper Fee.	When the amount or value of the sub- ject-matter exceeds	But does not exceed	Proper Fee.
Rs.	Rs.	Rs. A. P.	Rs.	Rs.	Rs. A. P.	Rs.	Rs.	Rs. A. P.
5	10	0 6 0	260	270	20 4 0	620	630	47 4 0
10	15	0 12 0	270	280	21 0 0	630	640	48 0 0
15	20	1 2 0	280	290	21 12 0	640	650	48 12 0
20	25	1 8 0	290	300	22 8 0	650	660	49 8 0
25	30	1 14 0	300	310	23 4 0	660	670	50 4 0
30	35	2 4 0	310	320	24 0 0	670	680	51 0 0
35	40	2 10 0	320	330	24 12 0	680	690	51 12 0
40	45	3 0 0	330	340	25 8 0	690	700	52 8 0
45	50	3 6 0	340	350	26 4 0	700	710	53 4 0
50	55	3 12 0	350	360	27 0 0	710	720	54 0 0
55	60	4 2 0	360	370	27 12 0	720	730	54 12 0
60	65	4 8 0	370	380	28 8 0	730	740	55 8 0
65	70	4 14 0	380	390	29 4 0	740	750	56 4 0
70	75	5 4 0	390	400	30 0 0	750	760	57 0 0
75	80	5 10 0	400	410	30 12 0	760	770	57 12 0
80	85	6 0 0	410	420	31 8 0	770	780	58 8 0
85	90	6 6 0	420	430	32 4 0	780	790	59 4 0
90	95	6 12 0	430	440	33 0 0	790	800	60 0 0
95	100	7 2 0	440	450	33 12 0	800	810	60 12 0
100	110	7 8 0	450	460	34 8 0	810	820	61 8 0
110	120	8 4 0	460	470	35 4 0	820	830	62 4 0
120	130	9 0 0	470	480	36 0 0	830	840	63 0 0
130	140	9 12 0	480	490	36 12 0	840	850	63 12 0
140	150	10 8 0	490	500	37 8 0	850	860	64 8 0
150	160	11 4 0	500	510	38 4 0	860	870	65 4 0
160	170	12 0 0	510	520	39 0 0	870	880	66 0 0
170	180	12 12 0	520	530	39 12 0	880	890	66 12 0
180	190	13 8 0	530	540	40 8 0	890	900	67 8 0
190	200	14 4 0	540	550	41 4 0	900	910	68 4 0
200	210	15 0 0	550	560	42 0 0	910	920	69 0 0
210	220	15 12 0	560	570	42 12 0	920	930	69 12 0
220	230	16 8 0	570	580	43 8 0	930	940	70 8 0
230	240	17 4 0	580	590	44 4 0	940	950	71 4 0
240	250	18 0 0	590	600	45 0 0	950	960	72 0 0
250	260	18 12 0	600	610	45 12 0	960	970	72 12 0
		19 8 0	610	620	46 8 0	970	980	73 8 0



When the amount or value of the subject matter exceeds.	But does not exceed	Proper Fee	When the amount or value of the subject matter exceeds	But does not exceed	Proper Fee	When the amount or value of the subject matter exceeds.	But does not exceed	Proper Fee
Rs.	Rs.	Rs. A. P.	Rs.	Rs.	Rs. A. P.	Rs.	Rs.	Rs. A. P.
980	990	74 4 0	9,250	9,500	455 0 0	1,30,000	1,35,000	1,600 0 0
990	1,000	75 0 0	9,500	9,750	465 0 0	1,35,000	1,40,000	1,625 0 0
1,000	1,100	80 0 0	9,750	10,000	475 0 0	1,40,000	1,45,000	1,650 0 0
1,100	1,200	85 0 0	10,000	10,500	490 0 0	1,45,000	1,50,000	1,675 0 0
1,200	1,300	90 0 0	10,500	11,000	505 0 0	1,50,000	1,55,000	1,700 0 0
1,300	1,400	95 0 0	11,000	11,500	520 0 0	1,55,000	1,60,000	1,725 0 0
1,400	1,500	100 0 0	11,500	12,000	535 0 0	1,60,000	1,65,000	1,750 0 0
1,500	1,600	105 0 0	12,000	12,500	550 0 0	1,65,000	1,70,000	1,775 0 0
1,600	1,700	110 0 0	12,500	13,000	565 0 0	1,70,000	1,75,000	1,800 0 0
1,700	1,800	115 0 0	13,000	13,500	580 0 0	1,75,000	1,80,000	1,825 0 0
1,800	1,900	120 0 0	13,500	14,000	595 0 0	1,80,000	1,85,000	1,850 0 0
1,900	2,000	125 0 0	14,000	14,500	610 0 0	1,85,000	1,90,000	1,875 0 0
2,000	2,100	130 0 0	14,500	15,000	625 0 0	1,90,000	1,95,000	1,900 0 0
2,100	2,200	135 0 0	15,000	15,500	640 0 0	1,95,000	2,00,000	1,925 0 0
2,200	2,300	140 0 0	15,500	16,000	655 0 0	2,00,000	2,05,000	1,950 0 0
2,300	2,400	145 0 0	16,000	16,500	670 0 0	2,05,000	2,10,000	1,975 0 0
2,400	2,500	150 0 0	16,500	17,000	685 0 0	2,10,000	2,15,000	2,000 0 0
2,500	2,600	155 0 0	17,000	17,500	700 0 0	2,15,000	2,20,000	2,025 0 0
2,600	2,700	160 0 0	17,500	18,000	715 0 0	2,20,000	2,25,000	2,050 0 0
2,700	2,800	165 0 0	18,000	18,500	730 0 0	2,25,000	2,30,000	2,075 0 0
2,800	2,900	170 0 0	18,500	19,000	745 0 0	2,30,000	2,35,000	2,100 0 0
2,900	3,000	175 0 0	19,000	19,500	760 0 0	2,35,000	2,40,000	2,125 0 0
3,000	3,100	180 0 0	19,500	20,000	775 0 0	2,40,000	2,45,000	2,150 0 0
3,100	3,200	185 0 0	20,000	21,000	795 0 0	2,45,000	2,50,000	2,175 0 0
3,200	3,300	190 0 0	21,000	22,000	815 0 0	2,50,000	2,55,000	2,200 0 0
3,300	3,400	195 0 0	22,000	23,000	835 0 0	2,55,000	2,60,000	2,225 0 0
3,400	3,500	200 0 0	23,000	24,000	855 0 0	2,60,000	2,65,000	2,250 0 0
3,500	3,600	205 0 0	24,000	25,000	875 0 0	2,65,000	2,70,000	2,275 0 0
3,600	3,700	210 0 0	25,000	26,000	895 0 0	2,70,000	2,75,000	2,300 0 0
3,700	3,800	215 0 0	26,000	27,000	915 0 0	2,75,000	2,80,000	2,325 0 0
3,800	3,900	220 0 0	27,000	28,000	935 0 0	2,80,000	2,85,000	2,350 0 0
3,900	4,000	225 0 0	28,000	29,000	955 0 0	2,85,000	2,90,000	2,375 0 0
4,000	4,100	230 0 0	29,000	30,000	975 0 0	2,90,000	2,95,000	2,400 0 0
4,100	4,200	235 0 0	30,000	32,000	995 0 0	2,95,000	3,00,000	2,425 0 0
4,200	4,300	240 0 0	32,000	34,000	1,015 0 0	3,00,000	3,05,000	2,450 0 0
4,300	4,400	245 0 0	34,000	36,000	1,035 0 0	3,05,000	3,10,000	2,475 0 0
4,400	4,500	250 0 0	36,000	38,000	1,055 0 0	3,10,000	3,15,000	2,500 0 0
4,500	4,600	255 0 0	38,000	40,000	1,075 0 0	3,15,000	3,20,000	2,525 0 0
4,600	4,700	260 0 0	40,000	42,000	1,095 0 0	3,20,000	3,25,000	2,550 0 0
4,700	4,800	265 0 0	42,000	44,000	1,115 0 0	3,25,000	3,30,000	2,575 0 0
4,800	4,900	270 0 0	44,000	46,000	1,135 0 0	3,30,000	3,35,000	2,600 0 0
4,900	5,000	275 0 0	46,000	48,000	1,155 0 0	3,35,000	3,40,000	2,625 0 0
5,000	5,250	285 0 0	48,000	50,000	1,175 0 0	3,40,000	3,45,000	2,650 0 0
5,250	5,500	295 0 0	50,000	55,000	1,200 0 0	3,45,000	3,50,000	2,675 0 0
5,500	5,750	305 0 0	55,000	60,000	1,225 0 0	3,50,000	3,55,000	2,700 0 0
5,750	6,000	315 0 0	60,000	65,000	1,250 0 0	3,55,000	3,60,000	2,725 0 0
6,000	6,250	325 0 0	65,000	70,000	1,275 0 0	3,60,000	3,65,000	2,750 0 0
6,250	6,500	335 0 0	70,000	75,000	1,300 0 0	3,65,000	3,70,000	2,775 0 0
6,500	6,750	345 0 0	75,000	80,000	1,325 0 0	3,70,000	3,75,000	2,800 0 0
6,750	7,000	355 0 0	80,000	85,000	1,350 0 0	3,75,000	3,80,000	2,825 0 0
7,000	7,250	365 0 0	85,000	90,000	1,375 0 0	3,80,000	3,85,000	2,850 0 0
7,250	7,500	375 0 0	90,000	95,000	1,400 0 0	3,85,000	3,90,000	2,875 0 0
7,500	7,750	385 0 0	95,000	1,00,000	1,425 0 0	3,90,000	3,95,000	2,900 0 0
7,750	8,000	395 0 0	1,00,000	1,05,000	1,450 0 0	3,95,000	4,00,000	2,925 0 0
8,000	8,250	405 0 0	1,05,000	1,10,000	1,475 0 0	4,00,000	4,05,000	2,950 0 0
8,250	8,500	415 0 0	1,10,000	1,15,000	1,500 0 0	4,05,000	4,10,000	2,975 0 0
8,500	8,750	425 0 0	1,15,000	1,20,000	1,525 0 0	...	...	...
8,750	9,000	435 0 0	1,20,000	1,25,000	1,550 0 0			
9,000	9,250	445 0 0	1,25,000	1,30,000	1,575 0 0			



Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
8,000	8,250	615 0	28,000	29,000	1,170 0	1,20,000	1,25,000	2,662 8
8,250	8,500	660 0	29,000	30,000	1,500 0	1,25,000	1,30,000	2,700 0
8,500	8,750	675 0	30,000	31,000	1,530 0	1,30,000	1,35,000	2,737 8
8,750	9,000	690 0	31,000	32,000	1,560 0	1,35,000	1,40,000	2,775 0
9,000	9,250	705 0	32,000	33,000	1,590 0	1,40,000	1,45,000	2,812 8
9,250	9,500	720 0	33,000	34,000	1,620 0	1,45,000	1,50,000	2,850 0
9,500	9,750	735 0	34,000	35,000	1,650 0	1,50,000	1,55,000	2,887 8
9,750	10,000	750 0	35,000	36,000	1,680 0	1,55,000	1,60,000	2,925 0
10,000	10,500	772 8	36,000	37,000	1,710 0	1,60,000	1,65,000	2,962 8
10,500	11,000	795 0	37,000	38,000	1,740 0	1,65,000	1,70,000	3,000 0
11,000	11,500	817 8	38,000	39,000	1,770 0	1,70,000	1,75,000	3,037 8
11,500	12,000	840 0	39,000	40,000	1,800 0	1,75,000	1,80,000	3,075 0
12,000	12,500	862 8	40,000	41,000	1,830 0	1,80,000	1,85,000	3,112 8
12,500	13,000	885 0	41,000	42,000	1,860 0	1,85,000	1,90,000	3,150 0
13,000	13,500	907 8	42,000	43,000	1,890 0	1,90,000	1,95,000	3,187 8
13,500	14,000	930 0	43,000	44,000	1,920 0	1,95,000	2,00,000	3,225 0
14,000	14,500	952 8	44,000	45,000	1,950 0	2,00,000	2,05,000	3,262 8
14,500	15,000	975 0	45,000	46,000	1,980 0			
15,000	15,500	997 8	46,000	47,000	2,010 0			
15,500	16,000	1,020 0	47,000	48,000	2,040 0			
16,000	16,500	1,042 8	48,000	49,000	2,070 0			
16,500	17,000	1,065 0	49,000	50,000	2,100 0			
17,000	17,500	1,087 8	50,000	55,000	2,137 8			
17,500	18,000	1,110 0	55,000	60,000	2,175 0			
18,000	18,500	1,132 8	60,000	65,000	2,212 8			
18,500	19,000	1,155 0	65,000	70,000	2,250 0			
19,000	19,500	1,177 8	70,000	75,000	2,287 8			
19,500	20,000	1,200 0	75,000	80,000	2,325 0			
20,000	21,000	1,220 0	80,000	85,000	2,362 8			
21,000	22,000	1,260 0	85,000	90,000	2,400 0			
22,000	23,000	1,290 0	90,000	95,000	2,437 8			
23,000	24,000	1,320 0	95,000	1,00,000	2,475 0			
24,000	25,000	1,350 0	1,00,000	1,05,000	2,512 8			
25,000	26,000	1,380 0	1,05,000	1,10,000	2,550 0			
26,000	27,000	1,410 0	1,10,000	1,15,000	2,587 8			
27,000	28,000	1,440 0	1,15,000	1,20,000	2,625 0			

and the fee increases at the rate of thirty-seven rupees eight annas for every five thousand rupees, or part thereof, up to a maximum fee of ten thousand rupees, for example,—

Rs.	Rs.	Rs. A.
	3,00,000	4,012 8
	4,00,000	4,762 8
	5,00,000	5,512 8
	6,00,000	6,262 8
	7,00,000	7,012 8
	8,00,000	7,762 8
	9,00,000	8,512 8
	10,00,000	9,262 8
	11,00,000	10,000 0

—Assam Act XIV of 1936  
[1-1-1937.]

## BENGAL

When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 6	110	120	11 6	320	330	37 2
5	10	0 12	120	130	13 0	330	340	38 4
10	15	1 2	130	140	14 10	340	350	39 6
15	20	1 8	140	150	16 4	350	360	40 8
20	25	1 14	150	160	18 0	360	370	41 10
25	30	2 4	160	170	19 2	370	380	42 12
30	35	2 10	170	180	20 4	380	390	43 14
35	40	3 0	180	190	21 6	390	400	45 0
40	45	3 6	190	200	22 8	400	410	46 2
45	50	3 12	200	210	23 10	410	420	47 4
50	55	4 2	210	220	24 12	420	430	48 6
55	60	4 8	220	230	25 14	430	440	49 8
60	65	4 14	230	240	27 0	440	450	50 10
65	70	5 4	240	250	28 2	450	460	51 12
70	75	5 10	250	260	29 4	460	470	52 14
75	80	6 2	260	270	30 6	470	480	54 0
80	85	6 10	270	280	31 8	480	490	55 2
85	90	7 2	280	290	32 10	490	500	56 4
90	95	7 10	290	300	33 12	500	510	57 6
95	100	8 2	300	310	34 14	510	520	58 8
100	110	9 12	310	320	36 0	520	530	59 10

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
530	540	60 12	3,200	3,300	285 0	18,000	18,500	1,132 8
540	550	61 14	3,300	3,400	292 8	18,500	19,000	1,155 0
550	560	63 0	3,400	3,500	300 0	19,000	19,500	1,177 8
560	570	64 2	3,500	3,600	307 8	19,500	20,000	1,200 0
570	580	65 4	3,600	3,700	315 0	20,000	21,000	1,230 0
580	590	66 6	3,700	3,800	322 8	21,000	22,000	1,260 0
590	600	67 8	3,800	3,900	330 0	22,000	23,000	1,290 0
600	610	68 10	3,900	4,000	337 8	23,000	24,000	1,320 0
610	620	69 12	4,000	4,100	345 0	24,000	25,000	1,350 0
620	630	70 14	4,100	4,200	352 8	25,000	26,000	1,380 0
630	640	72 0	4,200	4,300	360 0	26,000	27,000	1,410 0
640	650	73 2	4,300	4,400	367 8	27,000	28,000	1,440 0
650	660	74 4	4,400	4,500	375 0	28,000	29,000	1,470 0
660	670	75 6	4,500	4,600	382 8	29,000	30,000	1,500 0
670	680	76 8	4,600	4,700	390 0	30,000	31,000	1,530 0
680	690	77 10	4,700	4,800	397 8	31,000	32,000	1,560 0
690	700	78 12	4,800	4,900	405 0	32,000	33,000	1,590 0
700	710	79 14	4,900	5,000	412 8	33,000	34,000	1,620 0
710	720	81 0	5,000	5,100	420 0	34,000	35,000	1,650 0
720	730	82 2	5,100	5,200	427 8	35,000	36,000	1,680 0
730	740	83 4	5,200	5,300	435 0	36,000	37,000	1,710 0
740	750	84 6	5,300	5,400	442 8	37,000	38,000	1,740 0
750	760	85 8	5,400	5,500	450 0	38,000	39,000	1,770 0
760	770	86 10	5,500	5,600	457 8	39,000	40,000	1,800 0
770	780	87 12	5,600	5,700	465 0	40,000	41,000	1,830 0
780	790	88 14	5,700	5,800	472 8	41,000	42,000	1,860 0
790	800	90 0	5,800	5,900	480 0	42,000	43,000	1,890 0
800	810	91 2	5,900	6,000	487 8	43,000	44,000	1,920 0
810	820	92 4	6,000	6,100	495 0	44,000	45,000	1,950 0
820	830	93 6	6,100	6,200	502 8	45,000	46,000	1,980 0
830	840	94 8	6,200	6,300	510 0	46,000	47,000	2,010 0
840	850	95 10	6,300	6,400	517 8	47,000	48,000	2,040 0
850	860	96 12	6,400	6,500	525 0	48,000	49,000	2,070 0
860	870	97 14	6,500	6,600	532 8	49,000	50,000	2,100 0
870	880	99 0	6,600	6,700	540 0	50,000	51,000	2,137 8
880	890	100 2	6,700	6,800	547 8	51,000	52,000	2,175 0
890	900	101 4	6,800	6,900	555 0	52,000	53,000	2,212 8
900	910	102 6	6,900	7,000	562 8	53,000	54,000	2,250 0
910	920	103 8	7,000	7,100	570 0	54,000	55,000	2,287 8
920	930	104 10	7,100	7,200	577 8	55,000	56,000	2,325 0
930	940	105 12	7,200	7,300	585 0	56,000	57,000	2,362 8
940	950	106 14	7,300	7,400	592 8	57,000	58,000	2,400 0
950	960	108 0	7,400	7,500	600 0	58,000	59,000	2,437 8
960	970	109 2	7,500	7,600	615 0	59,000	60,000	2,475 0
970	980	110 4	7,600	7,700	630 0	60,000	61,000	2,512 8
980	990	111 6	7,700	7,800	645 0	61,000	62,000	2,550 0
990	1,000	112 8	7,800	7,900	660 0	62,000	63,000	2,587 8
1,000	1,100	120 0	8,500	8,600	675 0	63,000	64,000	2,625 0
1,100	1,200	127 8	8,750	9,000	690 0	64,000	65,000	2,662 8
1,200	1,300	135 0	9,000	9,250	705 0	65,000	66,000	2,700 0
1,300	1,400	142 8	9,250	9,500	720 0	66,000	67,000	2,737 8
1,400	1,500	150 0	9,500	9,750	735 0	67,000	68,000	2,775 0
1,500	1,600	157 8	9,750	10,000	750 0	68,000	69,000	2,812 8
1,600	1,700	165 0	10,000	10,500	772 8	69,000	70,000	2,850 0
1,700	1,800	172 8	10,500	11,000	795 0	70,000	71,000	2,887 8
1,800	1,900	180 0	11,000	11,500	817 8	71,000	72,000	2,925 0
1,900	2,000	187 8	11,500	12,000	840 0	72,000	73,000	2,962 8
2,000	2,100	195 0	12,000	12,500	862 8	73,000	74,000	3,000 0
2,100	2,200	202 8	12,500	13,000	885 0	74,000	75,000	3,037 8
2,200	2,300	210 0	13,000	13,500	907 8	75,000	76,000	3,075 0
2,300	2,400	217 8	13,500	14,000	930 0	76,000	77,000	3,112 8
2,400	2,500	225 0	14,000	14,500	952 8	77,000	78,000	3,150 0
2,500	2,600	232 8	14,500	15,000	975 0	78,000	79,000	3,187 8
2,600	2,700	240 0	15,000	15,500	997 8	79,000	80,000	3,225 0
2,700	2,800	247 8	15,500	16,000	1,020 0	80,000	81,000	3,262 8
2,800	2,900	255 0	16,000	16,500	1,042 8			
2,900	3,000	262 8	16,500	17,000	1,065 0			
3,000	3,100	270 0	17,000	17,500	1,087 8			
3,100	3,200	277 8	17,500	18,000	1,110 0			

and the fee increases at the rate of thirty-seven rupees, eight annas for every five thousand rupees, or part thereof, up to a maximum

fee of ten thousand rupees, for  
example—

Rs.	Rs. A.
3,00,000	4,012 8
4,00,000	4,762 8

Rs.	Rs. A.
5,00,000	5,512 8
6,00,000	6,262 8
7,00,000	7,012 8
8,00,000	7,762 8

Rs.	Rs. A.
9,00,000	8,512 8
10,00,000	9,262 8
11,00,000	10,000 0

—Bengal Act IV of 1922,  
(29-3-1922.)

## BIHAR

[Note—The fees have been increased by way of surcharge by Bihar Act IX of 1943, the text whereof is given in the Appendix at the end of Sch III.]

When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper Fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 6	420	130	40 8	940	950	92 8
5	10	0 12	430	140	41 8	950	960	93 8
10	15	1 2	440	150	42 8	960	970	94 8
15	20	1 8	450	160	43 8	970	980	95 8
20	25	1 14	460	170	44 8	980	990	96 8
25	30	2 4	470	180	45 8	990	1,000	97 8
30	35	2 10	480	190	46 8	1,000	1,100	105 0
35	40	3 0	490	200	47 8	1,100	1,200	112 8
40	45	3 6	500	210	48 8	1,200	1,300	120 0
45	50	3 12	510	220	49 8	1,300	1,400	127 8
50	55	4 2	520	230	50 8	1,400	1,500	135 0
55	60	4 8	530	240	51 8	1,500	1,600	142 8
60	65	4 14	540	250	52 8	1,600	1,700	150 0
65	70	5 4	550	260	53 8	1,700	1,800	157 8
70	75	5 10	560	270	54 8	1,800	1,900	165 0
75	80	6 0	570	280	55 8	1,900	2,000	172 8
80	85	6 6	580	290	56 8	2,000	2,100	180 0
85	90	6 12	590	300	57 8	2,100	2,200	187 8
90	95	7 2	600	310	58 8	2,200	2,300	195 0
95	100	7 8	610	320	59 8	2,300	2,400	202 8
100	110	8 8	620	330	60 8	2,400	2,500	210 0
110	120	9 8	630	340	61 8	2,500	2,600	217 8
120	130	10 8	640	350	62 8	2,600	2,700	225 0
130	140	11 8	650	360	63 8	2,700	2,800	232 8
140	150	12 8	660	370	64 8	2,800	2,900	240 0
150	160	13 8	670	380	65 8	2,900	3,000	247 8
160	170	14 8	680	390	66 8	3,000	3,100	255 0
170	180	15 8	690	400	67 8	3,100	3,200	262 8
180	190	16 8	700	410	68 8	3,200	3,300	270 0
190	200	17 8	710	420	69 8	3,300	3,400	277 8
200	210	18 8	720	430	70 8	3,400	3,500	285 0
210	220	19 8	730	440	71 8	3,500	3,600	292 8
220	230	20 8	740	450	72 8	3,600	3,700	300 0
230	240	21 8	750	460	73 8	3,700	3,800	307 8
240	250	22 8	760	470	74 8	3,800	3,900	315 0
250	260	23 8	770	480	75 8	3,900	4,000	322 8
260	270	24 8	780	490	76 8	4,000	4,100	330 0
270	280	25 8	790	500	77 8	4,100	4,200	337 8
280	290	26 8	800	510	78 8	4,200	4,300	345 0
290	300	27 8	810	520	79 8	4,300	4,400	352 8
300	310	28 8	820	530	80 8	4,400	4,500	360 0
310	320	29 8	830	540	81 8	4,500	4,600	367 8
320	330	30 8	840	550	82 8	4,600	4,700	375 0
330	340	31 8	850	560	83 8	4,700	4,800	382 8
340	350	32 8	860	570	84 8	4,800	4,900	390 0
350	360	33 8	870	580	85 8	4,900	5,000	397 8
360	370	34 8	880	590	86 8	5,000	5,100	405 0
370	380	35 8	890	600	87 8	5,100	5,200	412 8
380	390	36 8	900	610	88 8	5,200	5,300	420 0
390	400	37 8	910	620	89 8	5,300	5,400	427 8
400	410	38 8	920	630	90 8	5,400	5,500	435 0
410	420	39 8	930	640	91 8	5,500	5,600	442 8
			940			5,600	5,700	450 0
						5,700	5,800	457 8
						5,800	5,900	465 0
						5,900	6,000	472 8
						6,000	6,100	480 0
						6,100	6,200	487 8

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
6,500	6,750	502 8	23,000	24,000	1,267 8	1,50,000	1,55,000	2,535 0
6,750	7,000	517 8	24,000	25,000	1,297 8	1,55,000	1,60,000	2,572 8
7,000	7,250	532 8	25,000	26,000	1,327 8	1,60,000	1,65,000	2,610 0
7,250	7,500	547 8	26,000	27,000	1,357 8	1,65,000	1,70,000	2,647 0
7,500	7,750	562 8	27,000	28,000	1,387 8	1,70,000	1,75,000	2,685 0
7,750	8,000	577 8	28,000	29,000	1,417 8	1,75,000	1,80,000	2,722 8
8,000	8,250	592 8	29,000	30,000	1,447 8	1,80,000	1,85,000	2,760 0
8,250	8,500	607 8	30,000	32,000	1,477 8	1,85,000	1,90,000	2,797 8
8,500	8,750	622 8	32,000	34,000	1,507 8	1,90,000	1,95,000	2,835 0
8,750	9,000	637 8	34,000	36,000	1,537 8	1,95,000	2,00,000	2,872 8
9,000	9,250	652 8	36,000	38,000	1,567 8	2,00,000	2,05,000	2,910 0
9,250	9,500	667 8	38,000	40,000	1,597 8	and the fee increases at the rate of thirty-seven rupees eight annas for every five thousand rupees, or part thereof, [subject to a maximum of ten thousand rupees, for example,—		
9,500	9,750	682 8	40,000	42,000	1,627 8			
9,750	10,000	697 8	42,000	44,000	1,657 8			
10,000	10,500	720 0	44,000	46,000	1,687 8			
10,500	11,000	742 8	46,000	48,000	1,717 8			
11,000	11,500	765 0	48,000	50,000	1,747 8			
11,500	12,000	787 8	50,000	55,000	1,785 0			
12,000	12,500	810 0	55,000	60,000	1,822 8	3,00,000	3,05,000	3,660 0
12,500	13,000	832 8	60,000	65,000	1,860 0	4,00,000	4,05,000	4,410 0
13,000	13,500	855 8	65,000	70,000	1,897 8	5,00,000	5,05,000	5,160 0
13,500	14,000	877 8	70,000	75,000	1,935 0	6,00,000	6,05,000	5,910 0
14,000	14,500	900 0	75,000	80,000	1,972 8	7,00,000	7,05,000	6,660 0
14,500	15,000	922 8	80,000	85,000	2,010 0	8,00,000	8,05,000	7,410 0
15,000	15,500	945 0	85,000	90,000	2,047 8	9,00,000	9,05,000	8,160 0
15,500	16,000	967 8	90,000	95,000	2,085 0	10,00,000	10,05,000	8,910 0
16,000	16,500	990 0	95,000	1,00,000	2,122 8	11,00,000	11,05,000	9,660 0
16,500	17,000	1,012 8	1,00,000	1,05,000	2,160 0	11,45,000	11,50,000	9,997 8
17,000	17,500	1,035 0	1,05,000	1,10,000	2,197 8	and for all amounts and values exceeding Rs. 11,50,000 the Court-fee is Rs. 10,000.]		
17,500	18,000	1,057 8	1,10,000	1,15,000	2,235 0			
18,000	18,500	1,080 0	1,15,000	1,20,000	2,272 8			
18,500	19,000	1,102 8	1,20,000	1,25,000	2,310 0			
19,000	19,500	1,125 0	1,25,000	1,30,000	2,347 8			
19,500	20,000	1,147 8	1,30,000	1,35,000	2,385 0			
20,000	21,000	1,177 8	1,35,000	1,40,000	2,422 8			
21,000	22,000	1,207 8	1,40,000	1,45,000	2,460 0			
22,000	23,000	1,237 8	1,45,000	1,50,000	2,497 8			
—Bihar & Orissa Act II of 1922. (21-8-1922.) The portion in square brackets was substituted by Bihar Act XVII of 1939. (2-11-1939.)								

**BOMBAY**

[Note:—The fees have been increased by way of surcharge by Bombay Act XV of 1943, the text whereof is reproduced in the Appendix given at the end of Sch.III.]

When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 6	100	110	8 4	300	310	23 4
5	10	0 12	110	120	9 0	310	320	24 0
10	15	1 2	120	130	9 12	320	330	24 12
15	20	1 8	130	140	10 8	330	340	25 8
20	25	1 14	140	150	11 4	340	350	26 4
25	30	2 4	150	160	12 0	350	360	27 0
30	35	2 10	160	170	12 12	360	370	27 12
35	40	3 0	170	180	13 8	370	380	28 8
40	45	3 6	180	190	14 4	380	390	29 4
45	50	3 12	190	200	15 0	390	400	30 0
50	55	4 2	200	210	15 12	400	410	30 12
55	60	4 8	210	220	16 8	410	420	31 8
60	65	4 14	220	230	17 4	420	430	32 4
65	70	5 4	230	240	18 0	430	440	33 0
70	75	5 10	240	250	18 12	440	450	33 12
75	80	6 0	250	260	19 8	450	460	34 8
80	85	6 6	260	270	20 4	460	470	35 4
85	90	6 12	270	280	21 0	470	480	36 0
90	95	7 2	280	290	21 12	480	490	36 12
95	100	7 8	290	300	22 8	490	500	37 8

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
500	510	38 4	1,800	1,900	120 0	13,000	13,500	732 8
510	520	39 0	1,900	2,000	125 0	13,500	14,000	755 0
520	530	39 12	2,000	2,100	130 0	14,000	14,500	777 8
530	540	40 8	2,100	2,200	135 0	14,500	15,000	800 0
540	550	41 4	2,200	2,300	140 0	15,000	15,500	822 8
550	560	42 0	2,300	2,400	145 0	15,500	16,000	845 0
560	570	42 12	2,400	2,500	150 0	16,000	16,500	867 8
570	580	43 8	2,500	2,600	155 0	16,500	17,000	890 0
580	590	44 4	2,600	2,700	160 0	17,000	17,500	912 8
590	600	45 0	2,700	2,800	165 0	17,500	18,000	935 0
600	610	45 12	2,800	2,900	170 0	18,000	18,500	957 8
610	620	46 8	2,900	3,000	175 0	18,500	19,000	980 0
620	630	47 4	3,000	3,100	180 0	19,000	19,500	1,002 8
630	640	48 0	3,100	3,200	185 0	19,500	20,000	1,025 0
640	650	48 12	3,200	3,300	190 0	20,000	21,000	1,055 0
650	660	49 8	3,300	3,400	195 0	21,000	22,000	1,085 0
660	670	50 4	3,400	3,500	200 0	22,000	23,000	1,115 0
670	680	51 0	3,500	3,600	205 0	23,000	24,000	1,145 0
680	690	51 12	3,600	3,700	210 0	24,000	25,000	1,175 0
690	700	52 8	3,700	3,800	215 0	25,000	26,000	1,205 0
700	710	53 4	3,800	3,900	220 0	26,000	27,000	1,235 0
710	720	54 0	3,900	4,000	225 0	27,000	28,000	1,265 0
720	730	54 12	4,000	4,100	230 0	28,000	29,000	1,295 0
730	740	55 8	4,100	4,200	235 0	29,000	30,000	1,325 0
740	750	56 4	4,200	4,300	240 0	30,000	32,000	1,355 0
750	760	57 0	4,300	4,400	245 0	32,000	34,000	1,385 0
760	770	57 12	4,400	4,500	250 0	34,000	36,000	1,415 0
770	780	58 8	4,500	4,600	255 0	36,000	38,000	1,445 0
780	790	59 4	4,600	4,700	260 0	38,000	40,000	1,475 0
790	800	60 0	4,700	4,800	265 0	40,000	42,000	1,505 0
800	810	60 12	4,800	4,900	270 0	42,000	44,000	1,535 0
810	820	61 8	4,900	5,000	275 0	44,000	46,000	1,565 0
820	830	62 4	5,000	5,250	290 0	46,000	48,000	1,595 0
830	840	63 0	5,250	5,500	305 0	48,000	50,000	1,625 0
840	850	63 12	5,500	5,750	320 0	and the fee increases at the rate of thirty rupees for every five thousand rupees, or part thereof, up to a maximum of ten thousand rupees, for example—		
850	860	64 8	5,750	6,000	335 0			
860	870	65 4	6,000	6,250	350 0			
870	880	66 0	6,250	6,500	365 0			
880	890	66 12	6,500	6,750	380 0			
890	900	67 8	6,750	7,000	395 0			
900	910	68 4	7,000	7,250	410 0			
910	920	69 0	7,250	7,500	425 0			
920	930	69 12	7,500	7,750	440 0			
930	940	70 8	7,750	8,000	455 0			
940	950	71 4	8,000	8,250	470 0	1,00,000		1,925 0
950	960	72 0	8,250	8,500	485 0	2,00,000		2,525 0
960	970	72 12	8,500	8,750	500 0	3,00,000		3,125 0
970	980	73 8	8,750	9,000	515 0	4,00,000		3,725 0
980	990	74 4	9,000	9,250	530 0	5,00,000		4,325 0
990	1,000	75 0	9,250	9,500	545 0	6,00,000		4,925 0
1,000	1,100	80 0	9,500	9,750	560 0	7,00,000		5,525 0
1,100	1,200	85 0	9,750	10,000	575 0	8,00,000		6,125 0
1,200	1,300	90 0	10,000	10,500	597 8	9,00,000		6,725 0
1,300	1,400	95 0	10,500	11,000	620 0	10,00,000		7,325 0
1,400	1,500	100 0	11,000	11,500	642 8	11,00,000		7,925 0
1,500	1,600	105 0	11,500	12,000	665 0	12,00,000		8,525 0
1,600	1,700	110 0	12,000	12,500	687 8	13,00,000		9,125 0
1,700	1,800	115 0	12,500	13,000	710 0	14,00,000		9,725 0
						15,00,000		10,000 0

and the fee increases at the rate of thirty rupees for every five thousand rupees, or part thereof, up to a maximum of ten thousand rupees, for example—

Rs.	Rs. A.
1,00,000	1,925 0
2,00,000	2,525 0
3,00,000	3,125 0
4,00,000	3,725 0
5,00,000	4,325 0
6,00,000	4,925 0
7,00,000	5,525 0
8,00,000	6,125 0
9,00,000	6,725 0
10,00,000	7,325 0
11,00,000	7,925 0
12,00,000	8,525 0
13,00,000	9,125 0
14,00,000	9,725 0
15,00,000	10,000 0

—Bombay Finance Act II of 1932.  
(29-3-1932.)

### CENTRAL PROVINCES

[Note.—The fees have been increased by way of surcharge by C. P. & Berar Act III of 1947, the text whereof is reproduced in an Appendix given at the end of Sch. III.]

When the amount or value of the subject matter exceeds.	But does not exceed	Proper Fee	When the amount or value of the subject matter exceeds	But does not exceed	Proper Fee	When the amount or value of the subject matter exceeds	But does not exceed	Proper Fee
Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
...	...	...	1,000	1,100	81	1,100	1,200	87

[a. Upto Rs. 1,000 (subject-matter) the proper fees are the same as those given in the Court-fees Act, VII of 1870. Hence that much portion of the table is omitted.]

Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
1,200	1,300	98	5,000	5,200	325	17,000	17,500	865
1,300	1,400	99	5,200	5,400	335	17,500	18,000	885
1,400	1,500	105	5,400	5,600	345	18,000	18,500	905
1,500	1,600	111	5,600	5,800	355	18,500	19,000	925
1,600	1,700	117	5,800	6,000	365	19,000	19,500	945
1,700	1,800	123	6,000	6,200	375	19,500	20,000	965
1,800	1,900	129	6,200	6,400	385	20,000	21,000	995
1,900	2,000	135	6,400	6,600	395	21,000	22,000	1,025
2,000	2,100	141	6,600	6,800	405	22,000	23,000	1,055
2,100	2,200	147	6,800	7,000	415	23,000	24,000	1,085
2,200	2,300	153	7,000	7,200	425	24,000	25,000	1,115
2,300	2,400	159	7,200	7,400	435	25,000	26,000	1,145
2,400	2,500	165	7,400	7,600	445	26,000	27,000	1,175
2,500	2,600	171	7,600	7,800	455	27,000	28,000	1,205
2,600	2,700	177	7,800	8,000	465	28,000	29,000	1,235
2,700	2,800	183	8,000	8,200	475	29,000	30,000	1,265
2,800	2,900	189	8,200	8,400	485	30,000	32,000	1,295
2,900	3,000	195	8,400	8,600	495	32,000	34,000	1,325
3,000	3,100	201	8,600	8,800	505	34,000	36,000	1,355
3,100	3,200	207	8,800	9,000	515	36,000	38,000	1,385
3,200	3,300	213	9,000	9,200	525	38,000	40,000	1,415
3,300	3,400	219	9,200	9,400	535	40,000	42,000	1,445
3,400	3,500	225	9,400	9,600	545	42,000	44,000	1,475
3,500	3,600	231	9,600	9,800	555	44,000	46,000	1,505
3,600	3,700	237	9,800	10,000	565	46,000	48,000	1,535
3,700	3,800	243	10,000	10,500	585	48,000	50,000	1,565
3,800	3,900	249	10,500	11,000	605			
3,900	4,000	255	11,000	11,500	625			
4,000	4,100	261	11,500	12,000	645			
4,100	4,200	267	12,000	12,500	665			
4,200	4,300	273	12,500	13,000	685			
4,300	4,400	279	13,000	13,500	705			
4,400	4,500	285	13,500	14,000	725			
4,500	4,600	291	14,000	14,500	745			
4,600	4,700	297	14,500	15,000	765			
4,700	4,800	303	15,000	15,500	785			
4,800	4,900	309	15,500	16,000	805			
4,900	5,000	315	16,000	16,500	825			
			16,500	17,000	845			

When the amount or value of the subject-matter exceeds fifty thousand rupees, for every five thousand rupees or part thereof in excess of fifty thousand rupees—Thirty rupees:

Provided that the maximum fee leviable shall not exceed five thousand rupees.

—C. P. Act XVI of 1935.  
[21-5-1935.]

**MADRAS**

[a] On plaints, etc., mentioned in article 1 of this Schedule.

When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 8	85	90	10 1	230	240	26 15
5	10	1 1	90	95	10 10	240	250	28 1
10	15	1 10	95	100	11 3	250	260	29 3
15	20	2 3	100	110	12 5	260	270	30 5
20	25	2 12	110	120	13 7	270	280	31 7
25	30	3 5	120	130	14 9	280	290	32 9
30	35	3 14	130	140	15 11	290	300	33 11
35	40	4 7	140	150	16 13	300	310	34 13
40	45	5 0	150	160	17 15	310	320	35 15
45	50	5 9	160	170	19 1	320	330	37 1
50	55	6 2	170	180	20 8	330	340	38 3
55	60	6 11	180	190	21 5	340	350	39 5
60	65	7 4	190	200	22 7	350	360	40 7
65	70	7 13	200	210	23 9	360	370	41 9
70	75	8 6	210	220	24 11	370	380	42 11
75	80	8 15	220	230	25 13	380	390	43 13
80	85	9 8						



Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
390	400	11 15	1,800	1,900	179 15	18,500	19,000	1,117 7
400	410	16 1	1,900	2,000	187 7	19,000	19,500	1,139 15
410	420	17 3	2,000	2,100	191 15	19,500	20,000	1,162 7
420	430	18 5	2,100	2,200	202 7	20,000	21,000	1,192 7
430	440	19 7	2,200	2,300	209 15	21,000	22,000	1,222 7
440	450	20 9	2,300	2,400	217 7	22,000	23,000	1,252 7
450	460	21 11	2,400	2,500	221 15	23,000	24,000	1,282 7
460	470	22 13	2,500	2,600	232 7	24,000	25,000	1,312 7
470	480	23 15	2,600	2,700	239 15	25,000	26,000	1,342 7
480	490	25 1	2,700	2,800	247 7	26,000	27,000	1,372 7
490	500	26 3	2,800	2,900	251 15	27,000	28,000	1,402 7
500	510	27 5	2,900	3,000	262 7	28,000	29,000	1,432 7
510	520	28 7	3,000	3,100	269 15	29,000	30,000	1,462 7
520	530	29 9	3,100	3,200	277 7	30,000	32,000	1,492 7
530	540	30 11	3,200	3,300	281 15	32,000	34,000	1,522 7
540	550	31 13	3,300	3,400	292 7	34,000	36,000	1,552 7
550	560	32 15	3,400	3,500	299 15	36,000	38,000	1,582 7
560	570	34 1	3,500	3,600	307 7	38,000	40,000	1,612 7
570	580	35 3	3,600	3,700	311 15	40,000	42,000	1,642 7
580	590	36 5	3,700	3,800	322 7	42,000	44,000	1,672 7
590	600	37 7	3,800	3,900	329 15	44,000	46,000	1,702 7
600	610	38 9	3,900	4,000	337 7	46,000	48,000	1,732 7
610	620	39 11	4,000	4,100	341 15	48,000	50,000	1,762 7
620	630	40 13	4,100	4,200	352 7	When the amount or value of the subject-matter exceeds Rs. 50,000 for every five thousand rupees or part thereof in excess of fifty thousand rupees—thirty rupees.		
630	640	41 15	4,200	4,300	359 15			
640	650	43 1	4,300	4,400	367 7			
650	660	44 3	4,400	4,500	374 15			
660	670	45 5	4,500	4,600	382 7			
670	680	46 7	4,600	4,700	389 15			
680	690	47 9	4,700	4,800	397 7			
690	700	48 11	4,800	4,900	401 15			
700	710	49 13	4,900	5,000	412 7			
710	720	50 15	5,000	5,250	427 7			
720	730	52 1	5,250	5,500	442 7	Rs.	Rs.	Rs.
730	740	53 3	5,500	5,750	457 7	5	5	0 6
740	750	54 5	5,750	6,000	472 7	10	10	0 12
750	760	55 7	6,000	6,250	487 7	15	15	1 2
760	770	56 9	6,250	6,500	502 7	20	20	1 8
770	780	57 11	6,500	6,750	517 7	25	25	1 14
780	790	58 13	6,750	7,000	532 7	30	30	2 4
790	800	59 15	7,000	7,250	547 7	35	35	2 10
800	810	61 1	7,250	7,500	562 7	40	40	3 0
810	820	62 3	7,500	7,750	577 7	45	45	3 6
820	830	63 5	7,750	8,000	592 7	50	50	3 12
830	840	64 7	8,000	8,250	607 7	55	55	4 2
840	850	65 9	8,250	8,500	622 7	60	60	4 8
850	860	66 11	8,500	8,750	637 7	65	65	4 14
860	870	67 13	8,750	9,000	652 7	70	70	5 4
870	880	68 15	9,000	9,250	667 7	75	75	5 10
880	890	69 17	9,250	9,500	682 7	80	80	6 0
890	900	70 19	9,500	9,750	697 7	85	85	6 6
900	910	71 21	9,750	10,000	712 7	90	90	6 12
910	920	72 23	10,000	10,500	734 15	95	95	7 2
920	930	73 25	10,500	11,000	757 7	100	100	7 8
930	940	74 27	11,000	11,500	779 15	110	110	8 4
940	950	75 29	11,500	12,000	802 7	120	120	9 0
950	960	76 31	12,000	12,500	824 15	130	130	9 12
960	970	77 33	12,500	13,000	847 7	140	140	10 8
970	980	78 35	13,000	13,500	869 15	150	150	11 4
980	990	79 37	13,500	14,000	892 7	160	160	12 0
990	1,000	80 39	14,000	14,500	914 15	170	170	12 12
1,000	1,100	81 41	14,500	15,000	937 7	180	180	13 8
1,100	1,200	82 43	15,000	15,500	959 15	190	190	14 4
1,200	1,300	83 45	15,500	16,000	982 7	200	200	15 0
1,300	1,400	84 47	16,000	16,500	1,004 15	210	210	15 12
1,400	1,500	85 49	16,500	17,000	1,027 7	220	220	16 8
1,500	1,600	86 51	17,000	17,500	1,049 15	230	230	17 4
1,600	1,700	87 53	17,500	18,000	1,072 7	240	240	18 0
1,700	1,800	88 55	18,000	18,500	1,091 15	250	250	18 12
						260	260	19 8

When the amount or value of the subject-matter exceeds Rs. 50,000 for every five thousand rupees or part thereof in excess of fifty thousand rupees—thirty rupees.

(b) On plaints, etc., mentioned in Article 2 of this Schedule.

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
260	270	20 4	340	350	26 4	420	430	32 4
270	280	21 0	350	360	27 0	430	440	33 0
280	290	21 12	360	370	27 12	440	450	33 12
290	300	22 8	370	380	28 8	450	460	34 8
300	310	23 4	380	390	29 4	460	470	35 4
310	320	24 0	390	400	30 0	470	480	36 0
320	330	24 12	400	410	30 12	480	490	36 12
330	340	25 8	410	420	31 8	490	500	37 8

—Madras Act V of 1922. (30-3-1922.)

**ORISSA**

Note :—The fees have been increased by way of surcharge by Orissa Act IV of 1945, the text whereof is reproduced in an Appendix given at the end of Sch. III.]

(a) Table or rates of *ad valorem* fees leviable on plaints, etc., mentioned in Article 1 of Schedule I.

When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.
Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
...	5	0 6	360	370	34 8	820	830	84 10
5	10	0 12	370	380	35 8	830	840	85 12
10	15	1 2	380	390	36 8	840	850	86 14
15	20	1 8	390	400	37 8	850	860	88 0
20	25	1 14	400	410	38 8	860	870	89 2
25	30	2 4	410	420	39 8	870	880	90 4
30	35	2 10	420	430	40 8	880	890	91 6
35	40	3 0	430	440	41 8	890	900	92 8
40	45	3 6	440	450	42 8	900	910	93 10
45	50	3 12	450	460	43 8	910	920	94 12
50	55	4 2	460	470	44 8	920	930	95 14
55	60	4 8	470	480	45 8	930	940	97 0
60	65	4 14	480	490	46 8	940	950	98 2
65	70	5 4	490	500	47 8	950	960	99 4
70	75	5 10	500	510	48 10	960	970	100 6
75	80	6 0	510	520	49 12	970	980	101 8
80	85	6 6	520	530	50 14	980	990	102 10
85	90	6 12	530	540	52 0	990	1,000	103 12
90	95	7 2	540	550	53 2	1,000	1,100	111 4
95	100	7 8	550	560	54 4	1,100	1,200	118 12
100	110	8 8	560	570	55 6	1,200	1,300	126 4
110	120	9 8	570	580	56 8	1,300	1,400	133 12
120	130	10 8	580	590	57 10	1,400	1,500	141 4
130	140	11 8	590	600	58 12	1,500	1,600	148 12
140	150	12 8	600	610	59 14	1,600	1,700	156 4
150	160	13 8	610	620	61 0	1,700	1,800	163 12
160	170	14 8	620	630	62 2	1,800	1,900	171 4
170	180	15 8	630	640	63 4	1,900	2,000	178 12
180	190	16 8	640	650	64 6	2,000	2,100	186 4
190	200	17 8	650	660	65 8	2,100	2,200	193 12
200	210	18 8	660	670	66 10	2,200	2,300	201 4
210	220	19 8	670	680	67 12	2,300	2,400	208 12
220	230	20 8	680	690	68 14	2,400	2,500	216 4
230	240	21 8	690	700	70 0	2,500	2,600	223 12
240	250	22 8	700	710	71 2	2,600	2,700	231 4
250	260	23 8	710	720	72 4	2,700	2,800	238 12
260	270	24 8	720	730	73 6	2,800	2,900	246 4
270	280	25 8	730	740	74 8	2,900	3,000	253 12
280	290	26 8	740	750	75 10	3,000	3,100	261 4
290	300	27 8	750	760	76 12	3,100	3,200	268 12
300	310	28 8	760	770	77 14	3,200	3,300	276 4
310	320	29 8	770	780	79 0	3,300	3,400	283 12
320	330	30 8	780	790	80 2	3,400	3,500	291 4
330	340	31 8	790	800	81 4	3,500	3,600	298 12
340	350	32 8	800	810	82 6	3,600	3,700	306 4
350	360	33 8	810	820	83 8	3,700	3,800	313 12

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
3,800	3,900	321 4	13,000	13,500	898 12	40	45	3 6
3,900	4,000	328 12	13,500	14,000	921 4	45	50	3 12
4,000	4,100	336 4	14,000	14,500	943 12	50	55	4 2
4,100	4,200	343 12	14,500	15,000	966 4	55	60	4 8
4,200	4,300	351 4	15,000	15,500	988 12	60	65	4 14
4,300	4,400	358 12	15,500	16,000	1,011 4	65	70	5 4
4,400	4,500	366 4	16,000	16,500	1,033 12	70	75	5 10
4,500	4,600	373 12	16,500	17,000	1,056 4	75	80	6 0
4,600	4,700	381 4	17,000	17,500	1,078 12	80	85	6 6
4,700	4,800	388 12	17,500	18,000	1,101 4	85	90	6 12
4,800	4,900	396 4	18,000	18,500	1,123 12	90	95	7 2
4,900	5,000	403 12	18,500	19,000	1,146 4	95	100	7 8
5,000	5,100	411 4	19,000	19,500	1,168 12	100	110	8 4
5,100	5,200	418 12	19,500	20,000	1,191 4	110	120	9 0
5,200	5,300	426 4	20,000	21,000	1,221 4	120	130	9 12
5,300	5,400	433 12	21,000	22,000	1,251 4	130	140	10 8
5,400	5,500	441 4	22,000	23,000	1,281 4	140	150	11 4
5,500	5,600	448 12	23,000	24,000	1,311 4	150	160	12 0
5,600	5,700	456 4	24,000	25,000	1,341 4	160	170	12 12
5,700	5,800	463 12	25,000	26,000	1,371 4	170	180	13 8
5,800	5,900	471 4	26,000	27,000	1,401 4	180	190	14 4
5,900	6,000	478 12	27,000	28,000	1,431 4	190	200	15 0
6,000	6,100	486 4	28,000	29,000	1,461 4	200	210	15 12
6,100	6,200	493 12	29,000	30,000	1,491 4	210	220	16 8
6,200	6,300	501 4	30,000	31,000	1,521 4	220	230	17 4
6,300	6,400	508 12	31,000	32,000	1,551 4	230	240	18 0
6,400	6,500	516 4	32,000	33,000	1,581 4	240	250	18 12
6,500	6,600	523 12	33,000	34,000	1,611 4	250	260	19 8
6,600	6,700	531 4	34,000	35,000	1,641 4	260	270	20 4
6,700	6,800	538 12	35,000	36,000	1,671 4	270	280	21 0
6,800	6,900	546 4	36,000	37,000	1,701 4	280	290	21 12
6,900	7,000	553 12	37,000	38,000	1,731 4	290	300	22 8
7,000	7,100	561 4	38,000	39,000	1,761 4	300	310	23 4
7,100	7,200	568 12	39,000	40,000	1,791 4	310	320	24 0
7,200	7,300	576 4	40,000	41,000	1,821 4	320	330	24 12
7,300	7,400	583 12	41,000	42,000	1,851 4	330	340	25 8
7,400	7,500	591 4	42,000	43,000	1,881 4	340	350	26 4
7,500	7,600	598 12	43,000	44,000	1,911 4	350	360	27 0
7,600	7,700	606 4	44,000	45,000	1,941 4	360	370	27 12
7,700	7,800	613 12	45,000	46,000	1,971 4	370	380	28 8
7,800	7,900	621 4	46,000	47,000	2,001 4	380	390	29 4
7,900	8,000	628 12	47,000	48,000	2,031 4	390	400	30 0
8,000	8,100	636 4	48,000	49,000	2,061 4	400	410	30 12
8,100	8,200	643 12	49,000	50,000	2,091 4	410	420	31 8
8,200	8,300	651 4				420	430	32 4
8,300	8,400	658 12				430	440	33 0
8,400	8,500	666 4				440	450	33 12
8,500	8,600	673 12				450	460	34 8
8,600	8,700	681 4				460	470	35 4
8,700	8,800	688 12				470	480	36 0
8,800	8,900	696 4				480	490	36 12
8,900	9,000	703 12				490	500	37 8
9,000	9,100	711 4						
9,100	9,200	718 12						
9,200	9,300	726 4						
9,300	9,400	733 12						
9,400	9,500	741 4						
9,500	9,600	748 12						
9,600	9,700	756 4						
9,700	9,800	763 12						
9,800	9,900	771 4						
9,900	10,000	778 12						
10,000	10,100	786 4						
10,100	10,200	793 12						
10,200	10,300	801 4						
10,300	10,400	808 12						
10,400	10,500	816 4						
10,500	10,600	823 12						
10,600	10,700	831 4						
10,700	10,800	838 12						
10,800	10,900	846 4						
10,900	11,000	853 12						
11,000	11,100	861 4						
11,100	11,200	868 12						
11,200	11,300	876 4						
11,300	11,400							
11,400	11,500							
11,500	11,600							
11,600	11,700							
11,700	11,800							
11,800	11,900							
11,900	12,000							
12,000	12,100							
12,100	12,200							
12,200	12,300							
12,300	12,400							
12,400	12,500							
12,500	12,600							
12,600	12,700							
12,700	12,800							
12,800	12,900							
12,900	13,000							

When the amount or value exceeds Rs. 50,000 for every five thousand rupees or part thereof in excess of fifty thousand rupees—thirty-seven rupees eight annas.

(b) Table of rates of *ad valorem* fees payable on plaints, etc., mentioned in Article 3 of Schedule I.

Rs.	Rs.	Rs. A.
...	5	0 6
5	10	0 12
10	15	1 2
15	20	1 8
20	25	1 14
25	30	2 4
30	35	2 10
35	40	3 0

## PUNJAB

Orissa Act V of 1939. (31-10-1939.)

When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.	When the amount or value of the subject-matter exceeds—	But does not exceed	Proper fee.
Rs. a*	Rs. ***	Rs. A. ***	Rs. 510	Rs. 520	Rs. A. 530	Rs. 540	Rs. 550	Rs. A. 560
500	510	57 6	510	520	58 8	530	540	60 12
			520	530	59 10	540	550	61 14

(a) The proper fees for suits below Rs. 500 (subject-matter) are the same as those given in the table in the Court-fees Act VII of 1870, (the same being restored by Punjab Act VI of 1926). Hence that much portion of the table is omitted here.

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
550	560	68 0	3,400	3,500	300 0	36,000	38,000	1,582 8
560	570	64 2	3,500	3,600	307 8	38,000	40,000	1,612 8
570	580	65 4	3,600	3,700	315 0	40,000	42,000	1,642 8
580	590	66 6	3,700	3,800	322 8	42,000	44,000	1,672 8
590	600	67 8	3,800	3,900	330 0	44,000	46,000	1,702 8
600	610	68 10	3,900	4,000	337 8	46,000	48,000	1,732 8
610	620	69 12	4,000	4,100	345 0	48,000	50,000	1,762 8
620	630	70 14	4,100	4,200	352 8	50,000	55,000	1,792 8
630	640	72 0	4,200	4,300	360 0	55,000	60,000	1,822 8
640	650	73 2	4,300	4,400	367 8	60,000	65,000	1,852 8
650	660	74 4	4,400	4,500	375 0	65,000	70,000	1,882 8
660	670	75 6	4,500	4,600	382 8	70,000	75,000	1,912 8
670	680	76 8	4,600	4,700	390 0	75,000	80,000	1,942 8
680	690	77 10	4,700	4,800	397 8	80,000	85,000	1,972 8
690	700	78 12	4,800	4,900	405 0	85,000	90,000	2,002 8
700	710	79 14	4,900	5,000	412 8	90,000	95,000	2,032 8
710	720	81 0	5,000	5,250	427 8	95,000	1,00,000	2,062 8
720	730	82 2	5,250	5,500	442 8	1,00,000	1,05,000	2,092 8
730	740	83 4	5,500	5,750	457 8	1,05,000	1,10,000	2,122 8
740	750	84 6	5,750	6,000	472 8	1,10,000	1,15,000	2,152 8
750	760	85 8	6,000	6,250	487 8	1,15,000	1,20,000	2,182 8
760	770	86 10	6,250	6,500	502 8	1,20,000	1,25,000	2,212 8
770	780	87 12	6,500	6,750	517 8	1,25,000	1,30,000	2,242 8
780	790	88 14	6,750	7,000	532 8	1,30,000	1,35,000	2,272 8
790	800	90 0	7,000	7,250	547 8	1,35,000	1,40,000	2,302 8
800	810	91 2	7,250	7,500	562 8	1,40,000	1,45,000	2,332 8
810	820	92 4	7,500	7,750	577 8	1,45,000	1,50,000	2,362 8
820	830	93 6	7,750	8,000	592 8	1,50,000	1,55,000	2,392 8
830	840	94 8	8,000	8,250	607 8	1,55,000	1,60,000	2,422 8
840	850	95 10	8,250	8,500	622 8	1,60,000	1,65,000	2,452 8
850	860	96 12	8,500	8,750	637 8	1,65,000	1,70,000	2,482 8
860	870	97 14	8,750	9,000	652 8	1,70,000	1,75,000	2,512 8
870	880	99 2	9,000	9,250	667 8	1,75,000	1,80,000	2,542 8
880	890	100 2	9,250	9,500	682 8	1,80,000	1,85,000	2,572 8
890	900	101 4	9,500	9,750	697 8	1,85,000	1,90,000	2,602 8
900	910	102 6	9,750	10,000	712 8	1,90,000	1,95,000	2,632 8
910	920	103 8	10,000	10,500	725 0	1,95,000	2,00,000	2,662 8
920	930	104 10	10,500	11,000	737 8	2,00,000	2,05,000	2,692 8
930	940	105 12	11,000	11,500	750 0	2,05,000	2,10,000	2,722 8
940	950	106 14	11,500	12,000	802 8	2,10,000	2,15,000	2,752 8
950	960	108 0	12,000	12,500	825 0	2,15,000	2,20,000	2,782 8
960	970	109 2	12,500	13,000	847 8	2,20,000	2,25,000	2,812 8
970	980	110 4	13,000	13,500	870 0	2,25,000	2,30,000	2,842 8
980	990	111 6	13,500	14,000	892 8	2,30,000	2,35,000	2,872 8
990	1,000	112 8	14,000	14,500	915 0	2,35,000	2,40,000	2,902 8
1,000	1,100	120 0	14,500	15,000	937 8	2,40,000	2,45,000	2,932 8
1,100	1,200	127 8	15,000	15,500	960 0	2,45,000	2,50,000	2,962 8
1,200	1,300	135 0	15,500	16,000	982 8	2,50,000	2,55,000	2,992 8
1,300	1,400	142 8	16,000	16,500	1,005 0	2,55,000	2,60,000	3,022 8
1,400	1,500	150 0	16,500	17,000	1,027 8	2,60,000	2,65,000	3,052 8
1,500	1,600	157 8	17,000	17,500	1,050 0	2,65,000	2,70,000	3,082 8
1,600	1,700	165 0	17,500	18,000	1,072 8	2,70,000	2,75,000	3,112 8
1,700	1,800	172 8	18,000	18,500	1,095 0	2,75,000	2,80,000	3,142 8
1,800	1,900	180 0	18,500	19,000	1,117 8	2,80,000	2,85,000	3,172 8
1,900	2,000	187 8	19,000	19,500	1,140 0	2,85,000	2,90,000	3,202 8
2,000	2,100	195 0	19,500	20,000	1,162 8	2,90,000	2,95,000	3,232 8
2,100	2,200	202 8	20,000	21,000	1,192 8	2,95,000	3,00,000	3,262 8
2,200	2,300	210 0	21,000	22,000	1,222 8	3,00,000	3,05,000	3,292 8
2,300	2,400	217 8	22,000	23,000	1,252 8	3,05,000	3,10,000	3,322 8
2,400	2,500	225 0	23,000	24,000	1,282 8	3,10,000	3,15,000	3,352 8
2,500	2,600	232 8	24,000	25,000	1,312 8	3,15,000	3,20,000	3,382 8
2,600	2,700	240 0	25,000	26,000	1,342 8	3,20,000	3,25,000	3,412 8
2,700	2,800	247 8	26,000	27,000	1,372 8	3,25,000	3,30,000	3,442 8
2,800	2,900	255 0	27,000	28,000	1,402 8	3,30,000	3,35,000	3,472 8
2,900	3,000	262 8	28,000	29,000	1,432 8	3,35,000	3,40,000	3,502 8
3,000	3,100	270 0	29,000	30,000	1,462 8	3,40,000	3,45,000	3,532 8
3,100	3,200	277 8	30,000	32,000	1,492 8	3,45,000	3,50,000	3,562 8
3,200	3,300	285 0	32,000	34,000	1,522 8	3,50,000	3,55,000	3,592 8
3,300	3,400	292 8	34,000	36,000	1,552 8	3,55,000		

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
3,55,000	3,60,000	3,622 8	3,70,000	3,75,000	3,712 8	3,85,000	3,90,000	3,802 8
3,60,000	3,65,000	3,652 8	3,75,000	3,80,000	3,712 8	3,90,000	3,95,000	3,832 8
3,65,000	3,70,000	3,682 8	3,80,000	3,85,000	3,772 8	3,95,000	4,00,000	3,862 8

And when the amount or value of the subject-matter exceeds Rs. 4,00,000, the proper fee leviable shall be Rs. 3,862 annas 8 *plus* Rs. 30 for each five thousand rupees or part thereof in excess of Rs. 4,00,000.  
—*Punjab Act VII of 1922.* [23-11-1922.]

The table of *ad valorem* fees as substituted by the Bombay Finance Act, II of 1932, continues in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

#### UNITED PROVINCES

[Note:—The fees have been increased by way of surcharge by U. P. Act VIII of 1913, the text whereof is reproduced in an Appendix given at the end of Sch. III.]

When the amount or value of the subject-matter exceeds—			When the amount or value of the subject-matter exceeds—			When the amount or value of the subject-matter exceeds—		
Rs.	But does not exceed	Proper fee.	Rs.	But does not exceed	Proper fee.	Rs.	But does not exceed	Proper fee.
...			360			820		
5	5	0 6	370	28 10	8	830		81 4
10	10	0 12	380	29 8	8	840		82 8
15	15	1 2	390	30 6	8	850		83 12
20	20	1 8	400	31 4	8	860		85 0
25	25	1 14	410	32 2	8	870		86 4
30	30	2 4	420	33 0	8	880		87 8
35	35	2 10	430	33 14	8	890		88 12
40	40	3 0	440	34 12	8	900		90 0
45	45	3 6	450	35 10	8	910		91 4
50	50	3 12	460	36 8	8	920		92 8
55	55	4 2	470	37 6	8	930		93 12
60	60	4 8	480	38 4	8	940		95 0
65	65	4 14	490	39 2	8	950		96 4
70	70	5 4	500	40 0	8	960		97 8
75	75	5 10	510	41 4	8	970		98 12
80	80	6 0	520	42 8	8	980		100 0
85	85	6 6	530	43 12	8	990		101 4
90	90	6 12	540	44 0	8	1,000		102 8
95	95	7 2	550	45 4	8	1,100		110 0
100	100	7 8	560	46 8	8	1,200		117 8
110	110	8 4	570	47 8	8	1,300		125 0
120	120	9 0	580	48 12	8	1,400		132 8
130	130	9 12	590	50 0	8	1,500		140 0
140	140	10 8	600	51 4	8	1,600		147 8
150	150	11 4	610	52 8	8	1,700		155 0
160	160	12 0	620	53 12	8	1,800		162 8
170	170	12 12	630	55 0	8	1,900		170 0
180	180	13 8	640	56 4	8	2,000		177 8
190	190	14 4	650	57 8	8	2,100		185 0
200	200	15 0	660	58 12	8	2,200		192 8
210	210	15 12	670	60 0	8	2,300		200 0
220	220	16 8	680	61 4	8	2,400		207 8
230	230	17 4	690	62 8	8	2,500		215 0
240	240	18 0	700	63 12	8	2,600		222 8
250	250	18 12	710	65 0	8	2,700		230 0
260	260	19 8	720	66 4	8	2,800		237 8
270	270	20 4	730	67 8	8	2,900		245 0
280	280	21 0	740	68 12	8	3,000		252 8
290	290	21 12	750	70 0	8	3,100		260 0
300	300	22 8	760	71 4	8	3,200		267 8
310	310	23 4	770	72 8	8	3,300		275 0
320	320	24 0	780	73 12	8	3,400		282 8
330	330	24 12	790	75 0	8	3,500		290 0
340	340	25 6	800	76 4	8	3,600		297 8
350	350	26 2	810	77 8	8	3,700		305 0
360	360	26 8	820	78 12	8	3,800		312 8
		27 12		80 0	8			

Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.	Rs.	Rs.	Rs. A.
3,800	3,900	320 0	44,000	46,000	1,692 8	3,80,000	3,85,000	4,265 0
3,900	4,000	327 6	46,000	48,000	1,722 8	3,85,000	3,90,000	4,302 8
4,000	4,100	335 0	48,000	50,000	1,752 8	3,90,000	3,95,000	4,340 0
4,100	4,200	342 8	50,000	55,000	1,790 0	3,95,000	4,00,000	4,387 8
4,200	4,300	350 0	55,000	60,000	1,827 8	4,00,000	4,05,000	4,415 0
4,300	4,400	357 8	60,000	65,000	1,865 0	4,05,000	4,10,000	4,452 8
4,400	4,500	365 0	65,000	70,000	1,902 8	4,10,000	4,15,000	4,490 0
4,500	4,600	372 8	70,000	75,000	1,940 0	4,15,000	4,20,000	4,527 8
4,600	4,700	380 0	75,000	80,000	1,977 8	4,20,000	4,25,000	4,565 0
4,700	4,800	387 8	80,000	85,000	2,015 0	4,25,000	4,30,000	4,602 8
4,800	4,900	395 0	85,000	90,000	2,052 8	4,30,000	4,35,000	4,640 0
4,900	5,000	402 8	90,000	95,000	2,090 0	4,35,000	4,40,000	4,677 8
5,000	5,250	417 8	95,000	1,00,000	2,127 8	4,40,000	4,45,000	4,715 0
5,250	5,500	432 8	1,00,000	1,05,000	2,165 0	4,45,000	4,50,000	4,752 8
5,500	5,750	447 8	1,05,000	1,10,000	2,202 8	4,50,000	4,55,000	4,790 0
5,750	6,000	462 8	1,10,000	1,15,000	2,240 0	4,55,000	4,60,000	4,827 8
6,000	6,250	477 8	1,15,000	1,20,000	2,277 8	4,60,000	4,65,000	4,865 0
6,250	6,500	492 8	1,20,000	1,25,000	2,315 0	4,65,000	4,70,000	4,902 8
6,500	6,750	507 8	1,25,000	1,30,000	2,352 8	4,70,000	4,75,000	4,940 0
6,750	7,000	522 8	1,30,000	1,35,000	2,390 0	4,75,000	4,80,000	4,977 8
7,000	7,250	537 8	1,35,000	1,40,000	2,427 8	4,80,000	4,85,000	5,015 0
7,250	7,500	552 8	1,40,000	1,45,000	2,465 0	4,85,000	4,90,000	5,052 8
7,500	7,750	567 8	1,45,000	1,50,000	2,502 8	4,90,000	4,95,000	5,090 0
7,750	8,000	582 8	1,50,000	1,55,000	2,540 0	4,95,000	5,00,000	5,127 8
8,000	8,250	597 8	1,55,000	1,60,000	2,577 8	5,00,000	5,05,000	5,165 0
8,250	8,500	612 8	1,60,000	1,65,000	2,615 0	5,05,000	5,10,000	5,202 8
8,500	8,750	627 8	1,65,000	1,70,000	2,652 8	5,10,000	5,15,000	5,240 0
8,750	9,000	642 8	1,70,000	1,75,000	2,690 0	5,15,000	5,20,000	5,277 8
9,000	9,250	657 8	1,75,000	1,80,000	2,727 8	5,20,000	5,25,000	5,315 0
9,250	9,500	672 8	1,80,000	1,85,000	2,765 0	5,25,000	5,30,000	5,352 8
9,500	9,750	687 8	1,85,000	1,90,000	2,802 8	5,30,000	5,35,000	5,390 0
9,750	10,000	702 8	1,90,000	1,95,000	2,840 0	5,35,000	5,40,000	5,427 8
10,000	10,500	725 0	1,95,000	2,00,000	2,877 8	5,40,000	5,45,000	5,465 0
10,500	11,000	747 8	2,00,000	2,05,000	2,915 0	5,45,000	5,50,000	5,502 8
11,000	11,500	770 0	2,05,000	2,10,000	2,952 8	5,50,000	5,55,000	5,540 0
11,500	12,000	792 8	2,10,000	2,15,000	2,990 0	5,55,000	5,60,000	5,577 8
12,000	12,500	815 0	2,15,000	2,20,000	3,027 8	5,60,000	5,65,000	5,615 0
12,500	13,000	837 8	2,20,000	2,25,000	3,065 0	5,65,000	5,70,000	5,652 8
13,000	13,500	860 0	2,25,000	2,30,000	3,102 8	5,70,000	5,75,000	5,690 0
13,500	14,000	882 8	2,30,000	2,35,000	3,140 0	5,75,000	5,80,000	5,727 8
14,000	14,500	905 0	2,35,000	2,40,000	3,177 8	5,80,000	5,85,000	5,765 0
14,500	15,000	927 8	2,40,000	2,45,000	3,215 0	5,85,000	5,90,000	5,802 8
15,000	15,500	950 0	2,45,000	2,50,000	3,252 8	5,90,000	5,95,000	5,840 0
15,500	16,000	972 8	2,50,000	2,55,000	3,290 0	5,95,000	6,00,000	5,877 8
16,000	16,500	995 0	2,55,000	2,60,000	3,327 8	6,00,000	6,05,000	5,915 0
16,500	17,000	1,017 8	2,60,000	2,65,000	3,365 0	6,05,000	6,10,000	5,952 8
17,000	17,500	1,040 0	2,65,000	2,70,000	3,402 8	6,10,000	6,15,000	5,990 0
17,500	18,000	1,062 0	2,70,000	2,75,000	3,449 0	6,15,000	6,20,000	6,027 8
18,000	18,500	1,085 0	2,75,000	2,80,000	3,477 8	6,20,000	6,25,000	6,065 0
18,500	19,000	1,107 8	2,80,000	2,85,000	3,515 0	6,25,000	6,30,000	6,102 8
19,000	19,500	1,130 8	2,85,000	2,90,000	3,552 8	6,30,000	6,35,000	6,140 0
19,500	20,000	1,152 8	2,90,000	2,95,000	3,590 0	6,35,000	6,40,000	6,177 8
20,000	21,000	1,182 8	2,95,000	3,00,000	3,627 8	6,40,000	6,45,000	6,215 0
21,000	22,000	1,212 8	3,00,000	3,05,000	3,665 0	6,45,000	6,50,000	6,252 8
22,000	23,000	1,242 8	3,05,000	3,10,000	3,702 8	6,50,000	6,55,000	6,290 0
23,000	24,000	1,272 8	3,10,000	3,15,000	3,740 0	6,55,000	6,60,000	6,327 8
24,000	25,000	1,302 8	3,15,000	3,20,000	3,777 8	6,60,000	6,65,000	6,365 0
25,000	26,000	1,332 8	3,20,000	3,25,000	3,815 0	6,65,000	6,70,000	6,402 8
26,000	27,000	1,362 8	3,25,000	3,30,000	3,852 8	6,70,000	6,75,000	6,440 0
27,000	28,000	1,392 8	3,30,000	3,35,000	3,890 0	6,75,000	6,80,000	6,477 8
28,000	29,000	1,422 8	3,35,000	3,40,000	3,927 8	6,80,000	6,85,000	6,515 0
29,000	30,000	1,452 8	3,40,000	3,45,000	3,965 0	6,85,000	6,90,000	6,552 8
30,000	32,000	1,482 8	3,45,000	3,50,000	4,002 8	6,90,000	6,95,000	6,590 0
32,000	34,000	1,512 8	3,50,000	3,55,000	4,040 0	6,95,000	7,00,000	6,627 8
34,000	36,000	1,542 8	3,55,000	3,60,000	4,077 8	7,00,000	7,05,000	6,665 0
36,000	38,000	1,572 8	3,60,000	3,65,000	4,115 0	7,05,000	7,10,000	6,702 8
38,000	40,000	1,602 8	3,65,000	3,70,000	4,152 8	7,10,000	7,15,000	6,740 0
40,000	42,000	1,632 8	3,70,000	3,75,000	4,190 0	7,15,000	7,20,000	6,777 8
42,000	44,000	1,662 8	3,75,000	3,80,000	4,227 8	7,20,000	7,25,000	6,815 0

Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.	Rs.	Rs.	Rs.	A.
7,25,000	7,30,000	6,852	8	8,70,000	8,75,000	7,910	0	10,10,000	10,15,000	8,990	0
7,30,000	7,35,000	6,890	0	8,75,000	8,80,000	7,977	8	10,15,000	10,20,000	9,027	8
7,35,000	7,40,000	6,927	8	8,80,000	8,85,000	8,015	0	10,20,000	10,25,000	9,065	0
7,40,000	7,45,000	6,965	0	8,85,000	8,90,000	8,052	8	10,25,000	10,30,000	9,102	8
7,45,000	7,50,000	7,002	8	8,90,000	8,95,000	8,090	0	10,30,000	10,35,000	9,140	0
7,50,000	7,55,000	7,040	0	8,95,000	9,00,000	8,127	8	10,35,000	10,40,000	9,177	8
7,55,000	7,60,000	7,077	8	9,00,000	9,05,000	8,165	0	10,40,000	10,45,000	9,215	0
7,60,000	7,65,000	7,115	0	9,05,000	9,10,000	8,202	8	10,45,000	10,50,000	9,252	8
7,65,000	7,70,000	7,152	8	9,10,000	9,15,000	8,240	0	10,50,000	10,55,000	9,290	0
7,70,000	7,75,000	7,190	0	9,15,000	9,20,000	8,277	8	10,55,000	10,60,000	9,327	8
7,75,000	7,80,000	7,227	8	9,20,000	9,25,000	8,315	0	10,60,000	10,65,000	9,365	0
7,80,000	7,85,000	7,265	0	9,25,000	9,30,000	8,352	8	10,65,000	10,70,000	9,402	8
7,85,000	7,90,000	7,302	8	9,30,000	9,35,000	8,390	0	10,70,000	10,75,000	9,440	0
7,90,000	7,95,000	7,340	0	9,35,000	9,40,000	8,427	8	10,75,000	10,80,000	9,477	8
7,95,000	8,00,000	7,377	8	9,40,000	9,45,000	8,465	0	10,80,000	10,85,000	9,515	0
8,00,000	8,05,000	7,415	0	9,45,000	9,50,000	8,502	8	10,85,000	10,90,000	9,552	8
8,05,000	8,10,000	7,452	8	9,50,000	9,55,000	8,540	0	10,90,000	10,95,000	9,590	0
8,10,000	8,15,000	7,490	0	9,55,000	9,60,000	8,577	8	10,95,000	11,00,000	9,627	8
8,15,000	8,20,000	7,527	8	9,60,000	9,65,000	8,615	0	11,00,000	11,05,000	9,665	0
8,20,000	8,25,000	7,565	0	9,65,000	9,70,000	8,652	8	11,05,000	11,10,000	9,702	8
8,25,000	8,30,000	7,602	8	9,70,000	9,75,000	8,690	0	11,10,000	11,15,000	9,740	0
8,30,000	8,35,000	7,640	0	9,75,000	9,80,000	8,727	8	11,15,000		9,777	8
8,35,000	8,40,000	7,677	8	9,80,000	9,85,000	8,765	0	11,20,000		9,815	0
8,40,000	8,45,000	7,715	0	9,85,000	9,90,000	8,802	8	11,25,000		9,852	8
8,45,000	8,50,000	7,752	8	9,90,000		8,840	0	11,30,000		9,890	0
8,50,000	8,55,000	7,790	0					11,35,000		9,927	8
8,55,000	8,60,000	7,827	8	9,95,000	10,00,000	8,877	8	11,40,000		9,965	0
8,60,000	8,65,000	7,865	0	10,00,000	10,05,000	8,915	0	11,45,000		10,000	0
8,65,000	8,70,000	7,902	8	10,05,000	10,10,000	8,952	8				

—U. P. Act XIV of 1942. (16-7-1942.)

**SCHEDULE II***Fixed Fees.*

[Note :—In Bihar, Bombay, Central Provinces and Berar, Orissa and the United Provinces the fees leviable under the Court-fees Act, 1870, have been increased by way of **surchage**; see Bihar Act IX of 1943, Bombay Act XV of 1943, C. P. & Berar Act III of 1947, Orissa Act IV of 1945 and U. P. Act VIII of 1943. The text of these Acts is reproduced in an Appendix given at the end of Sch. III of the Court-fees Act.

In Central Provinces and Berar notwithstanding the provision as to surcharge, fixed fees have been provided in respect of certain documents by the schedule annexed to section 4 of the C. P. & Berar Act III of 1947.]

Number.	.....	Proper Fee.
1. Application or petition.	(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings;	

**SCHEDULE II ARTICLE 1—Synopsis.**

1. Scope.
2. Application for two or more reliefs.
3. Written statement.
4. Appeal.
5. Application under O. 34 R. 6 of the Civil P.C.
6. Memorandum of objections under O. 41 R. 26 of the Civil P.C.
7. Application for probate or letters of administration.

8. Application for copy of order.
9. Petition informing Court of compromise.
10. Application for transfer of a case.
11. Objection to award.
12. Revision petitions.
13. Application under Trusts Act.

1. Scope.—[1] The Article provides for the court-fee payable on application. (92) 16 Bom 700 (702) (DB) (79) 1878 Pun Re No. 6, page 11 (11) (DB).

[2] An oral application will not require any court-fee. (70) 2 N W P H C B 418 (418) (DB).

or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement;	
or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement;	One anna.
or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, <sup>a</sup> [* * * *]	
or to any Court of Small Causes constituted under Act <sup>b</sup> No. XI of 1865 or under Act <sup>c</sup> No. XVI of 1868, section 20, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees;	
or when presented to any Civil, Criminal or Revenue Court, or to any Board or executive officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or officer, or of any other document on record in such Court or Office.	One anna.
(b) When containing a complaint or charge of any offence other than an offence for which police-officers may, under the Criminal Procedure Code, <sup>d</sup> arrest without warrant, and presented to any Criminal Court;	
or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue-officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act;	Eight annas.
or to deposit in Court revenue or rent;	
or for determination by a Court of the amount of compensation to be paid by a landlord to his tenant.	
(c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive Authority, or to a Commissioner or Revenue of Circuit, or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act.	One rupee.
(d) When presented to a High Court.	Two rupees.

[a] The words 'or to any Cantonment Magistrate sitting as a Court of Civil Judicature under Act No. III of 1859' were *repealed* by the Cantonments Act, 1889 (18 [XIII] of 1889).

[b] See now the Provincial Small Causes Courts Act, 1887 (9 [IX] of 1887) by which Act XI of 1865 was *repealed*.

[c] See now the Bengal, Agra and Assam Civil Courts Act, 1887 (12 [XII] of 1887). S. 25.

[d] See now the Code of Criminal Procedure, 1898 (Act 5 [V] of 1898).

#### Sch. II Art. I (contd.)

[3] Where under the law no application is necessary for a certain relief, but a person chooses to apply in writing claiming that relief, the paper purporting to be an application need bear no stamp. ('89) 13 Bom 670 (671) (DB).

2. Application for two or more reliefs.—[1] The court-fee on an application comprising two reliefs will not be calculated separately on the two reliefs. (Vol 20) 1938 Sind 343 (344): 27 Sind LR 312.

3. Written statement.—[1] The expression "application or petition" does not include written statements. ('88) 12 Cal LR 367 (371) (DB).

4. Appeal.—[1] Appeal from order having the force of a decree but not arising out of a *suit*—Neither Sch. I Art. 1 nor Sch. II Art. 17 is applicable—Sch. II Art. 1 applies. (Vol 23) 1936 Rang 352 (353) \* (1911) 21 Mad L Jour 481 (482) (DB) \* ('08) 6 Oudh Cas 372 (378) (DB) (Application for partition under S. 107 of the N.W.P. and Oudh Act, III of 1901) \* ('01) 14 OPLR 100 (108) (Appeal against an order absolute for foreclosure or sale) \* ('01) 4 Oudh Cas 289 (292) (DB).



## PROVINCIAL AMENDMENTS

## ASSAM

- (1) In clause (a) after the words "Municipal Commissioner" in the third entry in the second column the words "or member of a Local Board" were *inserted*.
- (2) For the words "one anna" opposite clause (a) in the second column the words "two annas" were *substituted*.
- (3) For the words "eight annas" opposite clause (b) in the second column the following was *substituted*.  

"In the case of a complaint or charge of an offence presented to a Criminal Court, one rupee and in other cases twelve annas, and"
- (4) For the words "one rupee" opposite clause (c) in the second column the words "one rupee eight annas" were *substituted*.

—Assam Act XIV of 1936. [2-12-1936.]

## BENGAL

In clause (a) after the words "Municipal Commissioner" in the third entry in the second column, the words "or member of a District Board" were *inserted*. For the words "one anna" opposite clause (a) in the second column, the words "two annas" were *substituted*. For the words "eight annas" opposite clause (b) in the second column, the following was *substituted* viz., "In the case of a complaint or charge of an offence presented to a Criminal Court, one rupee and in other cases twelve annas;" For the words "one rupee" opposite clause (c) in the second column the words "one rupee eight annas" were *substituted*. For clause (d) in the second column and for the entries opposite that clause in the third column the following clause and entries were *substituted*:  
 "(d) (i) When presented to the High Court under S. 115 of the Code of Civil Procedure, 1908, for revision of an order

(a) When the value of the suit to which the order relates does not exceed Rs. 1,000.	Five rupees.
(b) When the value of the suit exceeds Rs. 1000	Ten rupees.
(i) When presented to the High Court otherwise than under that section.	Two rupees."

—Bengal Act IV of 1922. [22-3-1922.]

## BIHAR

"Two annas", "twelve annas", "one rupee and eight annas", "three rupees" were respectively *substituted* for "one anna", "eight annas" one rupee and "two rupees" as proper fees shown against the article.

—Bihar and Orissa Act II of 1922. [21-8-1922.]

## Sch. II Art. I (contd.)

(Proceedings under Oudh Land Revenue Act) \* ('96) 28 Cal 723 (730) (FB) (Application under S. 104 (3) of Bengal Tenancy Act—Appeal under S. 108(2) \* ('92) 16 Bom 408 (418) (DB). \* ('89) 1889 All WN 27 (27) (Memorandum of appeal to High Court under S. 263, Succession Act (X of 1865).

[See however (Vol 31) 1944 Cal 230 (231) (Application by debtor under S. 38 Bengal Money-lenders Act—Declaration by Court as to the amount due—Appeal under S. 38 (9) is governed by Sch. II Art. 17 (iii)) \* (Vol 25) 1938 Rang 141 (143, 144): 1938 Rang LR 72 (When an appeal is preferred from the order granting or refusing letters or probate of a will, Sch. II, Art. 1 does not apply.) \* ('18) 85 All 448 (450) (DB) (An order of District judge granting or refusing to grant letters of administration is a "decree" and court-fee payable on appeal from such order is under Art. 17 (vi)).]

5. Application under O. 34 R. 6 of the Civil P.C.—[1] An application under O. 34 R. 6, Civil P.C. by a decree-holder for recovery of the balance due on a mortgage, is chargeable under this article. (Vol 28) 1936 Rang 352 (353).

6. Memorandum of objections under O. 41 R. 26 of the Civil P.C.—[1] A memorandum of objections filed under O. 41 R. 26 of the Civil Procedure Code cannot be regarded as an application or petition within the meaning of this article and no court-fee is chargeable on it. (Vol 23) 1936 Oudh 180 (181): 11 Luck 704 (DB) \* (Vol 19) 1932 All 526 (526, 527): 54 All 465 \* (Vol 15) 1929 Pat 85 (86).

7. Application for probate or letters of administration.—[1] Application for initiating proceeding for a probate of a will or letters of administration is governed by this Article. (Vol 25) 1938 Rang 141 (143): 1938 Rang LR 72 (The article applies only in initial stage of this proceeding but not when it reaches the stage of an appeal.) \* ('71) 15 Suth WR 40 (41) (DB).

8. Application for copy of order.—[1] An application for a copy of an order passed by an Assistant Commissioner of Income-tax is governed by para 5 clause (a). (Vol 24) 1937 Lah 876 (878): HLR (1938) Lah 229 (DB) \* (Vol 19) 1932 Pat 103 (105): 11 Pat 40 (DB).

## BOMBAY

"1. Appli-  
cation or  
petition"

(a) When presented to any officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings:

or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement:

or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement:

or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, or to any Court of Small Causes constituted under the Provincial Small Cause Courts Act, 1887, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees, not being an application for assistance under section 86 of the Bombay Land Revenue Code, 1879:

Two  
annas.

or when presented to any Civil, Criminal or Revenue Court, or to any any Board or Executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or Officer, or of any other document on record in such Court or Office.

(aa) When presented to a Collector or other officer of revenue for assistance under section 86 of the Bombay Land Revenue Code, 1879.

Four  
annas.

(b) When containing a complaint or charge of any offence other than offence for which police-officers may, under the Criminal Procedure Code, 1898, arrest without warrant, and presented to any Criminal Court:

or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity and not otherwise provided for by this Act:

Eight  
annas.

or to deposit in Court revenue or rent:

or for determination by a Court of the amount of compensation to be paid by a landlord to his tenant.

(c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive Authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a Division and not otherwise provided for by this Act.

Two  
rupees

(d) When presented to a High Court.

Four  
rupees."

—Bombay Act II of 1932. [30-3-1932.]

## CENTRAL PROVINCES

In the third column for the words "one anna" opposite cl. (a) the words "two annas" were substituted:

For cl. (b) in the second column and the entry opposite it in the third column the following clause and entries were substituted.

"(b) When containing a complaint or charge of any offence other than an offence for which police-officers may, under the Code of Criminal Procedure, 1898, arrest without warrant, and presented to any Criminal Court;

Twelve annas.

or for orders of arrest or attachment before judgment or for temporary injunctions;	Two rupees.
or for compensation for arrest or attachment before judgment or in respect of a temporary injunction obtained on insufficient grounds;	Two rupees.
or for the appointment of a receiver in a case in which the applicant has no present right of possession of the properties in dispute;	Five rupees.
or for setting aside decrees passed <i>ex parte</i> and for review of orders dismissing suits for default;	Twelve annas.
or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act;	Twelve annas.
or to deposit in Court revenue or rent;	Eight annas.
or for determination by a Court of the amount of compensation to be paid by landlord to his tenant.	Eight annas."

For cls. (c) and (d) in the second column and for the entries in the third column opposite these clauses the following clauses and entries were substituted, viz.,

"(c) When presented to a Commissioner of Revenue or to any Chief Officer charged with the executive administration of a Division and not otherwise provided for by this Act.	One rupee and eight annas.
(d) When presented to a Chief Controlling Revenue Authority or Executive Authority and not otherwise provided for by this Act.	Two rupees.
(e) When presented to a Court of Judicial Commissioner	
(i) otherwise than under S. 25 of the Provincial Small Cause Courts Act, 1887 or S. 115 of the Code of Civil Procedure, 1908;	Two rupees.
(ii) under S. 25 of the Provincial Small Cause Courts Act, 1887.	Five rupees.
(iii) under S. 115 of the Code of Civil Procedure, 1908.	Five rupees."

—Central Provinces Act XVI of 1935. [21-5-1935.]

## MADRAS

"1. Application or petition.	(a) When presented to any Officer of the Customs or Excise Department or to any Magistrate by any person having dealings with the Government, and when the subject-matter of such application relates exclusively to those dealings;	One anna.
	or when presented to any officer of land-revenue by any person holding temporarily settled land under direct engagement with Government, and when the subject-matter of the application or petition relates exclusively to such engagement;	Two annas.
	or when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement;	One anna.
	or when presented to any Civil Court other than a principal Civil Court of original jurisdiction, or to any Court of Small Causes constituted under Act No. IX of 1887, or to a Collector or other officer of revenue in relation to any suit or case in which the amount or value of the subject-matter is less than fifty rupees;	Two annas.
	or when presented to any Civil, Criminal or Revenue Court, or to any Board or Executive Officer for the purpose of obtaining a copy or translation of any judgment, decree or order passed by such Court, Board or Officer, or of any other document on record in such Court or office.	Two annas.

(b) When containing a complaint or charge of any offence other than an offence for which police-officers may, under the Criminal Procedure Code, arrest without warrant, and presented to any Criminal Court;	In the case of a criminal complaint one rupee and in other case twelve annas.
or when presented to a Civil, Criminal or Revenue Court, or to a Collector, or any Revenue Officer having jurisdiction equal or subordinate to a Collector, or to any Magistrate in his executive capacity, and not otherwise provided for by this Act;	
or to deposit in Court revenue or rent;	Eight annas.
or for determination by a Court of the amount of compensation to be paid by landlord to his tenant.	
(c) When presented to a Chief Commissioner or other Chief Controlling Revenue or Executive authority, or to a Commissioner of Revenue or Circuit, or to any chief officer charged with the executive administration of a division and not otherwise provided for by this Act.	One rupee eight annas.
(d) (i) When presented to a High Court under S. 115 of the Code of Civil Procedure, 1908, for revision of an order—	Five rupees.
(a) When the value of the suit or proceeding to which the order relates does not exceed thousand rupees.	
(b) When the value of the suit or proceeding exceeds thousand rupees.	
(ii) When presented to a High Court otherwise than under that section.	Two rupees.

—Madras Act V of 1922. [30-3-1922; 17-4-1922.]

## ORISSA

- (a) In the third column opposite clause (a) for the words "one anna" the words "two annas" were substituted.
- (b) In the third column opposite clause (b) for the words "eight annas" the words "in the case of a criminal complaint and appeal one rupee and in other cases twelve annas" were substituted.
- (c) In the third column opposite clause (c) for the words "one rupee" the words "one rupee eight annas" were substituted.
- (d) In the second and third columns for clause (d) and the words opposite the said clause the following was substituted:
- "(d) (i) When presented to a High Court under section 115 of the Code of Civil Procedure, 1908 for revision of an order—

(a) When the value of the suit or proceedings to which the order relates does not exceed one thousand rupees	Five rupees.
(b) When the value of the suit or proceedings exceeds one thousand rupees	Ten rupees.
(ii) When presented to the High Court otherwise than under that section	Two rupees.

—Orissa Act V of 1939 [31-10-1939.]

**PUNJAB**

- (1) For the words "one anna" in the third column opposite clause (a) in the second column the words "two annas" were substituted.
- (2) For the words "eight annas" in the third column opposite clause (b) in the second column the words "one rupee" were substituted.
- (3) For clause (d) in the second column and the corresponding entry in the third column the following clause and entry were substituted, viz.,
- "(d) When presented to the High Court
- |   |                    |
|---|--------------------|
| (i) under the Indian Companies, Act, 1913, for winding up a company | One hundred rupees |
| (ii) under the same Act for taking some other judicial action       | Five rupees.       |
| (iii) in all other cases  | Two rupees         |

—*Punjab Act VII of 1922.* [23-11-1932.]

**SIND**

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of section 2 of the Bombay Finance (Sind Amendment) Act, I of 1936.

## UNITED PROVINCES

- (1) For the words "one anna" "eight annas" and "one rupee" in third column the words "two annas" "twelve annas" and "one rupee and eight annas" were respectively substituted.

The following was substituted for cl. (d) in the second column and the entry against the same in the third column:

- |   |                       |
|---|-----------------------|
| (d) When presented to the Board of Revenue for revision of a judgment or order              | Three rupees          |
| (e) When presented to a High Court—   |                       |
| (i) under the Indian Companies Act, 1913 (VII of 1913) for winding up a Company             | Fifty rupees          |
| (ii) under S. 115 of the Code of Civil Procedure, 1908 (V of 1908) for revision of an order | Four rupees           |
| (iii) In any other case   | Three rupees          |
| (f) When presented under Ch. IV of the Motor Vehicles, Act 1939, (IV of 1939)—              |                       |
| (i) to a Regional Transport Authority or its Chairman or Secretary                          | One rupee eight annas |
| (ii) to the Provincial Transport Authority or its Chairman or Secretary                     | Three rupees          |

—U. P. Act II of 1936 [2-4-1936] and U. P. Act IX of 1941. [19-6-1941.]

- (2) From Art. 1 (a) the clause "when presented to any Municipal Commissioner under any Act for the time being in force for the conservancy or improvement of any place, if the application or petition relates solely to such conservancy or improvement" was omitted and in its place the following new clause was inserted, viz.,

"When presented to the District Magistrate or any other officer for the correction of an electoral roll."

In Art. 1 (b) the words "other than an offence for which police-officer may under the Code of Criminal Procedure arrest without warrant" were deleted from the first paragraph and the following paragraphs were inserted between the first and second paragraphs:

"or when presented to a Collector containing a request from a local body such as the Municipal Board, the District Board or the Notified Area Committee for the realisation of any dues by issue of warrant or by other distress;

or when presented to a District Magistrate for permission to have displays of fire works, or for a police escort:

or when presented to a District Magistrate in the form of a programme or in any other form for the exhibition of a film at a shorter notice than that permitted by the conditions of the licence issued to cinema companies for exhibiting films;

or when presented to a District Magistrate or Collector or any officer subordinate to him, under the Village Panchayat Act, the Indian Arms Act, the Poisons Act, the Explosives Act, the Stage Carriage Act, the Indian Cinematograph Act, or any other enactment for the time being in force, unless specifically exempted from payment of court-fee."

-U. P. Act XIX of 1932. [9-1-1939.]

a[1A. Application to any Civil Court that records may be called for from another Court.	When the Court grants the application and is of opinion that the transmission of such records involves the use of the post.	Twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of article 1 of this schedule.]
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[a] Inserted by the Court-fees (Amendment) Act, 1911 (14 [XIV] of 1911), S. 2.

#### Provincial Amendments

#### BIHAR

The entry "one rupee in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Article 1 of this schedule" was substituted for the entry "twelve annas in addition to any fee levied on the application under clause (a), clause (b) or clause (d) of Art. 1 of this schedule" as proper fees shown against the article.—*Bihar and Orissa Act II of 1922.* [21-8-1922.]

#### ORISSA

In the third column for the words "twelve annas" the words "one rupee" were substituted—*Orissa Act V of 1939.* [31-10-1939]

#### UNITED PROVINCES

For the words "twelve annas" in the third column the words "one rupee two annas" were substituted—*U. P. Act II of 1936.* [2-4-1936]

2. Application for leave to sue as a pauper.	to sue as a . . . . .	Eight annas.
3. Application for leave to appeal as a pauper.	(a) When presented to a District Court. (b) When presented to a Commissioner or a High Court.	One rupee. Two rupees.

#### Provincial Amendment

#### MADRAS

In the second column, after the words "District Court", the words "or a Sub-Court" were inserted—*Madras Act V of 1922.* [30-8-1922; 17-4-1922.]

4. Plaint or memorandum of appeal in a suit to obtain possession under Act No. XVI of 1838, or [the Mamlatdars' Courts Act, 1876.]	. . . . .	Eight annas.
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[a] Bombay Courts of Adalat Act, 1838.

[b] Substituted for "Bombay Act V of 1861 (to give Mamlatdars' Courts jurisdiction in certain cases to maintain existing possession, or to restore possession to any party dispossessed otherwise than by course of law)," by the Amending Act, 1891 (12 [XII] of 1891).

[c] See now the Bombay Mamlatdars' Courts Act, 1906 (Bombay Act II of 1906).

#### Provincial Amendments

#### MADRAS

The article was omitted.—*Madras Act V of 1922.*

[30-8-1922; 17-4-1922.]

#### Sch. II, Art. 1 (contd.)

##### 9. Petition informing court of compromise.—

[1] A petition informing the Court of an agreement into which the parties have entered for the compromise of the suit is chargeable under para. 2, clause (b). ('85) 8 Mad 15 (17) (Parties praying for removal of suit from file.) \* (Vol 5) 1918 All 307 (308); 40 All 19 (DB) (Parties praying for a decree in terms of compromise.)

##### 10. Application for transfer of a case.—

[1] Fifteen suits were tried analogously and dismissed. They were governed by the same judgment. Two appeals against the dismissal were filed in the High Court and thirteen in the District Court. The appellant subsequently made an application to the High Court praying for the transfer of the thirteen appeals in the District Court to the High Court and for analogous trial of them with the two appeals in High Court. It was held that the application for transfer of the thirteen appeals could not be considered as an independent application for transfer but must be treated as an application made in the appeals pending before the High Court with thirteen prayers for transfer and was properly stamped with a single

stamp of Rs. 2. (Vol 27) 1940 Cal 84 (85); I L R (1939) 2 Cal 264 (DB).

11. Objection to award.—[1] A written objection to an award made in a pending suit is an "application" and chargeable under clause (b). (Vol 15) 1928 Sind 87 (88); 23 Sind L R 91 (DB) \* (Vol 33) 1946 Mad 104 (105).

12. Revision petitions.—[1] The word "proceeding" is used as meaning a proceeding in the nature of a suit (such as probate) and not a proceeding in the suit (such as execution proceeding) and both the words "suit" and "proceeding" are used as comprising the entire litigation commencing with the filing of the plaint or petition in the trial Court down to the stage when ultimate decision is reached in the final Court of appeal or revision. (Vol 29) 1942 Mad 390 (391) (Case under Local amendment Cl. d (i)).

13. Application under Trusts Act.—[1] Application under S. 74 of the Trusts Act for the appointment of a trustee—Clause (d) of the Article will apply when such applications are presented to the High Court. (Vol 21) 1934 Oudh 118 (121); 9 Luck 507,

**PUNJAB**

In the third column of the article for the words "eight annas" the words "one rupee" were substituted.—*Punjab Act VII of 1922.* [23-11-1922.]

5. Plaint or memorandum of appeal in a suit to | . . . | Eight annas,  
establish or disprove a right of occupancy.

**Provincial Amendments****BIHAR AND ORISSA**

After the words "memorandum of appeal" the words "or of cross-objection" were inserted in the first column.—*Bi-har and Orissa Act II of 1922.* [21-8-1922.]

**PUNJAB**

In the third column, for the words "eight annas" the words "one rupee" were substituted.—*Punjab Act VII of 1922.* [23-11-1922.]

**UNITED PROVINCES**

For the words "eight annas" the words "twelve annas" were substituted.—*U. P. Act II of 1936.* [2-4-1936.]

a[6. Bail-bond or other instrument of obligation | . . . | Eight annas.]  
given in pursuance of an order made by a Court or  
Magistrate under any section of the Code of Criminal  
Procedure, 1898, or the Code of Civil Procedure, 1908,  
and not otherwise provided for by this Act.]

[a] Substituted by the Second Repealing and Amending Act, 1914 (17 [XVII] of 1914), S. 2.

**Provincial Amendments****BOMBAY**

For the words "eight annas" the words "one rupee" were substituted.

—*Bombay Act II of 1932.* [30-3-1932.]

**SIND**

The amendment made in the article by the Bombay Finance Act, II of 1932, continues in force in the Province of Sind by virtue of S-2 of the Bombay Finance (Sind Amendment) Act, 1 of 1938.

**UNITED PROVINCES**

For the words "eight annas" the words "twelve annas" were substituted.

—*U. P. Act II of 1936.* [2-4-1936.]

7. Undertaking under section 49 of the Indian | . . . | Eight annas.  
Divorce Act.

**Provincial Amendments****BOMBAY**

For the words "eight annas" the words "one rupee" were substituted.

—*Bombay Act II of 1932.* [30-3-1932.]

**Schedule II, Article 5—Note 1.**

[1] Expression "right of occupancy" in this article did not mean right of mere tenant. ('02) 1 Low Bur Rul 303 (303) (SB).

[2] Expression "right of occupancy" in this article cannot be read as synonymous with "right of occupancy" under any of Acts relating to landlord and tenant. (Vol 21) 1934 Cal 674 (677): 61 Cal 513.

[3] Right of occupancy ryot is occupancy right within meaning of this article. (Vol 21) 1934 Cal 674 (677): 61 Cal 513 \* ('08) 31 Mad 14 (16) \* ('82) 11 Cal L R 91 (94).

[4] Suit for declaration that person has occupancy rights in holding is governed not by Art. 17 (iii) of Sch. II but by this article. (Vol 5) 1918 All 228 (228): 40 All 538.

[5] Suit to establish right of occupancy and for recovery of possession—This article will not apply. (Vol 18) 1931 Cal 338 (335).

[6] This article applies in terms to memorandum of appeal in suit of kind mentioned therein. (Vol 5) 1918 All 228 (228): 40 All 538.

**Schedule II, Article 6—Note 1.**

[1] Bond given under Guardians and Wards Act does not fall under Civil P. C. or Or. P. C. and is not

chargeable with any court-fee under this article. (Vol 27) 1940 Bom 275 (275) (SB) (Bond falls under Sch. I, Art 57, Stamp Act).

[2] Security bonds given under the following sections of Civil P. C. fall under this article and are chargeable with court-fee of eight annas:

(a) S. 55 (4). (Vol 20) 1933 Lah 89 (90): 14 Lah 284 (SB).

(b) O. 32, R. 6 (2). (Vol 16) 1929 Lah 205 (205) \* (Vol 12) 1925 Cal 906 (907): 53 Cal 101 (FB) (Overruling (Vol 5) 1918 Cal 125 (DB)).

(c) O. 40, R. 8. (Vol 7) 1920 Mad 939 (940): 43 Mad 368 (FB) (It is also chargeable with stamp-duty under Art. 40 of Sch. I, Stamp Act.)

(d) O. 41, R. 5 or R. 6 (Vol 23) 1936 Sind 41 (41): 30 Sind L R 1 (DB) \* (Vol 21) 1934 Lah 228 (229): 14 Lah 708 (DB) \* (Vol 16) 1929 Lah 205 (205).

[But see (Vol 12) 1925 Lah 552 (554).]

(e) O. 41, R. 10. ('89) 11 All 16 (17) (FB).

[3] Security bond executed in claim case on release of attached animals in accordance with rules framed under Civil P. C. is bond given in pursuance of order of Court under Civil P. C. and must bear court-fee stamp under this article. (Vol 10) 1923 Cal 269 (269, 270): 49 Cal 997 (DB) \* (Vol 1) 1914 Mad 652 (654): 37 Mad 17 (FB).

**PUNJAB**

In the third column, for the words "eight annas" the words "one rupee" were substituted.

—*Punjab Act VII of 1922.* [23-11-1922]

**SIND**

The amendments made by the Bombay Finance Act II of 1922, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1928.

**UNITED PROVINCES**

For the words "eight annas" the words "twelve annas" were substituted.

—*U. P. Act II of 1936.* [2-4-1936.]

8. [Repealed by the Repealing and Amending Act, 1891 (12 [XII] of 1891).]

9. [Repealed by Act XII of 1891.]

10. Mukhtarnama or Vakalatnama.	<p>When presented for the conduct of any one case—</p> <p>(a)—to any Civil or Criminal Court other than a High Court, or to any Revenue Court, or to any Collector or Magistrate, or other executive officer, except such as are mentioned in clauses (b) and (c) of this number;</p> <p>(b)—to a Commissioner of Revenue, Circuit or Customs or to any officer charged with the executive administration of a Division, not being the Chief Revenue or Executive Authority;</p> <p>(c)—to a High Court, Chief Commissioner, Board of Revenue, or other Chief Controlling Revenue or Executive Authority.</p>	<p>Eight annas.</p> <p>One rupee.</p> <p>Two rupees.</p>
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**Provincial Amendments****ASSAM**

In the third column for the words "eight annas" opposite clause (a) in the second column the words "one rupee" were substituted, and for the words "one rupee" opposite clause (b) in the second column the words "one rupee eight annas" were substituted.—*Assam Act XIV of 1936.* [2-12-1936.]

**Sch. II, Art. 6 (contd.)**

[4] Security bond taken by village Court under S. 58, Madras Village Courts Act (1 of 1889) is not bond under Civil P. C. (Vol 14) 1927 Mad 377 (377) (FB).

[5] Security bond executed under Civil P. C. and coming under this article, is also chargeable under Art. 40 or Art. 57 Sch. I of Stamp Act, unless it falls under residuary Art. 15, Sch. I of that Act. (Vol. 16) 1929 Lah 205 (205) \* (Vol 12) 1925 Cal 906 (907): 58 Cal 101 (FB) \* (Vol 7) 1920 Mad 989 (940): 43 Mad 863.

[6] Security bond given under Court's order under S. 17, Provincial Small Cause Courts Act, IX of 1887, to have *ex parte* decree set aside, must be deemed to be one given under Civil P. C. and is governed by this article. (Vol 22) 1935 Mad 380 (382): 58 Mad 687 (FB).

[But see ('97) 1897 Bom P J 167 (SB).]

**Schedule II, Article 10—Note 1.**

[1] Documents specified in this article are documents which it was intended to exclude from definition of power-of-attorney in S. 2 (21), Stamp Act. ('12) 1912 Pun L R No. 202 page 647 (648) (FB) \* ('11) 88 All 487 (489) (FB).

[2] Mukhtar is attorney, whether appointed specially or generally or certificated as legal practitioner, and mukhtarnama is document which empowers holder to act for person by or on whose behalf document is executed. ('12) 1912 Pun L R No. 202 page 647 (648) (FB).

[3] This article does not apply to mukhtarnama executed in favour of person who is not certificated mukhtar. ('11) 88 All 487 (489, 490) (FB) \* ('86) 9 Mad 358 (358, 359) (FB).

[But see ('12) 1912 Pun L R No. 202 page 647 (648) (FB).]

[4] Word "vakalatnama" relates to power filed by pleader, under O. 8 R. 4 of Civil P. C. to conduct case on behalf of suitor irrespective of class to which legal practitioner belongs. (Vol 13) 1926 Pat 246 (249): 5 Pat 255 (Vakalatnama filed by an Advocate whether barrister or not comes under Art. 10 of Sch. II).

[5] Vakalatnama is a kind of power-of-attorney. (Vol 24) 1937 Nag 65 (66): I L R (1937) Nag 494 \* (Vol 21) 1934 Bom 299 (302): 58 Bom 597 (DB) (Art. 10 Sch. II does not apply to vakalatnama filed in Presidency Small Cause Court).

[6] Vakalatnama to appear and act if fees were paid in advance, is chargeable under this article and need not be stamped as agreement under Stamp Act. (Vol 28) 1936 Cal 814 (815): I L R (1937) 1 Cal 461 (DB).

[7] A letter of appointment authorising Advocate to act and plead and to make or withdraw all deposits on behalf of his client, is chargeable with court-fee prescribed for vakalatnama under this article. (Vol 18) 1926 Pat 246 (248, 249): 5 Pat 255.

[8] A "case" need not necessarily mean suit or judicial proceeding, but would include any petition or application to Court or officer. ('86) 9 Mad 146 (148) (FB).

[9] Word "case" must be confined to judicial cases or *quasi judicial* cases as opposed to transactions. ('12) 1912 Pun. L R No. 202 page 647 (648) (FB).

[10] This article does not make it necessary that mukhtarnama or vakalatnama must be filed in criminal cases. (Vol 13) 1926 Pat 236 (239): 27 G. T. Ind. 344 (1926)



**BENGAL**

For the words "eight annas" opposite cl. (a) and for the words "one rupee" opposite cl. (b) in the second column the words "one rupee" and "one rupee eight annas" were respectively substituted.

—*Bengal Act IV of 1922.* [20-3-1922].

**BIHAR**

Words "one rupee", "two rupees" "three rupees" were respectively substituted for "eight annas", "one rupee", "two rupees" as proper fees shown against the article.

—*Bihar and Orissa Act II of 1922.* [21-8-1922.]

**CENTRAL PROVINCES**

In the third column for the words "eight annas" opposite cl. (a) the words "twelve annas" and for the words "two rupees" opposite cl. (c) the words "two rupees and eight annas" were substituted.

—*C. P. Act XVI of 1935.* [21-5-1935.]

**MADRAS**

(1) The following was substituted for the entry in the first column of the article.

"Mukhtarnama, Vakalatnama or any paper signed by an Advocate signifying or intimating that he is retained for a party".

(2) The words "one rupee", "one rupee and eight annas" and "three rupees" were respectively substituted for the words "eight annas" "one rupee" and "two rupees" in the third column of the article.

—*Madras Act V of 1922.* [30-3-1922; 17-4-1922.]

**ORISSA**

In the third column the words "one rupee", "two rupees" and "three rupees" were respectively substituted for the words "eight annas" "one rupee" and "two rupees".—*Orissa Act V of 1939.* [31-10-1939.]

**PUNJAB**

In the third column for words "eight annas" opposite cl. (a) in the second column the words "one rupee" were substituted.—*Punjab Act VII of 1922.* [23-11-1922.]

**UNITED PROVINCES**

For the words "eight annas" "one rupee" and "two rupees" the words "twelve annas" "one rupee and eight annas" and "three rupees" were respectively substituted.

—*United Provinces Act II of 1936.* [2-4-1936.]

11. Memorandum of appeal when the appeal is not a* * * from a decree or an order having the force of a decree, and is presented—	(a)—to any Civil Court other than a High Court, or to any Revenue Court or Executive Officer other than the High Court, or Chief Controlling Revenue or Executive Authority; (b)—to a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority.	Eight annas.  Two rupees.
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[a] The words "from an order rejecting a plaint or" were omitted by the Code of Civil Procedure, 1908, (Act 5 [V] of 1908), S. 155 and Sch. IV.

**Sch. II, Art. 10 (contd.)**

[11] Court has no inherent power to consolidate appeals in cases disposed of by single judgment so as to enable appellant to pay court-fee on value of consolidated appeals and file only one vakalatnama. (Vol 17) 1980 Mad 576 (581) : 58 Mad 248 (FB) (Vol 15) 1928 Mad 468 overruled).

[12] Several revisions from one judgment against common respondents cannot be consolidated for purposes of vakalat and process fee. (Vol 17, 1980 Mad 881 (882) : 58 Mad 262 (FB).

**Schedule II, Article 11—Synopsis**

1. "When the appeal is not from a decree or an order having the force of a decree."
2. Order rejecting plaint.
3. Order under S. 47, Civil P. C.
4. Order regarding restitution under S. 144, Civil P. C.
5. Order under O. 21 R. 50 (2).
6. Final Decree in mortgage suit.
7. Order under O. 34 R. 6 Civil P. C.
8. Order of remand.
9. Appeal against decree on award.
10. Order in probate proceedings.

**12. Memorandum of cross-objections.****13. Orders under special and local Acts.**

1. "When the appeal is not from a decree or an order having the force of a decree." [1] The definition of "decree" in the Civil Procedure Code may be regarded as applicable for the purposes of this Act also. (Vol 25) 1988 All 10 (51) : I L R (1988) All 181 (LB).

[But see (Vol 25) 1988 Rang 141 (144) : 1988 Rang L. R. 72.]

[2] To have the force of a decree, the order must possess all the characteristics of a decree. (Vol 25) 1988 All 10 (51) : I L R (1988) All 181 (DB).

[3] An order which is appealable "as if it were a decree" is not the same as an order having the force of a decree. (Vol 28) 1941 Mad 689 (640) : I L R (1941) Mad 985 (DB).

[4] An order of the Court under the Civil Procedure Code, Sch. III, Paras 4 and 5 has the force of a decree. (See Sch. III, Para. 6.) An appeal from such an order will not come under this article. (185) 7 All 565 (567) (DB). ((1882) 4 Mad 420, dissented from).

2. Order rejecting plaint :—[1] An appeal from an order rejecting a plaint will not be governed by this article. (Vol 16) 1929 Pat 615 (616, 617) (DB) \* (Vol. 14) 1927 Naz. 100 (101) \* (Vol. 8) 1921 Tab. 48

## Provincial Amendments

## ASSAM

The following article was substituted for Art. 11 :

"11. Memorandum of appeal when the appeal is not from a decree or order having the force of a decree, and is presented—	(a) (i) to any Revenue Court or Executive Officer other than a High Court, or Chief Controlling Revenue or Executive Authority;	Eight annas.
	(ii) to any Civil Court other than a High Court;	One rupee.
	(b) to a Chief Controlling Executive or Revenue Authority.	Two rupees."

—Assam Act XIV of 1936. [2-12-1936.]

## BENGAL

For Art. 11 the following article was substituted:

"11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented —	(a) (i) to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority;	Eight annas.
	(ii) to any Civil Court other than a High Court;	One rupee.
	(b) to a Chief Controlling Executive or Revenue Authority;	Two rupees.
	(c) to a High Court.	Five rupees."

—Bengal Act IV of 1922. [29-3-1922.]

## BIHAR

After the words "memorandum of appeal" in the first column the words "or of cross-objection" were inserted.

Words "one rupee," "four rupees" were respectively substituted for "eight annas," "two rupees" as proper fees shown against the article.

—Bihar and Orissa Act II of 1922. [21-8-1922.]

## Sch. II, Art. 11 (contd.)

3. Order under S. 47, Civil P.C. :—[1] Under S. 85, the various Provincial Governments have by notifications directed that the court-fee chargeable on appeals from orders under S. 47, Civil P. C., shall be limited to the fixed fee leviable under this article. (Vol. 80) 1943 Pat. 280 (280) : 22 Pat. 278.

[See also (1) Calcutta High Court Civil Rules and Orders Vol. I, Rule 638 (A) (3); (2) Madras Government Notification No. 358, dated 11th October 1921, (Fort St. George Gazette, pp. 1008-1011); (3) Bombay Government Notification No. 590 dated 22nd September 1921, (Bombay Government Gazette, pp. 2271 to 2274); (4) U.P. Government Notification No. M 6001X-501, dated 25th March 1942; (5) Govt. of India Notification No. 4344-S.R. dated 6-10-1893.)]

[2] An order under O. 21 R. 68 H of the Civil P. C. as amended by the Patna High Court, has the force of a decree and is not one under S. 47 of the Code. (Vol. 80) 1943 Pat. 280 (280) : 22 Pat. 278.

[3] An appeal against an order refusing to execute a decree against the surety of the judgment-debtor has been held to be governed by this Article. (02) 1902 Pun. Re. No. 72 p. 261 (264).

4. Order regarding restitution under S. 144 Civil P. C. (1) Where under S. 85 of the Act the provincial Governments have directed that the fee payable on appeals from orders under S. 47 of the Civil P. C. shall be limited to the amount chargeable as a fixed fee under this article appeals from orders regarding restitution would be chargeable under this Article, inasmuch as such orders fall under S. 47 of the Code. (Vol. 10) 1928 Mad. 270 (271, 272) \* (Vol. 12) 1925 Pat 577 (580) : 4 Pat 294. \* (Vol. 5) 1918 Cal 385 (385, 386). \* (Vol. 15) 1928 Lah. 143 (144). \* (Vol. 14) 1927 Lah. 635 (636).

[But see (Vol. 17) 1930 Lah. 24 (25). \* (Vol. 12) 1925 All: 137 (138) : 47 All. 98. \* (Vol. 24) 1937 Cal. 152 (155) : I L R (1937) 1 Cal. 637 (DB). \* (Vol. 28) 1941 Nag 313 (316) : I L R (1941) Nag 662 (DB). (Overruling (Vol. 9) 1922 Nag 62 : 18 Nag L R 15). \* (Vol. 26) 1939 Rang 32 (34) : 1938 Rang L R 635 (DB). \* (Vol. 17) 1930 Rang 241 (242, 243) : 8 Rang 271.]

5. Order under Order 21 Rule 50 (2) :—[1] An appeal from an order under O. 21, R. 50 (2), Civil P C is governed by Sch. I, Art. 1 and not by this art.

cla. Vol 26) 1939 Sind 161 (163) : I L R (1939) Kar 589 (FB). \* (Vol. 21) 1934 Lah 958 (959) : 15 Lah 898 (DB). (Letters Patent Appeal from (Vol. 17) 1930 Lah 825 affirming that decision). \* (Vol. 20) 1933 Cal 546 (547) : 60 Cal 530 \* (Vol. 4) 1917 Low Bur 179 (179) : 8 Low Bur Rul. 300 (DB).

6. Final decree in mortgage suit :—[1] An appeal from a final decree under O. 34, Civil P C must bear *ad valorem* court-fee. (Vol. 15) 1928 Nag 146 (147). \* (Vol. 7) 1920 Bom 101 (101). \* (Vol. 2) 1915 Oudh 121 (121) : 18 Oudh Cas. 114 (DB). \* (13) 35 All. 476 (478) (FB).

[2] Even where an appeal from a final decree under Order 34, Civil P. C., is based on the ground that the appellant ought to have been given further time to pay the mortgage-money, the appeal will have to be stamped with *ad valorem* court-fee as an appeal from a decree. (Vol. 18) 1931 Nag 1 (4) (FB). (7 Nag L R 41 overruled; 35 All 476; (Vol. 7) 1920. Bom 101; (Vol. 15) 1928 Rang 1946 Rang 285; (Vol. 14) 1927 Pat 46 : 5 Pat 721 relied on).

[3] No appeal lies from an order allowing an application for final decree. The appeal in such a case should be stamped *ad valorem* as an appeal from a decree. (Vol. 21) 1934 Mad 198 (198) : 57 Mad 437 (DB). (Dissenting from (Vol. 17) 1930 Mad 20 : 53 Mad 155) \* (Vol. 15) 1928 Rang 194 (195) : 6 Rang 285 (DB) \* (Vol. 12) 1925 Oudh 102 (102) : 27 Oudh Cas 225 (DB).

[4] If the order is one refusing to extend time for payment of mortgage-money and directing the drawing up of a final decree, the appeal from such an order will come under this article. (Vol. 15) 1928 Nag 333 (335) : 25 Nag L R 175.

[See also (Vol. 2) 1915 Oudh 121 (121) : 18 Oudh Cas 114 (DB)].

[5] An appeal against an order rejecting an application for final decree must bear *ad valorem* court-fee. (Vol. 7) 1920 All 145 (147) (DB) \* (08) 12 Cal WN 1028 (1029) (DB).

7. Order under O. 34, R. 6 of the Civil P. C.—

[1] An appeal from decree under O. 34, R. 6 must be stamped *ad valorem*. (Vol. 8) 1916 All 357 (358).

[2] An appeal from an order refusing to pass a personal decree under O. 54, R. 6 does not fall under this article. (Vol. 5) 1918 All 97 (97) : 40 All 558 (DB) \* (Vol. 26) 1941 Pat 68 (68) (DB).

**CENTRAL PROVINCES**

In the third column for the words "eight annas" opposite cl. (a) the words "one rupee" and for the words "two rupees" opposite cl. (b) the words "four rupees" were substituted.

—Central Provinces Act XVI of 1935. [21-5-1935.]

**MADRAS**

(1) The following was substituted for the entry in the first column of the article:—

"Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under S. 47 or S. 144 of the Code of Civil Procedure, 1908 and is presented."

(2) The words "one rupee" were substituted for the words "Eight annas" in the third column against the entry in clause (a) of the second column of the article.

—Madras Act V of 1922. [30-3-1922; 17-4-1922.]

**ORISSA**

(1) For the entry in the first column the following entry was substituted:

"Memorandum of appeal when the appeal is from an order inclusive of an order determining any question under S. 47 or S. 144 of the Code of Civil Procedure and is presented."

(2) In the third column for the words "Eight annas" and "Two rupees" the words "One rupee" and "Four rupees" were respectively substituted.

—Orissa Act V of 1939. [31-10-1939.]

**Sch. II, Art. 11 (contd.)**

[But see (Vol 23) 1936 Rang 352 (353)].

**8. Order of remand.**—[1] This article applies to an appeal from an order of remand. (Vol 20) 1938 Oudh 191 (192); 8 Luck 676 (DB) \* ('99) 21 All 178 (180) \* ('80) 1880 Pun Re No. 6 p. 16 (16) (DB).

[2] Where the lower Court decides the case on the merits and the appellate Court, reversing the decision on the merits, remands the case, an appeal from the appellate decision will not come under this article. (Vol 6) 1919 Pat 478 (479) (*Ad valorem* court-fee to be paid) \* (Vol 4) 1917 Pat 100 (101); 3 Pat L Jour 99 (DB) \* ('08) 5 All L Jour 545 (546) (DB).

**9. Appeal against decree on award.**—[1] An appeal against a decree on an award will not come under this article. (Vol 18) 1926 Lah. 403 (408).

**10. Order in probate proceedings.**—[1] An order granting or refusing probate or letters of administration is a decree or order having the force of a decree for the purpose of this article. (1911) 21 Mad L Jour 481 (481) (DB) \* ('13) 35 All 448 (450) (DB).

[But see (Vol 25) 1938 Rang 141 (144): 1938 Rang L R 72.

**11. Order relating to mesne profits.**—[1] Mesne profits left to be ascertained subsequently—Decree passed thereafter for the amount found to be due—Appeal from the decree will not come under this article. ('87) 18 Pat. L Tim 864 (866).

[2] Where the amount of mesne profits was left to be ascertained by the executing Court, the order of the executing Court ascertaining the amount and directing its payment was held to fall under S. 47 of the Civil P. C., and under the Government Notifications under S. 35 of the Act an appeal from such an order was held chargeable under this article. (Vol 25) 1938 Bom 820 (321).

[But see ('24) 79 Ind Cas 906 (906) (Pat.)]

[8] An appeal from order rejecting an application under O. 20, R. 12 Civil P. C., asking for an inquiry into mesne profits and for an order for the payment of such profits, falls under this article. (Vol 26) 1939 Mad 667 (669).

[But see (Vol 5) 1918 Pat 628 (624): 3 Pat L Jour 101 (DB) \* (Vol 18) 1931 All 588 (589) (DB) (*Ad valorem* fee is payable)].

**12. Memorandum of cross-objections.**—[1] The article does not apply to cross-objections. (Vol 8) 1921 Cal 55 (58).

**13. Orders under Special and Local Acts.**—

[4] Appeal against order imposing fine under S. 81 of

the Lunacy Act, 1912, is governed by this article (Vol 21) 1934 Lah 853 (853).

[2] Schedule II, Art. 11 as amended in Madras applies to an appeal filed under R. 9 of the rules framed under Madras Agriculturists' Relief Act, IV of 1938. (Vol 28) 1941 Mad 639 (640): 1 L R (1941) Mad 935 (DB).

[3] Order under S. 5 (1) of the U. P. Agriculturists' Relief Act—Appeal from the order falls under this Article. (Vol 25) 1938 All 50 (51): 1 L R (1938) All 181 (DB).

[4] An order passed under S. 12 of the U. P. Agriculturists' Relief Act has the force of a decree. (Vol 31) 1944 Oudh 118 (114). \* (Vol 25) 1938 All 14 (16): 1 L R (1937) All 949 (DB).

[5] An appeal against order awarding compensation made by a Commissioner under the Workmen's Compensation Act is governed by Art. 11. (Vol 31) 1944 Oudh 83 (84): 19 Luck 460.

[But see ('36-48) Tax Dec (Nag) 88 (89, 90)].

[6] An appeal against order of District Judge under S. 214 of the Indian Companies Act, VI of 1882 was held to be governed by this article. ('95) 17 All 288 (240, 241).

[7] Appeal from order under S. 58 of the Indian Companies Act (VI of 1882) was held to be governed by this article. ('86) Bom P J 214.

[8] An executable order made under the Companies Act, and enforceable under S. 199 of that Act as a decree, is not an order having the force of a decree. (Vol 32) 1945 Lah 146 (149) (FB).

[9] An order of a special Judge passed under S. 18 of the U. P. Encumbered Estates Act does not have the force of a decree. (Vol 28) 1941 All 168 (168): 1 L R (1941) All 328 \* (Vol 26) 1939 Oudh 48 (44): 14 Luck 344 (DB).

[10] An order of a special Judge passed under S. 14 of the U. P. Encumbered Estates Act is a decree. (Vol 25) 1938 All 97 (98): 1 L R (1938) All 280 (FB) \* (Vol 24) 1937 Oudh 501 (502) (DB).

[But see (Vol 28) 1941 Oudh 60 (61): 16 Luck 158 (DB)]

[11] A memorandum of appeal against an order rejecting an application for leave for Letters Patent Appeal is governed by this article. (Vol 16) 1929 Cal 575 (576): 46 Cal 462.

[12] On an application for payment of compensation money made to a District Judge under S. 18 of the Land Acquisition Act, he ordered the parties to seek redress in Civil Court. It was held that the order was not a decree and the appeal against it was governed by this article. (Vol 5 Cal W N 321 (324) (DB).

**PUNJAB**

In the third column of the article :

- (1) For the words "Eight annas" opposite clause (a) in the second column the words "One rupee" were substituted.
- (2) For the words "Two rupees" opposite clause (b) in the second column the words "Four rupees" were substituted.
- Punjab Act VII of 1922. [23-11-1922.]

**UNITED PROVINCES**

For Art. 11 the following article was substituted, viz.,

"11. Memorandum of appeal when the appeal is not from a decree or order having the force of a decree and is presented —	(a) to any Civil Court other than a High Court or to any Revenue Court or Executive Officer other than a Commissioner of the division or Chief Controlling revenue or executive authority ;	Twelve annas.
	(b) to a Commissioner of the division ;	Two rupees.
	(c) to a High Court or to a Chief Controlling Executive or Revenue Authority.	Three rupees.

—U. P. Act II of 1936 [2-4-1936] Act IX of 1941 [19-6-1941] and Act III of 1943. [1-9-1943.]

**12. Caveat**

...

**Five rupees.****Provincial Amendments****ASSAM**

Above the words "five rupees" where they occur in the third column opposite Arts. 12 and 13 the words "ten rupees" were inserted opposite Art. 12 and the bracket between Arts. 12 and 13 in the second column was omitted.

—Assam Act XIV of 1936. [2-12-1936.]

**BENGAL**

Above the words "five rupees" where they occur in the third column opposite Arts. 12 and 13 the words "ten rupees" were inserted opposite Art. 12 and the bracket between Arts. 12 and 13 in the second column was omitted.

—Bengal Act IV of 1922. [29-3-1922.]

**BIHAR**

"Ten rupees" were substituted for "five rupees" as proper fees shown against the article.

—Bihar and Orissa Act II of 1922. [21-8-1922.]

**BOMBAY**

For Art. 12 the following article was substituted :

"12. Caveat.	When the amount or value of the property involved does not exceed two thousand rupees.	Five rupees.
	When the amount or value of the property involved exceeds two thousand rupees.	Ten rupees."

—Bombay Act II of 1932. [30-3-1932.]

**MADRAS**

The words "ten rupees" were substituted for the words "five rupees" in the third column of the article.

—Madras Act V of 1922. [30-3-1922; 17-4-1922.]

**ORISSA**

In the third column for the words "five rupees" the words "ten rupees", were substituted.

—Orissa Act V of 1939. [31-10-1939.]

**SIND**

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

**UNITED PROVINCES**

The bracket opposite the article was omitted and the following article was substituted for the original :

"12. Caveat.	Where the amount or value of the property in respect of which the caveat is lodged—	
	(a) does not exceed five thousand rupees.	Five rupees.
	(b) exceeds five thousand rupees.	Ten rupees."

—U. P. Act II of 1936. [2-4-1936.]

**Sch. II, Art. 11 (contd.)**

[18] A declaration as to the amount due is appealable under S. 38 (8) of Bengal Money Lenders Act as if it were a decree—Such appeal is governed by Sch. II, Art. 17 and not by this article. (Vol 81) 1944 Cal 280 (231).

[14] Court-fee on an appeal from an order under S. 11, Central Provinces Money-Lenders Act is payable as on a miscellaneous appeal under S. 47 Civil P. C. ('86-48) Tax Dec (Nag) 26 (27).

[15] An appeal from an award by the arbitrator under S. 19, Defence of India Act, fixing the amount

of compensation payable to the claimant is governed by this Article (Vol 82) 1945 Bom 348 (350).

**Schedule II, Article 12—Note 1.**

[1] Fee prescribed for ordinary application (under Sch. II, Art. 1) would be sufficient on application in which a person intimates his intention of opposing application for probate. (Vol 4) 1917 Cal 311 (311) (DB).

[See however (' 82) 10 Cal L R 550 (550) (DB).]

13. Application under Acta No. X of 1859, S. 26 or ... | Five rupees.  
 bBengal Act No. VI of 1862, S. 9, or cBengal Act No. VIII |  
 of 1869, S. 37.

- [a] Act X of 1859 was *repealed* by the Bengal Tenancy Act, 1835 (VIII of 1835), in those portions of the Lower Provinces to which that Act extends and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure Act, 1879 (Ben. Act I of 1879), now *repealed* by the Chota Nagpur Tenancy Act, 1908 (Ben. Act VI of 1908) in the Province of Agra by Act XVIII of 1873; and in the Central Provinces, by the Central Provinces Tenancy Act, 1883 (IX of 1883).
- [b] Bengal Act VI of 1862 was *repealed* by the Bengal Tenancy Act, 1885 (VIII of 1885), so far as it affected those portions of the Lower Provinces to which that Act extends; and in the Chota Nagpur Division (except Manbhum and the Tributary Mahals) by the Chota Nagpur Landlord and Tenant Procedure Act, 1879 (Ben. Act I of 1879), (now *repealed* by the Chota Nagpur Tenancy Act, 1908, (Ben. Act VI of 1908).
- [c] Bengal Act VIII of 1869 was *repealed* by the Bengal Tenancy Act, 1885 (VIII of 1885).

#### Provincial Amendments.

##### ASSAM

Above the words "Five rupees" where they occur in the third column opposite Arts. 12 and 13, the words "ten rupees" were *inserted* opposite Art. 12 and the bracket between Arts. 12 and 13 in the second column was *omitted*. — Assam Act XIV of 1936. [2-12-1936].

##### MADRAS

The article was *omitted*.— Madras Act V of 1922.

[30-3-1922; 17-4-1922].

##### UNITED PROVINCES

The bracket opposite the article was *omitted*.— U. P. Act II of 1936.

[2-4-1936].

14. Petition in a suit under the Native Converts' ... | Five rupees.  
 Marriage Dissolution Act, 1866.

#### Provincial Amendments.

##### BIHAR

"Ten rupees" were *substituted* for "Five rupees" as proper fees shown against the article.— Bihar and Orissa Act II of 1922. [21-8-1922].

##### BOMBAY

In the third column, for the words, "Five rupees" the words "Ten rupees" were *substituted*.— Bombay Act II of 1932. [30-3-1932].

##### ORISSA

In the third column, for the words, "Five rupees" the words "Ten rupees" were *substituted*.— Orissa Act V of 1939. [30-10-1939].

##### SIND

The amendments made in article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1933.

##### UNITED PROVINCES

The brackets opposite the article were *omitted* and in the third column for the words "Five rupees" the words "seven rupees eight annas" were *substituted*. — U. P. Act II of 1936. [2-4-1936]

15. [Repealed by Act V of 1908].

16. [Repealed by Act VI of 1889, S. 18.(1)].

17. Plaint or memorandum of appeal in each of the following suits :—

(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court :

Ten rupees.

(ii) to alter or cancel any entry in a register of the names of Proprietors of revenue-paying estates:

Ten rupees.

#### Schedule II, Article 17 (General)—Note 1.

[1] This article does not apply to cross-objections. (Vol 20) 1933 Oudh 528 (529) : 9 Luck 406 (DB) \* (Vol 12) 1925 All 119 (119) : 47 All 89 \* (Vol 10) 1923 Oudh 44 (44) : 35 Oudh Cas 275 (DB) \* (Vol 5) 1913 All 185 (186) : 40 All 93 \* (Vol 5) 1913 Pat 145 (145) : 8 Pat L Jour 197.

[But see (Vol 21) 1934 All 728 (729) : 57 All 151].

[2] In suits mentioned in this article the value of the subject-matter is not relevant for computation of court-fees. (Vol 3) 1916 Mad 859 (858) : 83

Mad 602 (DB) \* ('08) 85 Cal 202 (207) : 85 Ind App 22 (PO).

#### Schedule II, Article 17 (i)—Note 1.

[1] A summary decision is the decision of a Court which hears and determines the matter, but does not finally conclude the parties. ('70) 5 Beng L R 16 (166) (FB).

[See (Vol 27) 1940 Cal 215 (317) (DB) (The definition of 'Summary decision' in 5 Beng L R 162 (F I accepted).

(iii) to obtain a declaratory decree where no consequential relief is prayed :

(iv) to set aside an award :

(v) to set aside an adoption :

(vi) every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.

} Ten rupees

#### Provincial Amendments.

#### ASSAM

(1) The words "ten rupees" in the third column opposite the article and the bracket opposite to that article in the second column were *omitted*.

(2) In the third column opposite entries (i), (ii), (iv) and (vi) the words "fifteen rupees" were *inserted* and opposite entries (iii) and (v) the words "twenty rupees" were *inserted*.

— *Assam Act XIV of 1936*. [2-12-1936].

#### BENGAL

(1) The words "ten rupees" in the third column and the bracket opposite to the article in the second column were *omitted* : In the third column opposite entries (i), (ii), (iv) and (vi) the words "fifteen rupees" were *inserted* and opposite entries (iii) and (v) the words "twenty rupees" were *inserted*.

— *Bengal Act IV of 1922*. [29-3-1922].

(2) After entry (v) the following entry was *inserted*, viz.—

"VA. for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property if the plaintiff is in possession of the property of which he claims to be a coparcener or co-owner.

Fifteen rupees.

— *Bengal Act VII of 1935*. [2-5-1935].

#### Sch. II, Art. 17 (i) (*contd.*)

[2] A suit under O. 21 R. 63 of the Civil Procedure Code is governed for purposes of court-fees by this clause. ('08) 35 Cal 202 (206) : 35 Ind App 22 (PC). (Reversing 31 Cal 511) \* (Vol 28) 1941 Cal 28 (29) \* (Vol 28) 1941 Pat 174 (175) (DB) \* (Vol 26) 1939 Pat 571 (572) : 18 Pat 323 (DB) \* (Vol 20) 1933 Mad 439 (440) : 56 Mad 716.

[3] A suit under O. 21, R. 63 would only come under this clause though it seeks, under S. 53 of the Transfer of Property Act, to avoid a deed of transfer executed by the judgment-debtor. (Vol 21) 1934 Rang 332 (333) : 12 Rang 670.

[But see ('94) 16 All 308 (310) (FB)].

[4] Suit by unsuccessful decree-holder under O. 21, R. 63, Civil P. C. with a prayer that declaration be made that he will be entitled to execute the decree. The prayer does not alter its character to bring it within this clause. (Vol 12) 1925 Pat 44 (46, 47) : 3 Pat 795 \* ('94) 16 All 308 (310) (FB) (2 All 720 dissented from).

[5] Suit by defeated claimant.—The clause applies though sale has taken place in execution of the decree. (Vol 10) 1923 Pat 152 (152).

[6] Suit by defeated claimant.—Delivery of possession made in pursuance of the decree does not take it out of this clause. (Vol 28) 1941 Pat 174 (175) (DB).

[7] Even if the objector plaintiff also asks for possession, the suit is governed by this clause. ('86) 10 Bom 610 (613) (FB).

[8] The mere fact that the judgment-debtor is made a party to the suit cannot alter the nature of the suit. (Vol 20) 1933 All 249 (250) : 55 All 315 (FB) (17 All 69 not approved).

[But see (Vol 2) 1915 Mad. 591 (591) 17 All 69 followed] \* ('94) 16 All 308 (310) (FB) (There are two declarations in such a case)].

[9] Objector suing under O. 21 R. 63 Civil P. C. making judgment-debtor party alleging that he is only the ostensible owner and seeking possession as

[10] A suit under O. 21 R. 103 is a suit to set aside a summary decision and falls under this clause even though plaintiff prays for possession. (Vol 25) 1938 Nag 300 (302) : I L R (1939) Nag 422 \* (Vol. 32) 1945 All 111 (112, 113) : I L R (1945) All 68.

[But see (1900) 22 All 384 (386) (DB) (S. 7 (IV) (c) applied)].

[11] Where a suit under O. 21 R. 103 relates to two separate adverse orders against the plaintiff he is liable to pay a separate amount of Rs. 10 in respect of each order impeached. (Vol 22) 1935 Sind 129 (131).

[12] Suit under Civil P. C., O. 21 R. 103, for avoiding summary order of executing Court under O. 21 R. 98—Suit in substance not one for avoiding decree passed in favour of decree-holders but only to secure reversal of order passed by executing Court—Case is governed by Sch. 2 Art. 17 (i) and not S. 7 (iv-A)—Moreover special provisions in Sch. 2, Art. 17 (i) override S. 7 (iv-A) (Vol 32) 1945 All 111 (112, 113) : I L R (1945) All 68.

[13] Summary decision by a Revenue Court—The fact that the party was given an opportunity to object or that he has a right of appeal to a superior Revenue Court will not take away its summary character. (Vol 27) 1940 Cal 215 (217) (DB).

[14] Suit for declaration that plaintiff is nearest reversionary heir filed before summary decision under S. 194, Succession Act—Plaint amended after summary decision without adding a prayer to set aside that decision. Suit held not one under Sch. II, Art. 17 (i). (Vol 33) 1946 Pat 403 (410, 411) (DB).

[15] The clause applies to appeals in the suits mentioned therein. (1880) 4 Bom 515 (523) (FB).

[16] The clause will apply whether appeal is by a plaintiff whose suit is dismissed or by a defendant against whom the suit is decreed. But if the nature of the dispute in the appeal is different, this clause will not apply. (Vol 26) 1939 Pat 571 (572) : 18 Pat 323 (DB).

[17] In (Vol 5) 1918 Pat 605 (606) it was held as follows :

**BIHAR**

After the words "memorandum of appeal" in the first column the words "or of cross-objection" were inserted, and "fifteen rupees" were substituted for "ten rupees" as proper fees shown in the third column

— *Bihar and Orissa Act II of 1922.* [21-8-1922].

**BOMBAY**

For Article 17 the following article was substituted, viz.:—

"17. Plaint or memorandum of appeal in each of the following suits:—	
i. to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court :	When the amount or value of the property involved does not exceed five hundred rupees. Ten rupees.
ii. to alter or cancel any entry in a register of the names of Proprietors of Revenue-paying estates : and	When the amount or value of the property involved exceeds five hundred rupees. Fifteen rupees.
iii. to obtain a declaratory decree or order where no consequential relief is prayed :	Fifteen rupees.
iv. to set aside alienation ;	Fifteen rupees.
v. to set aside a decree or award ;	When the amount or value of the property involved does not exceed five hundred rupees. Ten rupees.
vi. to set aside an adoption ; and	When the amount or value of the property involved exceeds five hundred rupees. Fifteen rupees.
vii. any other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.	Fifteen rupees.

*Bombay Act II of 1932.* [30-8-1932]

**Sch. II, Art. 17 (i) (contd.)**

from attachment, the Court-fee payable would be Rs. 10 under Sch. II, Art. 17 (i) of the Court-fees Act.

If the ostensible owner is also joined as a party to the suit and a prayer is made against him for recovery of possession, the Court-fee payable would be calculated upon the value of the property in accordance with S. 7 (iv) (c) of the Act.

If in such a suit the plaintiff is defeated and he prefers an appeal he must pay Court-fees on the value of the property plus Rs. 10 for declaration.

If the plaintiff succeeds in the suit and an appeal is preferred by the defendants, the Court-fee to be paid must be regulated by consideration of the relief sought in appeal.

If the attaching creditor appeals the Court-fee payable would be Rs. 10 only.

If the ostensible owner appeals, the Court-fee payable would be the Court-fee calculated upon the value of the property. (Vol. 5) 1918 Pat 605 (606) (DB).

**SCH II ART. 17 (ii)—Note 1.**

[1] A suit against the government for settlement of fair rent by altering or setting aside the rents already settled is one for a declaratory decree with the consequential relief of amendment of the Record of Rights. (1910) 11 Cal L Jour 158 (158) (D B).

[2] A suit for declaration of title to certain land and that the Record of Rights is null and void is a suit for declaration with consequential relief. (29) 118 Ind Cas 357 (358) (DB) (Cal).

[3] Suit for declaration of title to certain land with prayer for cancellation of mutation is one for declaration as the latter relief is redundant. (Vol. 23) 1936 Pesh 140 (141) (DB) \* (36-43) Tax Dec. (Nag) 66 (66, 67).

decision of a Revenue Court within the meaning of Art. 17 (i) of Sch. II. (82) 4 Mad 204 (208) (DB).

[5] A suit under S. 25-A of the Sonthal Pargana Settlement Regulation, III of 1872 is governed by clauses (i) and (iii) of this Article 6. (Vol 23) 1931 Pat 171 (172) : 15 Pat 386.

**SCH. II ART. 17 (iv)—Note 1.**

[1] Fixed fee of Rs. 10 for a suit to set aside an award irrespective of the value of the subject-matter involved. (08) 35 Cal 202 (207) : 35 Ind App 25 (PC), (Awards may be of value of Rs. 10 or of value of Rs. 1,00,000).

[2] The word "award" in this clause, applies to awards in arbitration proceedings. (Vol 11) 192 Mad 84 (84) \* (08) 35 Cal 202 (207) : 35 Ind App 2 (P C).

[3] Any judicial decision which is not a decree might be considered an award for the purpose of this clause. (Vol 28) 1941 Nag 248 (244) : I L R (1942) Nag 686 (Award by Registrar of Co-operative Societies is an award within this clause). \* (Vol 28) 194 Nag 249 (245) : I L R (1942) Nag 686 (Such a suit might fall under S. 7 (iv) (c) or under Art. 17 (iv) Sch. II, which is a specific provision for setting aside award. According to the rule of construction of fiscal statutes, that which presses least heavily on the subject, viz., Art. 17 (iv) Sch. II in the present case was to be adopted).

[4] Suit for declaration that an award is *ultra vires* must be treated as one to set it aside under this clause. (Vol 11) 1924 Sind 105 (110) : 17 Sind L. 15 \* (Vol 28) 1941 Nag 248 (245) : I L R (1942) Nag 686.

**SCH. II ART. 17 (v)—Note 1.**

[1] There can only be a suit for a declaration that an alleged adoption is invalid or never in fact took place, and not to set aside the adoption. (86) 13 C 308 (312, 320) : 13 Ind App 84 (PC).

**CENTRAL PROVINCES**

For Art. 17 the following article was substituted viz.,

- "17. Complaint or memorandum of appeal in each of the following suits:
- (i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court.
  - (ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates;
  - (iii) to obtain a declaratory decree where no consequential relief is prayed;
  - (iv) to set aside an award;
  - (v) to set aside an adoption;
  - (vi) Every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act.

Fifteen rupees.

Fifteen rupees".

—Central Provinces Act XVI of 1935. [21-5-1935.]

**MADRAS**

"17. Complaint or memorandum of appeal in a suit:

- (i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court;
- (ii) to alter or cancel any entry in a register of the names of proprietors of revenue paying estates;
- (iii) for relief under S. 14 of the Religious Endowments Act, 1863 or under S. 91 or 92 of the Code of Civil Procedure, 1908.

Fifteen rupees.

Fifteen rupees.

Fifty rupees.

—Madras Act V of 1922. [30-3-1922; 17-4-1922]

**Sch. II, Art. 17 (v) (contd.)**

which the question of title arises incidentally but is a declaratory suit for title first and for the consequential relief of possession. (Vol 10) 1923 Pat 100 (101) : 5 Pat L Jour 339 (DB).

[3] A suit for cancellation of a deed of adoption should be stamped, whether under Sch. II, Art. 17 cl. (v) or under S. 7 (iv) (c), at Rs. 10 only. (Vol 24) 1937 Rang 400 (400).

[4] Defendant left in possession of immovable property left by his adoptive father under a solenama between him and plaintiff—Plaintiff seeking to set aside the solenama cannot frame the suit as for setting aside the adoption under this clause. (74) 22 Suth W R 338 (340) (DB).

[5] Rule framed in Central Provinces under S. 9, Suits Valuation Act, that a declaratory suit in respect of adoption should be valued at Rupees four hundred and in cases where title to property is affected at the then value of such property for the purposes of that Act as well as this Act, though is inconsistent with this clause, has the force of law. (Vol 17) 1930 Nag 73 (85, 86) (DB) \* (Vol 17) 1930 Nag 20 (20) (DB) \* (Vol 7) 1920 Nag 233 (234) (Suit for declaration that defendant was never adopted falls under this rule—Court-fee on the value of property to be paid).

[6] Under Article 17-A, cl. (iii), Sch. II of the Madras Amendment a fixed fee of fifteen rupees is payable when the plaint is presented to or the memorandum of appeal is against the decree of a District Munsif's Court or the City Civil Court, when the plaint is presented to or the memorandum of appeal is against the decree of a District Court or a Sub-Court, a fixed fee of one hundred rupees is payable if the value for purposes of jurisdiction is less than ten thousand rupees but a fixed fee of five hundred rupees is payable if it is ten thousand rupees or upwards (Vol 22) 1935 Mad 279 (279) (DB).

[7] In valuing, for purposes of jurisdiction, a suit for a declaration that an adoption is invalid, computation has to be made of the value of the interest that would be lost to the alleged adopted son if the adoption be declared invalid. (Vol 15) 1928 Mad 1294 (1295) : 52 Mad 340 \* (88) 6 Mad 192 (196) (DB) (Valuation to be made of interest that will be

[8] The calculation is to be made on the market-value of the property which is affected by the declaration being granted or refused. (Vol 22) 1935 Mad 279 (279) (DB) \* (Vol 15) 1928 Mad 1294 (1296) : 52 Mad 340.

[9] Suit for declaration that plaintiff's husband was adopted to one R—The subject-matter of the suit was the fact and validity of adoption—But held that suit was for a declaration without consequential relief. (Vol 14) 1927 Mad 563 (563, 565) : 50 Mad 646 (DB) \* (Vol 12) 1925 Mad 1223 (1224) (DB) (Suit for setting aside adoption and alienation).

[10] A suit for a declaration that a deed of adoption executed by a widow should not, after her death or re-marriage, affect the reversionary rights of the plaintiff is not a suit for "annulling an adoption" within the meaning of the rule framed by the Lahore High Court but one for a declaration that the adoption should not affect plaintiff's reversionary rights. (Vol 12) 1925 Lah 229 (230) : 5 Lah 440 (DB).

[11] The fee prescribed under Art. 17 Cl. (5) of Sch. 2 of Court-fees Act (as amended) in Bombay is not an *ad valorem* fee, and hence S. 8, Suits Valuation Act will not apply. (Vol 32) 1945 Bom 474 (475) (DB) (Dissenting from (Vol 31) 1944 Bom 316 (318) : I L R (1944) Bom 352).

**SCH. II ART. 17 (vi)—Note 1.**

[1] For the applicability of this clause the suit must be incapable of valuation in terms of money and must not be otherwise provided for by this Act. These conditions must co-exist. (Vol 30) 1943 Pat 438 (438) \* (Vol 22) 1935 Cal 338 (342, 343) (DB) \* (28) 29 Pun L R 322 (327) \* (12) 39 Cal 906 (911, 913) (DB).

[2] Where an approximate valuation is possible this clause will not apply. (Vol 29) 1942 Mad 152 (153) (Decree granting certain sum but refusing first charge—Suit capable of valuation). \* (Vol 28) 1941 Mad 313 (314) \* (Vol 22) 1935 Cal 338 (342, 343) (DB) (Restitution of conjugal rights can be valued) \* (Vol 21) 1934 Cal 786 (787) (DB) \* (Vol 19) 1932 All 406 (407) : 54 All 608. \* (Vol 29) 1942 Mad 247 (249) : I L R (1942) Mad 455 (Administration suit for accounts and for divisions of Assets of a Mohomedan lady amongst the heirs). \* (Vol 22) 1935 Bom



## ORISSA

For Art. 17 of the following two articles were substituted:

"17. *Plaint or memorandum of appeal in a suit,—*

(i) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any Revenue Court;

Fifteen rupees.

(ii) to alter or cancel any entry in a register of the names of the proprietors of revenue-paying estates;

Fifteen rupees.

(iii) for relief under S. 14 of the Religious Endowments Act, 1863, or under S. 91 or S. 92 of the Code of Civil Procedure, 1908.

Fifteen rupees.

17A. *Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided for by this Act.*

When the plaint is presented to, or the memorandum of appeal is against the decree of—

(a) a Revenue Court in the district of Ganjam or Koraput;

Ten rupees

(b) any other Revenue Court, or any Court of a District Judge, Subordinate Judge or Munsif.

Fifteen rupees if the value for purposes of jurisdiction does not exceed four thousand rupees, one hundred rupees if such value exceeds four thousand rupees."

—Orissa Act V of 1939. [31-10-1939]

## SIND

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938. [31-3-1938]

## UNITED PROVINCES

(1) For the words "ten rupees" in the third column the words "fifteen rupees were substituted and the following proviso was added, viz.,

"Provided that in a suit filed before a High Court under its original jurisdiction the fee chargeable under this article shall be one hundred rupees."

U. P. Act II of 1936. [2-4-1936]

(2) In clause (1) in column 1 a comma was put after the word "order" and the following was inserted there after, viz.,

"not being one passed under O. 21 Rr. 60, 61 or 62 of the Code of Civil Procedure."

(8) In clause (iii) in column 1 the following words were added at the end, "in any suit not otherwise provided for by this Act."

(4) The following sub-articles were deleted, viz.,

(iv) to set aside an award;

(v) to set aside an adoption;

—U. P. Act XIX of 1938. [9-1-1939]

## Sch. II, Art. 17 (vi) (contd.)

decree imposing on him personal liability—Appeal falls under this clause) \* (Vol 31) 1944 Mad 252 (253) (Subject-matter of suit for specific performance of Contract in exchange for immovable property is capable of valuation). \* (Vol 27) 1940 Oudh 183 (184); 15 Luck 321 (Subject-matter in dispute in appeal is to the manner in which decree is to be enforced—Valuation not possible). \* (Vol 28) 1941 Lah 265 (267) (DB) (Suit for declaration that deed of relinquishment executed by manager of gurdwara void and for its cancellation—If cancellation the substantial relief, this clause applies). \* (Vol 27) 1940 All 521 (523) (Suit by Mahomedan heir for partition—Widow setting up possession in lieu of dower in priority to heir's right to partition—Appeal by widow to retain possession should bear fixed fee). \* (Vol 9) 1922 Nag 264 (265) (Suit for declaration that certain sum was settled as maintenance and for amendment of document to that effect—Suit held not under Art. 17 (vi)—Suit held fall under S. 7 (iv) (c).)

[8] Though otherwise a suit might have fallen under this clause, where the plaintiff had himself stated the value of the relief, the suit must be treated as capable of valuation (Vol 19) 1932 Pat 819 (821) \* ('84) 10 Cal 599 (603) (DB).

[4] Where the proceedings cannot be regarded as a suit, this article will not apply. ('96) 28 Cal 723 (720) (FB).

[5] Court-fee on petition under Indian and Colonial Divorce Jurisdiction Acts 1926 and 1940 is payable.

able under this article and not under Art. 20 c Art. 1 (d) of Sch. II. (Vol 38) 1946 Pat 401 (402) 25 Pat 194.

[But see (Vol 22) 1935 All 791 (791): 58 All 259].

[6] Applicability of this clause to appeals—see notes on S. 7 (iv) (c).

[7] Appeal from preliminary decree in suit for accounts. See notes on S. 7 (iv) (f).

[8] Suit for partition—See notes on S. 7 (iv) (b).

[9] Applicability of this clause to non-objection. See notes on Sch. I Art. 1.

[10] Suit to reduce rate of maintenance awarded under decree is governed by this article (Vol 32) 194 Nag 264 (266): 1 L R (1945) Nag 661 (DB) (See note on section 7 (ii).)

[11] A suit under S. 92 of the Civil Procedure Code is one falling under this clause irrespective of the actual reliefs asked for in the suit. (1910) 12 Cal Jour 211 (214) (DB) \* ('96) 19 All 60 (68) (DB) \* ('91) 21 All 200 (208) (DB) \* (Vol 30) 1943 Oudh 186 (190), 18 Luck 738 (DB) \* (Vol 11) 1924 Mad 882 (883) (Vol 12) 1925 Mad 722 (722) \* (Vol 28) 1941 Lah 5 (101): 1 L R (1941) Lah 451 (FB).

[See however (Vol 24) 1937 Mad 591 (598) \* ('06) 5 All 112 (120) (DB).]

[12] The principle underlying *ad valorem* court-fees is that the value of the action must mean the value to the plaintiff ('08) 35 Cal 202 (207): 35 Ir App 22 (PC).

**Articles 17a, 17b.****MADRAS**

"17A. Plaint or memorandum of appeal in a suit—

- (i) to obtain a declaratory decree where no consequential relief is prayed;
- (ii) to set aside an award;
- (iii) to obtain a declaration that an alleged adoption is invalid or never in fact took place or to obtain a declaration that an adoption is valid.

When the suit is presented to or the memorandum of appeal is against the decree of—

- (a) District Munsif's Court or the City Civil Court.
- (b) District Court or a Sub-Court.

Fifteen rupees.

Hundred rupees if the value for purposes of jurisdiction is less than ten thousand rupees or upwards."

"17B. Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act.

When the plaint is presented to or the memorandum of appeal is against the decree of—

- (a) Revenue Court.
- (b) District Munsif's Court or the City Civil Court.
- (c) District Court or a Sub-Court.

Ten rupees.

Fifteen rupees.

One hundred rupees."

*Madras Act V of 1922. [30-3-1922; 17-4-1922.]*

**Sch. II, Art. 17 (vi) (contd.)**

[13] Where a suit is brought against a person as representing a trust and on such suit being decreed, the defendant appealing from the decree should be assessed in the ordinary way. ('84) 10 Cal 389 (382).

[14] In the following cases not falling under S. 92 the facts of each case determined the court-fee payable;

(a) Temple as such has no market value and suit for recovery and possession of it falls under this clause. (Vol 11) 1924 Mad 19 (22): 46 Mad 782 (FB) \* (1988) 40 Pun L R 113 (115) (Held that in respect of other properties productive of income *ad valorem* court-fee was payable on the value thereof)\*. (Vol 16) 1929 Rang 184 (186): 7 Rang 245 (FB) \* (Vol 25) 1988 Nag 481 (482).

(b) Suit by shebait for possession of trust properties including alienated properties—Held suit did not fall under this clause but under S. 7 (v). (Vol 19) 1932 All 598 (595): 54 All 869.

(c) Suit for declaration that certain properties belonged to family deities and for removal of defendants as shebait, for framing a scheme of management, injunction and accounts—Suit held under S. 7 (iv) c. (Vol 28) 1941 Cal 509 (512) (DB).

(d) Prayer in suit by trust (temple) for declaration that property is debutter and for perpetual injunction—Latter relief held consequential falling under S. 7 (iv)(c)—This article held not applicable. (Vol 25) 1988 Cal 865 (865): I L R (1988) 2 Cal 64 (DB).

(e) In suit for removal of muttawalli and appointment of new one—Prayer for recovery of amounts annually paid to descendants of Wakif—Claim for annual receipts capable of valuation and this article held not applicable. (Vol 29) 1942 Sind 160 (161): I L R (1942) Kar 424.

(f) Suit for removal of muttawalli and appointment of plaintiff in his place falls under this clause. (Vol 25) 1988 Oudh 20 (21) (DB).

(g) Suit by newly appointed manager against expelled manager merely for the possession of the office falls under this clause (Vol 26) 1989 Mad 776 (779).

(h) Suit between rival managers for right to manage trust property—Beneficial ownership of temple not denied—No question of possession under

S.7(v)—Court-fee under this clause held sufficient. (Vol 31) 1944 All 279 (281): I L R (1944) All 564 (DB).

[15] Suit under S. 14 of the Religious Endowments Act 1863 is governed by this clause. ('88) 11 Mad 149n (149n) (DB).

[16] Application to modify or set aside the decision of the Board of Commissioners under S. 84 of Madras Hindu Religious Endowments Act II of 1927 is governed by Art. 17 (1) of Madras Court-fees (Amendment) Act which is the same as clause (1) of this article and not this clause. (Vol 17) 1930 Mad 892 (898): 53 Mad 266 (FB) (Vol 16) 1929 Mad 52 overruled.

[17] Suit for possession of property intended to be dedicated—Mere intention not tantamount to dedication—Court-fee should be paid *ad valorem* (Vol 25) 1988 Rang 303 (304).

[18] Madras High Court-fee Rules, 1925, do not exempt the payment of fees in respect of suits under S. 92, G P C (Vol 14) 1927 Mad 940 (943).

[19] Suit to remove karnavan of a Malabar Tarwad and appoint plaintiff in his stead is governed by this clause. ('88) 11 Mad 266 (268) (DB) \* ('82) 4 Mad 314 (314) (DB).

[20] A suit for restitution of conjugal rights will fall under Sch. II, Art 17 (vi) as being a suit of which the subject-matter is not capable of being valued in terms of money. ('11) 33 All 767 (770).

[But see (Vol 22) 1935 Cal 388 (341, 343).]

[21] A suit for the appointment of a Receiver will be liable only to a fixed court-fee of Rs. 10 under this clause. ('05) 27 All 406 (410) (DB) \* (Vol 33) 1946 All 392 (392, 393): I L R (1946) All 455 (DB).

[22] Where the appointment of the Receiver is asked for along with a declaration and as consequential on the declaration, the suit will come under S. 7 (iv) (c) and will be chargeable with an *ad valorem* court-fee according to the amount at which the plaintiff values the relief in his plaint. (Vol 4) 1917 Mad 184 (184).

[23] A suit to compel the registration of a document under S. 77 of the Registration Act is governed by this clause. (Vol 11) 1924 Cal 600 (605) (DB) \* ('95) 1895 Pun Re No. 21 page 88 (88) (DB) \* ('82) 9 Cal 515 (516) \* ('08) 31 Mad 89 (91) (12 Mad L Jour 87 impliedly overruled).

18. Application under section 326 of the Code of Civil Procedure.<sup>a</sup> | ... | Ten rupees.

[a] See now the Code of Civil Procedure, 1908 (Act [V] of 1908), Sch II which has been repealed by Arbitration Act, 1940 (10 [X] of 1940), S. 49 and Sch. III. [effective from 1-7-1940].

#### Provincial Amendments.

#### ASSAM

For the words and figures "section 326 of the Code of Civil Procedure" the words and figures "paragraph of the second schedule to the Code of Civil Procedure, 1908" were substituted.—

Assam Act XIV of 1936. [2-12-1936]

#### BENGAL

For the words and figures "section 326 of the Code of Civil Procedure" the words and figures "paragraph 17 of the second schedule to the Code of Civil Procedure, 1908" were substituted.—

Bengal Act XI of 1935. [5-5-1935]

#### BIHAR

"Fifteen rupees" were substituted for "ten rupees" as proper fees shown against the article.

—Bihar and Orissa Act II of 1922. [21-8-1922]

#### BOMBAY

The following article was substituted :

"18. Application—

(a) under paragraph 17 of the second schedule to the Code of Civil Procedure, 1908 :

(b) for probate or letters of administration or for revocation thereof under the Indian Succession Act, 1925 ;

(c) for a certificate under Part X of the Indian Succession Act, 1925, or Bombay Regulation VIII of 1827 ;

(d) for opinion or advice or for discharge from a Trust, or for appointment of new Trustees, under S. 34, 72, 73 or 74 of the Indian Trusts Act, 1882 ;

(e) for the winding up of a Company, under S. 166 of the Indian Companies Act, 1913 ;

(f) under Rule 56 of Order 21 of the Code of Civil Procedure, 1908, regarding a claim to attached property.

When the amount or value of the Estate does not exceed two thousand rupees.

When it exceeds two thousand rupees, but does not exceed five thousand rupees.

When it exceeds five thousand rupees.

When the amount or value of property exceeds five hundred rupees.

Ten rupees.

Two rupees.

Five rupees.

Ten rupees.

Ten rupees.

Ten rupees.

Ten rupees."

—Bombay Act II of 1932. [30-8-1932]

#### CENTRAL PROVINCES

For Art. 18 the following article was substituted, viz.,

"18. Applications—

(a) Under paragraph 17 or 20 of the second schedule to the Code of Civil Procedure, 1908 (V of 1908).

(b) For opinion or advice or for discharge from a trust or for appointment of new trustees under Ss. 34, 72, 73 or 74 of the Indian Trusts Act, 1882 (II of 1882).

(c) For the winding up of a company under S. 166 of the Indian Companies Act, 1913 (VII of 1913).

(d) For the appointment or declaration of a person as guardian of the person or property or both of minors under the Guardians and Wards Act, 1890 (VIII of 1890).

One rupee.

Ten rupees.

Ten rupees.

Two rupees."

C. P. Act XVI of 1935. [21-5-1935]

#### MADRAS

"18. Applications under S. 14 or S. 20 of the Arbitration Act, 1940, for a direction for filing an award or for an order for filing an agreement.

When presented to a District Munsiff's Court or the City Civil Court,  
When presented to a District Court or a Sub-Court.

Fifteen rupees.

One hundred rupees."

—Madras Acts V of 1922. [30-8-1922; 17-4-1922] and XVII of 1945. [11-9-1945]

#### Sch. II, Art. 17 (vi) (contd.)

[24] Suit by purchaser for possession of his vendor's share in joint family property.—Article 17 (vii) applies. (Vol 82) 1945 Bom 386 (387) (DB).

Schedule II Article 17A (Madras). [1] Suit to obtain declaratory decree, without consequential relief instituted in Munsiff's Court transferred to Sub Court—Appeal against the decree must bear a Court-fee of Rs. 100 and not Rs. 15. (Vol 27) 1940 Mad 384 (384): I L R (1940) Mad 646 (DB).

[2] Suit for declaration that document is void Allegation that material page of document fraudulently abstracted by defendant—Suit is not for cancellation—Article applies. (Vol 38) 1946 Mad 343, 344 (Madras Amendment).

Sch. II Art 18—Note 1. [1] An application under S. 38, Arbitration Act, to set aside an award falls under Sch II, Art 1 (b) and not under article (as amended in Madras) (Vol 38) 1946 I 104 (104).

**ORISSA**

In Art. 18 for the entry in the first column the following entry was *substituted* :

"Application under paragraph 17 or paragraph 20 of the second schedule to the Code of Civil Procedure, 1908."

In the third column for the words "ten rupees" the words "fifteen rupees" were *substituted*.

*Orissa Act V of 1939.* [31-10-1939.]

**SIND**

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, 1 of 1938.

**UNITED PROVINCES**

For Art. 18 the following was *substituted*, viz.,

18. Application under the Arbitration Act, 1940.

Fifteen rupees\*

—*U. P. Act S. II of 1936.* [2-4-1936] and *V of 1944.* [15-10-1944.]

**Article 18A****BENGAL**

After Art. 18 the following article was *inserted*, viz.,

"18A. Application under paragraph 20 of the second schedule to the Civil Procedure Code, 1908, to file an arbitration award, and memorandum of appeal from a decree passed under paragraph 21 of the said schedule."

Fifteen rupees."

*Bengal Act VII of 1935.* [2-5-1935.]

19. a[Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908.]

...

Ten rupees.

[a] *Substituted* by the Code of Civil Procedure (Act 5 [V] of 1908) S. 155 and Sch. IV for "Agreement under S. 328 of the same Code."

**Provincial Amendments****BIHAR**

"Fifteen rupees" were *substituted* for "ten rupees" as proper fees shown against the article.

—*Bihaar and Orissa Act II of 1922.*

[21-8-1922.]

**BOMBAY**

For the words "ten rupees" in the third column the words "twenty rupees" were *substituted*.

—*Bombay Act II of 1932.*

[30-8-1932.]

**CENTRAL PROVINCES**

For Art. 19 the following article was *substituted* :

"19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908, O. 36 R. 1."

Fifteen rupees."

—*C. P. Act XVI of 1935.*

[21-5-1935.]

**MADRAS**

"19. Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."

{ When presented to a District Munsif's Court or the City Civil Court. Fifteen rupees.  
When presented to a District Court or a Sub-Court. One hundred rupees."

—*Madras Act V of 1922.*

[30-3-1922; 17-4-1922.]

**ORISSA**

In the third column for the words "ten rupees" the words "fifteen rupees" were *substituted*.

—*Orissa Act V of 1939.*

[31-10-1939.]

**SIND**

The amendments made in the article by the Bombay Finance Act, II of 1932, continue in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

**UNITED PROVINCES**

For the word "ten" in the third column the word "fifteen" was *substituted*.

—*U. P. Act II of 1936.*

[2-4-1936.]

20. Every petition under the Indian Divorce Act, except petitions under section 44 of the same Act, and every memorandum of appeal under section 55 of the same Act.

...

Twenty rupees

**Provincial Amendments****BIHAR**

After the words "memorandum of appeal" in the first column the words "or of cross-objection" were *inserted*, and "thirty rupees" were *substituted* for "twenty rupees" as proper fees shown against the article.

—*Bihaar and Orissa Act II of 1922.*

[21-8-1922.]

Sch. II Article 20. Note 1.

was leviable. (Vol 18) 1981 Lah 1 (1): 12 Lah 266 (SB).

[1] Petitioner in petition for dissolution of marriage claimed Rs. 500 as damages from co-res-

[2] Wife obtains decree of divorce under Indian

**BOMBAY**

In the third column the words "thirty rupees" were substituted for "twenty rupees."

--Bombay Act II of 1932. [30-8-1932]

**ORISSA**

In the third column for the words "twenty rupees" the words "thirty rupees" were substituted.

--Orissa Act I of 1939. [31-10-1939]

**SIND**

The amendment made in the article by the Bombay Finance Act, II of 1932, continues in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

**UNITED PROVINCES**

For the word "twenty" in the third column the word "thirty" was substituted.

--U. P. Act II of 1936. [2-4-1936]

**21. Plaintiff or memorandum of appeal under the Parsi Marriage and Divorce Act, 1865.** . . . . . Twenty rupees.

[a] Substituted by Parsi Marriage and Divorce Act, 1936 (LIII) of 1936.]

**Provincial Amendments****BIHAR**

At the words "memorandum of appeal" in the first column the words "or of cross-objection" were inserted and in the third column "thirty rupees" were substituted for "twenty rupees" as proper fees shown against the article.

--Bihar and Orissa Act II of 1922. [21-8-1922]

**BOMBAY**

In the third column for the words "twenty rupees" the words "thirty rupees" were substituted.

--Bombay Act II of 1932. [30-3-1932]

**ORISSA**

In the third column for the words "twenty rupees" the words "thirty rupees" were substituted.

--Orissa Act V of 1939. [31-11-1939]

**SIND**

The amendment made in the article by the Bombay Finance Act, II of 1932, continues in force in the Province of Sind by virtue of S. 2 of the Bombay Finance (Sind Amendment) Act, I of 1938.

**UNITED PROVINCES**

For the word "twenty" in the third column the word "thirty" was substituted.

--U. P. Act II of 1936. [2-4-1936]

**Article 22****BENGAL**

After Article 21 the following article was inserted:

"22. Petition--

- (a) questioning the election of any person as a Municipal Commissioner, when presented to a District Judge under S. 36 of the Bengal Municipal Act, 1932;
- (b) questioning the election of any person as a member of a District Board or Local Board, when presented to a District Judge under S. 181B of the Bengal Local Self-Government Act of 1896 to decide disputes relating to such elections.

. . . . . Fifteen rupees."

--Bengal Act VII of 1935. [2-5-1935]

[a] Substituted by Bengal Act III of 1941, S. 8.

[15-5-1941]

**PUNJAB**

The following new article with the corresponding entry in the third column was added to the first column of Sch. II:

"22. Plaintiff or memorandum of appeal in a suit by a reversioner under the Punjab Customary Law for a declaration in respect of an alienation of ancestral land. . . . . Twenty rupees."

--Punjab Act VII of 1922. [23-11-1922]

**Sch. II, Art. 20 (contd.).**

alimony—Appeal against order of attachment of salary of husband—This article applies and memorandum of appeal is chargeable with court-fee of Rs. 20. (36-43) Tax Dec. (Nag) 90 (91).

[3] Application under S. 16, Divorce Act, for making *decree nisi* absolute—Court-fee is chargeable under this article. (Vol 83) 1946 Oudh 76 (76) (DB) (U.P. Amendment).

[4] Petition for divorce presented to High Court under Indian and Colonial Divorce Jurisdiction Act of 1926—This article held not applicable. (Vol 22) 1935 All 791 (791); 58 All 259 \* (Vol 83) 1946 Pat 401 (402); 25 Pat 194 (Sch II, Art. 17 (6) applies).

**Sch. II, Article 22 (Punjab Amendment) Note 1.**

[1] Suit by next heir to set aside alienation by female holder having customary life-interest in estate

--Suit held not "in respect of alienation of ancestral land" within the meaning of this article and is governed by article (iii) Schedule II. (Vol 15) 1928 Lah 221 (223) (The term "ancestral land" in Art 22 means land in respect of which, in order to enable the plaintiff to succeed, it is necessary for him to prove that the land was ancestral in other words, that it was held by the common ancestor himself and the last male owner).

[See however (Vol 26) 1939 Lah 58 (59); I L B (1938) Lah 450. (It is the allegation in the plaint that determines the fee—Where the allegation is that the land is ancestral and hence the widow cannot alienate it, Art 22 applies).]

[2] Mortgage with possession—Subsequent mortgage on same conditions simply increasing amount secured does not constitute second alienation and stamp of Rs. 20 is sufficient. (Vol 20) 1933 Lah 382 (389).

## UNITED PROVINCES

The following article was *substituted* for the new Art. 22 which was added at the end of Sch. II by United Provinces Act, III of 1933 :

- "22. Election petition questioning the election of any person. { (a) As a member of a Local Board other than a notified or town-area committee. One hundred rupees.  
(b) As a member of a notified or town-area committee. Ten rupees."

—United Provinces Act XIX of 1938. [9-1-1939]

SCHEDULE III<sup>a</sup>

(See Section 19 I.)

FORM OF VALUATION (TO BE USED WITH SUCH MODIFICATIONS, IF ANY,  
AS MAY BE NECESSARY.)

IN THE COURT OF

(*Re. Probate of the Will of*  
, deceased.)

(*or administration of the property and credits of*

I

{ solemnly affirm  
make oath }

and say that I am the executor (or one of the executors or one of the next-of-kin) of , deceased, and that I have truly set forth in Annexure A to this affidavit all the property and credits of which the abovenamed deceased died possessed or was entitled to at the time of his death, and which have come, or are likely to come, to my hands.

2. I further say that I have also truly set forth in Annexure B all the items I am by law allowed to deduct.

3. I further say that the said assets, exclusive only of such last-mentioned items, but inclusive of all rents, interest, dividends and increased values since the date of the death of the said deceased, are under the value of

[a] This schedule was *inserted* by the Court-fees Amendment Act, 1899 (11 [XI] of 1899) S. 3. The original Schedule III was repealed by the Repealing Act, 1870 (14 [XIV] of 1870).

## ANNEXURE A

VALUATION OF THE MOVABLE AND IMMOVABLE PROPERTY  
OF , DECEASED.

	RS.	A.	P.
Cash in the house and at the banks, household goods, wearing-apparel, books, plate, jewels, etc. (State estimated value according to best of Executor's or Administrator's belief.)			
Property in: Government securities transferable at the Public Debt Office. (State description and value at the price of the day; also the interest separately, calculating it to the time of making the application.)			
Immovable property consisting of (State description, giving, in the case of houses, the assessed value, if any, and the number of years' assessment the market-value is estimated at, and, in the case of land, the area, the market-value and all rents that have accrued.)			
Leasehold property (If the deceased held any leases for years determinable, state the number of years' purchase the profit rents are estimated to be worth and the value of such, inserting separately arrears due at the date of death and all rents received or due since that date to the time of making the application.)			
Property in public companies (State the particulars and the value calculated at the price of the day; also the interest separately, calculating it to the time of making the application.)			

	Rs.	A.	P.
Policy of insurance upon life, money lent out on mortgage and other securities, such as bonds, mortgages, bills, notes and other securities for money. (State the amount of the whole; also the interest separately, calculating it to the time of making the application)			
Book debts (Other than bad)			
Stock in trade (State the estimated value, if any)			
Other property not comprised under the foregoing heads (State the estimated value, if any.)			
TOTAL			
Deduct amount shown in Annexure B not subject to duty.			
NET TOTAL			

### ANNEXURE B SCHEDULE OF DEBTS, ETC.

	RS.	A.	P.
Amount of debts due and owing from the deceased, payable by law out of the estate			
Amount of funeral expenses			
Amount of mortgage incumbrances			
Property held in trust not beneficially or with general power to confer a beneficial interest.			
Other property not subject to duty.			
TOTAL			

### APPENDIX THE BIHAR COURT-FEES (WAR SURCHARGE AMENDMENT) ACT, 1943. (BIHAR ACT IX OF 1943.)

[11th November 1943.]

*An Act to amend the Court-fees Act, 1870, in its application to Bihar.*

Whereas it is expedient, for purposes connected with the war and the period immediately after the war, to enhance the fees payable under the Court-fees Act, 1870, as amended from time to time in its application to Bihar;

And whereas the Governor of Bihar has, by the Proclamation, dated the 3rd November, 1939, issued by him under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, therefore, in exercise of the powers so assumed to himself, the Governor of Bihar is pleased to enact as follows:

*Short title, extent, commencement and duration.* 1. (1) This Act may be called the Bihar Court-fees (War Surcharges Amendment) Act, 1943.  
(2) It extends to the whole of the Province of Bihar.

(3) It shall come into force and shall cease to have effect on such dates as the Provincial Government may, by notification in the official Gazette, appoint in this behalf.

*Enhancement of court-fees.* 2. Notwithstanding anything contained in the Court-fees Act, 1870, as amended from time to time in its application to Bihar (hereinafter called the principal Act), all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the Schedule annexed hereto.

*Application of the principal Act.* 3. The provisions of the principal Act, save in so far as they are inconsistent with anything herein contained, shall apply to this Act.

#### THE SCHEDULE

(See section 2.)

Rates of surcharge on fees leviable under the Court-fees Act, 1870, as amended from time to time in its application to Bihar.

1. On every whole rupee
2. (a) On a fraction of a rupee up to and including 4 annas
- (b) On a fraction exceeding 4 annas, but not exceeding 8 annas

Rates of surcharge.  
Four annas per rupee

One anna

Two annas

## Rates of surcharge.

- (c) On a fraction exceeding  
8 annas, but not exceeding  
12 annas

Three annas

- (d) On a fraction exceeding  
12 annas, but less than 16 annas

Four annas

Example.—On a court-fee of Rs. 20-6-0, the surcharge will be:  $(20 \times 4) - 2$  annas, i.e., Rs. 5-2-0, and the total court-fee chargeable will be Rs. 25-8-0.

## THE BOMBAY INCREASE OF COURT-FEES ACT, 1943.

(Bombay Act No. XV of 1943.)

[29th December 1943.]

*An Act to provide for an increase in court-fees leviable under the Court-fees Act, 1870, in its application to the Province of Bombay.*

Whereas it is expedient to provide for an increase in court-fees leviable under the Court-fees Act, 1870 (VII of 1870), in its application to the Province of Bombay.

And whereas the Governor of Bombay has assumed to himself under the Proclamation dated the 4th November 1939 issued by him under S. 93 of the Government of India Act, 1935 (25 & 26 Geo. v, ch. 42), all powers vested by or under the said Act in the Provincial Legislature;

Now, therefore, in exercise of the said powers the Governor of Bombay is pleased to make the following Act:

*Short title, extent, commencement and duration.* 1. (1) This Act may be called the Bombay Increase of Court-fees Act, 1943.  
(2) It extends to the whole of the Province of Bombay.  
(3) It shall come into force on the 1st day of January 1944 and shall cease to have effect on such date as the Provincial Government may by notification in the Official Gazette appoint in this behalf.

*Increase of court-fees.* 2. Notwithstanding anything contained in the Court-fees Act, 1870 (VII of 1870), in its application to the Province of Bombay (hereinafter called the principal Act), all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the schedule annexed hereto.

*Provisions of principal Act so far as not inconsistent to apply for purposes of this Act.* 3. The provisions of the principal Act shall, save in so far as they are inconsistent with anything herein contained, apply for the purposes of this Act.

## SCHEDULE

## Rates of Surcharge

Amount of Court-fee.	Rate of surcharge As.
(1) A fraction of a rupee not exceeding four annas	1
(2) A fraction of a rupee exceeding four annas but not exceeding eight annas	2
(3) A fraction of a rupee exceeding eight annas	3
(4) A whole	4

## THE CENTRAL PROVINCES AND BERAR FINANCE (ANNUAL) ACT, 1947.

(C. P. &amp; Berar Act III of 1947.)

[14th March 1947.]

*An Act further to extend the operation of the Court-fees the Central Provinces and Berar (Amendment) Act, 1935, the Central Provinces and Berar Indian Stamp (Amendment) Act, 1939, and the Central Provinces and Berar Tobacco Act, 1939, and to provide for the continuance of the levy of surcharge on court-fees and stamp duties and to provide for the continuance of the enhanced court-fees in certain appeals and revisions.*

Whereas it is expedient further to extend the operation of the Court-fees (Central Provinces and Berar Amendment) Act, 1935, the Central Provinces and Berar Indian Stamp (Amendment) Act, 1939, and Central Provinces and Berar Tobacco Act, 1939, and to provide for the continuance of the levy of surcharge on court-fees and stamp duties and to provide for the continuance of enhanced court-fees in certain appeals and revisions;

It is hereby enacted as follows:

## Part I—Preliminary.

*Short title, extent, commencement and duration.* 1. (1) This Act may be cited as the Central Provinces and Berar Finance (Annual) Act, 1947.

(2) It extends to the whole of the Central Provinces and Berar.

(3) Sections 1, 2, 6 and 9 shall come into force at once and the remaining sections shall come into force on the 1st day of April 1947.



## Part II - Court-Fees.

*Extension of the operation of Central Provinces and Berar Act No. 11 of 1935.* 2. In the section (a) inserted in the Court-fees (Central Provinces and Berar Amendment) Act, 1935, for the figures "1935", the figures "1948" shall be substituted.

*Levy of surcharge on court-fees.* 3. (1) The amount of the payable court-fees under the Court-fees Act, 1870, as amended by the Court-fees (Central Provinces and Berar Amendment) Act, 1935, shall be subject to a levy of a surcharge of thirty-three and one-third per cent.

(2) In levying the amount of surcharge under sub-section (1), if there is a fraction of an anna, the fraction shall be remitted.

*Explanation.*—Where in respect of any document or proceeding fees are prescribed by the Court-fees Act, 1870, as amended by the Court-fees (Central Provinces and Berar Amendment) Act, 1935, such minimum fees shall be subject to the surcharge.

*Enhanced Court-fees.* 4. Notwithstanding anything contained in the Court-fees Act, 1870, as amended by fees in certain the Court-fees (Central Provinces and Berar Amendment) Act, 1935, or section 3 of this appeals and revision. Any person who pays or pays for the documents specified in column (1) of the Schedule shall, in respect of the documents hereinafter specified, be that specified in the corresponding entry in column (2) of the foot:

## SCHEDULE

Description of the document. (1)	Amount of fee. (2) Rs.
Memorandum of appeal presented to the High Court when the amount or value of the subject-matter in dispute does not exceed Rs. 50 or, application or petition by way of appeal or revision presented to the High Court otherwise than under section 20 of the Provincial Small Cause Court Act, 1906, or section 16 of the Berar Small Cause Courts Law, 1905, or section 115 of the Code of Civil Procedure, 1908.	5
Memorandum of appeal presented to any Civil Court other than the High Court when the amount or value of the subject-matter in dispute does not exceed Rs. 50.	5
Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree and is presented to a Civil Court other than the High Court.	2
Application or petition by way of appeal or revision when presented to a Criminal Court other than the High Court.	2
Memorandum of appeal or application or petition by way of revision when presented	
(a) to the Revenue Tribunal, or Financial Commissioner, or a Chief Controlling Executive or Revenue Authority;	5
(b) to a Commissioner of Division, or the Settlement Commissioner, or Excise Commissioner;	3
(c) to a Revenue Court or Officer, or, an Executive Officer, not otherwise provided for under Clauses (a) and (b).	2

*Exceptions.* No application or petition by way of appeal or revision from any judgment or order of a Criminal Court when presented to the High Court or a Criminal Court by any person who is undergoing a sentence in jail, shall be chargeable with any fee.

*Application of the provisions of Act VII of 1870, as amended, to this Act.* 5. The provisions of the Court-fees Act, 1870 as amended by the Court-fees (Central Provinces and Berar Amendment) Act, 1935, shall have in so far as they are inconsistent with anything herein contained, apply to this Act.

## THE ORISSA COURT-FEES (SURCHARGE) AMENDMENT ACT, 1945.

(Orissa Act IV of 1945.)

[7th September 1945.]

*An act to amend the Court-fees Act, 1870, in its application to Orissa.*

Whereas it is expedient to enhance the fees payable under the Court-Fees Act, 1870, in its application to Orissa in the manner hereinafter appearing;

And whereas the Governor of Orissa has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, therefore, the Governor of Orissa, in exercise of the powers so assumed to himself by the Proclamation aforesaid, hereby enacts as follows:

*Short title, extent, commencement, and duration.* 1. (1) This Act may be called the Orissa Court-Fees (Surcharge Amendment) Act, 1945.

(2) It extends to the whole of the Province of Orissa.

(3) It shall come into force and shall cease to have effect on such dates as the Provincial Government may, by notification in the official Gazette, appoint in this behalf.

*Enhancement of Court-fees.* 2. Notwithstanding anything contained in the Court-Fees Act, 1870 (hereinafter called the principal Act), in its application to Orissa, all fees leviable under the principal Act, shall be increased by a surcharge at the rates specified in the Schedule annexed hereto.

*Application of the principal Act.* 3. The provisions of the principal Act, save in so far as they are inconsistent with anything herein contained, shall apply to this Act.

### THE SCHEDULE

(See section 2.)

Rates of surcharge on fees leviable under the Court-Fees Act, 1870, in its application to Orissa.

	Rates of surcharge
1. On every whole rupee ... ..	Four annas per rupee
2. (a) On a fraction of a rupee up to and including 4 annas ...	One anna
(b) On a fraction exceeding 4 annas, but not exceeding 8 annas ... ..	Two annas
(c) On a fraction exceeding 8 annas, but not exceeding 12 annas ... ..	Three annas
(d) On a fraction exceeding 12 annas, but less than 16 annas ... ..	Four annas

Illustration.—On a court-fees of Rs. 20-6-0 the surcharge will be  $(20 \times 4) = 2$  annas, i.e., Rs. 5-2-0 and the total court-fee chargeable will be Rs. 25-8-0.

### THE COURT-FEES (UNITED PROVINCES SECOND AMENDMENT) ACT, 1943.

(U. P. Act No. VIII of 1943.)

[24th July 1943.]

*An Act further to amend the Court-Fees Act, 1870, in its application to the United Provinces.*

Whereas it is expedient, for purposes connected with the war and the period immediately after the war, to enhance the fees payable under the Court-fees Act, 1870, as amended from time to time in its application to the United Provinces:

And whereas by the proclamation, dated the 8th day of November, 1939, promulgated under S. 93 of the Government of India Act, 1935, the Governor of the United Provinces has assumed to himself all powers vested by or under the aforesaid Act in the Provincial Legislature:

And whereas the said Proclamation is still in force.

Now, therefore, the Governor in exercise of the powers aforesaid is pleased to make the following Act:

*Short title, extent, commencement and duration.* 1. (1) This Act may be called the Court-fees (United Provinces Second Amendment) Act, 1943.

(2) It extends to the whole of the United Provinces.

(3) It shall come into force on 1st August 1943, and shall cease to have effect on such date as the Provincial Government may by notification in the Provincial Gazette appoint in this behalf.

*Enhancement of court-fees.* 2. Notwithstanding anything contained in Court-fees Act, 1870, as amended from time to time in its application to the United Provinces (hereinafter called the Principal Act), all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the schedule annexed hereto.

3. The provisions of the principal Act, save in so far as they are inconsistent with anything herein contained, shall apply to this Act.

### SCHEDULE

Rate of surcharge on fees leviable under the Court-Fees Act of 1870, as amended from time to time in its application to the United Provinces.

	Rate of surcharge
1. On every whole rupee ... ..	4 annas per rupee
2. (a) On a fraction of a rupee up to and including 4 annas ...	1 anna
(b) On a fraction exceeding 4 annas but not exceeding 8 annas ...	2 annas
(c) On a fraction exceeding 8 annas but not exceeding 16 annas ...	3 annas

Example.—On a court-fee of Rs. 20-6-0 the surcharge will be  $(20 \times 4) = 2$  annas, i.e., Rs. 5-2-0 and the total court-fee chargeable will be Rs. 25-8-0.

**[THE] COURTS (COLONIAL) JURISDICTION ACT, 1874**  
(37 & 38 Vict., c. 27)

(30th June, 1874.)

*An Act to regulate the Sentences imposed by Colonial Courts where jurisdiction to try is conferred by Imperial Acts.*

[Preamble and enacting words.] *Repealed by 56 & 57 Vict., c. 54.*

*Short title.* 1. This Act may be cited for all purposes as the Courts (Colonial) Jurisdiction Act, 1874.

*Definition of the term "colony".* 2. For the purposes of this Act, the term "colony" shall not include any places within the United Kingdom, the Isle of Man, [the Channel Islands, British India or British Burma, but shall include] any plantation, territory, or settlement situate elsewhere within Her Majesty's dominions, and subject to the same local government and for the purposes of this Act all plantations, territories, and settlements under a central legislature shall be deemed to be one colony under the same local government.

[a] These words were substituted by A. O. (P) for the words "or the Channel Islands, but shall include such territories as may for the time being be vested in Her Majesty by virtue of an Act of Parliament for the Government of India, and".

*Application of Act to British India and British Burma.*

**2A.** This Act applies in relation to each Governor's Province and Chief Commissioner's Province of British India and to British Burma as it applies in relation to a colony.

[a] This section was inserted by A. O. (P).

*At trials in any colonial courts by virtue of imperial Acts, courts empowered to pass sentences as if crimes had been committed in the colony.*

3. When, by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the Court, and to no

other, anything, in any Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the Court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England.

**[THE INDIAN] CRIMINAL LAW AMENDMENT ACT, 1908.**

(Act XIV of 1908)

**CONTENTS**

**SECTIONS.**

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*[Repealed]*

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18. Continuance of association.

**SECTION 3—Note 1.**

1. The trial of a British seaman for an offence committed on a British ship on the high seas must be conducted under the Criminal P. O., though the offence charged must be an offence under the English

law. "In the case of *Reg. v. Mount*, L. R. 6 P. C. 288, a question arose not as to the nature of the offence but as to the amount of punishment that should be inflicted. All doubts on that point are now settled by 37 & 38 Vict., c. 27." (1894) 21 Cal 782 (784).

## THE SCHEDULE

[Repealed]

## STATEMENT OF OBJECTS AND REASONS

"Recent events have demonstrated that it is expedient to provide for the more speedy trial of anarchical offence and for the suppression of associations dangerous to the public peace. This Bill has been prepared to meet these objects. \* \* \*

Part II provides for the suppression of unlawful associations. Such persons as are members of or in any way assist an association which encourages or aids the commitment of acts of violence or intimidation, or of which the members habitually commit such acts, are made liable to punishment, and a severe

punishment is provided for persons managing or promoting such associations. Further the Governor-General in Council is empowered to declare certain associations to be unlawful, and the same penalties are provided for persons who after this declaration maintain their connection with them.

The Bill extends in the first instance to the provinces of Bengal and Eastern Bengal and Assam, and the Governor-General in Council is empowered to extend it to other provinces."

—Gazette of India, 1908, part IV page 203.

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

Amended by Act 23 of 1932.

—Adopted by A. O.

—Repealed in part and amended by Act 38 of 1920.

—Repealed in part by Act 5 of 1922.

[THE INDIAN] CRIMINAL LAW AMENDMENT ACT, 1908 (ACT XIV OF 1908.)<sup>a</sup>

[11th December, 1908.]

*An Act to provide for the more speedy trial of certain offences, and for the prohibition of associations dangerous to the public peace.*

WHEREAS it is expedient to provide for the more speedy trial of certain offences; and for the prohibition of associations dangerous to the public peace; It is hereby enacted as follows :—

[a] For statement of Objects and Reasons, see Gazette of India, 1908, Pt. IV, p. 203; and for Proceedings in Council, see *ibid.*, Pt. VI, p. 158.

Short title and extent.

1. (1) This Act may be called The Criminal Law Amendment Act, 1908.

(2) It extends to the Provinces of Bengal and of Eastern Bengal and Assam; but the <sup>a</sup>[Provincial Government of any other province] may, at any time, by <sup>b</sup>notification in the <sup>c</sup>[Official Gazette], extend the whole or any Part thereof to <sup>d</sup>[that Province].

<sup>e</sup>[(3) \* \* \* \* \*]

[a] The words "Local Government of any other Province" were substituted for "Governor-General in Council" by the Devolution Act, 1920, [38 [XXXVIII] of 1920], S. 2 and Sch. I and the words "Provincial Government" were substituted by A. O. for "Local Government".

[b] The Act has been extended under this provision to Bombay Presidency, see Gazette of India, Extraordinary, dated 4th January, 1910; Madras Presidency, the U. P., the Punjab, and the C. P., see *ibid.*, dated 13th January, 1910 and *ibid.*, 1910, Pt. I, p. 95; The Punjab, see Punjab Gazette Extraordinary, dated 23rd June, 1930; The N.-W. F. P., see N. W. F. P. Gazette Extraordinary, dated 17th December, 1921; The Province of Delhi, see Gazette of India, Extraordinary, dated 9th December, 1920; Ajmer-Merwara, see Gazette of India, 1930, Pt. II-A, p. 515; Coorg, see Coorg Gazette Extraordinary, dated 11th January, 1932.

It has also been declared to be in force in the Sonthal Parganas by notification under the Sonthal Parganas Settlement Regulation (3 [III] of 1872), S. 3 (3) (a), see Calcutta Gazette, 1909, Pt. I, p. 649; in the Khondmals District by the Khondmals Laws Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch.; and in the Angul District by the Angul Laws Regulation, 1936 (5 [V] of 1936), S. 3 and Sch.

[c] Substituted by Act 38 of 1920, S. 2 and Sch. I, for "Gazette of India".

[d] Substituted, *ibid.*, for "for any other Province".

[e] Sub-sec. (3) was repealed by the Indian Criminal Law Amendment Repealing Act, 1922 (5 [V] of 1922), S. 3.

## PART I

[Special Procedure]

Repealed by the Indian Criminal Law Amendment Repealing Act, 1922 (5 [V] of 1922), S. 3.

## PART II

## UNLAWFUL ASSOCIATIONS

Definitions.

15. In this Part—

(1) "association" means any combination or body of persons, whether the same be known by any distinctive name or not; and

(2) "unlawful association" means an association—

(a) which encourages or aids persons to commit acts of violence or intimidation or of



(2) Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

a [ (3) An offence under sub-section (1) shall be cognizable by the police and notwithstanding anything contained in the Code of Criminal Procedure, 1898, shall be non-bailable.]

[a] Inserted by the Criminal Law Amendment Act, 1932 (23 [XXIII] of 1932), S. 12.

a 17A. (1) The b [Provincial Government] may, by notification in the c[Official Gazette],  
*Power to notify and take possession of places used for the purposes of an unlawful association.* notify any place which in its opinion is used for the purposes of an unlawful association.  
*Explanation.*—For the purposes of this section “place” includes a house or building, or part thereof, or a tent or vessel.

#### Section 17 (contd.)

[11] Words “in any way assists the operations of any such association” cover acts which assist, even without the co-operation of such associations. (Vol 18) 1981 Bom 206 (207): 32 Cr L Jour 804 (DB).

[12] It is immaterial whether the person who renders help to an unlawful association has been authorised to do so or whether he acts purely on his own initiative. (Vol 13) 1926 Lah 357 (359): 7 Lah 348: 27 Cr L Jour 913 (DB).

[13] The mere display of a Congress flag over a shop, and refusal to take it down at the request of the police, does not amount to assisting the operations of an unlawful association and is not an offence under S. 17 (1). (Vol 20) 1933 All 95 (96): 34 Cr L Jour 22 \* (Vol 20) 1933 Cal 695 (695): 34 Cr L Jour 925 (DB).

[14] Publication of notice in a newspaper stating that meeting of an unlawful association is to take place and giving its time and place is assisting the promoters and amounts to offence under S. 17 (1). (Vol 18) 1931 Bom 206 (207, 208): 32 Cr L Jour 804 (DB).

[15] Where the accused reproduced in his newspaper an appeal to stop trading in foreign cloth made by a person describing himself as a president of the war council and he was charged under S. 17 (1) with assisting the operations of an unlawful association. Held: that the article did not advocate any unlawful action; it only expressed views on an economic question and no offence was made under S. 17 (1). (Vol 18) 1931 Bom 413 (415): 32 Cr L Jour 1158 (DB).

[16] The mere fact that at a conference, people were asked to join the Congress and boycott of British goods was preached and also the civil disobedience movement was promoted, does not make the conference identical with the Congress which has been declared unlawful and a person who merely presided at such a conference cannot be convicted under S. 17 (1) or (2) of the Criminal Law Amendment Act. (Vol 19) 1932 Lah 615 (616): 34 Cr L Jour 25.

[17] A person making a speech at a meeting of an unlawful assembly must be held to be assisting in promoting a meeting though the speech is not specially violent. (Vol 21) 1934 Cal 161 (162): 35 Cr L Jour 605.

[18] Where the accused was charged as a Jathadar or the leader or controller of a Jatha of the Akali Dal who had addressed meetings—appealing to the Sikhs to organise themselves into jathas and he admitted he was a Jathadar, it amounted to his pleading guilty to an offence under S. 17. (Vol 13) 1926 Lah 406 (407):

assisting meeting of an unlawful association (1) there must be an association already in existence and (2) it must be promoting or assisting to promote a meeting of the association. Urging people to form into Jathas is not promoting. (Vol 12) 1925 Lah 522 (522): 6 Lah 349: 26 Cr L Jour 1135.

[20] Exhorting Sikhs to enlist themselves for Shakhida Jathas and to go out collecting funds for a committee declared unlawful is not an offence under S. 17 (1) and 17 (2) but is an offence under S. 117 I P C. (Vol 13) 1926 Lah 115 (116): 26 Cr L Jour 1374.

[21] One who organizes or assists in organizing a meeting is also promoting or assisting to promote it. (Vol 13) 1926 Lah 405 (405): 7 Lah 357: 27 Cr L Jour 911 (DB).

[22] Accused exhorted people to hold Diwans and to take steps to establish independent State—On his departure from the place unlawful association was formed—Held, accused instigated the formation of the association and abetted it and his act therefore would come under S. 117 I P C (Vol 11) 1924 Lah 440 (443, 444): 5 Lah 1: 26 Cr L Jour 1352 (DB).

[23] The leader of a party who induces certain boys to take out and publicly exhibit Congress flags, and clothes and some cash were agreed to be given in lieu of services rendered, is guilty under S. 17 (2). (Vol 20) 1933 Lah 387 (388): 34 Cr L Jour 1178.

[24] A Police report that a certain person was assisting the volunteers by giving them shelter in his house was held not to make out a *prima facie* case of offence under S. 17 (2). (Vol 9) 1922 Cal 538 (539): 24 Cr L Jour 1 (DB).

[25] Where a Pleader assists and promotes a meeting of an unlawful association, for which he is convicted under S. 17 (2), his action is nothing short of an open and defiant violation of law; by such conduct he makes himself liable to action under S. 12, Legal Practitioners' Act. (Vol 21) 1934 Cal 808 (809) (DB).

[26] An association called “Akhil Bharat Prabhat Feri Sangh” was declared unlawful. A prabhat Feri procession was taken out singing political songs: Held, that the persons taking part in such a procession were assisting the operations of the association. (Vol 18) 1931 Bom 202 (202): 32 Cr L Jour 728 (DB).

[27] Where a person has been charged under S. 17 (1) Criminal Law Amendment Act, 1908 of picketing foreign cloth shops, and under S. 4 of Ordinance V of 1932 of molestation in respect of the said picketing and has been convicted under both the sections, it is illegal to award separate sentences in respect of each of the convictions. (Vol 20) 1933 Mad 337 (338): 34 Cr L Jour 277.

[28] An offence of abetment under S. 17 (1) can be

(2) The District Magistrate or in a Presidency town the Commissioner of Police, or any officer attached to him, may, by the District Magistrate or Commissioner of Police, as the case may be, may thereupon take possession of the notified place and evict therefrom any person found therein, and shall forthwith make a report of the taking possession to the Provincial Government]:

Provided that where such place contains any apartment occupied by a woman or children, reasonable time and facilities shall be afforded for their withdrawal with the least possible inconvenience.

(3) A notified place whereof possession is taken under sub-section (1) shall be deemed to remain in the possession of Government, unless the notification under Sub-section (1) in respect thereof remains in force.

[a] See 17A to 17E inserted by the Criminal Law Amendment Act, 1908 (XXIII of 1908), S. 13.

[b] See *Section 17A* of the "Criminal Law Amendment Act, 1908".

[c] See *Section 17A* of the "Criminal Law Amendment Act, 1908".

#### STATEMENT OF OBJECTS AND REASONS.

Sections 17A to 17E were inserted in this Act by section 13 of the Criminal Law Amendment Act, 1908. In their Report on that Act the Select Committee of the Council of the Government of India stated: "We have made extensive alterations in the enactments proposed by the Criminal Law Amendment Act, 1908, with the object of providing some sort of machinery for the hearing of appeals against an order of forfeiture. Mr. Jelliffe was of opinion that the possession of a notified place should be removed all together. We have decided that it should be retained, but that in respect of an unlawfully notified place, possession may be taken by the District Magistrate or Commissioner of Police instead of by the Local Government, should only be

ordered after an opportunity has been afforded to the owner of the property to show cause to the officer proposed to take possession. A judicial officer that has been appointed to hear appeals in the same way with respect to notified places, we have provided that the notified place should not be taken possession of and that the notified place should not be taken possession of before a judicial officer has been appointed to hear appeals in the same way with respect to notified places. We have also provided that information obtained from any person who may be made liable to be taken possession of a notified place should be made available to the officer who is to take possession of the notified place."

*Movable property found in a notified place.*

**17B. (1)** The District Magistrate, Commissioner of Police or officer taking possession of a notified place shall take possession of all movable property found therein, and shall make a list thereof in the presence of two respectable witnesses.

(2) If, in the opinion of the District Magistrate, or in a Presidency town the Commissioner of Police, any articles specified in the list are or may be used for the purposes of the unlawful association, he may proceed, subject to the provisions hereafter contained in this section, to order such articles to be forfeited to his High Majesty.

(3) All other articles specified in the list shall be delivered to the person whom he considers to be entitled to possession thereof, or if no such person is found, shall be disposed of in such manner as the District Magistrate or Commissioner of Police, as the case may be, may direct.

(4) The District Magistrate or Commissioner of Police shall publish, as nearly as may be in the manner provided in section 87 of the Code of Criminal Procedure, 1898, for the publication of a proclamation, a notice specifying the articles which it is proposed to forfeit and calling upon any person claiming that any article is not liable to forfeiture to submit in writing within fifteen days any representation he desires to make against the forfeiture of the article.

(5) Where any such representation is accepted by the District Magistrate or Commissioner of Police, he shall deal with the article concerned in accordance with the provisions of sub-section (3).

(6) Where any such representation is rejected, the representation, with the decision thereon, shall be forwarded to the District Judge, in the case of a decision by a District Magistrate, or, to the Chief Judge of the Small Cause Court, in the case of a decision by the Commissioner of Police, and no order of forfeiture shall be made until the District Judge or Chief Judge of Small Cause Court, as the case may be, has adjudicated upon the representation. Where the decision is not confirmed the articles shall be dealt with in accordance with the provisions of sub-section (3).

(7) In making an adjudication under sub-section (6) the procedure to be followed shall be the procedure laid down in the Code of Civil Procedure, 1908, for the investigation of

claims so far as it can be made to apply, and the decision of the District Judge or Chief Judge of the Small Cause Court, as the case may be, shall be final.

(8) If the article seized is livestock or is of a perishable nature, the District Magistrate or Commissioner of Police may, if he thinks it expedient, order the immediate sale thereof, and the proceeds of the sale shall be disposed of in the manner herein provided for the disposal of other articles.

[a] See the legislative note [a] to S. 17A *supra*.

### STATEMENT OF OBJECTS AND REASONS.

See under Section 17A.

*Trespass upon notified places.* <sup>a</sup> 17C. Any person who enters or remains upon a notified place without the permission of the District Magistrate, or of an officer authorised by him in this behalf, shall be deemed to commit criminal trespass.

[a] See the legislative note [a] to S. 17 *supra*.

*The relinquishment of property.* <sup>a</sup> 17D. Before a notification under sub-section (1) of section 17A is cancelled, the <sup>b</sup>[Provincial Government] shall give such general or special directions as it may deem requisite regulating the relinquishment by Government of possession of notified places.

[a] See legislative note a to S. 17A, *supra*.

[b] Substituted by A. O. for "Local Government".

*Power to forfeit funds of an unlawful association.* <sup>a</sup> 17E. (1) Where the <sup>b</sup> [Provincial Government] is satisfied, after such inquiry as it may think fit, that any monies, securities or credits are being used or, are intended to be used for the purposes of an unlawful association, the <sup>b</sup>[Provincial Government] may, by order in writing, declare such monies, securities or credits to be forfeited to His Majesty.

(2) A copy of an order under sub-section (1) may be served on the person having custody of the monies securities or credits, and on the service of such copy such person shall pay or deliver the monies, securities or credits to the order of the <sup>b</sup>[Provincial Government]:

Provided that, in the case of monies or securities, a copy of the order may be endorsed for execution to such officer as the <sup>b</sup> [Provincial Government] may select, and such officer shall have power to enter upon and search for such monies and securities in any premises where they may reasonably be suspected to be, and to seize the same.

(3) Before an order of forfeiture is made under sub-section (1) the <sup>b</sup>[Provincial Government] shall give written notice to the person (if any) in whose custody the monies, securities or credits are found of its intention to forfeit, and any person aggrieved thereby may within fifteen days from the issue of such notice file an application to the District Judge in a District or to the Chief Judge of the Small Cause Court in a Presidency-town, to establish that the monies, securities or credits or any of them are not liable to forfeiture, and if any such application is made, no order of forfeiture shall be passed in respect of the monies, securities or credits concerned until such application has been disposed of, and unless the District Judge or Chief Judge of the Small Cause Court has decided that the monies, securities or credits are liable to forfeiture.

(4) In disposing of an application under sub-section (3) the procedure to be followed shall be the procedure laid down in the Code of Civil Procedure, 1908, for the investigation of claims so far as it can be made to apply, and the decision of the District Judge or Chief Judge of the Small Cause Court, as the case may be, shall be final.

(5) Where the <sup>b</sup> [Provincial Government] has reason to believe that any person has custody of any monies, securities or credits which are being used or are intended to be used for the purposes of an unlawful association, the <sup>b</sup> [Provincial Government] may, by order in writing, prohibit such person from paying, delivering, transferring or otherwise dealing in any manner whatsoever with the same, save in accordance with the written orders of the <sup>b</sup> [Provincial Government]. A copy of such order shall be served upon the person to whom it is directed.

(6) The <sup>b</sup> [Provincial Government] may endorse a copy of an order under <sup>c</sup> [sub-section (5)] for investigation to any officer it may select, and such copy shall be ~~warrant~~ whereunder



such officer may enter upon any premises of the person to whom the order is directed, examine the books of such person, search the same, and severally and make inquiries from such person, or any officer, agent or servant of such person, touching the origin of and dealings in any monies, securities or credits which the investigation officer may suspect are being used or are intended to be used for the purpose of an offence in violation.

(7) A copy of an order under this section may be served in the manner provided in the Code of Criminal Procedure, 1898, for the service of summons, or, where the person to be served is a corporation, company, firm, or association of persons, may be served on any secretary, director or other officer or person concerned in the management thereof, or by leaving it or sending it by post addressed to the corporation, company, firm, or association at its registered office, or, where there is no registered office, at the place where it carries on business.

(8) Where an order of forfeiture is made under sub-section (1) in respect of any monies, securities or credits in respect of which a prohibitory order has been made under sub-section (2), such order of forfeiture shall have effect from the date of the prohibitory order, and the person to whom the prohibitory order was directed shall pay or deliver the whole of the monies, securities, or credits forfeited, to the order of the <sup>b</sup> [Provincial Government].

(9) Where any person liable under this section to pay or deliver any monies, securities, or credits to the order of the <sup>b</sup> [Provincial Government] refuses or fails to comply with any direction of the <sup>b</sup> [Provincial Government] in this behalf, the <sup>c</sup> [Provincial Government] may recover from such person, as a debt due to the Government or as a fine, the amount of such monies or credits or the market-value of such securities.

(10) In this section, "security" includes a document whereby any person acknowledges that he is under a legal liability to pay money, or whereunder any person obtains a legal right to the payment of money; and the market value of any security means the value as fixed by any officer or person deputed by the <sup>c</sup> [Provincial Government] in this behalf.

(11) Except so far as is necessary for the purposes of any proceeding under this section no information obtained in the course of any investigation made under sub-section (6) shall be divulged by any officer of Government, without the consent of the <sup>c</sup> [Provincial Government].

[a] See legislative note [a] to S. 17A, *supra*.

[b] For *definition*—See under "Provincial Government".

[c] Substituted by the Repealing and Amending Act, 1921 (XXV of 1921), S. 2 and Sch. I, for sub-section 3.

### STATEMENT OF OBJECTS AND REASONS

See under section 17A.

*Immunities barred.*

\*17F. Every report of the taking possession of property and every declaration of forfeiture made, or purporting to be made, under this Act, shall, as against all persons, be conclusive proof that the property specified therein has been taken possession of by Government or has been forfeited, as the case may be, and save as provided in sections 17B and 17E no proceeding purporting to be taken under section 17A, 17B, 17C, 17D or 17E shall be called in question by any Court, and no civil or criminal proceeding shall be instituted against any person for anything in good faith done or intended to be done under the said sections or against Government or any person acting on behalf of or by authority of Government for any loss or damage caused to or in respect of any property whereof possession has been taken by Government under this Act.

[a] See legislative note [a] to S. 17A, *supra*.

*Continuance of association.*

18. An association shall not be deemed to have ceased to exist by reason only of any formal act of dissolution or change of title, but shall be deemed to continue so long as any actual combination for the purposes of such association continues between any members thereof.

The Schedule—*Repealed* by the Indian Criminal Law (Amendment) Repealing Act, 1922 (5 [V] of 1922), S. 3.

## [THE] CRIMINAL LAW AMENDMENT ACT, 1932

(Act XXIII of 1932.)

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## STATEMENT OF OBJECTS AND REASONS.

"The Civil Disobedience Movement has made it necessary to supplement the Criminal Law by means of certain Ordinances promulgated by the Governor-General in exercise of his powers under Section 72 of the Government of India Act. The Special Powers Ordinance, which combines powers taken by the earlier ordinances, expires on the 29th December, 1932. Though the Ordinances have enabled Local Governments and their officers to control the movement, its organisers have not yet abandoned their attempt to paralyse Government and to coerce law-abiding citizens. The experience of the last two years and of previous movements on the same lines shows that, in the absence of certain of the powers at present existing, it is no difficult matter to start or revive such subversive movements. The conditions prevailing at present as a result of measures taken by the Government of India and Local Governments are such as to render it unnecessary to assume for the whole of British India all the powers conferred by the Special Powers Ordinance now in force, and it is hoped that the powers conferred by Chapter II (Emer-

gency Powers), Chapter IV (Special Courts) and Chapter V (Special provisions against instigation to the illegal refusal of the payment of certain liabilities) will only be needed in certain provinces. It is, therefore, intended by this Bill to take only those powers which a general review of the situation shows are required for the whole of India, and to leave it to the Local Governments to supplement these provisions by means of local legislation in order to meet local or emergent conditions.

The present Bill reproduces in the form of amendments two Acts already on the statute-book, certain provisions of the Special Powers Ordinance (X of 1932) and includes :

- (a) provisions against associations dangerous to the public peace.
- (b) provisions against certain forms of intimidation.
- (c) provisions to secure greater control over the Press."

—*Gazette of India, 17-9-1932, Part V page 206.*

## ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act 24 of 1934.

—Adopted by A. O.

—Repealed in part and amended by Criminal

Law Amendment Act, 1935.

—Repealed in part by Act 1 of 1938.

[THE] CRIMINAL LAW AMENDMENT ACT, 1932 (ACT XXIII OF 1932)<sup>a</sup>

[19th December, 1932.]

*An Act to Supplement the Criminal Law.*

Whereas it is expedient to supplement the Criminal Law and to that end to amend the Indian Press (Emergency Powers) Act, 1931, and further to amend <sup>b</sup>[x] the Indian Criminal Law Amendment Act, 1908, for the purposes hereinafter appearing;

It is hereby enacted as follows :—

[a] For Report of Select Committee, see *Gazette of India, 12-11-1932, Part V, page 225.*

[b] The word "temporarily" was repealed by the Criminal Law Amendment Act, 1935, S. 8.

*Short title, extent,  
duration and com-  
mencement.*

1. (1) This Act may be called THE CRIMINAL LAW AMENDMENT ACT, 1932.

(2) It extends<sup>a</sup> to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) [\* \* \* \* \*]<sup>b</sup>

(4) The whole of the Act except [\* \* \* \* \*]<sup>c</sup> section 7 shall come into force at once, and the <sup>d</sup>[Provincial Government] may, by notification<sup>e</sup> in the [Official Gazette]<sup>f</sup> direct that [\* \* \* \* \*]<sup>g</sup> section 7 shall come into force in any area on such date as may be specified in the notification.

[a] The Act has been *declared* to be in force in the Khondmals District by the Khondmals Law Regulation, 1936 (4 [IV] of 1936), S. 3 and Sch.; and in the Angul District by the Angul Laws Regulation, 1936, (6 [V] of 1936), S. 3 and Sch.

[b] Sub-section (8) limiting the duration of the Act to three years from commencement was *repealed* by the Criminal Law Amendment Act, 1935, S. 2.

[c] The words and figure "section 4 and", were *repealed*, *ibid.*, S. 4.

[d] *Substituted* by A. O. for "Local Government":

[e] S. 7 was *brought into force* in Bihar and Orissa from 26th December, 1932: see B & O. Gazette, Extraordinary, dated 26 December, 1932; The Delhi Province from 24th December, 1932: see Gazette of India, Extraordinary, 1932, p. 429; The City of Bombay, the Bombay suburban district and the Districts of Karachi, Kaira, Ahmednagar, East Khandesh, West Khandesh, Ratnagiri and Kanara from 29th December, 1932: see Bombay Gazette, Extraordinary, dated 27th December, 1932; Lahore and Amritsar districts from 31st December, 1932: see Punjab Gazette, Extraordinary, 1932, p. 163; The Districts of Sylhet, Cachar, Goalpara, Kamrup, Darrang, Nowgong, Sibsagar and Lakhimpur from 5th January, 1933: see Assam Gazette, Extraordinary, dated 7th January, 1933; Ajmer-Merwara from 30th September, 1933: see Gazette of India, 1933, Pt. II A, p. 716.

[f] *Substituted* by A. O. for "local official Gazette".

[g] The words and figure "section 4 or" were *repealed* by Criminal Law Amendment Act, 1935, S. 4.

2 to 4. [Dissemination from enlistment. Tampering with public servants. Boycotting a public servant.] *Repealed* by the Criminal Law Amendment Act, 1935, S. 2.

5. (1) Whoever publishes, circulates or repeats in public any passage from a newspaper, book or other document copies whereof have been declared to be forfeited to His Majesty under any law for the time being in force, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) No Court shall take cognizance of an offence punishable under this section unless the [Provincial Government] has certified that the passage published, circulated or repeated contains, in the opinion of the [Provincial Government]<sup>a</sup>, seditious or other matter of the nature referred to in sub-section (1) of section 99-A of the Code of Criminal Procedure, 1898, or sub-section (1) of section 4 of the Indian Press (Emergency Powers) Act, 1931.

[a] *Substituted* by A. O. for "local Government".

#### STATEMENT OF OBJECTS AND REASONS

"We are impressed by the danger that persons who inadvertently repeat a passage not harmful in itself from a newspaper which has been declared to be forfeited may be exposed to the mischief of this clause.

We have accordingly introduced by sub-clause (2) a provision which we think will be sufficient safeguard against this danger."—S. C. R.

6. [Dissemination of false rumours.] *Repealed* by the Criminal Law Amendment Act, 1935, S. 2.

Molesting a person to prejudice of employment or business.

7. (1) Whoever—

(a) with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such person or any member of his family or person in his employ, or loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place, or interferes with any property owned or used by him or deprives him or hinders him in the use thereof, or

#### SECTION 7—Note 1.

[1] In the view of S. 4 of the Repealing and Amending Act of 1937 and of S. 6-A of the General Clauses (Amendment) Act of 1936 the Criminal Law Amendment Act, 1932 has not been repealed in its entirety where the notification which was issued by the Govt. of Madras, applied S. 7 and the Criminal Law Amendment Act, 1932 so far as S. 7 was concerned was still on the statute book. *Held*, that there was no necessity for re-notification and that S. 7 applied to the Madras Presidency. (Vol 26) 1939 Mad

21 (24, 25): I L R (1939) Mad 87: 40 Cr L Jour 224 (DB).

[2] The Criminal Law Amendment Act of 1932 is to be deemed to be a special law within the meaning of S. 41 I.P.C. and there can therefore be an abatement of an offence under S. 7 (1) (a). (Vol 26) 1939 Mad 21 (26): I L R (1939) Mad 87: 40 Cr L Jour 224 (DB).

[3] The language employed in S. 7 is clear and admits of only one meaning and is therefore unnecessary to speculate on the intention of the framers of the act as being only to prevent picketing and nothing

(b) loiters or does any similar act at or near the place where a person carries on business, in such a way and with intent that any person may thereby be deterred from entering or approaching or dealing at such place, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

*Explanation.*—Encouragement of indigenous industries or advocacy of temperance, without the commission of any of the acts prohibited by this section is not an offence under this section.

(2) No Court shall take cognizance of an offence punishable under this section except upon a report in writing of facts which constitute such offence made by a police officer not below the rank of officer in charge of a police station.

#### STATEMENT OF OBJECTS AND REASONS

The explanation emphasises the fact that the section is not intended [to hamper lawful advocacy of *swadeshi* or abstention from intoxicating liquor.—See S. C. R.

8. [Power to order parent or guardian to pay fine imposed on young person.] Repealed by the Criminal Law Amendment Act, 1935, S. 2.

*Procedure in offences under the Act.* 9. Notwithstanding anything contained in the Code of Criminal Procedure, 1898,—

(i) no Court inferior to that of a Presidency Magistrate or Magistrate of the first class shall try any offence under this Act;

(ii) an offence punishable under section [5, or 7]<sup>a</sup> shall be cognizable by the police;

(iii) b[\* \* \* \* \*] and

(iv) an offence punishable under section 7 shall be non-bailable.

[a] Substituted by the Criminal Law Amendment Act, 1935, S. 5, for "2, 3, 5, 6 or 7".

[b] Clause (iii) omitted, *ibid.*

10. (1) The <sup>a</sup>[Provincial Government] may, by notification <sup>b</sup> in the <sup>c</sup>[Official Gazette], declare that any offence punishable under Sections 186, 188, 189, 190, 228, 295-A, 298, 505, 506 or 507 of the Indian Penal Code, when committed in any area specified in the notification shall, notwithstanding any thing contained in the Code of Criminal Procedure, 1898, be cognizable, and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remain in force, be deemed to be amended accordingly.

(2) The <sup>a</sup>[Provincial Government] may, in like manner and subject to the like conditions, and with the like effect, declare <sup>b</sup> that an offence punishable under section 188 or section 506 of the Indian Penal Code shall be non-bailable.

[a] Substituted by A. O. for "Local Government".

[b] For such notifications, as to the former Province of Bihar and Orissa see B & O Gazette, Extraordinary, dated 26th December, 1932, and as to the former Presidency of Bombay see Bombay Gazette, Extraordinary, dated 27th December 1932.

[c] Substituted by A. O. for "Local Official Gazette".

#### Section 7 (contd.)

else. (Vol 26) 1939 Mad 21 (30) : 40 Cr L Jour 224 : I L R (1939) Mad 97 (DB).

[4] S. 7 is not in conflict with Trade Unions Act. Apart from immunity from criminal conspiracy Trade Unions Act does not allow immunity from any criminal offences. (Vol 22) 1935 Nag 149 (152) : 36 Cr L Jour 1158 : 31 Nag L R 318.

[5] S. 7 can be applied to picketing in the course of trade disputes. (Vol 22) 1935 Nag 149 (151) : 31 Nag L R 318 : 36 Cr L Jour 1158.

[6] In order to commit offence under S. 7 (b), loitering must be done with the intention that any person is deterred from entering or approaching or dealing at the particular place near which such loitering occurs. (1936) 37 Cr L Jour 10 (11, 12) (Nag).

house is picketed cannot claim the benefit of the section. There is no justification whatever for the plea that the offence contemplated by S. 7 (1) (a), when committed in respect of public official whether high or low, should go unpunished. (Vol 26) 1939 Mad 21 (25) : I L R (1939) Mad 87 : 40 Cr L Jour 224 (DB).

[8] Procession passing through a mohalla having foreign cloth shops and halting for distributing hand-bills does not amount to loitering or deterring people from buying foreign cloth. (1936) 37 Cr L Jour 10 (11, 12) (Nag).

[9] Many offences punishable under S. 7, may be committed but no Magistrate can take cognizance of any one of those offences unless that particular offence is constituted by the facts set out in the Sub-Inspector's report. Where a particular offence has not been indicated in the charge-sheet, the Court is not at liberty to try the accused for that particular

11 to 14. [Amendment of S. 16, Act XIV of 1908, Amendment of S. 17, Act XIV of 1908, Insertion of new ss. 17A to 17F in Act XIV of 1908, Amendment of title and preamble of Act XXIII of 1931]. *Repealed by the Repealing Act, 1938 (1 [I] of 1938), S. 2 and Sch.*

15. [Amendment of S. 1, Act XXIII of 1931.] *Repealed by the Criminal Law Amendment Act, 1935, S. 2.*

16. [Amendment of S. 4, Act XXIII of 1931.] *Repealed by the Repealing Act, 1938 (1 [I] of 1938), S. 2 and Sch.*

17. [Cessation of effect of Section 62, Ordinance X of 1932.] *Repealed by the Criminal Law Amendment Act, 1935, S. 2.*

18. Anything done or any proceedings commenced in pursuance of the provisions of Chapter VI of the Special Powers Ordinance, 1932, shall, upon the commencement of this Act, be deemed to have been done or to have been commenced in pursuance of the corresponding provisions of the Indian Criminal Law Amendment Act, 1908, as amended by this Act, and shall have effect as if this Act was already in force when such thing was done or such proceedings were commenced.

19. Anything done or any proceedings commenced in pursuance of the provisions of the Indian Press (Emergency Powers) Act, 1931, as amended by section 77 of the Special Powers Ordinance, 1932, shall, upon the commencement of this Act, be deemed to have been done or to have been commenced in pursuance of the corresponding provisions of the Indian Press (Emergency Powers) Act, 1931, as amended by this Act, and shall have effect as if this Act was already in force when such thing was done or such proceedings were commenced.

20. [Trial of, and completion of trials of offences against ordinance X of 1932.] *Repealed by the Criminal Law Amendment Act, 1935, S. 2.*

## [THE] CRIMINAL LAW AMENDMENT ACT, 1938.

### (ACT XX OF 1938).

#### STATEMENT OF OBJECTS AND REASONS.

"A large number of public speeches designed to dissuade persons from enlisting in the Defence Forces or, in the alternative, to incite would be recruits to commit acts of mutiny or insubordination after joining those Forces have come to notice during the past

18 months. The object of the speakers is clearly not the spread of pacifism, but to dissuade would be recruits from taking part in any war in which the British Empire may become engaged. The Bill is designed to penalise these activities."

—*Gazette of India, 13-8-1938, Part V page 276.*

## [THE] CRIMINAL LAW AMENDMENT ACT, 1938.

### (ACT XX OF 1938).<sup>a</sup>

[14th September, 1938].

*An Act to amend the criminal law.*

Whereas it is expedient to supplement the criminal law by providing for the punishment of certain acts prejudicial to the recruitment of persons to serve in, and to the discipline of, His Majesty's Forces: It is hereby enacted as follows:—

[a] The Act has been applied to British Baluchistan, see Notification No. 309-F, dated 15th December, 1938, Gazette of India, 1938, Pt. I, Page 2041.

*Short title, extent and commencement.*

1. (1) This Act may be called the CRIMINAL LAW AMENDMENT ACT 1938.

(2) It extends to the whole of British India.

(3) It shall come into force in a Province on such date as the Provincial Government may, by notification in the official Gazette, appoint in this behalf for such province.

**2. Whoever—**

*Dissuasion from enlistment and instigation to mutiny or insubordination after enlistment.*

(a) with intent to affect adversely the recruitment of persons to serve in the Military, Naval or Air Forces of His Majesty, wilfully dissuade or attempts to dissuade the public or any person from entering any such Forces, or

(b) without dissuading or attempting to dissuade any person from entering such Force, instigates the public or any person to do, after entering any such Force, anything which is an offence punishable as mutiny or insubordination under S. 27 of the Indian Army Act, 1911 or Ss. 10 to 12 and 14 to 17 inclusive of the Naval Discipline Act as applied to the Indian Navy by the Indian Navy (Discipline) Act, 1934, or Ss. 35 to 37 inclusive of the Indian Air Force Act, 1932, as the case may be, shall be punishable with imprisonment for a term which may extend to one year, or with fine or with both.

No person shall be prosecuted for any offence under this Act except with the previous sanction of the Provincial Government.

*Exception 1.*—The provisions of clause (a) of this section do not extend to comments or criticism of the policy of Government in connection with the Military, Naval or Air Forces, made in good faith without any intention of dissuading from enlistment.

*Exception 2.*—The provisions of clause (a) of this section do not extend to the case in which advice is given in good faith for the benefit of the individual to whom it is given, or for the benefit of any member of his family or of any of his dependants.

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**[THE CODE OF] CRIMINAL PROCEDURE, 1898.**

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## CODE HOW AFFECTED BY SUBSEQUENT LEGISLATION

- Amended by Acts 12 of 1899; 6 of 1900; 1 of 1903; 8 of 1913; 12 of 1916; 38 of 1920; 14 of 1922; 20 of 1923; 35 of 1923; 37 of 1923; 7 of 1924; 18 of 1924; 8 of 1925; 23 of 1925; 29 of 1925; 10 of 1926; 34 of 1926; 36 of 1926; 25 of 1927; 21 of 1932; 24 of 1934; 35 of 1934; 22 of 1939; 4 of 1940; 35 of 1940; 14 of 1941; 15 of 1941; 26 of 1943; 27 of 1943; 28 of 1943; 2 of 1945; 6 of 1945; 3 of 1946; 4 of 1946.
- Adapted by A. O.
- Repealed and amended by Acts 4 of 1900; 4 of 1903; 10 of 1914; 18 of 1919; 11 of 1923; 12 of 1923; 18 of 1923; 2 of 1926; 32 of 1925; 10 of 1927.
- Repealed in part by Acts 4 of 1909; 15 of 1910; 4 of 1912; 37 of 1925.

## COGNATE ACTS AND PROVISIONS

1. Cantonments (House Accommodation) Act, VI of 1923, S 37.
2. Cattle-Trespass Act, 1 of 1877, Chapter V, VI.
3. Criminal Law Amendment Act, XIV of 1908.
4. Criminal Law Amendment Act, XXIII of 1932.
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6. Electricity Act, IX of 1910, S 50.
7. European Vagrancy Act, IX of 1874.
8. Explosive Substances Act, VI of 1908, S 7.
9. Extradition Act, XV of 1903, S 28.
10. Foreign Relations Act, XIII of 1932.
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- Central Provinces—C P & Berar Act 19 of 1936.
- Madras—(Central) Act 5 of 1889.
- N-W. F. P.—N-W. F. P. Acts 10 of 1937; 8 of 1938; 8 of 1940.
- Orissa—Reg. No. IV of 1937.
- Punjab—Punj Acts 10 of 1926; 1 of 1936; 11 of 1940.
- Regulation III of 1901.
- (Temp) Punj Ord XIV of 1946.
- United Provinces—U P Acts 6 of 1938; 9 of 1940.

14. Indian States (Protection against Disaffection) Act, 1922, S 5.
15. Penal Servitude Act, XXIV of 1855.
16. Post Office Act, VI of 1898, S 72.
17. Presidency Magistrates (Court-fees) Act, IV of 1877, S 57.
18. Presidency Small Cause Courts Act, XV of 1882, Ch. XII.
19. Presidency-Towns Insolvency Act, III of 1909, Ss. 45, 100, 104.
20. Prevention of Seditious Meetings Act, X of 1911, S 4, 6.
21. Railways Act, IX of 1890, S 180.
22. Reformatory Schools Act, VIII of 1897.
23. Stamps Act, II of 1899, S 72.
24. Whipping Act, IV of 1909.

[THE CODE OF] CRIMINAL PROCEDURE, 1898  
(ACT V OF 1898)<sup>a</sup>

[22nd March, 1898.]

*An Act to consolidate and amend the law relating to the Criminal Procedure.*

WHEREAS it is expedient to consolidate and amend the law relating to Criminal Procedure;

It is hereby enacted as follows :—

[a] For Statement of Objects and Reasons, see Gazette of India, 1897, Pt. V. p. 363; for Report of the Select Committee, see *ibid.*, 1898, Pt. V. p. 19; and for Proceedings in Council, see *ibid.*, 1897, Pt. VI, pp. 238 and 254; and *ibid.*, 1898, pp. 22, 101 and 175.

This Act has been declared to be in force in Sonthal Parganas (with modifications), under the Sonthal Parganas Settlement Regulation, 1872 (3 of 1872), S 3 and Sch [as to the modifications, see the Sonthal Parganas Justice Regulation, 1933 (5 of 1933), S. 4]; Chittagong Hill Tracts (with a reservation as to cases tried by certain persons), by the Chittagong Hill Tracts Regulation, 1900 (1 of 1900) S. 4 and sch.; British Baluchistan, by the British Baluchistan Laws Regulation, 1913 (2 of 1913), s 3 and sch 1; Panth Piploda, by the Panth Piploda Laws Regulation, 1929 (1 of 1929), S. 2 and sch.; Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and sch.; and Angul District by the Angul Laws Regulation, 1936 (5 of 1936), S. 3 and sch.

## PREAMBLE—Note 1.

[1] Where the language is ambiguous, provisions of a section may be construed with reference to the scheme and arrangement of the Act. ('65) 5 Bom H C R (Cr) 69 (73, 74) (FB) \* (Vol 7) 1920 Mad 337 (337, 338, 343) : 43 Mad 511 : 21 Cri L Jour 402 (FB) \* ('81) 5 Bom 338 (347, 349) (FB) \* ('07) 34 Cal 912 (915) : 6 Cr L Jour 148 (DB).

[2] The division into chapters is an organic feature of the Criminal Procedure Code. ('06) 33 Cal 292 (294) : 3 Cr L Jour 12 (DB) \* ('68) 5 Bom H C R (Cr) 69 (74) (FB).

[3] All the sections under one chapter have reference exclusively to matters within the purview of that chapter. ('68) 5 Bom H C R (Cr) 69 (74) (FB).

[4] A doubtful point may be interpreted by a reference to the provisions on similar points in other parts. (Vol 31) 1944 All 137 (142, 160) : I L R (1944) All 403 : 46 Cr L Jour 38 (FB) \* ('71) 16 Suth W R (Cr) 28 (30) (DB).

[5] The Code provides for a machinery for the punishment and prevention of offences against the substantive criminal law. ('89) 13 Bom 590 (598) (FB) \* ('03) 26 Mad 55 (65) (SB).

[6] A penal statute must be construed strictly—(Vol 26) 1939 Bom 339 (340) : I L R (1939) Bom 434 : 40 Cr L Jour 891 (DB) \* (Vol 26) 1939 Lah 81 (85) : 40 Cri L Jour 497 (FB) \* (Vol 23) 1936 Nag 78 (79) : 37 Cri L Jour 588 : I L R (1936) Nag 89 \* (Vol 19) 1932 Pat 281 (284) : 33 Cri L Jour 775 \* (Vol 12) 1925 Mad 239 (240) (DB) \* ('12) 13 Cri L Jour 39 (DB) (Cal) (Penal Code S. 400) \* (Vol 3) 1916 Cal 431 (439) : 42 Cal 1092 : 17 Cri L Jour 113 (SB) \* (Vol 1) 1914 All 101 (102) : 15 Cri L Jour 291 \* (Vol 26) 1939 Mad 963 (967) : I L R (1940) Mad 87 \* (Vol 24) 1937 Bom 28 (30) : 38 Cri L Jour 145 (DB) \* (Vol 23) 1936 Nag 55 (62) : 37 Cri L Jour 474 (DB) \* ('12) 13 Cri L Jour 54 (55) (Upp Bur) \* ('01) 1901 Pun Re.No. 24 (Cr) (FB).

[See (Vol 28) 1936 Pat 350 (352) : 37 Cri L Jour 877 : 15 Pat 108 (DB) \* (Vol 19) 1932 All 441 (441) : 54 All 411 : 33 Cri L Jour 719.]

[See however (Vol 27) 1940 Rang 104 (108) : 1940 Rang L R 12 : 41 Cri L Jour 515 (DB) (Section admitting of only one reasonable interpretation—Such interpretation may be given even though it slightly disagrees with the natural meaning of words.)]

[7] A penal statute must be construed, in case of doubt or ambiguity, in favour of the subject. (Vol 31) 1944 All 137 (145) : 46 Cri L Jour 38 : I L R (1944)

All 403 (FB). (Interpretation of the provisions of Criminal P C calculated to prejudice an accused person, should be avoided. \* (Vol 26) 1939 Lah 81 (85) : 40 Cri L Jour 497 (FB) \* (Vol 23) 1936 Cal 529 (531) : 37 Cri L Jour 1092 : I L R (1937) 1 Cal 169 (DB) \* (Vol 23) 1936 Nag 55 (62) : 37 Cri L Jour 474 (DB) \* ('37) I L R (1937) 1 Cal 309 (310) (DB) \* ('30) 1930 Mad W N 249 (280) (DB) \* (Vol 10) 1923 Mad 523 (524) : 46 Mad 605 : 24 Cri L Jour 599 (FB) \* (Vol 15) 1928 Sind 1 (6, 7) : 22 Sind L R 157 : 28 Cri L Jour 913 (FB). \* (Vol 16) 1929 Bom 81 (84) : 53 Bom 149 : 30 Cri L Jour 772 (DB) \* (Vol 20) 1933 Peah 3 (6) : 34 Cri L Jour 212 \* ('70) 7 Bom H C R (Cr) 39 (40, 49) (FB). \* ('87) 10 All 150 (154) (FB) \* ('01) 25 Bom 680 (693) (FB) \* (Vol 6) 1919 Pat 556 (560) : 4 Pat L Jour 435 (445) : 20 Cri L Jour 545 (DB) \* (Vol 19) 1932 Nag 174 (176) : 28 Nag L R 302 : 34 Cri L Jour 311 : \* ('76) 1 Bom 303 (311) (FB) \* (1900) 24 Mad 271 (274) (DB).

[8] No liability should be held to attach and no penalty imposed by mere implication. ('79) 2 All 301 (307) (FB) \* ('01) 28 Cal 504 (508) (SB) \* (Vol 3) 1916 Sind 8 (9) : 10 Sind L R 9 : 17 Cri L Jour 364 (DB).

[9] Courts should not extend or narrow down the scope or meaning of a penal provision by loose or strained construction. (Vol 10) 1923 Mad 523 (531) : 46 Mad 605 : 24 Cri L Jour 599 (FB) \* ('13) 14 Cri L Jour 204 (206) : 37 Bom 402 (DB). \* ('88) 10 All 150 (154) (FB). \* (Vol 6) 1919 Pat 27 (34) : 4 Pat L Jour 74 : 20 Cri L Jour 161 (FB) \* ('79) 3 Bom 150 (161) (DB) \* (Vol 18) 1931 Nag 177 (177) : 27 Nag L R 270 : 32 Cri L Jour 1266. \* ('92) 15 Mad 323 (330) (DB) \* ('10) 4 Sind L R 44 (46) (DB) \* ('09) 9 Cri L Jour 539 (544) : 5 Nag L R 59. \* ('93-1900) 1893-1900 Low Bur. Rul. 284 (284). \* ('83-1900) 1883-1900 Low Bur Rul 121 (122). \* ('09) 10 Cri L Jour 395 (400) : 3 Sind L R 66 (SB).

[10] Matter both within the letter and the spirit of the enactment—Court cannot make out any ambiguity in its language by referring to the intention of the legislature. (Vol 28) 1941 Sind. 160 (164, 165) : I L R (1941) Kar 171 : 43 Cri L Jour 82 (DB) \* (Vol 27) 1940 Sind. 97 (100) : 41 Cri L Jour 750 : I L R (1940) Kar 287 (DB). \* (Vol 27) 1940 Lah 129 (132) : 41 Cri L Jour 591 : I L R (1940) Lah 242 (FB). \* ('70) 7 Bom H C R 39 (40) (FB) \* (1857) 7 Moo Ind App 72 (103) (PC).

[See (Vol 9) 1922 PC 257 (261) : 45 Mad 475 49 Ind App 211 (PC).]

It has been declared to be in force, by notification under the Scheduled Districts Act, 1874 (14 [XIV] of 1874), in the Scheduled Districts in the Ganjam and Vizagapatam—see Fort St. George Gazette, 1898, Pt. I, p. 869; and by notification under the same section and section 1 of the same Act, in the following other Scheduled Districts, namely, the Districts of Hazaribagh, Lohardaga (now the District of Lohardaga) and Palamou—see Calcutta Gazette, 1899, Pt. I p. 44), Manbhum and Palamau and in Pargana Dhalbhum in the Singbhum District—see Calcutta Gazette, 1898, Pt. I, p. 714 and Gazette of India, Pt. I, p. 770.

As to its application in (1) certain districts on the Sindh Frontier, see the Sindh Frontier Regulation, 1892 (3 of 1892), s. 11, and the Sindh Frontier Regulation, 1892 (3 of 1892); (2) the Andaman and Nicobar Islands, see the Andaman and Nicobar Islands Regulation (3 of 1876), s. 18.

It has been declared to be in force, by notification under the Assam Frontier Tracts Regulation, 1880 (2 of 1880), in the Garo Hills, the Khasi and Jaintia Hills, the Naga Hills, the North Cachar Sub-division of the Cachar District, the Miler Hill tracts in the Nowgong District, the Dibrugarh Frontier Tracts in the Lakhimpur District, and the Lushai Hills—see Assam Gazette, 1898, Pt. II, p. 788 and Assam Code, Pt. II, Appendix II-C.

## PART I

### Preliminary

#### CHAPTER I

1. (1) This Act may be called the Code of Criminal Procedure, 1898; and it shall come into force on the first day of July, 1898.

(2) It extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply to—

*Preamble (contd.)*

[11] The rules apply to the penal provisions of the statutes. (Vol 31) 1944 Nag 149 (151): I L R 344 Nag 813: 46 Cri L Jour 247: \*(Vol 18) 1931 All 1 (428): 52 All 445 (DB) \*(Vol 4) 1917 All 414 (414): Cri L Jour 45 \*(87) 11 Mad 253 (256) (DB) \*(89) Bom 180 (186, 187) (DB) \*(08) 31 Mad 408 (413) (B) \*(91) 19 Cal 35 (46) \*(Vol 9) 1922 Bom 97 (3, 99): 46 Bom 657: 23 Cri L Jour 259 (DB) \*(31) 14 ag L Jour 27 (38) \*(Vol 14) 1927 Rang 193 (194): 5 ang 244 (DB) \*(Vol 19) 1932 Pat 281 (284): 33 Cri Jour 775. \*(81) 8 Cal 259 (262) (DB).

[12] Retrospective effect to a Criminal Law cannot be given by an executive order of Government (Vol 30) 1943 Sind 39 (45): 44 Cri Law Jour 293 (B).

[13] Though the Code is exhaustive with regard to matters specifically dealt with by it, the Court may act on the principle that every procedure would be understood as permissible till it is shown to be prohibited by law. (Vol 27) 1940 Nag 390 (92): I L R (1942) Nag 333: 42 Cri L Jour 208.

#### SECTION I—SYNOPSIS

1. Criminal Procedure.
2. Extent—British India.
3. "In the absence of any specific provision to the contrary".
4. Special Law.
5. Local Law.
6. Special jurisdiction.
7. Special powers.
8. Police at Calcutta, Madras and Bombay.
9. Village headman in Madras.
10. Village police officers in the Presidency of Bombay.
11. Any special form of procedure.
1. Criminal procedure. [1] Criminal Courts are not to entertain matters which are properly within the jurisdiction of Civil Courts. (89) 40 Pun

LR 967 (968) \* (Vol 30) 1943 Sind 152 (155): I L R (1943) Kar 112: 44 Cri L Jour 761 (DB) \* (Vol 29) 1942 Lah 122 (123): 43 Cri L Jour 632 \* (Vol 10) 1923 All 544 (544): 24 Cri L Jour 693: \* (Vol 11) 1924 All 1 (7): 45 All 656: 24 Cri L Jour 817 (DB) \* (Vol 1) 191: Sind 17 (17): 7 Sind L R 100: 15 Cri L Jour 383 (DB) \* (1900) 27 Cal 131 (132) (DB) \* (23) 24 Cri L Jour 245 (247) (Pesh).

[See also (Vol 19) 1932 Pat 215 (217): 11 Pat 523: 33 Cri L Jour 864 (10B) \* (Vol 19) 1932 Pat 180 (191): 33 Cri L Jour 503 (DB).

[2] The existence of a Civil remedy is no reason for a Criminal Court to refuse trial of an offence, where one has been committed. (Vol 20) 1933 All 42 (42): 33 Cri L Jour 884.

[See also (Vol 7) 1920 Pat 810 (810): 22 Cri L Jour 238].

[3] It is the duty of a Judge in a criminal case to see that all relevant evidence is brought before him. (Vol 8) 1921 All 202 (204): 43 All 283: 22 Cri L Jour 210 (DB).

[4] In criminal case the Judges cannot ignore points which strike their attention merely because counsel have omitted to argue them. (Vol 30) 1943 Nag 26 (33, 34): I L R (1943) Nag 154: 44 Cri L Jour 345 (DB).

2. Extent—British India—[1] For definition of the expression "British India" see the General Clauses Act (X of 1897).

[2] British Baluchistan is part of British India. (Vol 28) 1941 Sind 20 (21, 22): 42 Cri L Jour 826: I L R (1941) Kar 247 (FB) (Overruling (Vol 27) 1940 Sind 154: 42 Cri L Jour 49).

[3] The following special tracts though in British territory are governed by special regulations:—

- (a) Chittagong Hill Tracts. (1900) 27 Cal 654 (654) (DB).
- (b) North Cachar Hills. (89) 26 Cal 874 (878) (DB).

- (a) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay;
- (b) heads of villages in the Presidency of Fort St. George; or
- (c) village police-officers in the Presidency of Bombay;

**S. 1 (contd.)**

- (c) Garo Hills. ('11) 12 Cri L Jour 10 (10) (Cal).
- (d) The tributary Mahal of Kherenjar. ('87) 16 Cal 667 (675) (DB).
- (e) Mewas Estate in West Khandesh. (Vol 3) 1916 Bom 318 (314) : 17 Cri L Jour 538 (DB).

[4] The following places do not form part of British India:—

- (a) The tributary Mahals of Moharbhunj. ('82) 8 Cal 985 (990, 992) (FB) \* (Vol 4) 1917 Cal 612 (612) : 17 Cri L Jour 128 (DB).
- (b) The tributary Mahals of Orissa. ('02) 29 Cal 400 (401, 402) (DB).
- (c) The Civil Station of Wadhavan. ('12) 13 Cri L Jour 790 (792) : 37 Bom 152 (DB).
- (d) The Native States. ('06) 33 Cal 219 (252, 253) : 33 Ind App 1 (PC).
- (e) The Foreign States. ('82) 5 Mad 23 (24) (DB) \* (Vol 10) 1923 All 64 (65) : 45 All 18 (DB).
- (f) Quetta. (Vol 27) 1940 Pesh 30 (31) : 41 Cri L Jour 857.

[5] In certain areas outside British India the Code is in force for the following reasons:—

- (a) By special powers vested in the Governor-General in Council. (Vol 27) 1940 Sind 154 (156) : 42 Cri L Jour 49 (DB). This decision was partly overruled in (Vol 28) 1941 Sind 20 : I L R (1941) Kar 247 : 42 Cri L Jour 326 (FB) which held that British Baluchistan was included in British India. \* (Vol 27) 1940 Pesh 30 (31) : 41 Cri L Jour 857 \* (Vol 3) 1916 Mad 589 (589) : 39 Mad 942 : 16 Cri L Jour 773 (DB) (Bangalore). \* ('11) 12 Cri L Jour 535 (535) : 34 Mad 343 (DB).
- (b) By treaty. ('98) 25 Cal 20 (33) : 24 Ind App 137 : 1897 Pun Re No 6 (Or), (PC).
- (c) By Orders in Council of His Majesty. ('94) 1894 Rat 710 (711).

[6] The transfer of a part of the British territory in which an offence was committed, to a Native State will not affect the jurisdiction of a British Indian Court to proceed with an appeal or with the trial in a case validly pending before it on the date of such transfer. ('11) 12 Cri L Jour 401 (401) : 38 All 578 (579) (DB) (Appeal) \* ('11) 12 Cri L Jour 470 (470, 471) (All) (Appeal) \* ('12) 13 Cri L Jour 575 (576) : 34 All 451 (454) (DB). (Trial) \* ('12) 13 Cri L Jour 169 (170) : 34 All 118 (120) (DB) (Trial).

[7] The transfer of one district from one Presidency to another in British India does not prevent the Code from operating therein or deprive the accused of his rights under it. (1864) 2 Bom H C R (Or) 106 (111, 116, 117).

[8] The procedure laid down in the Code applies to offences committed on:—

- (a) Territorial waters. (Vol 3) 1916 P C 21 (25) : 39 Mad 617 : 43 Ind App 192 (PC).
- (b) The high seas for offences by British Subjects. (Vol 23) 1936 Sind 3 (4, 5) : 37 Cri L Jour 314 : 29 Sind L R 281 (DB) \* (Vol 14) 1927 Mad 688 (688) : 28 Cri L Jour 543 (DB) \* ('01) 25 Bom 636 (638) (DB).

\* ('90) 14 Bom 227 (230) (DB) \* ('11) 12 Cri L Jour 198 (204) : 5 Low Bur Rul 221 (FB) \* ('94) 21 Cal 782 (784) (DB) \* ('89) 16 Cal 238 (244) (DB).

**3. "In the absence of any specific provision to the contrary."**—[1] One provision can be said to be "a specific provision to the contrary" when it completely covers the field of operation of the other and lays down a contrary rule for the entire field so as altogether to nullify the other. (Vol 29) 1942 Cal 598 (601, 602) : 44 Cri L Jour 145 : I L R (1942) 1 Cal 436 (DB).

[See also (Vol 28) 1941 Bom 146 (148) : 42 Cri L Jour 519 : I L R (1941) Bom 333 (DB).

**4. Special law.**—[1] Special law does not include the following:—

- (a) Local Family law. (Vol 6) 1919 Mad 193 (194) : 20 Cri L Jour 733 (DB) \* ('99) 22 Mad 246 (247) (DB).
- (b) The English Common Law. (Vol 12) 1925 Rang 345 (347) : 3 Rang 524 : 27 Cri L Jour 321 (DB).

[2] The following were held Special laws:—

- (a) The Coroners Act.
- (b) Indian Extradition Act.
- (c) Abkari Act.
- (d) Sind Frontier Regulation, 3 (III) of 1892.
- (e) Salt Act.
- (f) Banker's Book of Evidence Act, 1891.

[3] Special law does not exclude the operation of the Criminal Procedure Code in the absence of a provision express or implied to that effect. (Vol 33) 1946 Sind 67 (68) : I L R (1946) Sind 439 \* (Vol 18) 1926 Cal 786 (788) : 53 Cal 631 : 27 Cri L Jour 984 (DB) \* ('04) 1 Cri L Jour 13 (19) : 31 Cal 1 (DB) \* ('98) 22 Bom 596 (601) (DB) \* ('10) 11 Cri L Jour 117 (117) : 13 Oudh Cas 7 \* (Vol 19) 1932 Lah 436 (437) : 13 Lah 585 : 33 Cri L Jour 333 : \* (Vol 19) 1932 Sind 166 (167) : 26 Sind L R 402 : 34 Cri L Jour 166 (DB) \* (Vol 19) 1922 Mad 215 (216, 218) : 45 Mad 14 : 23 Cri L Jour 490 (DB) \* (Vol 30) 1943 Pat 245 (250) : 22 Pat 433 : 45 Cri L Jour 177 (SB) \* (Vol 32) 1945 Pat 69 (70) : 23 Pat 22 : 46 Cri L Jour 420 (DB) (Having regard to S 3 of the Defence of India Act, any provisions of the Criminal Procedure Code, inconsistent with anything in the Defence of India Act or Rules must be regarded as repealed).

[4] The law of Evidence is a special enactment on a specific subject which the former and not the Criminal Procedure Code governs, in the absence of a provision to the contrary. (Vol 29) 1942 Pat 156 (158) : 43 Cri L Jour 615 (DB) \* (Vol 28) 1941 Bom 146 (148, 149) : 42 Cri L Jour 519 : I L R (1941) Bom 333 (DB) \* (Vol 26) 1939 Mad 856 (858) : I L R (1939) Mad 947 : 41 Cri L Jour 41 (DB) \* ('09) 10 Cri L Jour 433 (441, 442) : 31 All 592 (FB) \* (Vol 18) 1926 Lah 88 (90) : 7 Lah 84 : 27 Cri L Jour 709 (DB) \* ('12) 13 Cri L Jour 305 (349) : 35 Mad 247 (SB).

[5] An Ordinance passed by the Governor-General may in effect modify the operation of this Code by enacting something repugnant to the provisions of the latter. (Vol 30) 1943 All 379 (385) : I L R (1944) All 42 : 45 Cri L Jour 491 (FB) \* (Vol 30) 1943 Pat 245 (258) : 22 Pat 433 : 45 Cri L Jour 177 (FB) \* (Vol 30) 1943 Pat 24 (28) : 22 Pat 160 : 44 Cri L Jour 209 (FB) \* (Vol 30) 1943 Pat 13 (22) : 22 Pat 175 : 44 Cri L Jour 273 (FB).

Provided that the [Provincial Government] may, if it thinks fit, b<sup>[xxx]</sup> by notification in the Official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such exempted persons.

[1832—S. 1; 1872—Ss. 1, 540, 541; 1861—Ss. 1, 441, 442.]

A<sup>1</sup> S. 1 inserted by A. O. for "Local Government".

b<sup>1</sup> The words "with the sanction of the Governor-General in Council" were repealed by the Devolution Act 1915 (85 [XXXVIII] of 1920) S. 2 and Sch. I.

### S. 1 (continued)

[1] S. 533 of the Code was held a "special" law. (71) 23 : 1926 Rang 250 (352) : 37 Cri L Jour 920 (Confession not recorded in manner provided by S. 164, Cr.P.C. S. 64, Evidence Act, prevents such confession from being proved—Still S. 533 of the Code being a special provision to the contrary prevents it from being ruled out as incapable of proof).

5. Local Law.—[1] The following were held to be local laws:—

- (a) Bengal Regulation 6 (VI) of 1925.
- (b) Bengal Criminal Law Amendment Act.
- (c) Bombay Gambling Act, 4 (IV) of 1887.
- (d) N.W.F.P. Crimes Regulation, 3 (III) of 1901.
- (e) Aden Courts Act.

[2] A local law does not necessarily include all the rules and bye-laws made thereunder. (Vol 16) 1929 Rang 74 (75) : 6 Rang 791 : 30 Cri L Jour 503 \* (39) 1891 Pun Re No 28 (Cr) p 81.

6. Special jurisdiction.—[1] A law dealing with a specific subject-matter and giving jurisdiction over it cannot be repealed by a general provision. (72) 7 Mai H. C. R. App. vi (vi), Proceedings, 4th June 1872.

[2] The special jurisdiction created in the undermentioned instances is not, to that extent, affected by the provisions of the Criminal Procedure Code:—

- (a) The special jurisdiction conferred on the second class Magistrate over offences under the Bombay Abkari Act, 5 (V) of 1878. ('86) 10 Bom 181 (192, 193) (DB).
- (b) The special jurisdiction of the English Consular Court at Zanzibar over foreigners under the British protection. ('95) 19 Bom 741 (744) (DB).
- (c) The jurisdiction of the Bombay High Court to try a Native Indian subject for murder at Zanzibar. ('79) 3 Bom 334 (339).
- (d) The jurisdiction of British Courts over a "British protected person" under the China and Corea Order in Council. (Vol 1) 1914 P C 155 (157) : 15 Cri L Jour 326 (PC).
- (e) The power by the High Court under Charter Act of (i) Revision. ('98) 26 Cal 188 (192, 193) (DB).
- (ii) Superintendence. ('08) 7 Cri L Jour 499 (501) (DB) (Cal).
- (f) The extraordinary original criminal jurisdiction of the High Court under Cl. 24 of the Letters Patent. (Vol 19) 1932 Cal 123 (123) : 33 Cri L Jour 219 (DB).
- (g) The jurisdiction of the Governor-General to pass Ordinances. (Vol 20) 1933 Bom 1 (3) : 57 Bom 93 : 34 Cri L Jour 199 (SB) \* (Vol 20) 1933 Cal 537 (538) : 60 Cal 652 : 34 Cri L Jour 1023 (DB).

[See (Vol 19) 1932 Cal 745 (747) : 33 Cri L Jour 839 : 60 Cal 403 (SB)].

[See also (Vol 7) 1920 P C 28 (26) : 1 Lah 326 : 47 Ind App 128 : 21 Cri L Jour 456 (PC)].

(h) The special jurisdiction created by the Bengal Criminal Law Amendment Act. (Vol 20) 1933 Cal 1 (2) : 33 Cri L Jour 837 (FB).

(i) The Special jurisdiction created by the Merchant Shipping Act. ('12) 13 Cri L Jour 246 (246) : 39 Cal 487 (DB).

(j) The jurisdiction of the High Court to issue writ of *certiorari*. (Vol 6) 1919 P C 31 (35) : 43 Mad 146 : 46 Ind App 176 : 20 Cri L Jour 593 (PC).

[See (Vol 5) 1918 Mad 1266 (1968, 1269) : 39 Mad 1164 : 18 Cri L Jour 229 (SB)].

(k) The jurisdiction of special tribunals created under the Defence of India Act. (Vol 5) 1918 Pat 103 (107) : 19 Cri L Jour 823 : 3 Pat L Jour 581 (FB) \* (Vol 1) 1917 Lah 138 (139) : 18 Cri L Jour 927 (928, 929) : 1917 Pun Re No. 38 (Cr.) (DB).

[See (Vol 5) 1918 Pat 155 (162) : 19 Cri L Jour 281 : 3 Pat 537 (FB)].

(l) Special jurisdiction under S. 13 of Act 19 (XIX) of 1888. ('68) 5 Bom H C R Cr. 6 (6).

(m) Magisterial powers under Madras Village Courts Act, 2 (II) of 1920. (Vol 12) 1925 Mad 465 (466) : 48 Mad 392.

7. Special powers.—[1] Surrender of offenders—Powers of High Court under this Code, are subject to the special power conferred on the Government under the Indian Extradition Act. (Vol 20) 1933 Pat 295 (297) : 12 Pat 347 : 34 Cri L Jour 932 (DB).

[2] The power of the High Court as a superior Court of Record to punish summarily for contempt is not affected by the Criminal Procedure Code. ('84) 10 Cal 103 (123) \* 10 Ind App 171 (P C) \* (Vol 13) 1926 All 623 (626, 628, 628) : 48 All 711 (SB) \* (1900) 2 Bom L R 130 (131) \* (Vol 14) 1927 Lah 610 (611) : 28 Cri L Jour 727 (SB) \* (Vol 13) 1926 Lah 1 (2) : 6 Lah 528 : 26 Cri L Jour 1409 (SB) \* ('01) 24 Mad 523 (548n) (SB).

[See also (Vol 29) 1912 Lah 105 (107) : 43 Cri L Jour 599 : I L R (1942) Lah 411 (FB)].

[3] Powers of departmental punishment exercised—Liability under Penal Law is not taken away. ('11) 12 Cri L Jour 143 (144) (Lah) \* (Vol 2) 1915 Lah 350 (350) : 1915 Pun Re No. 26 Cr : 16 Cri L Jour 788. (DB).

[4] The Chief Presidency Magistrate granting or dismissing claim for compensation under S. 45 of the Bombay City Police Act (1902) does so under Special powers. (Vol 17) 1930 Bom 486 (486) : 54 Bom 664 : 32 Cri L Jour 397 (DB).

### 8. Police at Calcutta, Madras and Bombay.—

[1] The Code does not apply to the Police in the presidency towns of Bombay and Calcutta. (Vol 25) 1938 Cal 545 (546) : 39 Cri L Jour 842 \* ('88) 15 Cal 595 (606) (FB) \* (Vol 17) 1930 Bom 158 (159) : 54 Bom 528 : 31 Cri L Jour 1008 : \* (Vol 13) 1926 Cal 1121 (1127) : 54 Cal 218 : 27 Cri L Jour 1201 (FB).

[2] The code applies to a Magistrate who is not a police officer. (Vol 13) 1926 Pat 279 (282) : 5 Pat 171 : 27 Cri L Jour 957 (DB).

2. [Repeal. of enactments, notifications, etc., under repealed Acts. Pending cases.]  
*Repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914).*

3. (1) In every enactment passed before this Code comes into force in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861 or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section.

*References to Code of Criminal Procedure and other repealed enactments.*

(2) In every enactment passed before this Code comes into force the expressions "Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class" and "Magistrate of the third class," the expression "Magistrate of a division of a district" shall be deemed to mean "Sub-divisional Magistrate," the expression "Magistrate of the district" shall be deemed to mean "District Magistrate," the expression "Magistrate of Police" shall be deemed to mean "Presidency Magistrate," and the expression "Joint Sessions Judge" shall mean "Additional Sessions Judge".

*Expressions in former Acts.*

[1882—S. 3; 1872—S. 2, paras 3 and 4].

4. (1) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context:—

*Definitions.*

[1882—S. 4, para (1); 1872—S. 4 para. 1; 1861—S. 2].

(a) "Advocate General" includes also a Government Advocate or, where there is no Advocate-General or Government Advocate, such officer as the [Provincial Government] may, from time to time, appoint in this behalf:

*"Advocate General."*

[1882—S. 4 (k).]

[a] Substituted by A. O. for "Local Government".

#### S. 1 (contd.)

But see ('88) 15 Cal 595 (606) (FB) \* ('97) 21 Bom 495 (499)].

9. **Village headman in Madras.**—[1] The village headman can be a complainant although in proceedings which he takes as headman he is not governed by the Code. (Vol 11) 1924 Mad 780 (780): 25 Cri L Jour 221 \* ('88) 11 Mad 875 (876) (DB).

[2] The village headman is not a Magistrate for the purposes of the Code except as provided therein. ('08) 26 Mad 894 (402) (SB) \* (Vol 1) 1914 Mad 694 (695, 696): 39 Mad 1006: 15 Cri L Jour 431 (DB).

10. **Village police officers in the Presidency of Bombay.**—[1] The ancient village system of police remains unaffected by the Code, except when the Code contains a specific provision to the contrary. ('95) 19 Bom 612 (618) (DB) \* (Vol 6) 1919 Bom 79 (79, 80): 20 Cri L Jour 315 (DB).

[2] The Code applies in the case of a complaint against a village police officer, although procedure in the Code does not govern actions of village police officers as such. (Vol 25) 1988 Bom 489 (490): 40 Cri L Jour 116 (DB).

11. **Any special form of procedure.**—[1] The special procedure in Bombay Prevention of Gambling Act, 4 (IV) of 1887, overrides the general law of procedure enacted in S. 342, Cr. P. C., whenever latter is inconsistent. (Vol 1) 1914 Sind 45 (46): 16 Cri L Jour 447: 8 Sind L R 309 (DB).

#### SECTION 3—Note 1.

[1] References to sections of the repealed Code have to be taken to be made to the corresponding provisions of the present Code. ('89) 12 Mad 94 (95, 96) (FB)—(Reference in the Reformatory Schools Act of 1876 to S. 318 of the Code of 1872 should be taken to

be reference to S. 399 of the Code of 1882 after the passing of that Code.) \* ('98) 25 Cal 333 (339) (DB) (Do).

[2] The following class of Magistrates are meant in the following Acts by the expression "Officer invested with full powers of Magistrate, authorised to exercise any of the powers of the Magistrate" etc.,

(a) A first class Magistrate in the Public Gambling Act 3 (III) of 1867. ('12) 18 Cri L Jour 716 (716): 34 All 597.

(b) Presidency Magistrate in the Calcutta Port Act, 1890 (Vol. 6) 1919 Cal 1 (2): 47 Cal 147: 20 Cri L Jour 782 (DB).

(c) Presidency Magistrate in the Workman's Breach of Contract Act 18 (XIII) of 1859. ('98) 25 Cal 637 (638) (DB).

[3] A Joint Sessions Judge under the Code of 1882 became an Additional Sessions Judge under the Code of 1898 without a fresh appointment. ('98) 2 Cal W. N-cccv (cccv).

#### SECTION 4 (1)—Note 1.

[1] Meaning of words and expressions used in this Code should be fixed with reference to the definitions contained in the Code itself. (Vol. 13) 1926 Sind 58 (61): 25 Sind L R 345 (FB) \* ('85) 12 Cal 430 (433) (DB) \* ('08) 30 Cal 910 (916) (FB).

[2] Unless a different intention appears from the subject or context the meaning assigned to a word under this section should be given. (Vol 30) 1948 All 6 (6, 7): 44 Cri L Jour 165: 1 L R 1948 All 29 \* ('12) 18 Cri L Jour 826 (827): 40 Cal 360 (DB).

[3] When a definition "includes" certain persons or things, it does not exclude other persons or things not so included. ('96) 22 Bom 285 (287) (DB) \* ('78) 4 Cal 433 (492, 493) (FB).



(b) "bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force; and  
 (c) "non-bailable offence" means any other offence:

[1932—S. 4 (f); 1872—S. 4 last two paras.]

(d) "charge" includes any head of charge when the charge contains more heads than one;

a[ \*

[a] Cl. (d) was repealed by the Repealing and Amending Act, 1923 (11 [XI] of 1923), S. 3 and Sch. II.

(e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown.

[1882—S. 4 (1).]

(f) "cognizable offence" means an offence for, and "cognizable case" means a case in, which a police-officer, within or without the presidency-towns, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant:

[1882—S. 4 (g), para (1); 1872—S. 4, para 19.]

S. 4 (1) (contd.)

[4] The word "includes" is a term of extension and is generally used in order to enlarge the meaning of the words or phrases occurring in the body of the Code. (100) 4 Cri L Jour 23 (31): 30 Bom 558 (DB).

[5] The word "means" is used to exhaust the signification of the word interpreted. (78) 2 Mad 5 (7) (DB); (Case under General Clauses Act, 1 (I) of 1860) (Vol 8) 1513 All 165 (170): 40 All 598: 19 Cri L Jour 615 (DB).

#### SECTION 4 (1) (a)—Note 1.

[1] Judgment of a Special Criminal Bench of the High Court constituted under S. 6 (b) of the Indian Criminal Law Amendment Act, 1908 is open to review on a certificate granted by the Advocate-General under Cl. 26 of the Letters Patent (12) 13 Cri L Jour 352 (354): 35 Mad 397 (FB).

[2] The Advocate-General must hear both counsel for prisoner and Crown before granting certificate under Cl. 26, Letters Patent. (Vol. 11) 1924 Cal 257 (261): 25 Cri L Jour 817 (FB).

[3] For the purposes of right to pre-audience the term "Advocate-General" includes acting Advocate-General. (Vol 19) 1932 Bom 71 (73, 74) (FB).

#### SECTION 4 (1) (b)—Note 1.

[1] Offence under Defence of India Rules (1939) R. 81 (4) is non-bailable. (Vol 33) 1946 Mad 390 (391): 47 Cri L Jour 843.

#### SECTION 4 (1) (c)—Note 1.

[1] A charge is a precise formulation of the specific accusation made against a person. (01) 28 Cal 434 (437) (DB).

[2] "Charge" denotes one formulated after inquiry as distinguished from inculcation of a person for an alleged offence. (Vol 14) 1927 Bom 96 (96): 23 Cri L Jour 380 (DB).

[3] A charge may include more than one head. (Vol 11) 1924 Cal 625 (626): 26 Cri L Jour 5 (DB)\* (Vol 2) 1915 Sind 50 (51): 16 Cri L Jour 573 (574): 9 Sind L R 37 (DB).

#### SECTION 4 (1) (f)—Note 1.

[1] An offence is cognizable even if the offender can be arrested without warrant by a particular class

of police officers only. (Vol 28) 1941 Nag 338 (339): 43 Cri L Jour 89: I L R (1942) Nag 426\* (Vol 26) 1939 Nag 95 (97): 40 Cri L Jour 905: 1 L R (1939) Nag 488\* (1900) 27 Cal 144 (150)\* (Vol 13) 1926 Bom 195 (197): 50 Bom 344: 27 Cri L Jour 503 (DB)\* (Vol 17) 1930 Bom 49 (50, 52): 51 Bom 146: 31 Cri L Jour 633 (DB).

[But see (Vol 29) 1942 Sind 106 (109, 110): 43 Cri L Jour 888: I L R (1942) Kar 94\* (Vol 22) 1935 Rang 181 (183): 13 Rang 130: 36 Cri L Jour 998 (DB)].

[2] The power of arrest referred to here must be an unqualified power and not conditional. (Vol 22) 1935 Rang 181 (182): 13 Rang 130: 36 Cri L Jour 998 (DB)\* (1897) 24 Cal 691 (696) (DB)\* (Vol 9) 1922 All 264 (265): 23 Cri L Jour 81\* (Vol 12) 1925 Bom 131 (132, 133): 49 Bom 212: 26 Cri L Jour 441 (DB).

[3] Offences under the following Acts are not cognizable offences.

(a) Offence under S. 4 or 5 of the Bombay Prevention of Gambling Act 4 (IV) of 1887. (Vol 29) 1942 Sind 106 (110): I L R (1942) Kar 94: 43 Cri L Jour 888\* (Vol 19) 1932 Bom 610 (611): 33 Cri L Jour 733 (DB).

(b) Offences under Chap VII of the Excise Act of 1881. (183) 1883 Pun Re No 28 (Cri P page 74 (75) (DB).

(c) Offences under S. 29 of Police Act of 1861. (1913) 1 Upp Bur Rul 295 (295).

[4] The words "under any other law for the time being in force" refer to offences which are punishable with imprisonment for less than three years but are specified as offences for which the police may arrest without warrant. (Vol 21) 1934 Nag 71 (75): 35 Cri L Jour 1097: 30 Nag L R 269.

[5] The following offences are made cognisable by the Acts relating to them.

(a) Being in possession of arms without licence (Vol 21) 1934 Nag 71 (76): 30 Nag L R 269: 35 Cri L Jour 1097.

(b) Offences made cognizable under S. 131 of the Railways Act 9 (IX) of 1890. (Vol 21) 1934 Nag 71 (75): 30 Nag L R 269: 35 Cri L Jour 1097.

(c) Offences under S. 34 of the Police Act. (Vol 21) 1939 Nag 95 (97): I L R (1939) Nag 488: 43 Cri L Jour 905.

"Commissioner  
of Police."

(g) "Commissioner of Police" includes a Deputy Commissioner of Police:

(h) "complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer:

[1882—S. 4 (1) (a).]

#### S. 4 (1) (f) (contd.)

(d) Offences under Penal Code, sections 161 and 165 are made cognizable offences by the Prevention of Corruption Act, 1947, S. 3.

[6] Offences punishable with fine only are not cognizable offences (Vol 25) 1928 Rang 161 (163): 39 Cri L Jour 642 (DB).

[7] The words "any other law for the time being in force" are wide enough to include any express or implied provision of any law or enactment. (Vol 17) 1920 Bom 49 (51): 54 Bom 146: 31 Cri L Jour 633 (DB).

#### SECTION 4 (1) (h)—SYNOPSIS.

1. Scope of the definition.
2. Form of Complaint.
3. Who may complain.
4. Statement in complaint, if privileged.
5. "To a Magistrate".
6. "With a view to his taking action".
7. "Under the Code".
8. "That some person has committed an offence".
9. "Some person whether known or unknown".
10. "Report of a police-officer".
11. Limitation.

1. **Scope of the definition.**—[1] In order to constitute a complaint an allegation must be made to a Magistrate and with a view to his taking action under this Code. (Vol 23) 1936 All 788 (791): 1 L R (1937) All 162: 38 Cri L Jour 57\* (Vol 22) 1935 Sind 1 (2): 28 Sind L R 347: 36 Cri L Jour 824 (DB)\* (Vol 21) 1934 Pat 156 (157): 35 Cri L Jour 1309\* ('84) 1884 Pun Re No 8 Cr p 10 (10) (DB).

[2] A "complaint" must be distinguished from "information". (Vol 17) 1930 All 820 (820, 821): 53 All 208: 32 Cri L Jour 306.

[3] The word "complaint" must be interpreted to mean a "complaint" as defined in this section. ('04) 1 Cri L Jour 25 (29): 80 Cal 910 (FB).

[4] There is nothing in the definition of "complaint" which requires it to be made only in a non-cognizable case (Vol 17) 1930 All 820 (821): 53 All 208: 32 Cri L Jour 306.

[5] Even in cases launched on private complaints the Crown alone is the prosecutor. (Vol 6) 1919 Mad 851 (852): 20 Cri L Jour 101\* ('74) 21 Suth W R (Cr) 13 (13) (DB).

2. **Form of complaint.**—[1] It is the substance of the complaint and not the form that is to be regarded. ('13) 14 Cri L Jour 425 (426) (All)\* (Vol 5) 1918 All 345 (346): 40 All 41: 19 Cri L Jour 12\* ('84) 1884 Pun Re No 8 (Cr) p 10 (10) (DB)\* (Vol 3) 1916 Nag 117 (118): 13 Nag L R 13: 18 Cri L Jour 459\* ('02) 26 Bom 193 (195) (DB)\* ('10) 11 Cri L Jour 596 (597) (Lah)\* (Vol 5) 1918 Mad 455 (455): 18 Cri L Jour 641 (642) (DB). (The use of a wrong printed form is immaterial).

[2] It is not necessary to state in the complain the section under which accused is charged but the facts alleged should constitute the offence for which accused is charged. (Vol 31) 1944 Nag 192 (194): 4 Cri L Jour 80: 1 L R (1944) Nag 589 (DB)\* ('03) 2 All 209 (211)\* (Vol 12) 1925 Lah 631 (632): 6 Lah 375: 27 Cri L Jour 769 (DB)\* (Vol 15) 1928 Lah 510 (514): 9 Lah 678: 29 Cri L Jour 652 (DB)\* (Vol 16) 1929 Mad 188 (189): 29 Cri L Jour 1062\* (Vol 4) 191 Nag 65 (67): 19 Cri L Jour 392: 14 Nag L R 157\* (Vol 8) 1921 Oudh 149 (150): 24 Oudh Cas 232: 22 Cri L Jour 742\* (Vol 20) 1933 Pat 297 (300): 12 Pat 758: 34 Cr L Jour 942 (DB).

[3] Quoting of wrong section does not invalidate a complaint where facts are sufficiently alleged. ('95) 1895 Pun Re No 23, Cr p 63 (65, 66) (DB)\* (Vol 15) 1928 Lah 510 (514): 9 Lah 678: 29 Cri L Jour 65 (DB).

[4] A complaint may be oral. (Vol 11) 1924 Ran 35 (36): 1 Rang 549: 25 Cri L Jour 229\* ('08) 7 Cri L Jour 10 (15): 35 Cal 141 (DB).

[5] Allegations not stated in the complaint do not form part of the complaint. (Vol 19) 1932 Pat 72 (75) 33 Cri L Jour 349.

[6] A statement made by a person as a witness cannot be treated as a complaint. (Vol 20) 1933 A 626 (627): 55 All 871: 34 Cri L Jour 1227\* ('02) 2 Cal 415 (416) (DB)\* ('87) 10 All 89 (48)\* ('12) 13 Cri Jour 287 (288) (DB) (Bom)\* ('13) 14 Cri L Jour (1,2) (DB) (Bom)\* ('88) 1883 Pun Re No 10 (Cr) pag 12 (13) (DB).

[But see (Vol 3) 1916 All 307 (307): 17 Cri L Jour 72 (73): 38 All 276\* ('01) 3 Bom L R 675 (676) (DB)

[7] A statement by a complainant in the course of his examination under S. 200 does not form part of the complaint. ('88) 10 All 39 (43)\* (Vol 19) 193 Pat 72 (75): 33 Cri L Jour 349\* (Vol 9) 1922 Mad 35 (356) (DB).

[But see (Vol 11) 1924 Mad 323 (323): 24 Cri L Jour 837\* ('79) 1879 Pun Re No 5 (Cr) page 6 (9)\* (DI ('91) 1891 Rat Un Re Cr Cas 584 (585)].

[8] A complaint need not allege unnecessary fact ('08) 9 Cri L Jour 108 (111): 32 Mad 3 (DB)\* (Vol 20) 1933 Oudh 430 (431): 35 Cri L Jour 128.

[9] A complaint in which no facts are set out but only the words of the section are copied is not a complaint. ('12) 13 Cri L Jour 609 (650) (SB) (Cal (Vol 8) 1921 Cal 561 (563): 22 Cri L Jour 455.

[10] A mere endorsement made by a Superintendent of Police forwarding to a Magistrate the report made to the former by a Sub-Inspector of Police is not a complaint. (Vol 23) 1936 All 788 (791): 1 L R (1937) All 162: 38 Cri L Jour 57.

[11] A complaint need not contain a list of witnesses. (Vol 20) 1933 Oudh 430 (431): 35 Cri L Jour 128.

[12] A complaint may be sent by telegram. (Vol 23) 1936 Pesh 66 (68): 37 Cri L Jour 604 (DB).

3. **Who may complain.**—[1] Any person having knowledge of the commission of an offence

**S 4(1) (h) (i).**

defamation in respect of a statement therein, will be entitled only to the benefit of the qualified privilege mentioned in S. 499 of the Penal Code. (Vol 8) 1921 Cal 1 (14, 15): 48 Cal 388: 22 Cri L Jour 31 (SB)\* (Vol 13) 1926 Mad 906 (309): 49 Mad 7:8: 27 Cri L Jour 1026 (H B). (Overruling (1913) 36 Mad 216 (H B) and (Vol 1) 1914 Mad 472: 57 Mad 110: 13 Cri L Jour 293 (DB))\* (Vol 1) 1914 Mad 382 (382): 15 Cri L Jour 281\* (Vol 9) 1922 Bom 581 (582): 47 Bom 15: 23 Cr L Jour 654 (DB).

[2] It is not necessary that the person making the complaint should have personal knowledge of the facts complained of. (Vol 8) 1921 Cal 561 (563): 22 Cri L Jour 455 (DB)\* ('89) 13 Bom 600 (605, 606) (DB)\* (Vol 7) 1920 Pat 163 (165): 21 Cri L Jour 346 \*('81) 1931 Mad W N 1316 (1317)\* (Vol 1) 1914 Smd 65 (65): 7 Smd L R 77: 15 Cri L Jour 369 (370)\* (Vol 10) 1923 Nag 156 (156): 26 Cri L Jour 327\* (Vol 18) 1931 Nag 98 (98, 99): 27 Nag L R 167: 32 Cri L Jour 896.

[2] It is not necessary that the person making the complaint should have personal knowledge of the facts complained of. (Vol 8) 1921 Cal 561 (563): 22 Cri L Jour 455 (DB)\* ('89) 13 Bom 600 (605, 606) (DB)\* (Vol 7) 1920 Pat 163 (165): 21 Cri L Jour 346 \*('81) 1931 Mad W N 1316 (1317)\* (Vol 1) 1914 Smd 65 (65): 7 Smd L R 77: 15 Cri L Jour 369 (370)\* (Vol 10) 1923 Nag 156 (156): 26 Cri L Jour 327\* (Vol 18) 1931 Nag 98 (98, 99): 27 Nag L R 167: 32 Cri L Jour 896.

[But see ('06) 4 Cri L Jour 217 (218) (DB) (Cal)\* ('07) 3 Cri L Jour 13 (14) (DB) (Cal)].

[3] An alien enemy, who resides in this country by license of the King and under his protection, has a right to complain against crimes directed against his person or property. (Vol 6) 1919 Mad 851 (852): 20 Cri L Jour 101.

[4] A convicted person is entitled to institute criminal proceedings. ('74/21 Suth W R Cr 13 (13) (DB).

[5] In the following cases it was held that only specified persons can complain—

- (a) A complaint under Ss. 196, 198 and 199 must be made by the persons specified therein (Vol 22) 1935 All 938 (939): 37 Cri L Jour 56\* ('89) 13 Bom 600 (623) (DB)\* (Vol 8) 1921 Cal 627 (629): 22 Cri L Jour 494 (DB)\* ('18) 14 Cri L Jour 409 (410) (Oudh).
- (b) A complaint in respect of the offences specified in cls (b) and (c) of S. 195, Sub-S. (1) can be made only by a Court. (Vol 2) 1915 Lah 259 (259): 1915 Pun Re No 13 (Cr): 16 Cri L Jour 251\* (Vol 4) 1917 Lah 338 (341): 1917 Pun Re No 19 Cr: 18 Cri L Jour 548\* (Vol 1) 1914 Bom 128 (139): 38 Bom 642: 15 Cri L Jour 581 (FB).
- (c) Where persons are specified by a special or Local law such specified persons. (Vol 9) 1922 Lah 220 (221): 24 Cri L Jour 183\* (Vol 19) 1932 All 187 (187): 33 Cri L Jour 888\* (Vol 11) 1924 All 267 (269): 46 All 158: 25 Cri L Jour 1345 (DB)\* (Vol 5) 1918 Mad 455 (455): 18 Cri L Jour 641 (DB)\* (Vol 19) 1932 Bom 256 (257): 33 Cri L Jour 462 (DB)\* (Vol 20) 1933 Bom 63 (64): 34 Cri L Jour 225 (DB)\* (Vol 15) 1928 Mad 969 (969): 29 Cri L Jour 587\* (Vol 15) 1928 Lah 27 (28): 8 Lah 613: 28 Cri L Jour 1002 (DB)\* (Vol 17) 1930 Nag 33 (34): 25 Nag L R 194: 31 Cri L Jour 882\* ('07) 6 Cri L Jour 281 (282): 4 Low Bur Rul 44.

**4. Statement in complaint, if privileged.**  
**[1] A party to a judicial proceeding prosecuted for**

defamation in respect of a statement therein, will be entitled only to the benefit of the qualified privilege mentioned in S. 499 of the Penal Code. (Vol 8) 1921 Cal 1 (14, 15): 48 Cal 388: 22 Cri L Jour 31 (SB)\* (Vol 13) 1926 Mad 906 (309): 49 Mad 7:8: 27 Cri L Jour 1026 (H B). (Overruling (1913) 36 Mad 216 (H B) and (Vol 1) 1914 Mad 472: 57 Mad 110: 13 Cri L Jour 293 (DB))\* (Vol 1) 1914 Mad 382 (382): 15 Cri L Jour 281\* (Vol 9) 1922 Bom 581 (582): 47 Bom 15: 23 Cr L Jour 654 (DB).

[2] If the complainant is sued in a Civil Court for damages for defamation in respect of a statement made in the complaint, his liability must be determined with reference to principles of justice, equity and good conscience. (Vol 27) 1940 Nag 125 (127): 1 L R (1940) Nag 48\* (Vol 5) 1918 All 69 (70, 71): 40 All 341 (H B)\* (Vol 15) 1928 All 336 (338)\* (Vol 8) 1921 Cal 1 (14, 15): 48 Cal 388: 22 Cri L Jour 31 (SB)\* (Vol 13) 1926 Mad 521 (523, 524): 49 Mad 315\* (1913) 17 Cal L Jour 105 (112, 114) (H B).

**5. "To a Magistrate".**—[1] The complaint must be made to a Magistrate as such. (Vol 28) 1936 All 788 (791): 1 L R (1937) All 162: 38 Cri L Jour 57 (DB).

[2] The following were held to be not complaints:

- (a) Petition to the Police who reported it to the Magistrate. ('04) 1 Cri L Jour 20 (20): 30 Cal 910 (FB)\* ('84) 7 Mad 563 (563)\* (Vol 10) 1923 Mad 59 (59): 23 Cri L Jour 592\* ('04) 1 Cri L Jour 763 (763): 15 C P L R 105\* (Vol 16) 1929 Pat 475 (475): 9 Pat 707: 30 Cri L Jour 1056 (FB)\* ('04) 1 Cri L Jour 1046 (1047): 27 All 305\* ('98) 22 Bom 949 (946) (DB).
- (b) Superintendent of Police forwarding report of Sub-Inspector to the Magistrate. (Vol 28) 1936 All 788 (791): 1 L R (1937) All 162: 38 Cri L Jour 57 (DB).
- (c) Petitions to a Collector as head of Court of Wards or otherwise. ('03) 30 Cal 415 (417) (DB)\* ('04) 1 Cri L Jour 957 (958) (Lah)\* (Vol 5) 1918 All 265 (265): 19 Cr L Jour 257\* ('13) 14 Cri L Jour 56 (66): 35 All 102\* (Complaint to a District Magistrate as head of the police and not as Magistrate)\* ('13) 14 Cri L Jour 125 (426) (All). (Petition to Collector—Collector taking steps as District Magistrate—Petitioner not protesting to the proceedings—Petition held to be complaint).
- (d) Petitions to an officer in his executive capacity. (Vol 2) 1915 All 457 (458): 38 All 32: 16 Cri L Jour 807\* ('08) 7 Cri L Jour 224 (225, 226) (DB) (Cal)\* ('88) 1888 All W N 216 (216).
- (e) Petitions to a village Magistrate who is not a Magistrate under the Code. ('02) 25 Mad 667 (668) (DB).
- (f) Petitions to a Civil Court complaining of obstructions to execution. ('04) 1 Cri L Jour 358 (359): 26 All 183\* ('76) 1 Bom 175 (176, 177) (DB)\* ('93) 20 Cal 481 (482) (DB)\* ('10) 11 Cri L Jour 634 (634): 1910 Pun Re No. 25 (Cr)\* (Vol 15) 1928 Lah 827 (828): 29 Cri L Jour 645.

[3] A complaint by a Magistrate to his own Court is a complaint. (Vol 13) 1926 Cal 470 (472, 477, 479): 53 Cal 350: 27 Cri L Jour 385 (FB).

**6. "With a view to his taking action".**—[1] The test to decide whether an allegation amounts to a complaint is to see whether it is made with a view to the Magistrate's taking action under the Code. (Vol 28) 1936 Pesh 66 (66): 37 Cri L Jour 604 (DB)\* ('95) 19 Bom 51 (62) (DB)\* (Vol 5) 1918 All 345 (346): 40 All 41:

"European British subject" means—

- (i) any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony, or
- (ii) any subject of His Majesty who is the child or grand child of any such person by legitimate descent : ]

[1882—S. 4 (u). ]

[a] Substituted by the Criminal Law (Amendment) Act, 1928 (12 [XII] of 1928), S. 2 (z) for original cl (i).

**S. 4 (1) (h) (contd.)**

19 Cri L Jour 12 \* (Vol 17) 1930 All 820 (821): 32 Cri L Jour 806: 53 All 203 \* (Vol 16) 1929 Pat 473 (474, 475): 30 Cri L Jour 1056: 9 Pat 707 (FB) \* (Vol 17) 1930 Pat 550 (553): 32 Cr L Jour 210 (DB) \* (Vol 16) 1929 Cal 346 (347): 56 Cal 1013: 31 Cri L Jour 369 \* (Vol 11) 1924 Nag 115 (115): 24 Cri L Jour 959\* ('88) 11 Mad 443 (444) (DB) \* (Vol 1) 1914 Sind 121 (121): 8 Sind L R 66: 15 Cri L Jour 657 (DB) \* ('13) 14 Cri L Jour 76 (76) (DB) (Cal).

[2] Whether in any particular case the allegations were made with such a view depends upon the facts and circumstances of that case. (Vol 27) 1940 Lah 203 (209): 41 Cri L Jour 618\* (Vol 17) 1930 Pat 550 (553), 32 Cri L Jour 210 (DB) \* ('10) 11 Cri L Jour 351 (352) (All).

**7. "Under the Code".**—[1] The action that is sought to be taken must be under this Code. (Vol 1) 1914 Sind 121 (121): 8 Sind L R 66: 15 Cri L Jour 657 (DB).

**8. "That some person has committed an offence".**—[1] Where no offence is disclosed upon the facts contained in the petition, there is no complaint. (1905) 1 Weir 720 (720) (DB) \* (Vol 19) 1932 Cal 287 (287): 33 Cri L Jour 406 (DB) \* (Vol 13) 1926 All 566 (567): 27 Cri L Jour 899.

[2] Acts for which a complaint under S. 20 of the Cattle Trespass Act will lie are offences and petition requesting suitable steps against the acts is a complaint. (Vol 14) 1927 Mad 396 (397): 50 Mad 841: 28 Cri L Jour 301\* ('07) 5 Cr L Jour 86 (86): 29 Mad 517 (DB).

[3] Complaints in the following cases were held to be not complaints within the meaning of this section.

- (a) Complaint under S. 41, Bombay District Police Act that certain house is used as a brothel. ('18) 14 Cri L Jour 320 (320): 6 Sind L R 254 (DB).
- (b) Proceedings for recovering excess charge under S. 113 of Railways Act. (Vol 16) 1929 Rang 11 (11): 6 Rang 619: 30 Cri L Jour 57.
- (c) Application for action under S. 107 of this Code. (Vol 25) 1938 Lah 861 (863, 864): 40 Cri L Jour 193: I L R (1938) Lah 640 (DB) \* ('10) 11 Cri L Jour 446 (446) (All) \* (Vol 18) 1931 All 38 (34): 53 All 148: 32 Cri L Jour 570 \* (Vol 11) 1924 Lah 630 (630): 25 Cri L Jour 89\* (Vol 15) 1928 Lah 694 (694): 29 Cri L Jour 866\* (Vol 12) 1925 Oudh 138 (138): 28 Oudh Cas 44: 25 Cri L Jour 1149 \* (Vol 17) 1930 Oudh 500 (501): 6 Luck 354.

[But see (Vol 13) 1926 All 358 (359): 27 Cri L Jour 405].

- (d) Application under S. 110 of the Code. (1900) 27 Cal 662 (663) (DB) \* ('08) 6 Oudh Cas 262 (266, 267) (DB).
- (e) Application under S. 183 of the Code. ('97) 24 Cal 395 (397, 398) (DB).
- (f) Application under S. 145 of the Code. ('98) 20 Cal 739 (737) (DB) \* (1913) 17 Cal L Jour 105

(108) (DB) \* (Vol 17) 1930 Oudh 500 (501): 6 Luck 354.

- (g) Petition for maintenance under S. 488 of the Code (1905) 2 Cri L Jour 421 (422): 1905 Pun Re No. 29 (Cr) \* ('93) 16 Mad 234 (234) (DB) \* ('10) 11 Cri L Jour 156 (157) (DB) (Mad) \* ('04) 1 Cri L Jour 864 (865): 17 O P L R 127 \* ('93-1900) 1893-1900 Low Bar Rul 662 (663) \* ('28) 29 Cri L Jour 907 (910) (Lah).

**9. "Some person whether known or unknown".**—[1] Complaint may be against unknown person or persons. ('11) 12 Cri L Jour 399 (399): 4 Sind L R 258 (DB).

[2] The complaint need not contain the names of the accused. ('12) 13 Cri L Jour 538 (539, 590) (DB) (All) \* (Vol 15) 1928 Pat 535 (537): 29 Cri L Jour 942 (944): 7 Pat 561.

[3] Specific accusation against any one individual is not necessary. ('99) 26 Cal 786 (789, 790) (DB) \* (Vol 20) 1933 Pat 297 (300): 12 Pat 758: 34 Cri L Jour 942 (DB).

[4] It is not necessary to accuse each person with a particular offence. ('91) 1891 Pun Re No 8 (Cr) p. 19 (21, 22) (DB).

[5] A magistrate can proceed against other persons not mentioned in the complaint, but who appears to have been concerned in the commission of the offence. (Vol 1) 1914 Cal 801 (804): 41 Cal 1013: 15 Cri L Jour 546 (DB).

**10. "Report of a police-officer".**—[1] The "report of a police officer" is not a complaint. (Vol 30) 1943 All 6 (6, 7): 44 Cri L Jour 165: I L R (1943) All 29 \* ('88) 1888 Pun Re No 4 (Cr) p. 6 (7, 8) (DB).

**11. Limitation.**—[1] There is no limitation for preferring a complaint of a criminal offence ('71) 15 Suth W R Cr 25 (27) (DB) \* ('91) 1891 Rat 549 (550) \* ('87) 11 Mad 332 (333) (DB).

[2] Where the penal law creating the offence fixes a period within which to prefer the complaint such period will be the period of limitation. ('86) 20 Bom 543 (547) (DB) \* (Vol 22) 1935 Cal 116 (116): 36 Cri L Jour 495 \* (Vol 13) 1931 Mad 276 (276): 32 Cri L Jour 309 \* (Vol 3) 1916 Sind 49 (50): 10 Sind L R 45: 17 Cri L Jour 367.

**SECTION 4 (1) (i)—Note 1.**

[1] Mere birth in Europe, in the absence of proof of domicile of the father or grandfather in British Island or in any Colony, will not confer the status of a European British subject. ('12) 13 Cri L Jour 197 (198): 1912 Pun Re No 6 (Cr) (DB).

[2] The legitimate descent of the accused and the nationality of his father or grandfather, must be proved to sustain a plea of British born subject. ('70) 6 Mad H O R 7 (3) (DB).

[3] Birth of grandfather in England—No proof of his European descent—Accused does not become European British subject. (Vol 26) 1939 Cal 545 (552, 553): I L R (1939) 51 Cal 162: 41 Cri L Jour 72 (DB).

(c) "High Court" means in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras<sup>a</sup> [\*] Bombay, <sup>b</sup>[Allahabad c[\*] Patna<sup>c</sup> [Lahore c[\*]] and Nagpur, <sup>ee</sup>[the Chief Courts of Oudh and Sind]; in other cases, "High Court" means the highest Court of criminal appeal or revision for any local area; or, where no such Court is established under any law for the time being in force, such officer as the [Provincial Government] may appoint in this behalf. <sup>g</sup>

[1882—S. 4 (j); 1872—S. 4, paras 14, 15.]

[<sup>a</sup>] The word "and" was *repealed* by the Amending Act, 1916 (13 [XIII] of 1916), S. 2 and schedule.

[<sup>b</sup>] *Substituted*, *ibid.*, for "the High Court of Judicature for the North-Western Provinces".

[<sup>c</sup>] The word "and" was *repealed* by the Repealing and Amending Act, 1919 (18 [XVIII] of 1919).

[<sup>d</sup>] *Substituted* by the Central Provinces Courts (Supplementary) Act, 1935 (8 [VIII] of 1935), S. 2 and Schedule, for "Lahore and Rangoon, the Chief Court of Oudh and the Court of the Judicial Commissioners of the Central Provinces and Sind".

[<sup>e</sup>] The word "Rangoon" was *repealed* by A. O.

[<sup>ee</sup>] *Substituted* by the Sind Court (Supplementary) Act, 1926 (34 [XXXIV] of 1926), S. 2 and Sch., this Act came into force on 15-4-1940 [See Sind Government Notification (Home Department Political) No. 1499 H-89 dated 25-2-1940.]

[<sup>f</sup>] *Substituted* by A. O. for "Governor-General in Council".

[<sup>g</sup>] As to (1) the Southal Paraganas, *see* the Southal Paraganas Justice Regulation, 1893 (5 [v] of 1893), S. 4; (2) Ajmer-Merwara, *see* the Ajmer Courts Regulation, 1926 (9 [IX] of 1926), S. 27; (3) Coorg, *see* the Courts Regulation, 1901 (1 [I] of 1901), S. 16; (4) the N.-W. F. P., *see* the N.-W. F. P. Law and Justice Regulation, 1901 (7 [VII] of 1901), s. 6 (1) (c); (5) British Baluchistan, *see* the British Baluchistan Criminal Justice Regulation, 1896 (8 [VIII] of 1896), Sch. Art I; (6) Panth Piploda, *see* the Panth Piploda Courts Regulation, 1931 (6 [VI] of 1931), S. 8.

(k) "inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court :

[1882—S. 4 (1) (k); 1872—S. 4, paras 5 to 8, 1861—S. 9.]

#### S. 4 (1) (i) (contd.)

[4] European British woman, who marries a native British Indian husband or a subject of an Indian State, does not cease to be a European British subject by reason of her marriage or of her domicile in the Native State. (Vol 16) 1929 Bom 31 (85, 86, 87) : 78 Bom 149 : 30 Cri L Jour 772 (DB).

#### SECTION 4 (1) (j)—Note 1.

[1] The Commissioners' Court at Bhagalpur is the High Court in respect of certain proceedings against European British subjects in that area. (Vol 13) 1926 Pat 449 (419 to 452) : 6 Pat 93 : 28 Cri L Jour 80 (DB).

[2] The Allahabad High Court is the High Court in reference to proceedings in the Kumaun division against European British subjects. (02) 24 All 348 (472, FB).

#### SECTION 4 (1) (k)—SYNOPSIS.

##### 1. "Inquiry".

##### 2. "Trial".

##### 3. "Trial, when begins and ends.

1. "Inquiry".—[1] The definition is not exhaustive. (Vol 6) 1919 Cal 59 (60) : 46 Cal 854 : 20 Cri L Jour 508 (DB).

[2] Definition is an explanation of the term as used in the Code. (1912) 13 Cri L Jour 693 (700) : 39 Cal 953 (PC).

[3] An inquiry must be distinguished from an "investigation" under Chapter XIV. (Vol 9) 1922 Bom 126 (142) : 46 Bom 61 (DB) \* (Vol 9) 1922 Mad 40 (41) : 45 Mad 230 : 23 Cri L Jour 680 (DB) (Impliedly overruled on another point in (Vol 23) 1936 P C 253 : 63 Ind App 372 : 17 Lah 629 : 37 Cri L Jour 897 (PC)) \* (Vol 7) 1920 Cal 352 (353, 354) : 21 Cri L Jour 573 (DB) \* (1886; 9 Mad 282 (282) (DB).

[4] An inquiry must be by a Magistrate or Court. (Vol 29) 1942 Bom 42 (43) : 43 Cri L Jour 362 (DB) \*

(Vol 27) 1940 Cal 97 (100) : ILR (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB) \* (Vol 9) 1922 Mad 40 (41) : 45 Mad 230 : 23 Cri L Jour 680 (DB).

[5] The object of an inquiry is to determine the truth or falsity of certain facts in order to take further action thereon. (Vol 7) 1920 Pat 563 (565) : 5 Pat L Jour 47 : 21 Cri L Jour 594.

[6] An inquiry under the Code is a proceeding distinct from a trial. (1912) 13 Cri L Jour 693 (700) : 39 Cal 953 (PC).

[7] An inquiry may have various endings according to the circumstances of the case and need not necessarily result in conviction or acquittal. (Vol 16) 1929 Pat 644 (646, 647) : 9 Pat 155 : 31 Cri L Jour 961 (DB) \* (Vol 19) 1932 Oudh 298 (303) : 8 Luck 135 : 34 Cri L Jour 58 (FB) \* (Vol 17) 1930 Pat 274 (275) : 9 Pat 131 : 31 Cri L Jour 958 (DB) \* (1887) 9 All 52 (56) (FB) \* (1909) 9 Cri L Jour 192 (204) : 32 Mad 220 (FB).

[8] An inquiry is not necessarily, confined to an inquiry into an offence such as is contemplated under Chapter XVIII but extends to matters which are not offences. (1907) 5 Cri L Jour 417 (419) : 3 Low Bur Rul 280 \* (Vol 9) 1922 Bom 138 (141 to 143) : 46 Bom 61 (DB) \* (Vol 9) 1922 Lah 49 (53) : 3 Lah 115 : 23 Cri L Jour 330 (DB) \* (Vol 16) 1929 Pat 644 (647) : 9 Pat 155 : 31 Cri L Jour 961 (DB) \* (Vol 7) 1920 Pat 563 (565) : 5 Pat L Jour 47 : 21 Cri L Jour 594 \* (Vol 6) 1919 Mad 190 (191) : 20 Cri L Jour 514 (DB) \* (Vol 14) 1927 Bom 21 (21) : 50 Bom 695 : 28 Cri L Jour 5 (DB) \* (Vol 7) 1920 Mad 337 (337, 341, 343) : 43 Mad 511 : 21 Cri L Jour 402 (FB).

[9] "Inquiry" will include everything done by a Magistrate whether the case has been challaned or not. (Vol 10) 1923 Lah 270 (271) : 3 Lah 431 : 24 Cri L Jour 941 (DB) \* (Vol 9) 1922 Bom 138 (139, 142) : 46 Bom 61 (DB). (Inquiry under S. 159)... \* (12) 13 Cri L Jour 33 (34) : 5 Sind L R 174 (DB) (Do) \* (Vol 15) 1928 Bom 390 (398) : 29 Cri L Jour 1063 (DB). (Inquiry under S. 176). \* (Vol 7) 1920 Pat 563

(l) "investigation" includes all the proceedings under this Code for the collection, of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf :

[1882—S. 4 (b) ; 1872—S. 4, para 4]

**S. 4 (k) (contd.)**

(565) : 5 Pat L Jour 47 : 21 Cr L Jour 594 (Inquiry under S. 202). \* ('97) 1897 Pun Re No 3 Cr P 4 (6) (DB) (Recording of statement under S. 164). \* (Vol 5) 1918 Pat 179 (181) : 3 Pat L Jour 291 : 19 Cr L Jour 135 (SB) (Inquiry under S. 465 as to the state of mind of the accused).

2. "Trial".—[1] The word "trial" must be construed with regard to the context in which it is used and with regard to the purpose of the measure concerned. (Vol 20) 1933 Cal 551 (552) : 34 Cr L Jour 684 (DB).

[2] A 'trial' generally means the determination of the issues arising in a particular case. (Vol 7) 1920 Mad 337 (341) : 43 Mad 511 : 21 Cr L Jour 402 (FB) \* ('04) 1 Cr L Jour 1037 (1038, 1039) : 27 Mad 510 (DB) \* (Vol 24) 1937 Bom 55 (56) : I L R (1937) Bom 211 : 33 Cr L Jour 250 (DB) (Proceeding—when commences). \* ('98) 25 Cal 863 (865) (DB) (Do).

[3] "Trial" does not include proceedings where the Court cannot pass final orders but can only report to the High Court. ('04) 1 Cr L Jour 605 (606, 607) : 27 All 25.

[4] A 'trial' is a judicial proceeding which ends in conviction or acquittal. (Vol 16) 1929 Pat 644 (646, 647) : 9 Pat 155 : 31 Cr L Jour 961 (DB) \* (Vol 19) 1932 Oudh 298 (303) : 8 Luck 135 : 34 Cr L Jour 58 (DB) \* (Vol 17) 1930 Pat 274 (275) : 9 Pat 131 : 31 Cr L Jour 958 (DB) \* ('87) 9 All 52 (56) (FB) \* ('09) 9 Cr L Jour 192 (204) : 32 Mad 220 (FB).

[5] The word 'trial' as used in the Code presupposes the idea of an offence. (Vol 7) 1920 Mad 337 (341) : 43 Mad 511 : 21 Cr L Jour 402 (FB).

3. Trial, when begins and ends:—[1] The following are the different views as to when a trial either before the Sessions Court or High Court begins.

(a) Begins with the framing of charges. (Vol 30) 1943 Nag 36 (49, 69) : I L R (1943) Nag 73 : 44 Cr L Jour 237 (DB) \* (Vol 9) 1922 Lah 49 (53) : 3 Lah 115 : 23 Cr L Jour 330 (DB) \* (Vol 12) 1925 Lah 435 (435, 436) : 6 Lah 176 : 27 Cr L Jour 735 \* ('09) 9 Cr L Jour 146 (146, 147) : 32 Mad 218 (DB) \* ('09) 9 Cr L Jour 192 (196) : 32 Mad 220 (FB) \* (Vol 14) 1927 Bom 21 (21) : 50 Bom 695 : 28 Cr L Jour 5 (DB) \* (Vol 16) 1929 Pat 644 (647) : 9 Pat 155 : 31 Cr L Jour 961 (DB).

(b) Only begins when the accused refuses to plead or does not plead or claims to be tried and thereupon the Court chooses the Jurors or assessors. ('90) 15 Bom 514 (515) (DB) \* (Vol 18) 1931 Cal 341 (343) : 53 Cal 1214 : 32 Cr L Jour 637 (DB) \* (Vol 12) 1925 Lah 446 (447) : 6 Lah 262 : 27 Cr L Jour 421 (DB) \* ('89) 1839 Pun Re No. 1 (Cr) p. 1 (3). (DB) \* (Vol 14) 1927 Bom 161 (162) : 28 Cr L Jour 402.

(c) Begins when charge is read out to the accused and he is asked to plead. (Vol 23) 1936 Mad 353 (357) : 37 Cr L Jour 637 (FB).

[2] In warrant cases, the inquiry "becomes a trial" after the charge is drawn up, read and explained to

the accused and he is called upon to plead to the charge. (Vol 30) 1943 Nag 36 (49, 69) : I L R (1943) Nag 73 : 44 Cr L Jour 237 (DB) \* (Vol 1) 1914 Lah 561 (562) : 1914 Pun Re No. 29 (Cr) : 16 Cr L Jour 81 (FB) \* (Vol 19) 1932 Oudh 298 (303) : 8 Luck 135 : 34 Cr L Jour 58 (DB) \* (Vol 16) 1929 Nag 237 (237) : 30 Cr L Jour 404 \* ('87) 9 All 52 (56) (FB) \* (Vol 9) 1922 Mad 512 (513) : 45 Mad 820 : 24 Cr L Jour 124 (DB) \* (Vol 10) 1923 Mad 660 (661) : 46 Mad 719 : 24 Cr L Jour 192 (DB) \* (Vol 16) 1929 Pat 644 (650) : 9 Pat 155 : 31 Cr L Jour 961 (DB) \* (1906) 3 Cr L Jour 426 (427) : 1905 Upp Bur Rull (Cr) 41 \* ('06) 4 Cr L Jour 284 (284, 285) (Upp. Bur).

[But see ('07) 5 Cr L Jour 417 (420) : 3 Low Bur Rul 280].

[3] In summons cases the "trial" begins when the accused is brought before the Magistrate, the particulars of the offence are stated to him and the Magistrate proceeds to hear the complainant and the prosecution evidence. (Vol 30) 1943 Nag 36 (49, 69) : I L R (1943) Nag 73 : 44 Cr L Jour 237 (DB) \* ('09) 9 Cr L Jour 192 (196) : 32 Mad 220 (FB) \* ('18) 14 Cr L Jour 280 (281) : 9 Nag L R 42.

[4] A "trial" means all proceedings including the sentence. (Vol 20) 1933 P C 218 (221) : 34 Cr L Jour 886 (PO).

[5] No trial can be concluded until judgment and sentence are passed. ('87) 9 All 420 (424) (DB).

[But see (Vol 16) 1929 Mad 201 (202) : 52 Mad 355 : 30 Cr L Jour 908 \* (Vol 20) 1933 Mad 251 (251) : 34 Cr L Jour 117 (Overruled on another point in (Vol 25) 1938 Mad 75 : I L R (1938) Mad 210 (DB).]

## SECTION 4 (1) (l)—Note 1.

[1] The definition of the word "investigation" includes all proceedings under the Code, for the collection of evidence, conducted by a police officer. (Vol 20) 1933 Sind 240 (243) \* (Vol 18) 1931 All 269 (272) : 33 Cr L Jour 256 (DB).

[2] The definition of "investigation" is not exhaustive. ('02) 26 Bom 533 (538) (DB) \* (Vol 6) 1919 Cal 59 (60) : 46 Cal 854 : 20 Cr L Jour 508 (DB).

[3] Taking out warrant of arrest, arresting the accused, seizing books, etc., form some part of an investigation within the meaning of this clause. ('03) 26 Bom 533 (536, 538) (DB).

[4] The definition includes an investigation held by a superior Police Officer, by virtue of S. 551. ('12) 18 Cr L Jour 305 (316, 317) : 35 Mad 247 (SB).

[5] The expression "collection of evidence" is a short way of saying "collection of material to be used as evidence". (Vol 24) 1937 Lah 160 (162) : 17 Lah 593 : 38 Cr L Jour 435.

[6] A proceeding for the collection of evidence to become an investigation within the meaning of the definition in this clause should be a proceeding under the Code. (Vol 27) 1940 Cal 97 (103) : I L R (1940) 1 Cal 231 : 41 Cr L Jour 329 (DB) (Investigation by the Calcutta police) \* (Vol 25) 1938 Cal 545 (545) : 39 Cr L Jour 342.

"Judicial proceeding" (m) "judicial proceeding" includes any proceeding in the court of which evidence is or may be legally taken on oath :

[1832—S. 4 (d) : 1872—S. 4, para 9]

### STATEMENT OF OBJECTS AND REASONS.

"Judicial proceedings.—We have added the words "on oath" in this definition, because the power to take evidence on oath is the characteristic test of judicial proceedings. We have omitted the new words providing for consequent proceedings which the Bill as introduced proposed to add to the definition, as they

appear to be too wide. On the other hand, we have altered the word "means" at the commencement of the definition into "includes" and have thus given the Courts a certain latitude of construction." *S. C. R., 1898.*

"Non-cognizable offence." (n) "non-cognizable offence" means an offence for, and "non-cognizable case" means a case in, which a police-officer, within or without a presidency-town, may not arrest without warrant :

[1882—S. 4 (c), para 2 ; 1872—S. 4, para 20].

#### S. 4 (1) (l) (contd.)

[7] An investigation can be made only by a Police Officer or any person other than a Magistrate or Court. (Vol 29) 1912 Bom 42 (43) : 43 Cr L Jour 364 (DB) \* (Vol 27) 1940 Cal 97 (100) : 1 L R (1943) 1 Cal 231 : 41 Cr L Jour 329 (DB) \* (Vol 9) 1922 Mad 40 (41) : 45 Mad 230 : 23 Cr L Jour 630 (DB).

[8] The object of an investigation is to collect evidence. (Vol 7) 1920 Pat 563 (565) : 5 Pat L Jour 47 : 21 Cr L Jour 594.

#### SECTION 4 (1) (m)—SYNOPSIS

1. Scope and applicability of the definition.
2. Judicial proceedings, what are.
3. Non-judicial proceedings under the Code.
4. Departmental enquiries.
5. Judge acting in his executive capacity.
6. Proceedings coram non iudice.

##### 1. Scope and applicability of the definition :—

[1] Section 4 (1) (m) does not attempt to give an exhaustive definition of a "judicial proceeding" (Vol 31) 1944 Mad 87 (38) : 45 Cr L Jour 212 \* (Vol 1) 1914 Nag 40 (41) : 10 Nag L R 177 : 16 Cr L Jour 161 \* ('10) 11 Cr L Jour 407 (410) : 37 Cal 642 (FB).

[2] A judicial proceeding determines a jural relation between one person and another or a group of persons or between him and the community. ('88) 12 Bom 36 (42) (DB).

[3] A judicial proceeding is a step taken by a Court in the course of the administration of justice in connexion with a pending case. (1864) 2 Mad H C R 43 (46) (DB).

[4] The test whether a proceeding is or is not a "judicial proceeding" is whether, the presiding Judge has the power legally to take evidence on oath and not whether he has actually taken such evidence. ('10) 11 Cr L Jour 90 (93) : 1910 Pun Re No. 1 (Cr) (DB).

[5] Judicial proceedings continue until the accused is discharged or removed in custody. ('97) 1897 Pun Re No 16 (Cr) p 43 (44, 45) \* (1905) 1 Weir 214 (214).

[6] Definition of "judicial proceeding" does not apply to the Penal Code. (Vol 8) 1921 Bom 3 (8) : 45 Bom 884 : 22 Cr L Jour 241 (FB).

[7] Definition of "judicial proceeding" does not apply to the Civil Procedure Code. ('78) 2 Bom 5 (556) (DB).

2. Judicial proceedings, what are.—[1] The following have been held to be judicial proceedings :—

Inquiry under S. 96, or 100; Proceedings under 117, 122, Chapt. X, S. 164, S. 176 and S. 195; Inquiry under S. 145 or S. 202; Examination of a complaint under S. 200; dismissal of a complaint under S. 20 Receiving of a complaint and issuing process under S. 204; recording of evidence under S. 428; Order under S. 435; enquiry under S. 476; Proceedings under Ss. 489, 497, 514; Inquiry under S. 83 (For cases and other details, see Commentary).

##### 3. Non-judicial proceedings under the Code.

[1] The following proceedings have been held not to be judicial proceedings.

- (a) Proceedings under S. 125. ('10) 11 Cr L Jour 147 (117) : 37 Cal 72 (DB).
- (b) An inquest under S. 174 ('96) 1896 Rat Un F Cri Cas 843 (343, 844) (DB).

4. Departmental enquiries.—[1] Departmental enquiries by the following officers are not judicial proceedings :

- (a) By a forest Officer who is not empowered by law to hold an enquiry. ('75) 12 Bom H C R (6) (DB).
- (b) By the Registrar, High Court, into the conduct of a clerk. ('87) 12 Bom 36 (42) (DB).
- (c) By a Collector and Magistrate on charges of bribery or misconduct, against a Revenue Officer. ('94) 19 Bom 51 (62-69) (DB) \* ('98) 2 Bom 936 (939) (DB) \* (1900) 4 Cal W N 36 (367) (DB) \* ('06) 3 Cr L Jour 376 (378) : 29 Ma 100 (DB).
- (d) By a District Registrar against a Sub-Registrar. ('06) 3 Cr L Jour 112 (114) (DB) (Cal).

##### 5. Judge acting in his executive capacity.

[1] The action of a Judge or a Magistrate in his executive capacity is not a judicial proceeding. ('07) Cr L Jour 476 (477) : 29 All 563 \* ('74) 11 Bom H C 11 (12) (DB) \* ('10) 11 Cr L Jour 705 (707) (DB) ('10) 11 Cr L Jour 112 (113) : 37 Cal 287 (DB) \* ('8)

"Offence."

(o) "offence" means any act or omission made punishable by any law for the time being in force ;

it also includes any act in respect of which a complaint may be made under S. 20 of the Cattle-trespass Act, 1871 :

[1882—S. 4 (p)].

#### S. 4 (m) (contd.)

(1880) Pun Re No 26 (Cr) p. 48 (44, 47, 48) (DB) \* ('04) 1 Cr L Jour 275 (278) : 27 Mad 54 \* (Vol 5) 1918 Mad 1266 (1270, 1277) : 39 Mad 1164 : 18 Cr L Jour 239 (SB) \* (Vol 9) 1922 Pat 269 (263, 273) : 1 Pat 104 (FB) \* (Vol 4) 1917 All 41 (42) : 18 Cr L Jour 942.

[2] Where the judge in the midst of judicial work turns his attention to his executive duties, that stage is not a judicial proceedings. ('81) 1881 Pun Re (Cr) No. 40- p. 101 (102).

6. Proceedings coram nonjudice.—[1] Where the proceedings are *coram non judice*, i. e. without jurisdiction or not before the proper Judge, they are not judicial proceedings. (1900) 4 Cal W N 351 (352) (DB) \* (1900) 27 Cal 455 (457) (DB) \* (Vol 8) 1921 Pat 302 (305) : 22 Cr L Jour 785 \* ('94) 1894 Pun Re No. 15 (Cr) p. 48 (49) \* ('11) 12 Cr L Jour 326 (327) (Sind) (DB) \* ('18) 14 Cr L Jour 56 (56) : 35 All 102 \* (Vol 2) 1915 All 457 (458) : 38 All 32 : 16 Cr L Jour 807 \* ('05) 2 Cr L Jour 851 (854) (DB) (Cal) \* (Vol 5) 1918 Mad 398 (399, 400) : 18 Cr L Jour 785.

#### SECTION 4 (1) (o)—Note 1.

[1] This definition does not govern the definition of offences under other Acts. ('08) 26 Mad 607 (614, 615 625) (SB).

[2] The definition does not apply where a different intention appears from the subject or context. (Vol 8) 1916 Mad 642 (642) : 16 Cr L Jour 602.

[3] Only punishable act or omission is an offence. (Vol 18) 1931 Pat 369 (375) : 32 Cr L Jour 1256 (FB) \* (Vol 18) 1931 P C 94 (99) : 32 Cr L Jour 899 (PC) \* ('97) 20 All 95 (95) (Travelling without ticket is not an offence within the definition.) \* ('97) 20 Mad 385 (386) (DB) (Do.) \* ('99) 1 Bom L R 166 (166) (do) \* ('06) 4 Cr L Jour 439 (440) (Cal) (do.) \* (Vol 16) 1929 Rang 11 (11) : 6 Rang 619 : 30 Cr L Jour 57 \* ('07) 5 Cr L Jour 463 (464) (Cal). (Neither S. 47 of Railways Act, 1890, nor rules made thereunder create any criminal offence.) \* ('97) 1897 All W N 25 (26) (Non-compliance with S. 16 of the Press and Registration of Books Act, 25 (XXV) of 1867, is not a criminal offence.) \* (Vol 7) 1920 Bom 350 (350) : 44 Bom 468 : 21 Cr L Jour 380 (DB) (Complaint under S. 28 of the Bombay Public Conveyances Act, 1887, is not a complaint in respect of an offence within the meaning of S. 250, Cr P. C.).

[4] The following are not proceedings in respect of any offence.

(a) Proceedings under Chap. VIII. (Vol 11) 1924 Cal 392 (393) : 50 Cal 985 : 25 Cr L Jour 1085 \* ('68) 4 Mad H C R App. xxii (xxiii) \* (Vol 8) 1921 All 281 (281) : 43 All 185 : 21 Cr L Jour 831 \* ('82) 4 All 212 (212, 213) (FB) \* ('01) 25 Bom 48 (49) \* ('05) 2 Cr L Jour 697 (701) : 1905 Pun Re No 42 (Cr) (DB) \* (Vol 18) 1931 Pat 369 (375) : 32 Cr L Jour 1256 (FB) \* ('07) 5 Cr L Jour 434 (435) : 3 Nag L R 51 \* (Vol 1) 1914 Lah 281 (282) : 1914 Pun Re No. 5 (Cr) : 15 Cr L Jour 563 (DB) \* ('08) 6 Oudh. Cas 262 (266) (DB) \* ('08) 2 Low Bur Rul 89 (82, 88, 84) (DB) \* (1900) 27 Cal 662 (668).

(b) Proceedings under Chapter XII (Vol 1) 1914 All 478 (474) : 15 Cr L Jour 520 \* (1901) 25 Bom 179 (183, 184) \* ('99) 3 Cal W N 148 (150) (DB) \* (1900) 5 Cal W N 71 (72).

(c) Proceedings under S. 133. ('97) 24 Cal 395 (398) (DB) \* ('05) 2 Cr L Jour 575 (577, 578) (Cal).

[5] Orders passed by Magistrates under any provision of law directing or prohibiting the doing of any act is not a conviction for an "offence" as in the following cases.

(a) Order to pay maintenance under S. 488. ('67) 7 Suth W R Cr 10 (11) (SB) \* ('78) 5 N W P H C R 237 (238) \* ('93) 1893 Pun Re No 3 (Cr) p. 30 (32, 33) (DB) \* (Vol 16) 1929 Lah 32 (33, 34) : 10 Lah 406 : 29 Cr L Jour 1002 (DB) \* ('92) 16 Mad 234 (234) \* ('93-1900) 1893-1900 Low Bur Rul 662 (663) \* ('04) 1 Cr L Jour 864 (865) : 17 C P L R 127.

(b) Order under Sub-S. (1) of S. 2 and 3 of Workman's Breach of Contract Act. ('92) 16 Bom 363 (370, 371) (DB) \* ('04) 1 Cr L Jour 263 (264) : 33 Bom 22 (DB) \* (1900) 27 Cal 131 (133) \* (1900) 4 Cal W N 253 (254) \* ('82) 4 Mad 234 (234) (DB) \* ('02) 1 Upp Bur Rul Cr P C 1 (1) \* ('13) 14 Cr L Jour 256 (256) : 6 Sind L R 165 (DB) \* (Vol 1) 1914 Sind 17 (18) : 7 Sind L R 100 : 15 Cr L Jour 388 (DB).

[But see (Vol 8) 1921 All 285 (285) : 43 All 281 : 22 Cr L Jour 165 (DB) \* ('89) 11 All 262 (265).]

[6] Disobedience of an order by a Magistrate directing or prohibiting the doing of any act is an offence as in the following cases.

(a) Disobedience of an order under S. 488 to pay maintenance. (1891) 13 All 348 (350) \* (1895) 9 Bom 40 (45) (DB).

(b) Disobedience of an order under Sub-S. 1 of S. 2 and 3 of Workmen's Breach of Contract Act. (1904) 1 Cr L Jour 263 (264) : 33 Bom 22 (DB) \* (Vol 7) 1920 Mad 553 (554, 555) : 43 Mad 443 : 22 Cr L Jour 13 (DB) \* (Vol 10) 1923 Mad 719 (720) : 46 Mad 723 : 24 Cr L Jour 465 (DB) \* (1904) 2 Low Bur Rul 163 (164) (DB) \* (1913) 14 Cr L Jour 404 (404) : 7 Low Bur Rul 35.

(c) Disobedience of an order under the Municipal Act for demolition or alteration of work unlawfully erected. (Vol 14) 1927 Cal 509 (510, 511) : 54 Cal 532 : 28 Cr L Jour 407 (DB) \* ('10) 11 Cr L Jour 183 (184) : 37 Cal 884 (DB) \* ('10) 11 Cr L Jour 63 (64) : 1909 Pun Re No. 13 (Cr). (Non-compliance with the provisions of the first part of Sub-S. (4) of S. 92 of the Punjab Municipal Act of 1891, does not, by itself, make a person criminally liable).

(d) Disobedience of order prohibiting the use of a house as a brothel. ('10) 11 Cr L Jour 112 (112, 113) : 37 Cal 287 (DB) \* (Vol 16) 1929 Pat 406 (406) : 30 Cr L Jour 517 \* (1913) 18 Cal L Jour 352 (358) (DB) \* ('13) 14 Cr L Jour 326 (326) : 6 Sind L R 254 (DB) \* (Vol 5) 1913 Lah 249 (250) : 19 Cr L Jour 449.



(c) "officer in charge of a police-station" includes, when the officer in charge of the police-station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when the [Provincial Government] so directs, any other police-officer so present :

[1882—S. 4 (o), part 2].

[a] Substituted by A. O. for "Local Government."

"Place."

(g) "place" includes also a house, building, tent and vessel :

[1882—S. 4 (i) (w)].

(r) "pleader," used with reference to any proceeding in any Court, means a pleader<sup>a</sup> [or a mukhtar] authorized under any law<sup>b</sup> for the time being in force to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any c[\*\*\*] other person appointed with the permission of the Court to act in such proceeding :

[1882—S. 4 (a)].

[a] Inserted by the Code of Criminal Procedure (Further Amendment) Act, 1923 (35 [XXXV] of 1923), S. 2.

[b] See the Legal Practitioners Act, 1846 (1 [I] of 1846) ; *ibid.*, 1853 (20 [XX] of 1853) ; *ibid.*, 1879 (18 [XVIII] of 1879) ; *ibid.*, 1884 (9 [IX] of 1884) ; *ibid.*, (Amendment) Act, 1908 (1 [I] of 1908).

In British Baluchistan, see the British Baluchistan Criminal Justice Regulation, 1896 (8 [VIII] of 1896), Sch., S. 20 (1) (c) ; in the N.-W. F. P., see the N.-W.F.P. Law and Justice Regulation, 1901 (7 [VII] of 1901), S. 9 and the rules issued thereunder in Gazette of India, 1902, Pt. II, p. 5.

[c] The words "mukhtar or" repealed by the Code of Criminal Procedure (Further Amendment) Act, 1923 (35 [XXXV] of 1923), S. 2.

#### S. 4 (1) (o) (contd.)

[7] An Ordinance is a "law for the time being in force" and an infringement of its provisions is an offence. (Vol 3) 1916 Lah 207 (207, 208) : 1916 Pun Re No. 10 (Cr) : 17 Cr L Jour 225.

[8] The words "any law" would include not only the Penal Code but also all local or special laws which create offences. See (Vol 7) 1920 Lah 405 (405, 406) : 1919 Pun Re No. 33 (Cr) : 21 Cr L Jour 180 (Opium Act) \* (Vol 19) 1932 Cal 465 (466) : 59 Cal 1065 : 33 Cr L Jour 267 (DB) (Do.) \* (Vol 23) 1936 All 880 (880) : 1 I L R (1937) All 220 : 36 Cr L Jour 111 (FB). (Companies Act S. 85) \* (Vol 18) 1931 Pat 369 (375) : 11 Pat 865 : 32 Cr L Jour 1256 (FB) (Legal Practitioners Act, S. 13) \* (Vol 28) 1941 Mad 897 (897) : 1 I L R (1942) Mad 143 (Mussalman Wakf Act, S. 10) \* ('82) 4 All 216 (217) (FB) (Court-fees Act S. 84) \* (Vol 18) 1931 Lah 571 (571, 572) : 33 Cr L Jour 110 (Arms Act S. 19).

[9] An act in respect of which a complaint may be made under S. 20 of the Cattle Trespass Act is an offence. (Vol 7) 1920 Bom 85 (85) : 44 Bom 42 : 21 Cr L Jour 95 (DB) \* ('07) 6 Cr L Jour 363 (364) : 34 Cal 926 (DB) \* ('01) 1 Weir 712 (713) (DB) \* (Vol 14) 1927 Mad 396 (397) : 50 Mad 841 : 28 Cr L Jour 301 \* ('07) 6 Cr L Jour 121 (121) : 4 Low Bur Rul 10 \* ('07) 6 Cr L Jour 122 (122) : 4 Low Bur Rul 11.

[10] A fine, levied by a pound-keeper under S. 12 of the Cattle-Trespass Act is not a punishment imposed on conviction for an offence. ('70) 7 Bom H C R Cr 55 (56).

#### SECTION 4 (1) (p)—Note 1.

[1] The object of the definition is to permit the discharge of the duties of an officer in charge of a police-station by some other person, when such officer is unable to attend to his duties. (Vol 6) 1919 Mad 326 (327) : 42 Mad 446 : 20 Cr L Jour 424 (DB) \* (Vol

10) 1923 Pat 547 (549) : 2 Pat 379 : 24 Cr L Jour 357 (DB).

[2] When the officer in charge of the police-station is present in the station-house and able to attend to his duties, the other persons mentioned in the definition cannot wield the powers of an officer-in-charge of a police-station. (Vol 15) 1928 Cal 771 (772) : 30 Cr L Jour 803 (DB).

[3] The expression "present at the station-house" refers to the time when charge is assumed. (Vol 6) 1919 Mad 226 (227, 228) : 42 Mad 446 : 20 Cr L Jour 422 (DB).

[4] The section empowers the Provincial Government to authorise even a police officer of lower rank to officiate. ('11) 12 Cr L Jour 190 (192) (DB) (Mad).

#### SECTION 4 (1) (r)—Note 1.

[1] The words "any other person .....in such proceeding" do not refer to advocates,pleaders or mukhtars authorised under any law to practise. (Vol 21) 1934 Bom 212 (213) : 35 Cr L Jour 1035 (DB).

[2] A person not enrolled as a legal practitioner but appointed by a party with the permission of the Court to represent him would be a "pleader" for the purpose of that proceeding. (Vol 21) 1934 Bom 212 (213) : 35 Cr L Jour 1035 (DB) \* (Vol 17) 1930 Nag 150 (151) : 26 Nag L R 172 : 31 Cr L Jour 419 \* (Vol 13) 1926 Bom 218 (222) : 50 Bom 250 : 27 Cr L Jour 440 (DB).

[3] "Private vakils" can be allowed to appear as pleaders in criminal cases. ('74) 7 Mad H C R App xxxvii (xxxvii) (DB) (High Court Proceedings, dated 11th November 1874).

[See however (Vol 30) 1943 Mad 470 (471) : 44 Cr L Jour 662].

[4] The discretion of the Court in permitting persons to appear as "pleaders" must be exercised judi-

(s) "police-station" means any post or place declared, generally or specially, by "Police-station," the <sup>a</sup>[Provincial Government] to be a police-station, and includes any local area specified by the <sup>a</sup>[Provincial Government] in this behalf:

[1882—S. 4 (o), part 1].

[a] Substituted by A. O. for "Local Government."

(t) "Public Prosecutor" means any person appointed under S. 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction:

[1882—S. 4 (m)].

"Sub-division." (u) "sub-division" means a sub-division of a district:

[1882—S. 4 (f)].

"Summons-case." (v) "summons-case" means a case relating to an offence, and not being a warrant-case: and

[1882—S. 4 (t); 1872—S. 4, para 21.]

"Warrant-case." (w) "warrant-case" means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months.

[1882—S. 4 (s); 1872—S. 4, para 22].

Words referring  
to acts. and

(2) Words which refer to acts done, extend also to illegal omissions;

#### S. 4 (1) (r) (contd.)

cially with due regard to the interest of the party engaging him. (Vol 5) 1918 Upp Bur 56 (56): 2 Upp Bur Rul 121: 18 Cr L Jour 345.

[5] The character of the person appointed is one of the factors to be considered in granting permission. ('11) 12 Cr L Jour 111 (112): 38 Cal 488 (DB).

[6] A general order prohibiting a particular class of persons from appearing is not legal. (Vol 15) 1928 Bom 33 (34): 29 Cr L Jour 226 (DB).

[7] Court cannot pass an order prohibiting a certain person from appearing in any case in that Court. ('08) 4 Mad L Tim 91 (91).

[8] Unless a person has been appointed by a party, the Court cannot sanction his appearance as a pleader. (Vol 17) 1980 Nag 150 (151): 26 Nag L R 172: 31 Cr L Jour 419.

[9] Persons enrolled as pleaders, advocates, vakils or attorneys but not entitled to practise in the particular Court in question cannot appear as "pleaders" in criminal cases as a matter of right, but can do so with the permission of the Court. ('11) 12 Cr L Jour 118 (119): 4 Sind L R 207 (DB) \* (Vol 1) 1914 Sind 7 (8): 7 Sind L R 98: 15 Cr L Jour 382 (SB) \* (Vol 5) 1918 Upp Bur 56 (56): 2 Upp Rul 121: 18 Cr L Jour 345.

[See also (Vol 21) 1934 Bom 70 (71): 58 Bom 456 (FB).

[10] Advocates on the appellate side are precluded from appearing in the Sessions Court under the Appellate side Rules of the Bombay High Court. (Vol 21) 1984 Bom 70 (71): 58 Bom 456 (FB).

[11] Persons who claim to be entitled to practise as vakils of a High Court, must show that they are "authorised to do so." (Vol 30) 1943 Mad 470 (470, 471): 44 Cr L Jour 662.

[12] A mukhtar, authorised to practise, is not required to take the permission of the Court in each case before appearing in it as a pleader, but in provinces in which mukhtars are not recognised they can appear with the permission of the Court in each case. (Vol 15) 1928 Bom 33 (33): 29 Cr L Jour 226 (DB).

#### SECTION 4 (1) (s)—Note 1.

[1] This clause does not apply to the police in the towns of Calcutta and Bombay. ('04) 31 Cal 557 (560) (DB).

#### SECTION 4 (1) (w)—Note 1.

[1] Where the Code deals with offences only, it divides them into cognizable and non-cognizable offences but when it deals with procedure it speaks of cases, as a summons case or as a warrant case. (Vol 5) 1918 Mad 371 (373): 41 Mad 727: 19 Cr L Jour 618 (DB).

[2] A case becomes a "summons-case" or a "warrant-case" according to the nature and the measure of punishment which the law attaches to the offence. (Vol 25) 1938 Cal 205 (205): 39 Cr L Jour 488 \* (Vol 19) 1932 Nag 111 (111): 28 Nag L R 18: 33 Cr L Jour 578.

[3] Where there is a charge of abetment of a specific offence, the abetment is a summons case or a warrant case according as the specific offence is a summons or a warrant case. (Vol 18) 1931 Bom 199 (199): 32 Cr L Jour 718 (DB).

#### SECTION 4 (2)—Note 1.

[1] The following words used in this Code have to be given the definitions given to them in the Penal Code:

all words and expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code.

[1832—S. 4, last two paras].

5. (1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

[1832—S. 5 ; 1872—Ss. 6, 7, 8 para 1, 63 Explanation ; 1861—S. 21.]

#### S. 4 (2) (Contd.)

(a) The words "force" and "criminal force" in S. 322 must be interpreted according to the definitions of those words in Ss. 349 and 350 of the Penal Code. (Vol 8) 1921 Pat 391 (392) : 22 Cr L Jour 325 \* ('08) 25 All 341 (342, 343). \* (1930) 27 Cr L 174 (175) (DB) \* ('01) 5 Cal W N 250 (252) (DB) \* (Vol 6) 1919 Lah 248 (245) : 1919 Pun Re No 16 Cr : 20 Cr L Jour 458.

(b) The words "special law" in S 1, Sub-S. (2) in this Code have the meaning given to them in S. 11 of the Penal Code. (Vol 27) 1940 Lah 129 (131, 132) : 41 Cr L Jour 591 : I L R (1940) Lah 242 (FB) \* (Vol 20) 1938 All 440 (442) : 55 All 463 : 34 Cr L Jour 875 (DB) (Overruled on another point in (Vol 27) 1940 All 263 : I L R (1940) All 296 : 41 Cr L Jour 627 (FB)).

(c) The word "injury" in S. 543 in this Code has the meaning given to it in S. 44 of the Penal Code. ('98) 21 Mad 74 (76) (FB).

(d) The word "punishable" in S. 4, Sub-S. (1) (o) in this Code has the meaning given to it in S. 58 of the Penal Code. (Vol 15) 1928 All 755 (756) : 51 All 408 : 30 Cr L Jour 63.

(e) The word "Judge" in S. 589 has the meaning given to it in S. 19 of the Penal Code. (Vol 13) 1926 Pat 214 (216; 218) : 5 Pat 110 : 27 Cr L Jour 499 (DB).

[2] In the following cases it was held that the definitions of the Penal Code for the following terms do not apply under this Code:

(a) Adultery. ('97) 20 Mad 470 (474, 475) (Overruling 17 Mad 260 (FB)).

(b) Movable property. (Vol 4) 1917 Mad 748 (748, 749) : 18 Cr L Jour 1 (DB).

#### SECTION 5—Note 1.

[1] In criminal proceedings, the question is not alone whether substantial justice has been done according to law. All proceedings in *poenam* are *strictissimi juris*. (Vol 12) 1925 Oudh 1 (8) : 27 Oudh Cas 40 : 25 Cr L Jour 49.

[2] It is the duty of the presiding officer in criminal trials to see that the procedure as laid down in the Code is strictly and fully complied with. (Vol 14) 1927 Cal 986 (986) : 28 Cr L Jour 478 (DB) \* (Vol 14) 1927 Cal 631 (632) : 28 Cr L Jour 742 (DB) \* (Vol 16) 1929 Lah 382 (384) : 10 Lah 223 : 29 Cr L Jour 769 \* (Vol 19) 1932 Mad 602 (605) : 33 Cr L Jour 765.

[3] An offence may be said to be "otherwise dealt with" where a case is transferred from one Panchayat Court to another under S. 526. (Vol 14) 1927 All 199 (200) : 49 All 188 : 28 Cr L Jour 94.

[4] The word "enactment" does not include a rule framed under the provisions of an Act, though such rule may be a "law". (Vol 8) 1921 Cal 708 (711) : 48 Cal 955 : 22 Cr L Jour 354 (DB) \* ('94) 1894 Pun Re No 23 (Cr) p. 80 (S1).

[5] Notification issued under an Act is a law within the meaning of this section. (Vol 10) 1923 Pat 1 (3, 4) : 2 Pat 134 : 23 Cr L Jour 625 (SB).

[6] An "Ordinance" is a "law". (Vol 3) 1916 Lah 207 (208) : 17 Cr L Jour 225 : 1916 Pun Re No 10 (Cr).

[7] Where no procedure is laid down in this Act creating an offence the procedure laid down in this Code must be followed. (Vol 32) 1945 Nag 8 (17) : I L R (1945) Nag 6 (DB) \* (Vol 23) 1936 All 830 (831) : I L R (1937) All 226 : 38 Cr L Jour 111 (FB) \* (Vol 6) 1919 Mad 24 (25) : 42 Mad 69 : 20 Cr L Jour 129 (DB) \* (Vol 16) 1929 Bom 433 (438) : 54 Bom 35 : 31 Cr L Jour 495 (DB) \* (Vol 15) 1928 Bom 162 (164) : 52 Bom 238 : 29 Cr L Jour 551 (DB) \* (Vol 8) 1916 Lah 207 (207, 208) : 17 Cr L Jour 225 : 1916 Pun Re No 10 (Cr) \* (Vol 18) 1931 Lah 359 (360) : 38 Cr L Jour 126 \* (Vol 13) 1926 Cal 786 (788) : 53 Cal 631 : 27 Cr L Jour 984 (DB) \* (Vol 14) 1927 Cal 509 (510) : 54 Cal 532 : 28 Cr L Jour 407 (DB) \* (Vol 16) 1929 Pat 406 (406) : 30 Cr L Jour 517 \* (Vol 12) 1925 Rang 69 (70) : 2 Rang 524 : 26 Cr L Jour 417 \* (Vol 12) 1925 Rang 112 (112) : 2 Rang 641 : 26 Cr L Jour 395 \* (Vol 18) 1931 Mad 769 (770) : 55 Mad 86 : 32 Cr L Jour 1035 \* (Vol 14) 1927 All 199 (200) : 49 All 188 : 28 Cr L Jour 94.

[8] Where a complete procedure is provided in any enactment for the trial, etc., of offences under it, it is the procedure of that enactment that must be followed. (Vol 29) 1942 Sind 9 (10) : 43 Cr L Jour 304 \* (Vol 13) 1926 Cal 586 (588) : 53 Cal 650 : 27 Cr L Jour 602 (DB).

[9] Where an enactment provides a special procedure only for some matters, its provisions must apply in regard to those matters and the provisions of this Code will apply for the matters on which the enactment is silent. ('28) 29 Cr L Jour 591 (592) (Nag) \* (Vol 19) 1932 Pat 188 (189) : 33 Cr L Jour 274 \* (Vol 16) 1929 Mad 604 (605) : 52 Mad 613 : 30 Cr L Jour 1011 \* (Vol 7) 1920 All 150 (152) : 42 All 385 : 21 Cr L Jour 737 \* (Vol 9) 1922 Lah 458 (458, 459) : 8 Lah 359 : 23 Cr L Jour 621 \* (Vol 29) 1941 Nag 388 (389) : 48 Cr L Jour 89 : I L R (1942) Nag 426 \* ('07) 6 Cr L Jour 60 (66) : 31 Bom 438 (DB) \* (Vol 19)

## PART II

## CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.

## CHAPTER II.

## OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

## A.—Classes of Criminal Courts.

*Classes of Criminal Courts.*

a6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely :—

I.—Courts of Sessions :

II.—Presidency Magistrates :

III.—Magistrates of the first class :

IV.—Magistrates of the second class :

V.—Magistrates of the third class.

[1882—S. 6; 1872—Ss. 5, 19].

- [a] In places where the Frontier Crimes Regulation, 1901 is in force, cases may be tried by a Council of Elders *see* the Frontier Crimes Regulation, 1901 (8 [III] of 1901), S. 11; *see also ibid.*, S. 13 for executing sentences passed on the finding of a Council of Elders for bar of second trial before any of these Courts, *see ibid.*, S. 15.

S. 5 (*contd.*)

1932 Bom 610 (611) : 38 Cr L Jour 738 (DB) \* (Vol 19) 1932 All 18 (23) : 53 All 642 : 38 Cr L Jour 286 (DB) \* (Vol 20) 1933 Cal 1 (2) : 38 Cr L Jour 837 (FB) \* (Vol 24) 1937 Cal 218 (218) : 38 Cr L Jour 632 \* ('10) 11 Cr L Jour 426 (427) : 1910 Pun Re No 19 (Cr) \* (Vol 20) 1933 Sind 325 (326) : 35 Cr L Jour 129 (DB) \* (Vol 5) 1918 Sind 49 (50) : 11 Sind L R 113 : 19 Cr L Jour 588 (DB) \* ('32) 1932 Mad W N 1076 (1076).

[10] Contempt of Court is an offence "under any other law" within the meaning of Sub-section (2) and hence the procedure laid down under this Code applies. (Vol 32) 1945 All 1 (4) : 46 Cr L Jour 272 : I L R (1944) All 665 (DB) \* (Vol 32) 1945 Oudh 266 (268) : 20 Luck 442 (DB).

[But *see* (Vol 31) 1944 Bom 127 (129) : 45 Cr L Jour 647 : I L R (1944) Bom 338 (DB) (10 Cal 109 : 10 Ind App 171 (P C) followed). \* (Vol 29) 1942 Lah 105 (107) : 43 Cr L Jour 599 : I L R (1942) Lah 411 (FB).]

## SECTION 6—Note 1.

[1] A Magistrate has executive as well as judicial duties to perform and it is in the performance of the latter duties that he acts as a Court. (Vol 6) 1919 P C 31 (34) : 43 Mad 146 : 46 Ind App 176 : 20 Cr L Jour 593 (P C).

[2] The word "Court" is used to include all classes of Criminal Courts (including the Court of Sessions and the High Court), and the word "Magistrate" to exclude certain Courts or classes of Courts. ('12) 13 Cr L Jour 693 (700, 701) : 39 Cal 953 : 39 Ind App 163 (P C).

[3] A Magistrate is not always a "Judge" or his Court a "Court of justice." ('97) 20 Mad 189 (206) (FB).

[4] A Magistrate engaged in committal proceedings is a Criminal Court. (1887) 10 Mad 154 (155, 156) (DB).

[5] The making of a departmental inquiry under the orders of the Government is an executive act. ('96) 19 Bom 51 (69) (DB).

[See however ('05) 2 Cr L Jour 454 (455) : 28 All 89 (DB).]

[6] An order under S. 96 or S. 145 of the Code is a judicial order. ('12) 13 Cr L Jour 693 (701) : 39 Cal 953 : 39 Ind App 163 (P C) (under S. 96) \* ('01) 28 Cal 709 (713) (DB) (under S. 145).

[7] A High Court is not a Court of Session, even when exercising original criminal jurisdiction. (Vol 12) 1925 Cal 384 (385) : 51 Cal 980 : 26 Cr L Jour 385.

[8] A Court of Session is not a Magistrate. ('10) 11 Cr L Jour 330 (331) : 1910 Pun Re No 11 Cr (DB).

[9] A Presidency Magistrate is not a Magistrate of the First Class. ('07) 6 Cr L Jour 240 (249) : 31 Bom 611 (DB). (For the purpose of the Emigration Act, 21 (XXI) of 1883, a Magistrate of the First class includes a Presidency Magistrate). \* ('97) 24 Cal 551 (555) (DB) \* ('06) 3 Cr L Jour 329 (331) (DB) (Cal).

[10] A Presidency Magistrate is not a Magistrate of any other class of Magistrates referred to in the section. (1900) 27 Cal 126 (128, 129) (DB) \* ('09) 10 Cr L Jour 393 (394) : 32 Mad 303 (DB).

[11] The Code does not recognise any such Court as the "Court of a District Magistrate," or the "Court of a Sub-Divisional Magistrate" or the "Court of a Deputy Magistrate" or the "Court of a Special Magistrate". ('81) 3 All 563 (566) (FB) \* (Vol 16) 1929 Nag 97 (98) : 25 Nag L R 1 : 30 Cr L Jour 550 (FB) \* ('77) 2 Bom 384 (386) (DB) \* ('12) 13 Cr L Jour 850 (852) (DB) (Mad).

[12] As to Courts constituted under other laws *see* the following Acts:—(a) Punjab Frontier Crimes Regn., 3 (III) of 1901; Ss. 2, 11, 13 and 15, (b) Act 7 (VII) of 1878; (c) Act 19 (XIX) of 1881; (d) Madras Act 5 (V) of 1882; (e) Act 14 (XIV) of 1887; (f) Act 5 (V) of 1869; (g) Act 12 (XII) of 1894; (h) 26 and 27 Vict. c 24; (i) Act 12 (XII) of 1859, Calcutta Pilots Act; (j) Act 12 (XII) of 1888, British Burma Pilots Act; (k) 44 & 45 Vict., c 58 (Army).

*B.—Territorial Divisions.*

*Sessions divisions and districts.*

7. (1) Every province (excluding the presidency-towns) shall be sessions division, or shall consist of sessions divisions : and every sessions division shall, for the purposes of this Code, be a district or consist of districts.

*Power to alter divisions and districts.*

(2) The a[Provincial Governments] may alter, the limits or the number of such divisions and districts.

*Existing divisions and districts maintained till altered.*

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively unless and until they are so altered.

*Presidency-towns to be deemed districts.*

(4) Every presidency-town shall, for the purposes of this Code, be deemed to be a district.

[1882—S. 7, 12, 13 and 14].

[a] Substituted by A. O. for "Local Government."

[b] For notifications, see the different local Rules and Orders.

[c] The words "with the previous sanction of the Governor-General in Council" were repealed by Devolution Act, 1920 [38 [XXXVIII] of 1920], S. 2 and Sch. I.

*Power to divide districts into sub-divisions.*

8. (1) The a[Provincial Government] may divide any district side the presidency-towns into sub-divisions, or make any portion of such district a sub-division and may alter the limits of any sub-division.

*Existing sub-divisions maintained.*

(2) All existing sub-divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code.

[1882—S. 8 ; 1872—S. 39].

[a] Substituted by A. O. for "Local Government."

[b] For notifications see the different local Rules and Orders.

### SECTION 7—Note 1.

[1] The object of Sub-S. (1) is to lay down a rule governing the relation between sessions divisions and districts. (Vol 30) 1943 Sind 39 (42) : 44 Cr L Jour 293 (FB) \* (Vol 18) 1931 Mad 697 (698) : 54 Mad 943 : 32 Cr L Jour 1095 (FB) \* (86) 10 Bom 274 (282, 283) (DB).

[2] Sessions division shall not consist of half a district or even one and a half districts but shall consist of one district or a plurality of whole districts. (Vol 18) 1931 Mad 697 (698) : 54 Mad 943 : 32 Cr L Jour 1095 (FB).

[3] The want of a formal notification defining the territorial limits of a newly separated sessions division or establishing a Court of Sessions therein, will not deprive the Court of Sessions which actually comes into existence in such division of its jurisdiction, where the intention of the Government to reform a sessions division under this section is beyond doubt. (Vol 30) 1943 Sind 39 (42, 45) : 44 Cr L Jour 293 (FB).

[4] The expression "Presidency town" means the local limits for the time being of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay.

(See S. 8 (41) of the General Clauses Act, 1897).

[See also Clause 11 of the Letters Patent for Madras Bombay and Calcutta for the local limits of the original civil jurisdiction of the High Court.]

[5] District made and altered for the purpose criminal administration. (Vol 18) 1931 Mad 698 : 54 Mad 943 : 32 Cr L Jour 1096 (FB) (son, J., contra at Page 501) \* (Vol 30) 1943 S. (11) : 44 Cr L Jour 266 (FB). "District" in this section must be related to the "District" in S. 10).

[6] Where, under Sub-S. (2), of the section Government notified that the "Deep stream" river Coora was to be the boundary between two districts, X and Y but after the date of the notification the river divided into two branches and the question was to whether the land between the two branches formed part of the district X or district Y, held by the High Court of Calcutta that the "stream" spoken of in the notification must be deep stream as it existed at the time of the notification. (58) 25 Cal 858 (859) (DB).

[But see (Vol 5) 1915 Oudh 168 (169) : 19 Jour 671].

[7] The formation of two sessions divisions in the same revenue district, viz., in the same Circle is not unwarranted by law. (56) 4 Cr L Jour (114) : 30 Mad 116 (117) \* (12) 15 Cr L Jour 85 (851) (DB) (Mad).

[8] It has been held that by virtue of the "every sessions division and for the purposes Code be a district", each of the sessions divisions formed will become a "district" for the purpose criminal administration. (Vol 18) 1931 Mad 697 (698) : 54 Mad 943 : 32 Cr L Jour 1095 (FB).

*C.—Courts and Offices outside the Presidency-towns.*

Court of Session.

9. (1) The <sup>a</sup>[Provincial Government] shall establish a Court of Session for every sessions division, and appoint a judge of such Court

(2) The <sup>a</sup>[Provincial Government] may, by general or special order in the Official Gazette direct at what place or places the Court of Session shall hold its sittings; but, until such order is made, the Courts of Session shall hold their sittings as heretofore.

(3) The <sup>a</sup>[Provincial Government] may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

(4) A Sessions Judge of one sessions division may be appointed by the <sup>a</sup>[Provincial Government] to be also an Additional Sessions Judge of another division, and in such case he may exercise jurisdiction for the disposal of cases at such place or places in either division as the <sup>a</sup>[Provincial Government] may direct.

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

[1882—S. 9; 1872—Ss. 15, 16, 17 and 18.]

[<sup>a</sup> Substituted by A. O. for "Local Government."

## SECTION 9—Synopsis.

1. Scope of the Section.
2. Court of Session.
3. Jurisdiction of Judges appointed under this section.
4. Power to direct place or places of sitting.
5. Courts constituted under other laws.

1. **Scope of the Section.**—[1] Section deals with the power of the Provincial Government to establish Courts of Session, to appoint Judges thereto and to direct at what place or places such Court shall hold its sittings. (Vol 18) 1931 Cal 190 (191): 58 Cal 1117: 32 Cri L Jour 842 (DB) \* (Vol 18) 1931 Bom 313 (319): 55 Bom 576: 32 Cri L Jour 1147 (SB).

[2] Under the section a formal publication relating to the establishment of a Sessions Court, though desirable is not essential. (Vol 30) 1943 Sind 39 (45): 44 Cri L Jour 293 (FB).

2. **Court of Session.**—[1] The Provincial Government is bound under this section to establish the Court of Session for every Sessions division in the Province. ('86) 10 Bom 258 (263) (DB).

[2] The words "Court of Session" mean a Court established under this section. (Vol 12) 1925 Cal 384 (385): 51 Cal 980: 26 Cri L Jour 385.

[3] A High Court exercising original criminal jurisdiction is not a Court of session within this section. (Vol 12) 1925 Cal 384 (385): 51 Cal 980: 26 Cri L Jour 385 \* (Vol 19) 1932 Cal 867 (868): 59 Cal 1248: 34 Cri L Jour 107.

[4] A court established under a special or local law with powers similar to a Court of Session under the Code is not a Court of Session within the meaning of the Code. ('86) 10 Bom 263 (271, 272) (DB).

[5] There can be only one Court of Session for every sessions division though it may be manned by several Judges. (Vol 18) 1931 Cal 190 (191): 58 Cal 1117: 32 Cri L Jour 842 (DB) \* ('91) 1 Mad L Jour 397 (400) (FB) \* (Vol 23) 1936 Cal 185 (186): 62 Cal 861: 37 Cri L Jour 541. (Additional Sessions Judge is a court of session and of appeal within Section 520 of the Code).

[See however ('74) 11 Bom HCR 98 (101) (DB) (Different court for the purposes of S. 487) \* ('75) 12

Bom HCR 1 (8) (DB) (Do) \* (Vol 18) 1931 Bom 313 (321): 55 Bom 576: 32 Cri L Jour 1147 (SB) (Different Court for the purposes of S. 526).]

3. **Jurisdiction of Judges appointed under Section.**—[1] Acts done by a person not appointed sessions Judge or additional sessions Judge are invalid. (Vol 28) 1941 Mad 681 (681) \* ('85) 9 Bom (295,299) (FB).

[2] Sessions Judge is competent to make a complaint in respect of an offence committed before an Additional Sessions Judge. (Vol 13) 1931 Cal 190 (191): 58 Cal 1117: 32 Cri L Jour 842 (DB) \* (Vol 9) All 987 (388): 44 All 157: 23 Cri L Jour 107 (I).

[3] The exercise of jurisdiction by the Additional and Assistant Sessions Judges is limited by the provisions of the Code, e.g., Ss. 193 and 409. (1900—Low Bur Rul 119 (120) \* ('85) 9 Bom 164 (168) (I) (Vol 7) 1920 Bom 415 (416): 44 Bom 877: 21 L Jour 382 (DB) \* ('91) 1 Mad L Jour 397 (400) (F) ('03) 1903 All W N 28 (28, 29) (DB) \* ('1890 Bat 500 (500) \* (Vol 29) 1942 Oudh 50 (54) Cri L Jour 50.

[4] A Sessions Judge cannot transfer an appeal in his Court to an Assistant Sessions Judge for hearing. (Vol 2) 1915 All 101 (102): 28 Ind Cas 652 (652) All 286: 16 Cr L Jour 316 \* ('05) 28 All 93 (94) (I).

[5] A Sessions Judge cannot direct a stay of proceedings before a Magistrate outside his sessions division although the case has arisen out of a sanction by a Magistrate within such division. ('03) 26 Mad 187 (I) (Can refer proceedings to High Court).

[6] Additional Sessions Judge at Secunderabad may exercise the discretion of dispensing with jury or assessors, equally with the Sessions Judge empowered under S. 268, Criminal Procedure Code, as modified by Notification No. 260-I, dated 24th April 1929 in exercise of powers conferred by the Indian Foreign Jurisdiction Order in Council, 1902. (Vol 24) 1937 PC 119 (120) ILR (1937) Bom 711: 38 Cri L Jour 498: 64 Ind 148 (PC).

4. **Power to direct place or places of sitting**  
[1] Direction by Provincial Government regarding place of sitting does not effect the High Court's power to transfer cases from one Court to another. (Vol 18) 1931 Bom 313 (316): 55 Bom 576: 32 Cri L Jour 1147 (SB).

10. (1) In every district outside the presidency-towns the District Magistrate. [Provincial Government] shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

(2) The [Provincial Government] may appoint any Magistrate of the first class to be an Additional District Magistrate [ \* \* \* \* ], and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code, [or under any other law for the time being in force,] as the [Provincial Government] may direct.

(3) For the purposes of sections 192, sub-section (1) 407, sub-section (2) and 528, sub-sections (2) and (3) such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate.]

[1882—S. 10 ; 1872—S. 35.]

[a] Substituted by A. O. for "Local Government."

[b] The words "for a period not exceeding six months" were repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923. S. 2.)

[c] Inserted, *ibid.*

### Section 9 (*contd.*)

[2] No direction regarding the place of sitting—Trial of a case should be within the area of the Sessions division. ('94) 17 All 36 (37) (FB).

[3] Sessions division covering two districts—Appeal to Sessions Judge—His discretion to hear appeal in any one of districts must be exercised in a judicial and a reasonable manner—Judgment after exercising discretion wrongly can be set aside. (Vol 21) 1934 Pat 643 (643) : 36 Cri L Jour 371.

5. Courts constituted under other laws.—[1] Court established under special law and judge appointed—Another Court should not be established under this section so as to affect the Jurisdiction of the special Court. ('86) 10 Bom 283 (272) (DB).

[2] The powers exercisable by the Judge of a special Court will be such as are conferred upon him by the Act, under which he is appointed. ('05) 2 Cri L Jour 75 (75) : 29 Bom 575 (578.)

### SECTION 10—Synopsis.

1. "In every district".
2. District Magistrate.
3. "Shall appoint a Magistrate of the first class."

#### 4. Additional District Magistrate.

#### 5. Powers and duties of the District Magistrate.

1. "In every district".—[1] A district magistrate need not be situate within the district but may have his headquarters even outside the district.—('31) 1931 Mad WN 1064 (1066.)

2. District Magistrate.—[1] A presidency Magistrate is not a District Magistrate as he is not appointed as a Magistrate in a district outside the presidency-town. ('07) 6 Cri L Jour 240 (249) : 31 Bom 611 (DB) \* ('09) 10 Cri L Jour 393 (394) : 32 Mad 803 (DB).

3. "Shall appoint a Magistrate of the first class [1] One officer can be appointed as District Magistrate for two or more districts. (Vol 18) 1931 Mad 697 (700) : 54 Mad 943 : 32 Cri L Jour 1095 (FB).

[2] No Magistrate can be appointed as District Magistrate to a non-existent district. ('31) 1931 Mad WN 1064 (1065).

4. Additional District Magistrate.—[1] The appointment of an Additional Magistrate does not make

him a District Magistrate though he can exercise all or any of the powers of a District Magistrate. (Vol 31) 1944 Nag 84 (87) : 45 Cri L Jour 296 : ILR (1944) Nag 114 (DB) \* ('08) 9 Cri L Jour 104 (104) : 1908 Pun Re No. 25 Cr P 70 (71, 72) (DB) \* (Vol 8) 1921 Cal 347 (348) : 48 Cal 874 (DB) \* ('97) 19 All 114 (119) (DB).

[2] An Additional District Magistrate will be entitled to exercise all the powers exercisable by the District Magistrate as on the date of notification including powers that fall outside Sch III (V). (Vol 10) 1923 Mad 338 (338) : 24 Cri L Jour 116 \* (Vol 24) 1937 Mad 637 (638) : ILR (1937) Mad 1034 : 35 Cri L Jour 664. (May try an offence under Child Marriage Restraint Act).

[3] An Additional District Magistrate appointed under this section cannot exercise powers delegated to the District Magistrate by the Provincial Government under S. 2 (5) of the Defence of India Act. (Vol 31). 1944 Nag 84 (86, 89) : 45 Cri L Jour 296 : ILR (1944) Nag 114 (DB) \* (Vol 30) 1943 Nag 26 (34) : ILR (1943) Nag 154 : 44 Cri L Jour 345 (DB).

#### 5. Powers and duties of the District Magistrate.

—[1] The District Magistrate is primarily responsible for the peace of the district. (Vol 1) 1914 All 158 (160) : 36 All 147 : 15 Cri L Jour 39 (DB) \* (Vol 1) 1914 Mad 613 (619) : 87 Mad 125 : 14 Cri L Jour 546 (FB) \* ('12) 18 Cri L Jour 693 (699, 701) : 39 Cal 953 : 39 Ind App 163 (PC) \* ('06) 4 Cri L Jour 399 (399) (DB).

[2] The District Magistrate exercises general control over the police force. ('08) 10 Cal WN 322 (328) (DB).

[3] The District Magistrate is the Court of Appeal from the orders of First Class Magistrates in proceedings under Chap. VIII. (Vol 1) 1914 All 158 (160) : 36 All 147 : 15 Cri L Jour 39 (DB).

[4] It is the duty of a District Magistrate to see that all the Magistrates in the District exercise the powers conferred on them in an equitable and rational manner. ('99) 3 Cri L Jour 274 (289) : 29 Mad 126 (FB).

[5] In his capacities as Collector and District officer the District Magistrate has to perform many functions which are not covered by the Criminal Procedure Code (Vol 27) 1940 Cal 30 (31) : ILR (1939) 2 Cal 532 : 41 Cri L Jour 442.

Officers temporarily succeeding to vacancies in office of District Magistrate.

11. Whenever in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the orders of the Provincial Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

[1882—S. 11; 1872—S. 55]

[a] Substituted by A. O. for "Local Government."

12. (1) The Provincial Government may appoint as many persons as it thinks fit, be the District Magistrate, to be Magistrates of the first, second or third class in any district outside the Presidency towns; and the Provincial Government or the District Magistrate subject to the control of the Provincial Government may from time to time, define local limits within which such persons may exercise all or any of the powers with which they respectively be invested under this Code.

Local limits of their jurisdiction.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such persons shall extend throughout such district.

[1882—S. 12; 1872—S. 37 para 1 and S. 49; 1861—S. 23]

[a] Substituted by A. O. for "Local Government."

#### SECTION 11—Note 1.

[1] An office cannot be said to be "vacant" where the officer is temporarily disabled from attending to his work and is absent on casual leave. (Vol 8) 1921 Oudh 162 (162, 163): 24 Oudh Cas 255: 22 Cri L Jour 713.

[2] An Officer cannot be said to "succeed temporarily" to the chief Executive administration of the district unless he has, by order, been appointed to officiate as the District Magistrate. (Vol 8) 1921 Oudh 162 (163): 24 Oudh Cas 255: 22 Cri L Jour 713.

[3] An officer who assumes charge of the current duties of the office during the absence on casual leave of the District Magistrate, cannot—

(a) Transfer a case from one Magistrate to another. (Vol 8) 1921 Oudh 162 (163): 24 Oudh Cas 255: 22 Cri L Jour 713.

(b) Act under S. 437. ('85) 11 Cal 236 (237) (DB).

[4] The officer succeeding temporarily to the Chief executive administration of district has all the powers and should perform all the duties of a District Magistrate. (Vol 6) 1919 Mad 24 (25, 26): 42 Mad 69: 20 Cri L Jour 129 (DB).

[5] Where a Magistrate of the first class while officiating for the District Magistrate commences a trial and during its pendency reverts as Magistrate of the first class, he has jurisdiction to continue the trial provided that he, as a Magistrate of the first class, could have held the trial. ('06) 4 Cri L Jour 140 (142) (All).

#### SECTION 12—Note 1.

[1] Where a Magistrate is appointed for a particular period, the term imposed is *ultra vires* the powers of the Government and he can try cases even after the expiry of the period in the absence of an order cancelling his appointment. (Vol 17) 1930 Nag 96 (97): 31 Cri L Jour 24.

[2] The words "local area" contemplate some area within a district. ('01) 1901 Pun Re No 24 Or page 59 (62) (FB).

[3] Where the jurisdiction of a Magistrate stationed at a particular place is not defined under sub-S. (1) his jurisdiction will extend throughout the district. (Vol 32) 1945 Nag 56 (57): ILR (1944) Nag 836: 46 Cri L Jour

654 \* (Vol 19) 1932 Cal 864 (864): 59 Cal 1484 Cri L Jour 858 (DB) \* ('02) 29 Cal 389 (391) (D) (Vol 8) 1921 Oudh 162 (162): 24 Oudh Cas 255: 2 L Jour 713.

[4] The mere definition of areas of jurisdiction the appointment of a Magistrate to a certain division cannot be taken as a provision excluding jurisdiction of the Magistrate in the rest of the district and that in the absence of some provision expressed by necessary implication excluding such jurisdiction the Magistrate must be held to have jurisdiction throughout the district. (Vol 22) 1935 Bom 409 (409) 37 Cri L Jour 514 (DB) \* (Vol 7) 1920 Pat 563 (563) 5 Pat L Jour 47: 21 Cri L Jour 594 \* ('02) 29 Cal (391) (DB) \* (Vol 20) 1933 Lah 143 (144) \* (Vol 1945 Nag 56 (57): ILR (1944) Nag 836: 46 Cri L Jour 654 \* (Vol 12) 1925 Nag 40 (40): 25 Cri L Jour 55

[5] The mere fact that a Magistrate is placed in charge of a sub-division under S. 13, is, in the absence of anything to the contrary, no ground for holding that his jurisdiction over the rest of the district is excluded. ('12) 13 Cri L Jour 716 (716): 34 All 597 \* (Vol 1935 Bom 409 (410): 37 Cri L Jour 514 (DB) \* (Vol 22) 1935 Pat 436 (437): 37 Cri L Jour 55 \* (Vol 7) 1920 Pat 25 (27): 21 Cri L Jour 321 (DB).

[But see (Vol 25) 1938 Nag 448 (448, 449): ILR (1939) Nag 158: 39 Cri L Jour 810 \* (Vol 8) 1921 123 (124): 22 Cri L Jour 122].

[6] District Magistrate can confer jurisdiction on two Magistrates to entertain the same class of offences from the same area. ('46) 47 Cri L Jour 7 (795) (Nag).

[7] The Legislature does not contemplate the exercise of jurisdiction by any Magistrate outside the district in which he might be appointed by the Provincial Government. ('85) 9 Bom 40 (44, 45) (DB) (Vol 8) 1921 All 61 (62): 22 Cri L Jour 567 (DB) ('84) 1884 Pun Re No. 15 (Cr) page 20 (20, 21) (DB).

[8] Where a Magistrate is transferred from one local area to another within the same district, he does not thereby cease to have jurisdiction in the former area. ('98) 22 Mad 47 (48) (DB) \* (Vol 7) 1920 All 17 (179): 42 All 649: 21 Cri L Jour 746 \* ('12) 13 Cri L Jour 203 (204): 34 All 203.

[But see ('04) 1 All L Jour 815 (816).]



Power to put Magistrate in charge of sub-division.

13. (1) The a[Provincial Government] may place any Magistrate of the first or second class in charge of a sub-division, and relieve him of the charge as occasion requires.

(2) Such Magistrates shall be called Sub-divisional Magistrates.

Delegation of powers to District Magistrate.

(3) The a[Provincial Government] may delegate its powers under this section to the District Magistrate.

[1882—S. 13; 1872—S. 40]

[a] Substituted by A. O. for "Local Government."

14. (1) The a[Provincial Government] may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally in any local area outside the presidency towns.

(2) Such Magistrates shall be called Special Magistrates, and shall be appointed for such term as the a[Provincial Government] may by general or special order direct.

(3) b[ \* \* \* ] The a[Provincial Government] may delegate, with such limitations as it thinks fit, to any officer under its control the powers conferred by sub-section (1).

(4) No powers shall be conferred under this section on any police-officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police-officer except so far as may be necessary for preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

[1882—S. 14; 1872—S. 42]

[a] Substituted by A. O. for "Local Government".

[b] The words "with the previous sanction of the Governor-General in Council" were repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I.

## Section 12 (contd.)

[9] When a Magistrate is transferred from one district to another and he hands over charge to his successor, he has no jurisdiction thereafter in the former area and a judgment pronounced by him after handing over charge is bad in law. (Vol. 19) 1932 All 582 (582): 34 Cri L Jour 112 (DB) \* (81) 3 All 563 (565, 566) (FB) \* (Vol. 11) 1924 Cal 192 (193): 25 Cri L Jour 192 (DB) \* (Vol. 11) 1924 Cal 55 (55): 50 Cal 664: 24 Cri L Jour 489 (DB) \* (02) 15 C P L R 15 (16).

### SECTION 13—Note 1.

[1] Mere authority from the District Magistrate to be in charge of the Sub-divisional Officer's file at headquarters so long as he is on tour amounts to an appointment though it is limited to a particular kind of work. (Vol. 25) 1938 Cal 195 (197): 39 Cri L Jour 417 (DB).

### SECTION 14—Note 1.

[1] A special Magistrate should have (a) specified powers conferrable by the Provincial Government on a Magistrate, (b) a local area within which to exercise those powers, and (c) jurisdiction to try particular cases or a particular class of cases generally. ('01) 1901 Pun Re No. 24 (Cr) page 59 (78) (FB).

[2] "Local area" permits the inclusion of a whole province (except the presidency towns) within the juris-

diction of a special Magistrate but not areas outside the Province. ('01) 1901 Pun Re No. 24 (Cr), p. 59 (62, 64, 68, 69, 70, 78) (FB).

[3] It is incumbent upon a Provincial Government to define the local area within which the special Magistrate is to exercise the power. ('01) 1901 Pun Re No. 24 (Cr.) p. 59 (62, 69, 73) (FB).

[4] The word "case" does not necessarily mean a single charge; it comprises all charges or classes of charges. (Vol. 14) 1927 Bom 501 (503, 508): 28 Cri L Jour 1012 (DB) \* (Vol. 18) 1931 Bom 517 (519): 33 Cri L Jour 68 (DB).

[5] Where a Magistrate is appointed to try a case, he can commit the accused for trial before a Court of Sessions. (Vol. 18) 1931 Bom 517 (518, 520): 33 Cri L Jour 68 (DB).

[6] Where a District Superintendent of Police who was appointed a special Magistrate tried a case, it was held that the trial was illegal. ('92-96) 1 Upp Bur Rul P 10 (10).

[7] An appeal from an order of a special Magistrate lies to the Sessions Judge within the local limits of whose jurisdiction the special Magistrate holds his Court in disposing of the case. (Vol. 5) 1918 Lah 196 (197): 1918 Pun Re No. 7 (Cr): 19 Cri L Jour 310 (DB).

15. (1) The <sup>a</sup>[Provincial Government] may direct any two or more Magistrates in any <sup>b</sup> outside the presidency-towns to sit together as a Bench, and may by <sup>c</sup> Benches of Magistrates. invest such Bench with any of the powers conferred or conferrable b under this Code on a Magistrate of the first, second or third class, and direct it to exercise powers in such cases, or, such classes of cases only, and within such local limits, as the <sup>a</sup>[Provincial Government] thinks fit.

(2) Except as otherwise provided by any order under this section, every such Bench <sup>a</sup> Powers exercisable by have the powers conferred by this Code on a Magistrate of the high Bench in absence of class to which any one of its members, who is present taking part in special direction. proceedings as a member of the Bench, belongs, and as far as practice shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

[(1882) S. 15; 1872—Ss. 50 and 51.]

[a] Substituted by A. O. for "Local Government".

16. The <sup>a</sup>[Provincial Government] may, or, subject to the control of the <sup>a</sup>[Provincial Government], the District Magistrate may, from time to time, or for guidance of Benches. rules <sup>b</sup> consistent with this Code for the guidance of Magistrate Benches in any district respecting the following subjects:—

- (a) the classes of cases to be tried;
- (b) the times and places of sitting;

#### SECTION 15—Note 1.

[1] The powers can be exercised by any Bench that is constituted under the next section out of the Magistrates directed to "sit together" as a bench under this section. (Vol. 21) 1934 Bom 176 (177,178): 36 Cri L Jour 592 (DB).

[2] The object of constituting a Bench of Magistrates is that the Magistrates composing the Bench should individually and collectively give their attention and apply their minds to the hearing of the evidence and the determination of the points at issue and arrive at an independent judgment in regard to the merits of the case. (Vol 30) 1943 Pat 381 (382): 45 Cri L Jour 88 \* (Vol 9) 1922 Oudh 21 (22): 25 Oudh Cas 182: 23 Cri L Jour 696.

[3] Where in a trial before a Bench of two Magistrates one of them recorded the evidence, while the other was attending to some other case and a joint judgment was delivered with the signatures of both, the judgment was set aside. (Vol 9) 1922 Oudh 21 (22): 25 Oudh Cas 182: 23 Cri L Jour 696.

[4] The mere fact that one of the two Magistrates constituting a Bench did not sign the statement of witnesses and the charge-sheet does not show that he was absent or was not paying attention to the proceedings and cannot serve as a ground for setting aside the conviction. (Vol. 29) 1942 Oudh 423 (423): 43 Cri L Jour 646.

[5] Bench composed of Magistrates having third class magisterial powers may be invested with the ordinary or additional powers of a second class Magistrate. (Vol 15) 1928 Sind 1 (5): 22 Sind L R 157: 28 Cri L Jour 913 (FB).

[6] It is not competent to the Provincial Government to invest a Bench of Magistrates with the incidental or ordinary powers of a second class Magistrate without having powers to try second class cases or to invest a Bench with the additional powers of a second class Magistrate without having other powers conferred by the Code on a second class Magistrate. (Vol 15) 1928 Sind 1 (5, 8): 22 Sind L R 157: 28 Cri L Jour 913 (FB).

[7] Where a notification of a Provincial Government issued under this section purported to invest a Bench of Magistrates, individuals of which had third powers with the ordinary powers of a second Magistrate, but did not expressly invest the Bench with jurisdiction to try offences cognizable by a Magistrate of the second class, it was held that the Bench could supply the omission in the notification and the Bench must be taken to have been invested powers to try offences triable by second class Magistrates. (Vol 15) 1928 Sind 1 (7,9): 22 Sind L R 157: 28 Cri L Jour 913 (FB). (Aston and DeSouza, A. dissenting.)

[8] A Magistrate who is a member of a Bench can act independently unless he is so authorized. (Vol 10) Cal 483 (486) (DB).

[9] Where a Bench of two Magistrates invested first class powers, but neither of whom individually such powers, began the hearing of a case triable by a Magistrate of the first class and at an adjourned sitting only one of them was present, he was not competent to try the case alone. (Vol 2) Cal L Rep 348 (349) (DB).

[10] District Magistrate cannot under S. 16 rules fixing the territorial jurisdiction of Bench of Magistrate. (Vol 74) 21 Suth W R 45 (46).

#### SECTION 16—Note 1.

[1] It is not desirable to place before a Bench of Magistrates cases involving difficult questions of law, though the Provincial Government or District Magistrate has the power to do so. (Vol 23) Cal 23 (32) (DB)\* (Vol. 12) 1925 Mad 64 (67): 47 716: 25 Cri L Jour 1070.

[2] According to the rules framed by the Provincial Government where there are even number of Magistrates constituting a Bench and are equally dividing the case shall be referred back to the District Magistrate or the Sub-divisional Magistrate. (Vol. 5) 1918 Cal (305): 19 Cri L Jour 312 (DB).

[3] According to the rules of the Government of United Provinces, where an even number of Magistrates constituting a Bench are equally divided in opinion

- (c) the constitution of the Bench for conducting trials ;
- (d) the mode of settling differences of opinion which may arise between the Magistrates in session.

*D.—Courts of Presidency Magistrates.*

18. (1) The <sup>a</sup>[Provincial Government] shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town.

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the <sup>a</sup>[Provincial Government] to sit singly; or by any Bench of Presidency Magistrates.

b[(3) A Presidency Magistrate may be appointed under this section for such term as the a[Provincial Government] may, by general or special order, direct.

(4) The a[Provincial Government] may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the a[Provincial Government] may direct.

[1882—S. 18, para 1.]

[a] Substituted by A. O. for "Local Government".

[b] Sub-sections (3) and (4) were inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 3.

**Objects and Reasons.**

Sub-section (4).—"We think there is force in the suggestion of the Calcutta Bar Library Club that it is not necessary to restrict the appointment of an Additional Chief Presidency Magistrate to persons who are already Presidency Magistrates and have therefore substituted the words "any person" for the words "any Presidency Magistrate."—S. C. R. [XVIII of 1923.]

19. Any two or more of such persons may (subject to the rules made by the Chief Presidency Benches. Magistrate under the power hereinafter conferred) sit together as a Bench.

[1882—S. 18, para 2.]

20. Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port dues.

[1882—S. 20]

**Section 17 (contd.)**

the work of the Magistrate so transferred. ('96) 19 All 114 (119) (DB).

[11] The order of a District Magistrate authorizing or directing the Senior Honorary Magistrate to distribute work among other Honorary Magistrates is *ultra vires*. (Vol 1) 1914 All 202 (202) : 36 All 468 : 15 Cri L Jour 584.

[12] An Additional sessions Judge cannot grant or cancel bail unless power to do so is conferred on him under sub-section (4). (Vol 17) 1930 Rang 335 (336) : 32 Cri L Jour 148.

**SECTION 18—Note 1.**

[1] The Court of the Chief Presidency Magistrate is of "equal jurisdiction" to the Court of any other Presidency Magistrate within the meaning of S. 526. ('11) 12 Cr L Jour 451 (452) : 35 Mad 739 (DB).

[2] Under S. 7 of the Madras City Police Act (3 [III] of 1898), the Commissioner of Police is a Presidency Magistrate. (Vol 19) 1932 Mad 428 (428) : 33 Cri L Jour 539.

[3] The powers of a Presidency Magistrate under

the Code are conferred on any Bench of Presidency Magistrates. ('05) 2 Cri L Jour 770 (773) (DB) (Bom).

[4] Where the Provincial Government has declared all Presidency Magistrates to be subordinate to the Chief Presidency Magistrate, it has been held that the Presidency Magistrates are subordinate to the Additional Chief Presidency Magistrate also. (Vol 21) 1934 Cal 405 (406) : 61 Cal 467 : 35 Cri L Jour 729 (DB).

**SECTION 20—Note 1.**

[1] The local limits of the jurisdiction of a Presidency Magistrate extend to all places.

(a) Within the presidency-town. (Vol 13) 1926 Bom 564 (564) : 27 Cl L Jour 1213 (DB).

(b) Within the limits of the port of such town and of any navigable river or channel leading thereto, though such place is outside the presidency town proper. (Vol 6) 1919 Cal 1 (2) : 47 Cal 147 : 20 Cr L Jour 782 (DB).

[2] A presidency Magistrate will have jurisdiction within the limits of the ports of the presidency town as defined in the Indian Ports Act XV of 1908: ('84) 1884 Rat 193 (194).

21. (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may, from time to time, with the previous sanction of the <sup>a</sup> 'Provincial Government', make rules<sup>b</sup> consistent with this Code to regulate—

- (a) the conduct and distribution of business and the practice in the Courts of the Magistrates of the town ;
- (b) the times and places at which Benches of Magistrates shall sit ;
- (c) the constitution of such Benches ;
- (d) the mode of settling differences of opinion which may arise between Magistrates in session ; and
- (e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.

(2) The <sup>a</sup> 'Provincial Government' may, for the purposes of this Code, declare what Presidency Magistrates [including Additional Chief Presidency Magistrates] are subordinate to the Chief Presidency Magistrate, and may define the extent of their subordination.

[1882—S. 21]

[a] *Substituted by* A. O. for "Local Government".

[b] For rules, *see* the different provincial Rules and Orders.

[c] *Inserted by* the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 4.

#### Objects and Reasons.

*Sub-section (2).*—"The Government of Madras recommended that all Presidency Magistrates should be subordinate to the Chief Presidency Magistrate in the like manner as in a district, Magistrates are subordinate to the District Magistrate. This appears to be sound in principle, and the clause as it stands enables the Chief Presidency Magistrate, with the sanction of the

Local Government, to make rules on this footing. We are informed, however, that in Calcutta the Presidency Magistrates are not considered as subordinate to the Chief Presidency Magistrate. If this be so, we have no doubt that the Local Government in sanctioning rules under this clause will pay such regard as it thinks right to any existing practice."—S. C. R., 1838.

#### SECTION 21—Note 1.

[1] Where a rule was framed under this section directing that only cases arising under certain specified enactments be made over to the Bench of Honorary Magistrates for disposal and the Bench convicted an accused and took action under S. 106, it was held that the order under S. 106 was not void. ('05) 2 Cri L Jour 770 (774) (DB) (Bom).

[2] According to Calcutta High Court a rule made under this section, directing that in a Bench of two members the opinion of the Chairman shall prevail is not *ultra vires*. ('06) 3 Cri L Jour 409 (415, 417) (FB) (Impliedly overruling ('04) 1 Cr L Jour 342 (DB) (Cal)).

[3] Where a rule by the Chief Presidency Magistrate of Bombay provided that every member of a Bench shall have a voice in the determination of a case and that when a bench is equally divided in opinion the Chairman shall have a casting vote, it was held that the judgment of the dissenting Magistrate, if any, should form part of the record. (Vol. 14) 1927 Bom

[4] The Governments of Bombay and Calcutta have declared that all Presidency Magistrates, whether sitting singly or as members of a Bench, are subordinate to the Chief Presidency Magistrate in the same manner and to the same extent as ordinary Magistrates are subordinate to the District Magistrate under S. 17. ('99) 1 Bom LR 347 (348) (DB) \* ('98) 2 Cal WN 261 (DB) \* (Vol 11) 1924 Cal 911 (912) : 51 Cal 820 : 26 Cri L Jour 101 (DB).

[5] The Chief Presidency Magistrate has power under S. 528 to withdraw any case from the file of a Presidency Magistrate :

(a) Either to his own file or . (Vol 11) 1924 Cal 911 (912) : 51 Cal 820 : 26 Cri L Jour 101 (DB).

(b) To transfer it for enquiry to any other Presidency Magistrate. ('99) 1 Bom LR 347 (348) (DB).

[6] The Government of Madras have directed that the subordination of a Presidency Magistrate shall be limited to the purposes of S. 124 sub-s. (1) S. 144 sub-s. (4) S 192 and S. 528 of the Code. ('11) 12 Cri 451 (452) : 35 Mad 739 (DB).

*E.—Justices of the Peace.*

a(22. Every b[Provincial Government], so far as regards the territories subject to its Justice of the Peace for administration c[\* \* \*] may, by notification in the Official Gazette, the mufassal. appoint such d[persons resident within British India and not being the subjects of any foreign State] as it thinks fit to be Justices of the Peace within and for the local area mentioned in such notification.]

[1882—S. 22]

[a] Substituted by the Devolution Act, 1920 (38 [XXXVIII] of 1920) S. 2 and Sch. I for the original section.

[b] Substituted by A. O. for "Local Government."

[c] The words and brackets "(other than the presidency towns)" were repealed by the Criminal Law (Amendment) Act 1923 (12 [XII] of 1923), S. 3.

[d] Substituted, *ibid.*, for "European British Subjects".

23 and 24. [Justice of the Peace for the Presidency towns. Present Justices of the Peace.] Repealed by the Criminal Law (Amendment) Act, 1928 (12 [XII] of 1923), S. 4.

25. In virtue of their respective offices, a[\* \* \* \* \*] *Ex-officio* Justices of b[the Judges of the High Courts] are Justices of the Peace within and for the whole of British India, Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the c[Provincial Government] under which they are serving, and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

[1882—S. 25]

[a] The words "Governor-General, Governors, Lieutenant-Governors, and Chief Commissioners, the ordinary members of the Council of the Governor-General and" were repealed by A. O.

[b] Substituted by the Lower Burma Courts Act, 1900 (6 [VI] of 1900), S. 47 and Sch. I for the Judges of the High Courts and the Recorder of Rangoon.

[c] Substituted by A. O. for "Local Government".

*F.—Suspension and Removal.*

26 and 27. [Suspension and removal of Judges and Magistrates. Suspension and removal of Justices of the Peace.] Repealed by A. O.

## CHAPTER III.

## POWERS OF COURTS.

*A.—Description of offences cognizable by each Court.*

28. Subject to the other provisions of this Code any offence under the Indian Penal Code Offences under Penal may be tried—~~a~~  
Code.

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

*Illustration.*

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

[1882—S. 28; 1872—S. 7; 1891—S. 22, para 1]

## SECTION 22—Note 1.

[1] Justice of peace might still possibly exercise powers vested in justices in 1726 but that as to any further powers, they could only be such as are conferred by Act of Parliament or other competent authority. ('70) 7 Bom H C R (Cr) 6 (22, 23).

## SECTION 25—Note 1.

[1] The Courts are bound to take judicial notice that

certain person are justices of the Peace. ('71) 15 Squh WR (Ch) 73n (75n) (DB).

## SECTION 28—Note 1.

[1] The jurisdiction of every criminal Court to try a particular offence is derived from statute, either from the statute which creates the Court, or from the statute which defines the offence. (Vol 32) 1945 Pat 98 (102, 103): 46 Ori L Jour 399 (FB) (The Special Courts established under Ordinance 2 (II) of 1942 are not any exception to this rule).

Offences under other laws.

29. (1) Subject to the a[other provisions of this Code], any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

(2) When no Court is so mentioned, it may be tried by the High Court or b[subject as afore. said] by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

[1882—S. 29; 1872—S. 8; 1861—S. 21]

[a] Substituted by the Criminal Law (Amendment) Act, 1923 (12 [XII] of 1923), S. 5, for "provisions of Section 447"

[b] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 5.

### Section 28 (contd.)

[2] The High Court and the Court of Session have concurrent jurisdiction with the subordinate Courts over offences triable by the latter. (Vol 29) 1942 Mad 440 (441); 43 Cri L Jour 715 \* ('82) 1842 Pun Re No. 22 p. 78 (79) (DB) \* ('86) 8 All 665 (667) \* ('88) 1888 All WN 235 (236).

[See also ('97) 24 Cal 429 (431) (DB).]

[3] A Magistrate who is not mentioned in the eighth column of the second schedule as being empowered to try a particular offence, has no jurisdiction to try it. (Vol 11) 1924 Rang 12 (12) \* (Vol 12) 1925 Mad 387 (387); 25 Cri L Jour 1193 \* ('98) 1898 Rat Un Cri Cas 953 (953) (DB) \* (1888) 11 Mad 441 (442) (DB) \* ('67) 7 Suth WR Cr 52 (52) \* ('10) 11 Cri L Jour 185 (186); 1909 Upp Bur Rul (4th quarter Penal Code 29) \* ('67) 7 Suth WR Cr 13 (13) (DB).

[See however ('72) 18 Suth WR (Cr) 8 (9) (DB).]

[4] No jurisdiction will be conferred on the Magistrate.

(a) By the consent of the parties. (Vol 19) 1932 Oudh 251 (251); 33 Cri L Jour 511.

(b) By the order of the District Magistrate. (Vol 13) 1926 Cal 590 (592); 27 Cri L Jour 545 (DB) \* ('96) 23 Cal 442 (445) (DB).

[5] The fact that the offence which a Magistrate is not empowered to try includes a minor offence which he is authorised to try, cannot give him jurisdiction to try the accused for the former offence. ('10) 11 Cri L Jour 639 (640); 1910 Pun Re No. 31 Cr.

[6] Magistrates cannot clutch at jurisdiction by intentionally ignoring facts of aggravation which make the offence cognizable only by a higher tribunal. (Vol 31) 1944 Mad 166 (168); 45 Cri L Jour 508 \* (Vol 22) 1935 Sind 221 (221); 37 Cri L Jour 80; 29 Sind LR 428 (DB) \* ('89) 13 Bom 502 (505) (DB) \* ('76) 1876 Pun Re No. 2 Cr. p. 3 (3) \* ('88) 12 Mad 54 (55) (DB) \* (29) 11 Lah L Jour 95 (96) \* ('97-01) 1 Upp Bur, Rul 328 (328).

[7] A Magistrate cannot split up a graver offence into a number of smaller offences and thus give himself jurisdiction. (1900) 5 Cal WN 372-373 (DB).

[8] The jurisdiction of a magistrate to try the accused for an offence triable by him, is not ousted merely by the fact that the accused is liable to be charged for an offence not triable by him. ('88) 1 Weir 449 (450) \* ('33) 1933 Mad WN 550 (551) \* ('30) 1930 Mad WN 770 (771).

[Bur see (1866) 6 Suth WR (Cr) 49 (49) (DB).]

[9] If a Second Class Magistrate should ignore the offence and commit the offender instead of

sending the accused before a First Class Magistrate to be tried for robbery, try the case for theft, the proceedings cannot be void for want of jurisdiction. (Vol 12) 1925 Rang 45 (47); 2 Rang 455; 26 Cri L Jour 1108.

[10] The proper course for a Court which finds that a case in which it is not empowered to pass the legal sentence has been inadvertently transferred to it is to return it. (Vol 31) 1944 Pat 93 (96); 22 Pat 607; 45 Cri L Jour 409 (DB).

[11] The statement of a complainant in a criminal case has to be accepted for the purpose of jurisdiction. (Vol 12) 1925 All 290 (291); 47 All 64; 26 Cri L Jour 586.

[12] A statement by an accused person that the offence committed by him is a more serious one, not triable by the Magistrate, does not deprive the Magistrate of Jurisdiction, unless the prosecution accept the truth of that statement or the Magistrate is of the opinion that it is true. (Vol 25) 1938 Mad 784 (786); 39 Cri L Jour 659.

[13] Person charged with petty offence cannot at the discretion of the Magistrate be sent for trial to court of sessions. (Vol 33) 1946 All 365 (370) (DB) (Overruling Cri Appeal No. 398 of 1942.)

[14] As to the jurisdiction of summary Courts under Ordinance 2 (II) of 1921, see the undermentioned cases. (Vol 9) 1922 Mad 499 (500); 45 Mad 922; 23 Cri L Jour 614 (FB) (A summary Court appointed under Martial Law Ordinance has no jurisdiction to try offences committed outside the Martial law area) (Overruled on another point in (Vol 26) 1939 Mad 120; ILR (1939) Mad 708; 40 Cri L Jour 320 (FB).)

[15] Illustrations of other provisions to which this section is subject are.

(a) S. 207.

(b) S. 254; ('92) 16 Bom 580 (585).

[16] This section is subject to S. 30, though the latter section specifically mentions only S. 29 and not this. (Vol 23) 1936 Rang 230 (231); 14 Rang 378; 37 Cri L Jour 773 (DB) \* (Vol 25) 1938 Nag 56 (57); ILR (1938) Nag 248; 39 Cri L Jour 660.

### SECTION 29—Note 1.

[1] Where the Court which should try an offence created by an act is specified in the Act itself the Court alone can try such offence. ('13) 14 Cri L Jour 637 (638) (DB) (Mad) \* (Vol 10) 1923 Cal 339 (341) (DB) \* ('10) 11 Cri L Jour 476 (477); 33 All 84 \* ('09) 1 Cri L Jour 393 (395); 32 Mad 303 (DB) \* ('22) 2 Cri L Jour 87 (87) (Lah) \* ('79) 1879 Pun Re No. (Cr.) p. 12 (13) (FB) \* ('70) 7 Bom H C R (Cr) 59 (60) (Ss 4, 7 and 10 of Regulation 21 (XXX) of 1927).

Trial of European British subjects by second and third class Magistrates.

<sup>a</sup>[29A. No Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is an European British subject who claims to be tried as such.]

[a] *Inserted* by the Criminal Law (Amendment) Act, 1923 (12 [XII] of 1923). S. 6.

<sup>a</sup>[29B. Any offence, other than one punishable with death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the <sup>b</sup>[Provincial Government] to exercise the powers conferred by section 8, sub-section (1), of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.]

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923, (18 [XVIII] of 1923), S. 6.

[b] *Substituted* by A. O. for "Local Government".

### Section 29 (*contd.*)

[2] If no Court is specified in the enactment creating the offence, it can be tried by the High Court or by any Court specified in this behalf in the second schedule to the Code. (Vol 28) 1941 Mad 897 (897, 898) : I-L R (1942) Mad 143 \* (Vol 11) 1924 All 616 (617) : 25 Cr L Jour 1294 \* (Vol 6) 1919 Mad 24 (25) : 42 Mad 69 : 20 Cr L Jour 129 (DB) \* ('01) 14 C P L R 176 (176) \* ('05) 2 Cr L Jour 532 (533) (DB) (Cal) \* ('70) 1870 Pun Re No. 12 (Cr) p. 21 (22) (DB) \* (Vol 6) 1919 Bom 173 (174) : 43 Bom 888 : 20 Cr L Jour 699 (DB) \* (Vol 15) 1928 Sind 43 (44) : 22 Sind L R 141 : 28 Cr L Jour 954 (DB) \* (Vol 10) 1923 Rang 139 (140) : 25 Cr L Jour 623 \* ('81) 1881 Pun Re No. 34 (Cr) p. 90 (90) (DB) \* ('71) 8 Bom H C R (Cr) 115 (117) (DB).

[3] Where the special act prescribes the class of Magistrate that should try the offences such offences cannot be tried by magistrates of a lower class though the offences may be tried by them under the Code. ('79-01) 1 Upp Bur Rul 374 (374) \* ('79) Weir 3rd Ed 584 (585).

[4] Sub-section (2) must be read with S 5 and the High Court cannot take cognizance of a case not committed to it for trial under section 194. (Vol 23) 1936 All 830 (831) : I L R (1937) All 220 : 38 Cr L Jour 111 (FB).

### SECTION 29 A—Note 1.

[1] Offences under Ss. 403, 417 and 427, Penal Code being punishable otherwise than with fine not exceeding Rs. 50, a second class Magistrate has no jurisdiction to commit the accused to the Court of Session. (Vol 26) 1939 All 602 (603) : 40 Cr L Jour 917 : I L R (1939) All 851.

### SECTION 29 B—Note 1.

[1] The section extends to certain Magistrates the power to try juvenile offenders for certain offences which would otherwise have been triable exclusively by the Court of Session. (Vol 23) 1936 All 675 (676). I L R (1937) All 101 : 37 Cr L Jour 1073 \* (Vol 21) 1934 Bom 211 (212) : 35 Cr L Jour 1033 (DB).

[2] Offence under S. 304 of the Penal Code being punishable with transportation cannot be tried by Magistrate in charge of Central Children Court and specially empowered under S. 8 of the Reformatory Schools Act, 1897. (Vol 19) 1932 Cal 487 (487, 488) : 59 Cal 856 : 33 Cr L Jour 645 (DB).

[3] Magistrate not specified in the section has a discretion to direct that the accused be dealt with under this section or to deal with the case himself. (Vol 21) 1934 Bom 211 (212) : 35 Cr L Jour 1033 (DB).

[4] A Magistrate other than one mentioned in this section when he proposes to try the case himself must have jurisdiction to do so (Vol 23) 1936 Sind 185 (185, 186) : 30 Sind L R 2 : 38 Cr L Jour 53 (DB) (Case under S. 130 Railways Act cannot be tried by any Magistrate other than one specified in the Act itself or by the High Court) \* (Vol 15) 1928 Lah 909 (909) : 29 Cr L Jour 733 (Do).

[5] Due enquiry should be made about the actual age of the child—The burden of proof that accused is a child rests upon the accused. (Vol 19) 1932 Mad 213 (214) : 33 Cr L Jour 192 (DB) (Case under Madras Children Act 1920).

[6] Second class Magistrate not empowered to act under S. 8 of the Reformatory Schools Act 1897 must refer his case to the District Magistrate. (Vol 2) 1915 Mad 841 (841) : 16 Cr L Jour 32.

[7] Under S. 20 (3) of the Burma Prevention of Crime (Young Offenders) Act, 1930 the only orders that can be passed are either for sending the offenders to junior school or for detaining them in custody for any period upto 16 years of age. (Vol 20) 1933 Rang 275 (276) : 35 Cr L Jour 599.

[8] Under S. 6 of the Borstal Schools Act (1929) the procedure for a Magistrate to adopt is to convict the accused, and in place of the sentence direct his detention in the Borstal School. (Vol 19) 1932 Bom 489 (490) : 33 Cr L Jour 395 (DB) \* (Vol 19) 1932 Sind 175 (176) : 26 Sind L R 295 \* 34 Cr L Jour 11. (Actual sentence of imprisonment is not necessary and conviction for the offence is enough.)



30. In the territories respectively administered by the Lieutenant-Governors of the Punjab and the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam, in Sind and in those parts of the other provinces in which there are Deputy Commissioners or Assistant Commissioners the <sup>b</sup>[Provincial Government] may, notwithstanding anything contained in section 29, invest the District Magistrate or any Magistrate of the first class, with power to try as a Magistrate all offences not punishable with death,

[1882—S. 30 ; 1872—S. 36.]

[a] The words "and Burma" were *repealed* by A. O.

[b] *Substituted* by A. O. for "Local Government."

### SECTION 30—Note 1.

[1] The section deals only with the trial of offences and confers no power to pass a sentence. (Vol 30) 1943 Sind 87 (89) : 1 L R (1942) Kar 597 : 14 Cri L Jour 461.

[2] Special powers are conferred on District Magistrates to avoid delay in the trial consequent on commitment to the Session and to afford relief to witnesses. (Vol 25) 1938 Nag 50<sup>4</sup>(58) : 1 L R (1938) Nag 248 : 39 Cri L Jour 660 \* ('03) 7 Cal W N 457 (460) (DB).

[3] Though the section specifically refers only to S. 29, S. 28 also must be read subject to this section. (Vol 25) 1938 Nag 56 (58) : 1 L R (1938) Nag 248 : 38 Cri L Jour 660.

[4] A Magistrate tendering pardon under S. 337 is precluded from trying the case himself. ('06) 4 Cri L Jour 44 (46) (DB) (Cal) \* (Vol 12) 1925 Nag 119 (119) : 25 Cri L Jour 1341.

[5] A committal cannot be made to a magistrate who has tendered pardon under S. 337. ('73) 1873 Pun Re No. 17 (Cr) page 19 (20) (DB).

[6] A committal made to a District Magistrate empowered under S. 30 instead of to a Sessions Judge is irregular but if the trial by the former does not prejudice the accused the conviction will be upheld. ('03) 7 Cal W N 457 (460) (DB).

[7] The words "Triable by a Magistrate" occurring in S. 250, must mean triable under S. 28 of the Code by a Magistrate. ('02) 1902 Pun Re No. 26 (Cr) page 74 (75) \* ('10) 11 Cri L Jour 396 (396) (DB) (Lah).

[But see (Vol 23) 1936 Rang 230 (231) : 14 Rang 378 : 37 Cri L Jour 773 (DB).]

[8] The Court of the District Magistrate exercising enhanced powers is nevertheless not constituted a Court of Session thereby and the procedure for the trial is regulated by chap XXI. ('04) 1 Cri L Jour 1063 (1065) : 1904 Pun Re No. 15 (Cr) (DB) \* (Vol 3) 1916 Nag 97 (98) : 12 Nag L R 94 : 17 Cri L Jour 245.

[9] A Magistrate under this section has no power to try an accused person summarily. Colm Dig (Cr) 42 of 1876 \* ('79) 1879 Pun Re No. 25 Cr Page 75 (75) (DB).

[10] All offences not punishable with death may be tried by Magistrates empowered under this section notwithstanding that under Ss. 28 and 29 they are triable by the Courts specified in the Eighth column of the second schedule of the Code. (Vol 13) 1926 Nag

374 (375) : 27 Cri L Jour 728 \* ('12) 1912 Pun L R No. 223 (DB) \* (Vol 12) 1925 Lah 157 (158) : 25 Cri L Jour 1241 (Charge under S. 120 B—Where no murder has taken place a magistrate can try under this section).

[11] A *prima facie* case of murder cannot be tried by a Magistrate with powers under this section. (Vol 81) 1944 Pat 92 (96) : 22 Pat 607 : 45 Cri L Jour 409 (DB) \* (Vol 15) 1928 Lah 868 (869) : 30 Cri L Jour 573 (DB) \* (08) 8 Cri L Jour 263 (264) : 1908 Pun Re No. 14 (Cr).

[12] A Magistrate empowered under Ss. 30 and 34 should avoid trying accused for a minor offence, when the evidence admits of a doubt that a serious offence is committed. ('84) 10 Cal 85 (86) (DB).

[13] An offence of culpable homicide not amounting to murder cannot be tried by a Magistrate empowered under this section. ('91) 1891 Pun Re No. 3 (Cr) page 8 (9) \* ('93) 1893 Pun Re No. 1 Cr page 1 (20) (FB).

[See however ('22) 23 Cri L Jour 726 (728) (Pesh) + ('22) 23 Cri L Jour 731 (731) (Pesh)]

[14] Cases on the borderline of jurisdiction and cases of great difficulty ought to be committed rather than be tried by the Magistrate under this section. 1 Bur L R 158 \* ('93-1900) 1893-1900 Low Bur Rul 219 (219).

[15] Sessions Judge of opinion that trial by special Magistrate incompetent—Case should be sent to High Court for order committing accused for trial to sessions court. (Vol 13) 1926 Lah 575 (575) : 27 Cri L Jour 846.

[16] A case triable by the special magistrate himself can also be committed to sessions for good reasons. (Vol 23) 1936 Pesh 139 (139) : 37 Cri L Jour 852 \* (Vol 5) 1918 Nag 141 (142) : 20 Cri L Jour 97.

[17] Cases of rape and unnatural vice should, as far as possible, be tried by a Magistrate with S. 30 powers. (Vol 23) 1936 Lah 256 (256) : 37 Cri L Jour 474.

[18] A Court of a Magistrate exercising enhanced powers is still inferior to a Sessions Court and subject to its revisional powers. ('04) 1 Cr L Jour 1063 (1065) : 1904 Pun Re No. 15 (Cr) . (DB).

[19] Magistrate invested with special powers is not a District Magistrate. He is subordinate to the District Magistrate and his orders are open to revision by the District Magistrate. (Vol 3) 1916 Nag 97 (98) : 12 Nag L R 94 : 17 Cr L Jour 245.

*B.—Sentences which may be passed by Courts of various Classes.*

Sentences which High  
Courts and Sessions  
Judges may pass.

31. (1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years.

[1882—S. 31 ; 1872—Ss. 15, 17; 18 ; 1861—S. 22. Paras 1, 2, 3]

**Objects and Reasons.**

"In accordance with the recommendation of the Judges of the Bombay High Court, we have dispensed with the necessity for confirmation of sentences passed by Assistant Sessions Judges where such sentences

exceed four years. For the most part such confirmation is simply a preliminary to an appeal and interposes useless formality which delays the hearing of the appeal on the merits."—S. C. R., 1898.

Sentences which Magis-  
trates may pass.

32. (1) The Courts of Magistrates may pass the following sentences:  
namely :—

- |  |  |
|--|--|
| (a) Courts of Presidency Magis-<br>trates and of Magistrates of<br>the first class : | { Imprisonment for a term not exceeding two years, includ-<br>ing such solitary confinement as is authorized by<br>law ;<br>Fine not exceeding one thousand rupees ;<br>Whipping aa. |
|--|--|

**SECTION 31—Note 1.**

[1] The punishment of penal servitude is applicable only to Europeans and Americans. ('96) 19 Mad 483 (485).

[2] Offence punishable only under Local Act—Solitary confinement cannot be awarded. ('70) 1870 Pun Re No. 20 (Cr) page 35 (36) \* (Vol 11) 1924 Lah 667 (667) : 25 Cri L Jour 120.

[3] Substantive punishment awarded including only fine—Solitary confinement cannot be awarded. ('82) 1882 Pun Re No. 9 (Cr) page 13 (13).

[4] Cumulative sentences of solitary confinement are contrary to the intention of S. 73, Penal Code. (Vol 10) 1923 Rang 197 (198) : 1 Rang 306 : 25 Cri L Jour 85.

[5] Sentence of whipping passed under S. 3, Whipping Act—No other punishment can be awarded. ('92) 16 Bom 857 (358) (DB) \* (Vol 12) 1925 Mad 183 (184) : 25 Cri L Jour 1185.

[6] Offence under S. 4 of the Whipping Act—Whipping may be awarded either in addition to or in lieu of any other punishment. (Vol 9) 1922 All 245 (246) : 44 All 538 : 23 Cri L Jour 274 (DB).

[7] Offender not coming under Ss. 3, 4 or 5 of the Whipping Act cannot be punished with whipping. (Vol 15) 1928 Oudh 111 (111) : 1 Luck 668 : 29 Cri L Jour 666.

[8] Under S. 59 of the Penal Code transportation cannot be awarded for an offence under a special or local Act. ('01) 11 Mad L Jour 127 (128) (DB).

[9] Imprisonment awarded in default of payment of fine—Transportation cannot be substituted for imprisonment. ('82) 5 Mad 28 (29).

[10] Transportation under S. 75 of the Penal Code must be for life. ('82) 1882 Pun Re No. 38 (Cr) page 64. (64) (DB).

[11] Read with S. 59 Court may commute sentence of imprisonment to one of transportation for not less

than seven years but not exceeding ten years. ('02) Low Bur Rul 292 (293). (DB) \* (93-1900) 1893-1900 Low Bur Rul 482 (482) \* (Vol 2) 1915 Lah 76 (76) 1915 Pun Re No. 14 Cr : 16 Cri L Jour 554 (DB).

[12] Order directing period undergone as under-trial prisoner to be considered as part of sentence is illegal (Vol 10) 1923 Lah 104 (105) \* ('93-1900) 1893-1900 Low Bur Rul 42 (42) \* ('08) 7 Cri L Jour 453 (453) : Low Bur Rul 152.

[13] S. 79, Penal Code—Second conviction—Sentence of imprisonment for more than double the prescribed term is illegal. ('82) 1882 Pun Re No. 38 (Cr) page 6 (64).

[14] Order that term of imprisonment subsequently ordered should run concurrently with term of imprisonment being undergone at time, in default of payment of fine, is opposed to spirit of S. 64 and should not be passed. (Vol 18) 1931 Rang 51 (51) : 32 Cri L Jour 687.

[15] Order sending offender to reformatory school can only be passed where offender is sentenced to imprisonment or transportation. ('11) 12 Cri L Jour 24 (244) (Low Bur).

**SECTION 32—Synopsis.**

1. Scope of the section.
2. General principles as to punishments.
3. Imprisonment.
4. Solitary confinement.
5. Fine.
6. Whipping.
7. "May pass any lawful sentence".

1. Scope of the section.—[1] This section lays down the extent of the punishment which a Magistrate in his ordinary jurisdiction is competent to inflict. ('69) 34th WR Cr 41 (41) (FB).

- (b) Courts of Magistrates of the second class : { Imprisonment for a term not exceeding six months, including such solitary confinement as is authorised by law ;  
Fine not exceeding two hundred rupees ;  
b[\* \* \* \* \* ]
- (c) Courts of Magistrates of the third class : { Imprisonment for a term not exceeding one month ;  
Fine not exceeding fifty rupees.

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.

e[ \* \* \* \* \* ]

[1882—S. 32 ; 1872—S. 20 ; 1861—S. 22, paras 4 to 8]

[a] See however Ordinance III of 1946, section 7 sub-section (4) by virtue of which such Magistrates may impose a fine exceeding one thousand rupees in cases tried under that section.

[aa] As to the power to pass sentence of whipping in certain cases governed by the (Punjab) Frontier Crimes Regulation, 1901 (III of 1901), see section 6 of that Regulation.

[b] The words "Whipping (if specially empowered)" were repealed by the Whipping Act, 1909 (4 [IV] of 1909), S. 8 and Sch.

[c] Sub-section (3) was repealed, *ibid.*

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[2] A Magistrate cannot pass a sentence which he is not authorised to pass. (1863) 1 Bom H C R 87 (88) \* (1864) 2 Bom H C R 126 (127) \* (Vol 16) 1929 Rang 279 (279) : 7 Rang 358 : 31 Cri L Jour 175.

[3] Magistrate cannot sentence a person under S. 75 of the Penal Code as being a previous offender and award an enhanced punishment exceeding the limits of his power under this section. (1865) 1 Weir 36 (36) \* ('93-1900) 1893-1900 Low Bur Rul 78 (78) \* ('70) 6 Mad H C R (App) ii (iii) \* ('94) 1894 Rat Un Cri Cas 688 (688) \* ('04) 1 Cri L Jour 607 (608, 609) (Bom) \* ('05) 2 Cri L Jour 749 (750) : 1 Nag L R 137 \* ('69) 3 Beng L R App 49 (52) (DB).

[4] Magistrate acting under S. 395 cannot inflict any sentence exceeding his limit. ('02) Weir 449 (449).

[5] Magistrate specially empowered under S. 30 cannot, when exercising his ordinary powers, pass a sentence greater than that allowed by this section. (Vol 20) 1933 Bom 58 (59) : 34 Cri L Jour 162 (SB).

[6] Appellate Court affirming conviction passed by Magistrate of the second class but changing sentence from one of three months' simple imprisonment to one of fine of four hundred rupees—Sentence held illegal. (Vol 11) 1924 All 130 (130) : 45 All 594 : 25 Cri L Jour 312 (DB).

[7] The High Court has under S. 439 power to enhance sentence beyond the power of the trying Magistrate. (Vol 2) 1915 Sind 33 (33) : 9 Sind L R 82 : 19 Cri L Jour 712 (DB).

[8] Second Class Magistrate who is also a sub-Divisional Magistrate, is not limited by this section from binding over a person to keep the peace for a period of six months only but can go as far as S. 106 allows. (Vol 2) 1915 All 15 (16) : 37 All 230 : 16 Cri L Jour 850.

2. General principles as to punishments.—[1] Maximum punishment which Magistrate is empowered by law to award does not follow automatically upon conviction. See (Vol 16) 1929 Lah 29 (30) : 10 Lah 524 : 30 Cri L Jour 15 \* (Vol 15) 1928 Nag 188 (189) : 24 Nag L R 110 : 29 Cri L Jour 506.

2. Maximum punishment should be awarded only

in extreme cases. (Vol 16) 1929 All 919 (924) : 31 Cr L Jour 88 \* ('67) 8 Suth W R Cr 3 (3).

[3] Magistrate should exercise judicial discretion in each case and pass adequate sentence after taking into consideration all pertinent circumstances of the case. (Vol 23) 1936 Lah 833 (835) : 37 Cri L Jour 1079 \* (Vol 17) 1930 Sind 58 (59) : 31 Cri L Jour 763 (DB) \* (Vol 17) 1930 All 279 (279) : 31 Cri L Jour 631 (DB) \* (Vol 18) 1931 Cal 448 (450) : 58 Cal 892 : 32 Cri L Jour 1181 (DB) \* (Vol 14) 1927 Nag 221 (221) : 28 Cri L Jour 493 \* (Vol 17) 1930 Sind 225 (240) : 31 Cri L Jour 1026 (DB) \* (Vol 15) 1928 All 150 (155, 156) : 30 Cri L Jour 933 (SB) \* (Vol 20) 1933 Oudh 269 (271) : 35 Cr L Jour 58 \* (Vol 13) 1926 Mad 1163 (1166) : 50 Mad 474 : 27 Cri L Jour 1357 (DB) \* (Vol 16) 1929 Mad 841 (842) : 53 Mad 80 : 31 Cri L Jour 454 (DB) \* (Vol 20) 1933 Cal 1 (2, 3) : 33 Cr L Jour 837 (FB) \* (Vol 18) 1931 Bom 70 (73) : 55 Bom 220 : 32 Cr L Jour 283 (DB) \* (Vol 10) 1923 Oudh 180 (181) \* (Vol 15) 1928 Pat 159 (160) : 6 Pat 471 : 28 Cri L Jour 820 (DB) \* (Vol 24) 1937 Rang 467 (468) : 39 Cri L Jour 117 (DB).

[4] The following are mitigating circumstances.

(a) Offence being first offence. (Vol 20) 1933 All 488 (440) : 55 All 557 : 34 Cri L Jour 641 \* (Vol 17) 1930 Lah 424 (425) : 31 Cri L Jour 1076 \* (Vol 17) 1930 Lah 306 (308) : 31 Cri L Jour 201.

(b) Offence committed on sudden provocation. (Vol 14) 1927 All 105 (106) : 27 Cri L Jour 1392 (DB) \* (Vol 3) 1916 Oudh 138 (138) : 17 Cri L Jour 190 (DB) \* (Vol 19) 1932 Lah 302 (303) : 33 Cri L Jour 577 (DB) \* ('31) 1931 Mad WN 134 (136) (DB) \* (Vol 4) 1917 Low Bur 91 (91) : 18 Cri L Jour 113 (DB) \* (Vol 20) 1933 Lah 165 (166) : 34 Cri L Jour 1161 (DB) \* ('09) 9 Cri L Jour 245 (246) : 1 Sind L R 1 (DB).

(c) Offence committed in excess of right of self-defence. (Vol 11) 1924 Lah 61 (62) \* (Vol 19) 1932 Lah 344 (345) : 33 Cri L Jour 587 (DB) \* (Vol 3) 1916 Low Bur 63 (64) : 17 Cri L Jour 335.

(d) Accused making confession (Vol 3) 1916 Upp Bur 1 (1) : 2 Upp Bur Rul 113 : 17 Cri L Jour 402.

[See however (Vol 10) 1923 Nag 251 (254) : 24 Cri L Jour 579 (DB).]

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(e) Immediate apology by accused in cases of defamation or abuse. (Vol 15) 1928 All 321 (326) : 30 Cri L Jour 766 (DB).

(f) Fact that in cases of rape or abduction, woman was a consenting party or was unchaste. (Vol 14) 1927 Lah 91 (91) : 28 Cr L Jour 52 \* (Vol 19) 1932 Lah 203 (204) : 33 Cri L Jour 190 \* (Vol 11) 1924 Oudh 335 (336) : 27 Oudh Cas 32 : 25 Cri L Jour 913 \* (Vol 14) 1927 Lah 772 (772) : 28 Cri L Jour 256.

[5] The theory of deterrent punishment should not be loosely put into practice except where there is a danger of a wide breach of the peace or security. (Vol 9) 1922 Pat 267 (268, 269) : 22 Cri L Jour 679.

[6] Gang of desperate men of an unlawful assembly threatening to defy law—Heaviest possible sentence should be passed. ('11) 12 Cri L Jour 260 (265) Lah (DB) \* (Vol 14) 1927 Oudh 151 (154) : 28 Cri L Jour 337 \* (Vol 16) 1929 Pat 502 (503) : 30 Cri L Jour 1100.

[7] Following crimes should be punished with a deterrent sentence.

(a) Arson (Vol 11) 1924 All 781 (782) : 25 Cri L Jour 1190 (DB) \* (Vol 18) 1931 Oudh 116 (119) : 6 Luck 539 : 32 Cri L Jour 694 (DB).

(b) Crimes relating to coins. (Vol 14) 1927 Lah 220 (221) : 28 Cri L Jour 305.

(c) Burglary (Vol 19) 1932 Lah 258 (258) : 33 Cri L Jour 500 (DB).

(d) Crimes of violence on women. (Vol 16) 1929 Lah 584 (585) : 30 Cri L Jour 699.

(e) Illegal traffic in drugs or liquor. (Vol 14) 1927 Oudh 132 (134) : 29 Oudh Cas 374 : 1 Luck 301 : 28 Cri L Jour 321 \* (Vol 13) 1926 Sind 193 (193) : 20 Sind LR 70 : 27 Cri L Jour 633 (DB) \* ('38) 34 Cri L Jour 180 (181) (Lah) \* (Vol 13) 1926 Sind 176 (176) : 20 Sind LR 1 : 27 Cri L Jour 300 (DB) \* (Vol 3) 1916 Lah 345 (345) : 17 Cri L Jour 232 \* ('21) 22 Cri L Jour 258 (Lah).

[But see (Vol 19) 1932 Lah 10 (10) : 33 Cri L Jour 114 \* ('92) 5 O P L R Cr 44 (44).]

(f) Extortion by a police officer. ('97-01) 1 Upp Bur Bul 320 (324).

(g) Sodomy. (Vol 20) 1933 Sind 87 (88) : 34 Cri L Jour 618 (DB).

(h) Theft in a railway train. ('12) 13 Cri L Jour 531 (531) (DB) (Bom.).

[8] Accused, a person of high position and one who has done good service for the Government in the past, or belongs to a particular caste or community—Accused is not entitled to get off with a small sentence. (Vol 14) 1927 Oudh 319 (320) : 28 Cri L Jour 749 \* (Vol 15) 1928 All 150 (156) : 30 Cri L Jour 933 (SB) \* (Vol 19) 1932 Lah 500 (501) : 33 Cri L Jour 497 (DB).

[9] Public interest in a case and its sensational character should be definitely excluded from consideration in determining the sentence to be passed. ('24) 25 Cri L Jour 105 (111) (Pesh).

[10] Inadmissible evidence or any extraneous circumstances should not influence the Magistrate in awarding the sentence. (Vol 13) 1926 Cal 1163 (1165) : 53 Cal 706 : 27 Cri L Jour 1329 (DB).

[11] Whipping is not a proper sentence in the case of an accused of some position; in the case of a juvenile offender, it is more appropriate than a fine or a sentence of imprisonment. ('07) 5 Cri L Jour 217 (218)

(Lah) \* ('72-92) 1 Low Bur Bul 221 (221) ('84) 1884 Pun Re No. 3 Cr. page 4 (4) \* (Vol 21) 1928 Rang 123 (124) : 12 Rang 349 : 35 Cri L Jour 90 (DB).

[12] Petty offences possibly are more appropriately punished by fine than by imprisonment. ('79) 1 Wei 894 (895) (FB) \* ('11) 12 Cri L Jour 435 (435) (Lah) : (Vol 17) 1930 Pat 241 (242) : 9 Pat 113 : 31 Cri L Jour 789 (DB) \* (Vol 18) 1931 Pat 342 (343) : 32 Cri L Jour 1166 \* ('72-92) 1872-1892 Low Bur Bul 537 (537) (1900) 1900 Pun LR 52 (53) \* (Vol 3) 1916 Bom 9 (98) : 41 Bom 149 : 18 Cri L Jour 97 (DB) \* (Vol 11) 1924 Bom 453 (453) : 26 Cri L Jour 759 (DB).

[13] In the case of first offences, sentences of short term imprisonment should be avoided. (Vol 28) 194 Sind 48 (48) : ILR (1940) Kar 477 : 42 Cri L Jour 40 (DB).

[14] Imprisonment, for offences outside the Penal Code, should be awarded only as a last resort in case of contumacy. (Vol 18) 1931 Mad 777 (778) : 32 Cri L Jour 1279 \* ('13) 14 Cri L Jour 293 (295) : 9 Na LR 68.

[15] Magistrate pronouncing sentence must define precisely the nature of sentence intended, as well as period of detention. Generally sentence ought to be self-contained. ('01) 24 Mad 13 (15, 16) (DB) \* ('93) 1 All 208 (209, 210) (DB) \* ('69) 1869 Pun Re No. 3 (Cr) page 68 (68).

[16] Court awarding maximum punishment should give reason therefor. (Vol 13) 1926 Lah 239 (240) : 3 Cri L Jour 186.

3. Imprisonment.—[1] Where nature of imprisonment is not specified when sentence is passed it must be taken to be simple. ('72) 18 Suth WB (Cr) 3 (3) (DB) ('07) 5 Cal L Jour 445 (447) (DB).

[2] Where the Magistrate uses the phrase, "I pass sentence under Ss. 326 and 148" or whatever the section may be, it must be interpreted to mean that the Magistrate intended to pass concurrent sentences. (Vol 11) 1924 All 492 (492) : 25 Cri L Jour 992.

[3] Magistrate has no jurisdiction in awarding sentence to direct that any portion of the period during which the accused had been detained in custody as a under-trial prisoner should be computed as part of the sentence. ('97) 1897 Rat Un Re Cri Cas 892 (893) (DI) \* (Vol 6) 1919 Lah 29 : (30) : 1919 Pun Re No. 27 Cr 20 Cri L Jour 684 \* ('98-1900) 1893-1900 Low Bur Bul 42 (42) \* ('08) 7 Cri L Jour 453 (453) : 4 Low Bur Bul 152 \* (Vol 10) 1923 Lah 104 (105).

[4] In estimating proper sentences, Court can take into consideration period of detention as an under-trial ('10) 11 Cri L Jour 9 (10) (DB) (Cal).

[5] Sentence of imprisonment until rising of Court is good. (Vol 32) 1945 Mad 313 (313) : ILR (1945) Mad 529 : 47 Cri L Jour 50 (DB) (Vol 16) 1929 Ma 226 : 30 Cri L Jour 247 and (Vol 29) 1942 Mad 723 ILR (1943) Mad 230 : 44 Cri L Jour 139 overruled ('07) 5 Cri L Jour 217 (218) (Lah).

[See also ('06) 3 Cri L Jour 494 (496) (DB) (Bom.).

[6] A Magistrate cannot award imprisonment for several periods with intervals between each period.

[7] A Magistrate cannot order accused. (Vol 14) 1927 Lah 62 (62, 63) : 28 Cri L Jour 23 to suffer imprisonment in police lock-up. (Vol 1) 1914 Low Bur Bul 157 : 7 Low Bur Bul 62 : 15 Cri L Jour 10.

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4. Solitary confinement.—[1] No solitary confinement can be ordered in case of convictions under the following Acts.

(a) The Arms Act. ('66) 1866 Pun Re No. 120 Cr P 120 (120) (DB).

(b) The Excise Act. ('89) 1889 Pun Re No. 17 Cr p. 65 (66) \* ('93-1900) 1893-1900 Low Bur Rul 554 (555).

(c) The Criminal Tribes Act. (Vol 11) 1924 All 319 (320) : 46 All 114 : 25 Cri L Jour 654 \* ('89) 1889 Pun Re No. 17 Cr. Page 66 (67).

(d) The Post Offices Act. ('70) 1870 Pun Re No. 20 Cr. p. 35 (36) (DB) (Act 14 (XIV) of 1866) \* ('79) 1879 Pun Re No. 24 Cr p. 73 (74) (DB).

(e) The NW Frontier Rules. ('80) 1880 Pun Re No. 4 Cr p. 10 (11) (DB) \* ('81) 1881 Pun Re No. 36 Cr p. 92 (94) (DB).

(f) The Opium Act. ('01) 14 CPLR 39 (40).

[2] Imprisonment awarded in default of payment of fine or of furnishing security. Solitary confinement cannot be awarded ('82) 1882 Pun Re No. 9 Cr p. 13 (13) (DB) \* ('87) 1887 Pun Re No. 53 Cr p. 142 (143) (DB) \* (Vol 1) 1914 All 422 (423) : 36 All 495 (496) : 15 Cri L Jour 616 \* (Vol 14) 1927 All 472 (473) : 28 Cri L Jour 534.

[3] Solitary confinement can be awarded in lieu of whipping under S. 395. ('99) 1899 Pun Re No. 14 (Cr) p. 38 (39) (DB).

[4] Summary trial—Solitary confinement can be ordered. ('83) 6 All 83 (83).

5. Fine.—[1] Maximum amount of fine for payment of which Magistrate may sentence offender is Rs. 1,000. ('67) 7 Suth WR Cr 37 (37).

[2] Power to punish with fine for separate offences is not affected by this section even though the aggregate fine imposed in respect thereof exceeds Rs. 1000. ('93) 20 Cal 676 (681, 682) (DB).

[3] Order for payment of a daily fine, in anticipation of offences not yet committed, is illegal. (Vol 22) 1935 Pat 208 (210) : 14 Pat 455 : 36 Cri L Jour 1048 (DB) \* (Vol 5) 1918 All 266 (266) : 40 All 569 : 19 Cri L Jour 694 \* (Vol 14) 1927 All 131 (131) : 49 All 245 : 27 Cri L Jour 1120 \* (Vol 6) 1919 Bom 28 (28) : 43 Bom 836 : 20 Cri L Jour 624 (DB) \* (Vol 13) 1926 Bom 526 (526) : 27 Cri L Jour 1328 (DB) \* ('10) 11 Cri L Jour 540 (540) : 37 Cal 671 ('11) 12 Cri L Jour 371 (372) (Lah) \* (Vol 13) 1926 Lah 248 (248) : 7 Lah 168 : 27 Cri L Jour 465 \* ('93) 16 Mad 230 (233) (DB) \* (Vol 4) 1917 Nag 65 (68, 69) : 14 Nag LR 157 : 19 Cri L Jour 392 \* (Vol 19) 1932 Nag 116 (117) : 33 Cri L Jour 859 \* ('08) 7 Cri L Jour 454 (456) : 11 Qudh Cas 122 (DB) \* (Vol 12) 1925 Pat 322 (323) : 25 Cri L Jour 1357 \* (72-92) 1 Bur 421 (421) \* (92-96) 1 Upp Bur Rul 132 (132) \* (Vol 16) 1929 Sind 56 (51) : 23 Sind LR 125 : 30 Cri L Jour 442 (DB) \* (Vol 16) 1929 Sind 52 (52) : 28 Sind LR 222 : 30 Cri L Jour 443 (DB).

[See however, ('03) 7 Cal WN 853 (858) (DB)]

[4] In fixing amount of fine within limits prescribed under this section Court should have regard to nature of offence and means of accused to pay fine imposed. ('97-01) 1 Upp Bur Rul 244 (246) \* (Vol 16) 1929 All 919 (924) : 31 Cri L Jour 88 (DB) \* ('91) 1891 Rat 558 (556) (DB) \* (Vol 12) 1925 Bom 526 (526) : 26 Cri L Jour 1536 (DB) \* (Vol 13) 1926 Cal 455 (455) : 33 Cri

L Jour 28 (DB) \* ('13) 14 Cri L Jour 522 (523) : 1913 Pun Re No. 18 (Cr) \* (Vol 19) 1932 Lah 194 (194) : 33 Cri L Jour 368 (DB) \* ('79) 1 Weir 894 (895) (FB) \* (Vol 15) 1928 Pat 59 (60) : 28 Cri L Jour 865 (DB) \* (72-92) 1872 92 Low Bur Rul 483 (484, 485).

[See also (Vol 19) 1932 Cal 465 (467) : 59 Cal 1065 : 33 Cri L Jour 267 (DB).]

[5] In the case of offences of aggravated nature sentence of imprisonment is more suitable. (Vol 11) 1924 Lah 81 (82) : 24 Cri L Jour 278 \* (Vol 17) 1930 All 279 (279) : 31 Cri L Jour 631 (DB) \* (Vol 19) 1932 Lah 194 (194) : 33 Cri L Jour 368.

[See (Vol 16) 1929 All 919 (925) : 31 Cri L Jour 88 (DB).]

[6] Imposition of fines should be avoided where a death sentence or any substantial term of imprisonment is given. ('13) 14 Cri L Jour 522 (523) : 1913 Pun Re No. 18 Cr \* (Vol 18) 1931 Cal 710 (711) : 33 Cri L Jour 31 (DB).

[7] Imposition of fine is only suitable in cases where the Court considers that justice of the case will be met by inflicting a fine but at the same time considers that a term of imprisonment in addition will serve as a salutary lesson to the accused, or where it is desired to compensate the complainant or where the accused has profited financially by his misdeed (Vol 18) 1931 Cal 710 (711) : 33 Cri L Jour 31 (DB).

[8] The above rule is inapplicable to a conviction under an Ordinance specially enacting that a fine shall be imposed along with a substantial term of imprisonment. (Vol 20) 1933 Cal 333 (335) : 34 Cri L Jour 1189 (DB).

6. Whipping.—[1] Whipping as a punishment is only awardable for offences under the Penal Code and not for offences under any other law, unless the offender is a juvenile offender and the Provincial Government has specified in the Official Gazette such offence as being one in which whipping may be awarded as a punishment. ('83) 1883 Rat 190 (190) (DB) \* ('93-1900) 1893 3-1900 Low Bur Rul 567 (568) \* (1800) 1 Weir 845 (845, 846).

7. "May pass any lawful sentence".—[1] The following are not lawful sentences for any Magistrate to pass.

(a) Sentence of fine only under S. 193 I. P. C. ('86) 1866 Pun Re No. 30 Cr p. 29 (29) (DB) \* ('78) 2 Shome 26.

(b) Sentence of fine only under S. 390 I.P.C. (Vol 9) 1922 All 245 (246) : 44 All 538 : 23 Cri L Jour 274 (DB).

(c) Sentence of fine only under S. 420 IPC (Vol 16) 1929 All 260 (260) : 30 Cri L Jour 340 (DB).

(d) Sentence of fine only under S. 211 IPC (1862-1865) : 1 Bom HCR Cr 34 (34) (DB).

(e) Sentence of fine only under S. 309 IPC (1862-1865) 1 Bom HCR Cr 4 (4) (SB).

(f) Sentence of fine only under S. 325 IPC. (1865) 2 Suth WR Cr 33 (34) (DB) \* ('69) 11 Suth WR Cr 39 (39) \* ('66) 1866 Pun Re No. 28 Cr p. 28 (28) (DB) \* (Vol 1) 1914 Mad 230 (230) : 15 Cri L Jour 192 \* (Vol 14) 1927 Nag 49 (50) : 27 Cri L Jour 1229 \* (Vol 20) 1933 Pat 179 (179) : 34 Cri L Jour 407 (DB) \* (72-92) 1 Low Bur Rul 221 (221).

(g) Sentence of fine only under S. 344 IPC. (1862-1865) 1 Bom HCR Cr 39 (39) (DB).

Power of Magistrates to sentence to imprisonment in default of fine.

33. (1) The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorised by law in case of such default:

Proviso as to certain cases.

Provided that—

- (a) the term is not in excess of the Magistrate's powers under this Code;
- (b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 34.

[1882—S. 33.; 1872—S. 20; Explanation 309; 1861—S. 45.]

#### Section 32 (contd.)

(h) A sentence of fine only under S. 380 or S. 456 PC \* ('66) 1866 Pun Re No. 80 Cr page 85 (86) (DB).

(i) A sentence of imprisonment for offence under S. 302, Penal Code ('11) 12 Cri L Jour 145 (146) (DB) (Mad).

(j) Transportation for fifteen years for an offence under S. 304 Penal Code. ('66) 1866 Pun Re No. 58 Cr. Page 66 (66) (DB).

[See also ('64) 1864 Suth WR Cr 30 (31) (DB).]

(k) Order of confiscation for an offence under S. 188, Penal Code ('72) 1872 Pun Re No. 13 Cr Page 18 (19) (DB).

[l] Mere order of refund of the money taken, on a conviction for an offence under S. 161 Penal Code ('71) 16 Suth WR Cr 64 (64) (DB).

(m) A sentence of transportation in default of fine ('80) 1880 Pun Re No. 17 Cr page 29 (30) (DB).

(n) Imprisonment in default of fine for a period exceeding one-fourth of the maximum period for which the imprisonment can be awarded for the offence. ('71) 16 Suth WR Cr. 42 (42).

(o) A double sentence of fine and imprisonment for an offence punishable with fine or imprisonment but not with both. ('94) 1894 Rat 686 (687) \* ('80) 1880 Pun Re No. 25 Cr. page 42 (42) (DB).

(p) A conditional sentence on a woman, of imprisonment for failure to reside with her husband. ('66) 1866 Pun Re No. 40. Cr page 45 (46) (DB).

#### SECTION 33—Synopsis.

1. Scope.
2. Court of any Magistrate.
3. Fine.
4. Imprisonment.
5. "Authorized by law".
6. Refund of fine.
7. Proviso (a) : In Excess of powers.
8. Proviso (b) : Limits to imprisonment in default where substantive sentence is ordered.
9. Sub-section (2).

1. Scope.—[1] Imprisonment in default of payment of fine is a punishment imposed on account of

failure of accused to pay fine which Court has ordered him to pay. ('72-92) 1872-92 Low Bur Rul 433 (434).

[2] Section 33 only relates to cases in which imprisonment in default is authorised by law. ('94) 21 Cal 979 (985) (DB).

[3] Under S. 25, General Clauses Act Sections 63 to 70, Penal Code authorising award of imprisonment in default of payment of fine in cases of offences punishable under the Penal Code have been made applicable to all fines imposed under any Act, Regulation, Rule or By-law unless they contain any express provision to the contrary. ('02) 1 Low Bur Rul 150 (151) \* ('93) 1900 1893-1900 Low Bur Rul 385 (385) \* ('70) 7 Bom HCR Cr 76 (77) (DB) \* ('75) 1875 Rat Un Re Cri Cas 91 (92) (DB) \* ('96) 23 Cal 421 (423) (DB) \* ('72) 1872 Pun Re No. 6 Cr p. 11 (11) (DB) \* ('92) 1 Weir 652 (653) \* (Vol 19) 1932 Cal 63 (63) : 58 Cal 1293 : 33 Cri L Jour 303 \* (Vol 13) 1926 Sind 144 (144) : 20 Sind LR 31 : 27 Cri L Jour 90 (DB). ('95) 18 Mad 490 (492) (DB).

[See also ('70) 5 Mad HCR App 23-24.]

[But see ('72-92) 1872-92 Low Bur Rul 473 (473).]

[4] Section 33 does not make it imperative on a Court to award imprisonment in default of payment of fine ('78) 1878 Pun Re No. 30 Cr. p. 73 (73) (DB).

[5] When a Court is competent to award imprisonment in default of payment of fine, it should as a rule award it. ('92-96) 1 Upp Bur Rul 18 (18).

[6] Person sentenced to imprisonment and fine and after he had served full term of imprisonment released on his giving security for paying fine by instalments. Held that order re-committing him to prison for default in paying fine, passed after period of six years, within which fine is leviable under S. 70 of the Penal Code, was illegal. (23) 1936 Lah 348 (349) : 37 Cr L Jour 503.

[7] Sentence of joint fine on two accused persons, with terms of imprisonment in default, cannot be supported. (Vol. 25) 1938 Pat 271 (271, 272) : 59 Cr L Jour 531.

2. Court of any Magistrate.—[1] The section applies also to Magistrates specially empowered under section 34. ('93-1900) 1893-1900 Low Bur Rul 281 (281).

3. Fine.—[1] Imprisonment cannot be awarded in default of payment of excess charge or fare referred to in S. 113 of the Railway Act. ('94) 18 Bom 440 (441)

## Section 33 (contd.)

(DB) \* ('99) 1 Bom LR 166 (166) (DB) \* ('97) 20 All 95 (95) \* ('09) 10 Cri L Jour 519 (520) : 5 Nag LR 151 \* ('97) 20 Mad 885 (886) (DB).

[2] Where an Act provides for award of compensation, the fact that compensation may be levied as a fine does not authorise Court to order imprisonment in default of payment thereof. ('90) 1 Weir 712 (712) \* ('96) 19 Mad 238 (239) (DB) \* ('94) 23 Cal 139 (143) (DB) \* (1900) 27 Cal 992 (992) : 5 Cal W N 32 (DB) \* (Vol 17) 1930 Nag 149 (149) : 26 Nag L R 158 : 31 Cri L Jour 278 \* ('72-92) 1872-92 Low Bur Rul 515 (515).

[3] This section does not apply to compensation ordered under S. 250. ('94) 21 Cal 979 (985) (DB).

[4] Imprisonment may be awarded in default of payment of penalty under the Bombay District Municipalities Act. ('93) 18 Bom 400 (401) (DB).

4. Imprisonment.—[1] In default of payment of fine, transportation cannot be awarded nor whipping. ('82) 5 Mad 28 (29) (DB) \* ('80) 1880 Pun Re No. 17 Cr P 29 (30) (DB) \* ('67) 7 Suth W R Cr 31 (31) (DB) \* ('66) 1866 Pun Re No. 5 Cr P 6 (6).

[2] Court cannot order juvenile offender to be sent to Reformatory School in default of payment of fine. ('11) 12 Cri L Jour 244 (244) (Burma).

[3] When simple imprisonment is the substantive sentence for convicts' offence sentence to be awarded in lieu of fine must be simple. ('66) 5 Suth W R Cr 76 (76) (DB) \* ('67) 7 Suth W R Cr 31 (31) (DB) \* ('97-01) 1 Upp Bur Rul 363 (364).

[See ('68) 5 Bom H C R Cr 43 (43) (DB).]

[4] The amendment of S 67, Penal Code, by Act 8 (VIII) of 1882 has made it clear that when the offence is punishable with fine only the imprisonment in default of payment of fine can only be simple. ('72-92) 1872-1892 Low Bur Rul 279 (280) \* ('72-92) 1872-1892 Low Bur Rul 410 (410) \* ('82) 1 Weir 239 (239).

[5] In the case of offence punishable with imprisonment of either description—Imprisonment in default of payment of fine may be of either description. ('72-92) 1872-1892 Low Bur Rul 434 (435).

[6] When rigorous imprisonment may be awarded in default of payment of fine Court cannot order that a portion of the term of imprisonment be spent in solitary confinement under S. 73 of the Penal Code. ('73) 1873 Pun Re No. 26 Cr p. 34 (35) (DB) \* ('69) 1869 Pun Re No. 20 Cr P 37 (38).

5. "Authorized by law".—[1] It is not only necessary that the imprisonment awarded should not be in excess of the Magistrate's powers but it should also be in conformity with the provisions of the Penal Code. (Vol 30) 1943 Sind 124 (126) : I L R (1944) Kar 1 : 44 Cri L Jour 637 (DB) \* (Vol 28) 1941 Pat 48 (48) : 41 Cri L Jour 957.

[2] Where an offence is punishable with fine only, S. 67, Penal Code should be referred to for determining limit to imprisonment to be awarded in default of payment of fine. ('68) 10 Suth W R Cr 30 (30) (DB).

[3] Where an offence is punishable with imprisonment and fine or imprisonment or fine, S. 65 and not S. 67 determines term of imprisonment awardable. ('01) 1 Low Bur Rul 150. (152) \* ('99) 22 Mad 288 (289), (DB) \* ('92) 1 Weir 852 (853).

[4] Accused sentenced under S. 58 of the Excise Act to a fine of Rs. 100 and in default to three months' imprisonment and in an additional sentence under S. 74, to six months' imprisonment—Held that two sentences must be regarded as separate. Standing by itself, sentence of three months' imprisonment in default of payment of fine was a legal one ('81) 6 Cal 575 (578,579) (DB).

[5] Imprisonment under this section should bear a reasonable proportion to the amount of the fine. ('72-92) 1872-92 Low Bur Rul 353 (353).

[But see 1 Bur LR 483 (484).]

6. Refund of fine.—[1] Accused paid a sum towards fine inflicted—That fact not having been communicated by Magistrate to jailor, prisoner suffered whole term of imprisonment ordered in default—Held Magistrate had no power to order a refund—Any application for that relief should be made to Government. ('67-68) 4 Bom H C R Cr 37 (38).

7. Proviso (a) : In excess of powers.—[1] Although S. 65 of the Penal Code authorises the awarding of imprisonment in default of payment of fine to the extent of one-fourth of the maximum term prescribed for the offence, the Magistrate, under this section, will not be competent to award even this term if it is in excess of his ordinary powers. ('77) 1 All 461 (465) (FB) \* Oudh S. C. No. 28 p. 28 (28).

[2] Imprisonment awarded as a process for enforcement of payment of fine—The rule of S. 262 of this Code limiting period of imprisonment in summary trials does not apply. (Vol 30) 1943 Sind 124 (125) : I L R (1944) Kar 1 : 44 Cri L Jour 637 (DB) \* (Vol 27) 1940 Rang 171 (172) : (1940) Rang L R 233 : 41 Cri L Jour 768 \* ('83) 6 All 61 (61).

8. Proviso (b) : Limits to imprisonment in default where substantive sentence is ordered.—[1] Offence punishable with imprisonment and fine—Magistrate sentencing offender to both punishments and ordering further that he is to undergo a term of imprisonment in default of payment of the fine—There is, in addition to restriction found in S. 65 of the Penal Code, further restriction imposed on a Magistrate by this section. ('01) 1 Low Bur Rul 150 (152).

[See also (Vol 30) 1943 Sind 124 (126) : I L R (1944) Kar 1 : 44 Cri L Jour 637 (DB).]

[2] Magistrate not empowered to pass a sentence of more than six months' imprisonment cannot award a term of more than one and a half months' imprisonment in default of payment of fine. ('79) 1879 Pun Re No. 24 Cr p. 74 (74) (DB) \* ('66) 6 Suth W R Cr 51 (51) (DB).

[3] Magistrate with special powers is now enabled to sentence a person under this section for period of one year and nine months. ('85) 1885 Pun Re No. 35 Cr p 78 (79) (DB) \* ('93-1900) 1893-1900 Low Bur Rul 281 (281).

9. Sub-section (2).—[1] Proviso to S. 35 which limits the aggregate punishment that a Magistrate may inflict to twice the amount which he is in his ordinary jurisdiction competent to inflict does not affect his power of awarding over and above that maximum a term of imprisonment in default of payment of fine. ('68) 9 Suth W R Cr 41 (47).

34. The Court of a Magistrate, specially empowered under section 30, may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years.

[1882—S. 34; 1872—S. 36.]

Sentences which Courts and Magistrates may pass upon European British subjects.

\*[34A. Notwithstanding anything contained in sections 31, 32 and 34—

- (a) no Court of Session shall pass on any European British subject any sentence other than a sentence of death, penal servitude, or imprisonment with or without fine, or of fine, and
- (b) no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years, or fine which may extend to one thousand rupees, or both.]

[1898 and 1882—Ss. 446 and 449; 1872—Ss. 74, 76.]

[a] Inserted by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 7.

35. (1) \* [When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code] sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of imprisonment or transportation to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

#### SECTION 34—Note 1.

[1] A sentence of seven years' imprisonment is the maximum sentence which a Magistrate empowered under S. 30 is authorized to pass. (Vol 17) 1930 Sind 211 (214) : 24 Sind L R 252 : 31 Cri L Jour 1046 (DB).

[2] Section 75, Penal Code does not enable a Magistrate acting hereunder to sentence a person to a longer term than seven years. ('72) 1872 Pan Re No. 31 Cr page 41 (41) (DB).

[3] Offence punishable with whipping in addition to any other punishment—Magistrate may pass a sentence of whipping in addition to maximum sentence of seven years' imprisonment for same offence by virtue of provision of S. 32 Sub-S. (2). (Vol 24) 1937 Rang 183 (184) : 14 Rang 662 : 38 Cri L Jour 670 (DB).

[4] Sentences passed by High Court under its powers of enhancement under S. 439 should not ordinarily exceed one of seven years' rigorous imprisonment which a Magistrate acting under S. 34 is empowered to pass. If Court considers that seven years will not meet ends of justice usual course will be to set aside trial and order the case to be committed to Sessions. (Vol 10) 1923 Lah 600 (600) : 24 Cri L Jour 932 (DB) \* (Vol 12) 1925 Lah 318 (318) : 26 Cri L Jour 757 (DB).

[5] Case referred under S. 349 to a Magistrate specially empowered—Latter cannot exercise his power under S. 34 but can order a re-trial before himself and in that re-trial, can exercise such powers if he finds accused guilty ('07) 6 Cri L Jour 289 (290) : 4 Low Bur Rul 53 \* ('81) 1881 Pan Re No. 10 Cr p. 10 (11) (DB).

[6] The enhanced sentence under this section will not be legal unless the Magistrate has purported to act under powers conferred under S. 30. (Vol 20) 1933 Bom 58 (59) : 34 Cri L Jour 162 (SB) \* ('08) 7 Cri L Jour 461 (461) (Lah) \* (Vol 21) 1934 Lah 361 (361) : 35 IrC L Jour 1288.

[But see (Vol 28) 1941 Lah 324 (326) : 42 Cri L Jour 890 \* (Vol 22) 1935 Pesh 108 (109) : 36 Cri L Jour 1143 (DB).]

[7] If a Magistrate acting under S. 349 exercises powers under S. 34 (which the section debars from doing) sentence is *ultra vires* and even if it exceeds four years an appeal therefrom will lie only to Sessions Court and not to High Court. ('07) 6 Cr L Jour 289 (290) : 4 Low Bur Rul 53.

#### SECTION 35—Synopsis.

1. Scope of the section.
2. "One trial".
3. Section when applies.
4. This section and section 71, Penal Code.
5. "May sentence".
6. Separate and aggregate sentences.
7. Consecutive sentences.
8. Imprisonment and whipping.
9. Concurrent sentences.
10. Imprisonment or transportation—Concurrent sentences of.
11. Whipping—Concurrent sentences of.
12. Imprisonment in default of payment of fine, if can be made concurrent.
13. No imprisonment for a period longer than 14 years—Proviso (a).
14. Aggregate of sentences, when treated as a single sentence.

1. Scope of the section.—[1] It is a general principle of law that whenever an offence is proved against any person, a conviction must necessarily follow it, except where there are specific provisions to the contrary. ('87) 10 All 58 (64, 65) \* ('88) 5 Bom H C R Cr 3 (5).



(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court :

Provided as follows :—

- Maximum term of punishment. (a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years ;
- (b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

(3) For the purpose of appeal, <sup>b</sup>[the aggregate of consecutive] sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

(c) [\* \* \* \* \*]

[1882—S. 35 ; 1872—S. 314 ; 1861—S. 46.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 7, for "when a person is convicted at one trial of two or more distinct offences, the Court may."

[b] *Substituted, ibid.* for "aggregate."

[c] The Explanation and Illustration to S. 35 were *repealed ibid.*

#### Objects and Reasons.

"On the recommendation of the High Court, North-Western Provinces, we have empowered Courts in India, as in England to pass concurrent, as well as consecutive, sentences of transportation and imprisonment.

The effect of this change will probably be to mitigate sentences and at the same time also to discourage frivolous appeals.....—S. C. R., 1898.

#### Section 35 (contd.)

[2] The object and effect of this section is to regulate and, in some cases, to increase, subject to the provisions of S. 71 of the Penal Code, the period of the punishment that the Courts are competent to inflict. (Vol 21) 1934 Rang 338 (339) : 12 Rang 419 : 36 Cri L Jour 460.

[3] In the case of several sentences as to whether they should run concurrently or consecutively. See S. 397.

2. "One trial".—[1] Sections 234 and 235 deal with questions as to when and how far several offences can be tried at one trial. The rules as to assessment of punishment must be sought for in S. 71 of the Penal Code and this section. ('86) 10 Bom 493 (496) \* ('75) 1 Bom 214 (216) (FB) (Per West J. in Order of Reference) \* ('88) 12 Mad 36 (38) (DB).

[2] Where a person is accused of several offences separately tried and convicted for each of such offences, this section has no application. Aggregate punishment which can be awarded is not limited to twice the amount which the Magistrate is, by his ordinary jurisdiction, competent to inflict. In such cases awarding of aggregate sentence of more than fourteen years is not prohibited. ('80) 3 All 805 (311, 312, 315) (FB) \* ('81) 1881 All W N 23 (23) \* ('79) 2 Weir 30 (31) \* ('80) 2 Weir 31 (32) \* ('86) 1886 Pun Re No. 14 Cr page 23 (25) \* ('87) 7 Suth W R Cr 1 (2) (FB).

3. Section when applies.—[1] Convicted person liable to be punished under S. 75, Penal Code—Separate sentence cannot legally be passed against him on account of previous conviction recorded against him. (Vol 3) 1916 Mad 829 (829) : 16 Cri L Jour 611 \* ('69) 1 Mad H O R App 3 (3) : 1 Weir 37 \* ('88) 1888 Rat Ha Re Cri Cas 417 (418) \* ('94) 1894 Rat Un Re Cri

Cas 688 (688) \* (1865) 1 Weir 36 (36) \* ('89) 11 All 393 (394, 395).

4. This section and section 71, Penal Code.—[1] A commits criminal trespass on certain property with intent to commit theft, and also commits theft. The former is an offence under 457 of the Penal Code and the latter under S. 380 thereof. The offences in such a case are not 'separable' offences but 'distinct' offences and separate sentences can be passed in respect of them. (Vol 32) 1945 Mad 330 (330). (Vol 13) 1926 Pat 367 : 5 Pat 464 : 27 Cri L Jour 976 (dissent) \* (Vol 12) 1927 Cal 1015 (1016) : 26 Cri L Jour 1253 (DB) \* (Vol 26) 1939 Sind 76 (77) : ILR (1939) Kar 378 : 40 Cri L Jour 466.

[See also (Vol 19) 1932 Pat 335 (336) : 34 Cri L Jour 81 (DB) \* (Vol 15) 1928 Pat 115 (116) : 6 Pat 828 : 29 Cri L Jour 79 (DB).]

[But see (Vol 17) 1930 Pat 385 (386) : 31 Cri L Jour 492 (DB) \* (Vol 13) 1926 Pat 367 (368) : 5 Pat 464 : 27 Cri L Jour 976 (DB) \* (Vol 26) 1939 Pat (349, 350) : 46 Cri L Jour 751 (DB).

[2] A, B, C, D and E are members of an unlawful assembly, and A, in prosecution of the common object of the assembly, commits hurt. A would be guilty of rioting and of causing hurt. The hurt may have been caused in the course of rioting after the offence of rioting is complete, by the use of other forces. The hurt is not part of rioting within the meaning of S. 71 and separate sentences can be passed. (Vol 27) 1941 Oudh 419 (420) : 16 Luck 51 : 41 Cri L Jour 775 (DB) \* (Vol 27) 1940 Nag 120 (123) : 41 Cri L Jour 360 \* ('86) 7 All 757 (758) (FB) \* (Vol 4) 1917 All 11 (12) : 18 Cri L Jour 788 (788) : 89 All 623 \* ('85) 7 A 414 (421, 423) (FB) \* ('26) 27 Cri L Jour 1172 (Oudh) \* ('93) 17 Bom 260 (270) (FB) \* (Vol 14) 1927 Cal 51

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(576) : 28 Cr L Jour 751 (DB) \* (Vol 1) 1914 Cal 675 (877) : 41 Cal 836 : 15 Cr L Jour 251 (DB) \* ('85) 1885 Pun Re No. 32 Cr P 70 (76) \* ('94) 1894 Pun Re No. 31 Cr. P 102 (108) \* (Vol 8) 1921 Pat 323 (324) : 22 Cr L Jour 702 \* (Vol 8) 1921 Pat 374 (376) : 22 Cr L Jour 460.

(a) According to following cases the hurt is part of the rioting within the meaning of S. 71 and separate sentences cannot be passed for the two offences. (Vol 27) 1940 Pesh 10 (11) : 41 Cr L Jour 543 \* (Vol 14) 1927 Mad 970 (970) : 28 Cr L Jour 1004 \* ('85) 11 Cal 349 (353) (DB) \* ('91) 19 Cal 105 (109) (DB) \* (Vol 14) 1927 Lah 786 (788) : 28 Cr L Jour 838 \* (Vol 13) 1926 Lah 581 (581) : 27 Cr L Jour 834 \* ('01) 1901 Pun Re No. 4 Cr P 9 (10) (FB).

(b) The following cases hold that the hurt is part of the rioting and even in such a case A may be punished separately for the two offences. (Vol 20) 1933 Mad 338 (339) : 56 Mad 481 : 34 Cr L Jour 273 (DB) \* (Vol 15) 1928 Mad 18 (18) : 28 Cr L Jour 982 \* (Vol 27) 1940 Nag 120 (123) : 41 Cr L Jour 360.

[4] B, C, D and E are guilty of the offence of rioting and by virtue of their being members of an unlawful assembly and for that reason only of the offence of hurt under S. 149 read with S. 323 of the Penal Code. The offence under S. 149 read with S. 323 is therefore a part of the offence of rioting and separate sentences for each of the offences cannot be passed. ('89) 16 Cal 442 (446) (FB) \* (Vol 18) 1931 Cal 606 (607) : 33 Cr L Jour 1 (DB) \* (Vol 6) 1919 Mad 353 (357) : 20 Cr L Jour 145 (DB) \* (Vol 21) 1934 Mad 388 (391) : 57 Mad 643 : 35 Cr L Jour 1226 (DB) \* (Vol 8) 1921 Pat 432 (433) : 22 Cr L Jour 449 (DB) \* (Vol 16) 1929 Pat 263 (264) : 8 Pat 274 : 31 Cr L Jour 83 (DB) \* (Vol 6) 1919 All 379 (380) : 20 Cr L Jour 517 \* ('89) 1889 Rat 493 (494) \* (Vol 17) 1930 Lah 1044 (1045) : 32 Cr L Jour 249 \* (Vol 21) 1934 Lah 614 (614) : 36 Cr L Jour 294 \* (Vol 27) 1940 Nag 120 (123) : 41 Cr L Jour 360 \* (Vol 30) 1943 Sind 212 (218) : ILR (1943) Kar 132 : 45 Cr L Jour 130 (DB).

[But see ('87) 9 All 645 (655) (DB) (6 All 121 dis sented) \* (Vol 13) 1926 All 225 (226) : 27 Cr L Jour 287 \* (Vol 3) 1916 All 49 (50) : 17 Cr L Jour 418 (419) \* ('93) 17 Bom 260 (270) (FB) \* (Vol 13) 1926 Bom 64 (64) : 49 Bom 916 : 27 Cr L Jour 113 (DB) \* (Vol 16) 1929 Lah 670 (672) : 30 Cr L Jour 575 \* (Vol 13) 1926 Lah 521 (521) : 27 Cr L Jour 824 \* (1929) 30 Cr L Jour 295 (295) (Lah) \* ('95) 1895 Pun Re No. 8 Cr P. 31 (33) \* (Vol 11) 1924 Rang 291 (293) : 25 Cr L Jour 1305 \* (Vol 1) 1914 Oudh 205 (206) : 17 Oudh Cas 184 : 15 Cr L Jour 625 \* (Vol 13) 1926 Nag 459 (461) : 27 Cr L Jour 830.]

[5] Convictions under Ss. 323 and 452, I.P.C.—Separate sentences are legal. (Vol 25) 1938 Rang 114 (115) : 39 Cr L Jour 437.

[6] Conviction under Ss. 379 and 429, I.P.C. Separate sentences are legal. (Vol 23) 1936 Bom 172 (173) : 60 Bom 627 : 37 Cr L Jour 553 (DB).

[7] Convictions for theft and mischief—Imposition of separate sentences is legal. (Vol 25) 1938 Rang 138 (139) : 1938 Rang LR 63 : 39 Cr L Jour 607.

[8] An accused convicted under S. 325 cannot be convicted and sentenced separately under S. 323 in respect of the same person. (Vol 27) 1940 Oudh 419 (420) : 16 Luck 51 : 41 Cr L Jour 775 (DB).

[9] The offences under Ss. 225 and 353 are separate offences and therefore the provisions of S. 71 cannot

apply to them. (Vol 27) 1940 Pesh 10 (11) : 41 Cr L Jour 543.

5. "May sentence".—[1] The word "may" in this section must be interpreted as "shall". (Vol 20) 1933 Sind 9 (10, 11, 12) : 26 Sind LR 416 : 34 Cr L Jour 143 (DB).

[3] Where accused person is convicted at one trial of two or more offences, Court must, in cases in which the provisions of S. 71, Penal Code do not come into play, pass separate sentences for several offences, Court has no discretion whatever to pass only one sentence for one offence and decline to pass sentences for other offences of which it may find accused guilty. (Vol 21) 1934 Rang 338 (339, 341) : 12 Rang 419 : 36 Cr L Jour 460 (DB) \* (Vol 20) 1933 Sind 9 (10, 11) : 26 Sind LR 416 : 34 Cr L Jour 143 (DB) \* ('05) 2 Cr L Jour 155 (156) : 27 All 491 \* ('88) 1888 Rat 369 (370) (DB) \* ('68) 1 Beng LR (A C) Cr 3 (5) (DB) \* (1900) 13 C P L R 124 (124) \* (Vol 5) 1918 Lah 297 (298) : 1917 Pun Re No. 46 Cr : 19 Cr L Jour 223.

[But see ('72-92) 1872-1892 Low Bur Rul 271 (271) \* ('72 92) 1872-1892 Low Bur Rul 526 (527) \* ('75) 12 Bom H C R 147 (148) (DB).]

6. Separate and aggregate sentences.—[1] In cases coming within the scope of this section a Court has no power to pass an aggregate sentence instead of separate sentences on each head of charge ('86) 1886 Pun Re No. 14 Cr Page 23 (24) (DB).

[See also (Vol 11) 1924 Mad 584 (585) : 25 Cr L Jour 396 (DB).]

[2] Object of the section in imposing separate sentences is to enable appellate or revisional Court to determine amount of punishment to be remitted in case one or other of the charges breaks down in appeal or revision. (Vol 21) 1934 Rang 338 (339) : 12 Rang 419 : 36 Cr L Jour 460 (DB) \* ('86) 1886 Pun Re No 14 Cr page 23 (24).

[3] Passing consolidated sentence instead of separate sentences is a curable defect. ('66) 2 Bom H C R 391 (392) (DB).

7. Consecutive Sentences.—[1] Magistrate convicting accused under two sections of Penal Code and passing two separate sentences of imprisonment, but not specifying that the two sentences are to run concurrently. It must be held that they have been ordered to run consecutively. (Vol 26) 1939 Pat 349 (349) : 40 Cr L Jour 751 (DB).

8. Imprisonment and whipping.—[1] An accused person convicted at one trial of two or more offences may, in addition to any other punishment be sentenced to whipping subject to restrictions contained in the Whipping Act. ('71) 7 Beng LR 165 (170) (FB). (Impliedly overruling 9 Suth W R Cr 41) \* ('70) 5 Mad H C R (App) 18 (18).

[But see ('70) 14 Suth W R Cr 7 (7) (DB).]

[2] Person convicted at one trial of two or more offences sentenced to imprisonment and also to whipping for one of the offences—Sentence of whipping ought not be directed to be delayed till expiry of sentences of imprisonment, but must be carried out in accordance with S. 391. ('95) 1895 Rat Un Re Cr Cas 803 (804) (DB) \* ('02) 4 Bom LR 929 (930).

9. Concurrent sentences.—[1] A Magistrate convicted an accused of offences under Ss. 143 and 326, Penal Code, and sentenced him to 18 months' imprisonment "under Ss. 326 and 143, Penal Code"—*Held*, it must be interpreted as meaning that the Magistrate

*C.—Ordinary and Additional Powers*

36. All District Magistrates, Sub-Divisional Magistrates and Magistrates of the first, second Ordinary powers of and third classes, have the powers hereinafter respectively conferred upon Magistrates. them and specified in the third schedule. Such powers are called their "ordinary powers."

[1882—S. 36; 1872—Ss. 21, 22, 24, 26, 28, 30.]

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passed soncurrent sentences under each section and not separate sentences of nine months on each charge. (Vol 11) 1924 All 492 (492): 25 Cr L Jour 992.

[2] As to power of Court to pass concurrent sentences in cases where an accused has been convicted in two or more separate trials, see S. 397.

10. Imprisonment or transportation—Concurrent sentences of.—[1] The section applies also to cases where one of the sentences inflicted is imprisonment and the other is transportation. (Vol 4) 1917 Cal 377 (378): 17 Cr L Jour 238 (238) (DB).

[2] A term of imprisonment can legally be made to run concurrently with a term of transportation. (Vol 1) 1914 Lah 75 (76): 1913 Pun Re No. Cr 21: 15 Cr L Jour 68 (DB) \* (Vol 4) 1917 Cal 377 (378): 17 Cr L Jour 238 (238) (DB).

11. Whipping—Concurrent sentences of.—[1] It is illegal for a Court to pass concurrent sentences of whipping. (Vol 24) 1937 Rang 310 (311): 38 Cr L Jour 1013 \* (Vol 24) 1937 Rang 286 (287): 1937 Rang L R 366: 38 Cr L Jour 878.

12. Imprisonment in default of payment of fine, if can be made concurrent.—[1] This section does not refer to sentences of imprisonment in default of payment of fine, but refers only to substantive sentences of imprisonment. (Vol 31) 1944 Mad 448 (448): 45 Cr L Jour 770 \* (Vol 24) 1937 Mad 406 (407): 11 LR (1937) Mad 362: 38 Cr L Jour 796 \* (Vol 16) 1929 Sind 179 (179): 30 Cr L Jour 907 (DB).

[2] This section does not expressly refer to substantive sentence of imprisonment but it should be read with Section 64, Penal Code, which contemplates that when imprisonment in default of payment of a fine is ordered, the imprisonment shall be in excess of any other imprisonment to which the accused may have been sentenced. (Vol 29) 1942 Sind 80 (81): 11 LR (1942) Kar 1: 43 Cr L Jour 779.

[3] It is illegal to pass concurrent sentences of imprisonment in default of payment of fines imposed upon convictions for two or more offences at one trial or at separate trials. (Vol 24) 1937 Mad 406 (407): 11 LR (1937) Mad 362: 38 Cr L Jour 796 \* (Vol 13) 1926 Bom 62 (62): 27 Cr L Jour 111 (DB) \* (Vol 16) 1929 Sind 179 (179): 30 Cr L Jour 907 (DB) \* (12) 13 Cr L Jour 536 (536): 5 Sind L R 263 \* (Vol 27) 1940 Lah 388 (389): 11 LR (1940) Lah 143: 42 Cr L Jour 33 (DB).

[4] Sentence of imprisonment in default of payment of fine cannot be directed to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials. (Vol 28) 1941 Lah 209 (210): 42 Cr L Jour 642 \* (Vol 31) 1944 Mad 448 (448): 45 Cr L Jour 770 \* (Vol 29) 1942 Sind 80 (81): 11 LR (1942) Kar 1: 43 Cr L Jour 779 (DB).

13. No imprisonment for a period longer than 14 years—Proviso (a).—[1] An aggregate sentence of 20 years passed in respect of three convictions at one trial is contrary to proviso (a). (10) 11 Cr L Jour 679 (680) (DB).

tions at one trial is contrary to proviso (a). (10) 11 Cr L Jour 679 (680) (DB).

[See also ('70) 1870 Pun Re No. 33 Cr P 52 (53).]

[2] Sentences ordered to run concurrently—Period of such concurrent sentences not exceeding 14 years. The proviso is not infringed. (Vol 24) 1937 Rang 391 (392): 39 Cr L Jour 28.

[3] Accused tried and convicted separately in two or more cases—Aggregate of several sentences may be accumulated beyond period of fourteen years. ('87) 7 Suth W R Cr 1 (2) (FB).

[4] Accused convicted at one trial of two or more offences and sentences of transportation passed upon him under S. 59, Penal Code in lieu of the terms of imprisonment awarded—Aggregate of sentences of transportation is also subject to maximum limit of fourteen years. ('94) 7 C P L R Cr 29 (30) \* ('93-1900) 1893-1900 Low Bur Rul 478 (478) \* ('84) 1884 All W N 285 (285, 286).

14. Aggregate of sentences when treated as a single sentence.—[1] The aggregate of consecutive sentences passed under this section can be deemed to be a single sentence only for purposes of appeal. ('87) 1887 Pun Re No. 45 Cr P. 110 (113).

[2] Two or more consecutive sentences of imprisonment each less than seven years, cannot be added up and treated as a single sentence for purpose of commuting them into transportation under section 59, Penal Code (1865) 3 Suth W R Cr 1 (1) \* ('66) 5 Suth W R Cr 44 (44) (DB).

[3] The aggregate of consecutive sentences referred to in sub-section (3) refers only to sentences of imprisonment and not to sentences of fine. (Vol 13) 1926 Bom 416 (416): 27 Cr L Jour 926 (DB).

**SECTION 36—Note 1.**

[1] The section read with Sch. III defines certain incidental powers exercisable by Magistrates as ordinary powers. (Vol 15) 1928 Sind 1 (4): 22 Sind L R 157: 28 Cr L Jour 913 (FB).

[2] The power to issue a search warrant under S. 96 is one of the ordinary powers of any Magistrate. (1912) 13 Cr L J 693 (700): 39 Cal 953: 39 Ind App 163 (PC).

[3] The power to entertain complaints is not an ordinary power but must be conferred as an additional power on a Magistrate. (1911) 12 Cr L Jour 535 (535): 34 Mad 343 (DB).

[4] Schedule III is not exhaustive of the powers conferred on a Magistrate and therefore a first class Magistrate has power under S. 106 to demand security for keeping good behaviour as he is authorised to do so under that section. (1932) 1932 Mad W N 151 (152).

[5] Power to act under a particular section referred to in Sch. III is a power to act subject to the conditions of that section. (1908) 7 Cr L Jour 360 (360): 31 Mad 315 (FB).

[6] Notification, conferring on Justices of the Peace the powers of a first class Magistrate, confers only the

37. In addition to his ordinary powers, any sub-divisional Magistrate or any Magistrate of the first, second or third class may be invested by the a[Provincial Government] or the District Magistrate, as the case may be, with any powers specified in the fourth schedule as powers with which he may be invested by the a[Provincial Government] or the District Magistrate.

[1882—S. 37; 1872—Ss. 23, 25, 27, 29.]

[a] Substituted by A. O. for "Local Government".

Control of District Magistrates' investing power. 38. The power conferred on the District Magistrate by section 37 shall be exercised subject to the control of the a[Provincial Government].

[1882—S. 38.]

[a] Substituted by A. O. for "Local Government".

#### *D.—Conferment, Continuance and Cancellation of Powers.*

39. (1) In conferring powers under this Code the a[Provincial Government] may by order, Mode of conferring empower persons specially by name or in virtue of their office or classes of powers. officials generally by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

[1882—S. 39; 1872—S. 43.]

[a] Substituted by A. O. for "Local Government".

40. Whenever any person holding an office in the service of Government who has been Powers of officers appointed to an equal or higher office of the same nature, within a like local area under the same b[Provincial Government], he shall, unless the b[Provincial Govern-

#### Section 36 (contd.)

ordinary powers and not any of the powers detailed below:—

(a) Powers conferable under S. 37. (1911) 12 Cri L Jour 535 (535) : 34 Mad 343 (DB) \* (1911) 12 Cri L Jour 42 (42) : 34 Mad 346.

(b) Any other general powers of the Magistrate under the Code. (Vol 4) 1917 Mad 139 (140) : 17 Cr L Jour 293 (293) (DB).

#### SECTION 37—Note 1.

[1] This section deals with the conferment of additional powers on Magistrates. (Vol 15) 1928 Sind 1 (4) : 22 Sind L R 157 : 28 Cri L Jour 913 (FB).

[2] A District Magistrate cannot authorize a second class Magistrate to commit a case for trial under S 206. (Vol 13) 1926 Pat 400 (400) : 5 Pat 447 : 27 Cri L Jour 704 (DB).

[3] Additional powers conferred on any Magistrate remain personal to him and independent of the local area where he may be exercising them until withdrawn by the authority conferring the powers. (Vol 18) 1931 Bom 517 (519,520) : 33 Cri L Jour 68 (DB).

#### SECTION 39—Note 1.

[1] Where, by notification of the Government, a class of officials is invested with powers to try certain offences, such officials are generally empowered. (Vol 2) 1915 Mad 1159 (1160) : 16 Cri L Jour 268 (269) (DB) \* ('82) Weir 3rd Edn 715 (716).

[2] Where a notification empowers the Magistrates, mentioned in the list attached to the notification, to try certain cases, such Magistrates are specially empowered. (Vol 11) 1924 Mad 256 (256) : 24 Cri L Jour

846 (DB) \* (Vol 20) 1933 Rang 116 (117) : 34 Cri L Jour 929.

[3] Where, before the sentence is passed in a case, the Magistrate trying the case is invested with higher powers, he can pass sentence in the exercise of such higher powers. ('85) 7 All 414 (418, 419, 422) \* (FB) \* (Vol 15) 1928 Mad 55 (55) : 51 Mad 257 : 29 Cri L Jour 71 (DB).

[See (Vol 12) 1925 Pat 472 (472) : 26 Cri L Jour 914 (DB) \* ('08) 8 Cri L Jour 48 (49) : 4 Low Bur Bul 239 (DB)]

[4] The maxim *omnis ratihabitio retrotrahitur et mandato priori acquiparatur* (a subsequent ratification or confirmation has a retrospective effect and is equivalent to a prior command) does not apply to criminal cases. (1864) 1 Bom H C R 107 (111).

[5] A power conferred under this section has no retrospective effect. ('78) 3 Cal L Rep 281 (282) \* (Vol 20) 1933 Pesh 97 (97) : 35 Cri L Jour 482 \* ('78) 3 Cal Rep 281 (282).

[6] Where an order is found to have been communicated on a particular day, but the hour of communication thereof is not clear, the rule that official acts must be presumed to have been done at the earliest part of the day will be applied. ('06) 10 Cal W N 243 (244) (DB).

#### SECTION 40—Note 1.

[1] Person invested with powers under this code continues to hold them even though he may be transferred to some other area provided such area is under the same provincial government. ('99) 22 Mad 47 (48) (DB) \* ('92) 15 Mad 132 (133) (DB).

ment] otherwise directs or has otherwise directed, <sup>a</sup>[ \* \* ] exercise the same powers in the local area <sup>d</sup>[in which] he is so <sup>a</sup>[appointed].

[1882—S. 40 ; 1872—S. 53]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 8 for “transferred”.

[b] *Substituted* by A. O. for “Local Government”.

[c] The words “continue to” were *repealed*, by Act 18 of 1923, S. 8.

[d] *Substituted, ibid.*, for “to which”.

41. (1) The <sup>a</sup>[Provincial Government] may withdraw all or any of the powers conferred Powers may be can- under this Code on any person by it or by any officer subordinate called. to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

[1882—S. 41 ; 1872—S. 54.]

[a] *Substituted* by A. O. for “Local Government”.

### PART III.

#### GENERAL PROVISIONS.

#### CHAPTER IV.

#### OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS.

Public when to assist  
Magistrate and police.  
towns,—

42. Every person is bound to assist a Magistrate or police officer reasonably demanding his aid, whether within or without the presidency

(a) in the taking or preventing the escape of any other person whom such Magistrate or police officer is authorised to arrest;

(b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

[1882—S. 42; 1872—S. 91; 1861—S. 82.]

#### Section 40 (contd.)

[2] Powers invested can be exercised by the person only in the local area in which he is so appointed. ('84) 1884 Pun Re No. 15 Cr page 20 (22, 23) (DB).

[3] Person invested with summary powers in a particular District posted to a different district on return from leave—*Fresh notification investing him with first class powers—Held*, the fresh notification amounted to a “direction otherwise” and that summary powers could not be exercised by him in the latter district. ('76) 2 Cal 117 (120, 121, 122) (DB).

[4] Section applies only where the person is appointed to an equal or higher office of the same nature within a local area under the same Government. (Vol 20) 1933 Sind 398 (400) : 27 Sind L R 427 : 35 Cri L Jour 187 (DB).

[5] A person invested by name with powers under this Code continues to hold them even when he is appointed to a lesser office in the same local area. ('87) 1897 Pat 322 (322).

[6] Absence on leave will not interfere with the continuity of the powers vested in a person. (1900) 2 Bom L R 536 (538, 539) (DB) \* (Vol 17) 1930 Lah 833 (834) : 31 Cri L Jour 1051.

[7] Person invested with power of recording confession sent on “foreign service”—*Subsequent recall to*

duty—*Even while on foreign service Government retain ing some form of control over the officer. Held*, he continued to hold the power invested and could exercise it after the recall. (Vol 31) 1944 Mad 302 (304) : 46 Cri L Jour 667 (DB) \* (Vol 10) 1923 Mad 598 : 24 Cri L Jour 381 (DB).

#### SECTION 41—Note 1.

[1] A Government order wrongly interpreting a previous investiture order will not operate as a withdrawal. ('82) Weir 3rd Ed 715 (717).

[2] A withdrawal may be implied where the Magistrate upon whom powers are conferred, is permanently allotted to another duty not entailing magisterial powers or when he resigns or retires from his appointment. (Vol 10) 1923 Mad 598 (599) : 24 Cri L Jour 381 (DB) \* ('67) 1867 Pun Re No. 22 Cr page 41 (41) (DB).

[3] A withdrawal of powers operates only from the date of communication to the Magistrate. ('92) 15 Mad 132 (133) (DB) \* ('93) 2 Weir 36 (37) (DB).

#### SECTION 42—Note 1.

[1] In the cases specified every person shall assist a Magistrate or a police-officer reasonably demanding his aid. ('81) 3 All 201 (202, 203).

[2] Aid cannot be demanded for such general purposes as tracing out the whereabouts of an absconding

Aid to person, other than police-officer, executing warrant.

43. When a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

[1882—S. 43; 1872—S. 163; 1861—S. 78.]

44. (1) Every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely), 121, 121.A, 122, 123, 124, 124.A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459 and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.

[1882—S. 44; 1872—S. 89; 1861—S. 138.]

#### Section 42 (contd.)

criminal or collecting evidence to warrant his conviction. (Vol 7) 1920 All 265 (266) : 42 All 314 : 21 Cri L Jour 801 (DB).

[3] In the following cases demand for the aid of the following nature was held illegal.

(a) Ordering to find clue in a theft case. ('81) 3 All 201 (202).

(b) Requiring an accused to assist in tracing the whereabouts of unknown persons for the purpose of arresting them. (Vol 7) 1920 All 265 (266) : 42 All 314 : 21 Cri L Jour 801 (DB).

[4] Only personal assistance can be demanded under this section. ('05) 2 Weir 37 (37) (DB).

[5] Personal assistance will include also such assistance in materials as the placing at the disposal of the police-officer, the use of a firearm or of a bicycle or other means of locomotion urgently required by the circumstances. (Vol 7) 1920 All 265 (266) : 42 All 314 : 21 Cri L Jour 801 (DB).

[6] Personal assistance will not include the supply of a contingent of men to assist. ('05) 2 Weir 37 (37) (DB).

[7] A person assisting under this section is not a "public servant" within the meaning of the words under S. 21 of Penal Code. (Vol 4) 1917 Upp Bur 8 (9) : 2 Upp Bur Rul 122 : 18 Cri L Jour 351.

[8] Person arrested lying on the ground and refusing to move—Police officer can demand assistance to prevent his escape. (Vol 19) 1932 All 506 (507) : 33 Cri L Jour 736.

[9] The police cannot wholly delegate their duties to a private individual authorising the latter to arrest an offender. (Vol 24) 1937 Sind 254 (255, 258) : 32 Sind LR 41 : 38 Cri L Jour 1101 (DB).

[10] The fact that assistance is taken under this section will not render the arrest or custody lawful if it is otherwise illegal. ('05) 1 Weir 341 (341).

[11] The disobedience of a valid order under this section is punishable under S. 187 of the Penal Code. (Vol 19) 1932 All 506 (507) : 33 Cri L Jour 736 \* ('02) 6 Cal WN 337 (338) (DB).

[12] Disobedience of an order not authorised by the section is not an offence and is not punishable under that section. ('81) 3 All 201 (202, 203) \* (Vol 7) 1920 All 265 (266) : 42 All 314 : 21 Cri L Jour 801 (DB).

#### SECTION 44—Synopsis.

##### 1. Scope.

2. "Shall, in the absence of reasonable excuse, ... forthwith give information."

3. "Information." meaning of.

4. Failure to give information, effect of.

1. Scope.—[1] This section imposes a duty on every person aware of the commission or of the intention of any other person to commit any of the offences specified in the section, to give forthwith information thereof to the nearest Magistrate or police-officer. (Vol 28) 1941 Rang 324 (331) : 1941 Rang LR 566 : 43 Cri L Jour 873 (DB).

[2] The object of imposing such an obligation is to suppress all such dangerous forms of crimes. (1911-13) 1 Upp Bur Rul 273 (273.)

[3] There is no obligation under this section to give information of the offences not specified in the section, though there may be an obligation under some other section to do so. ('67) 3 Mad HCR App xxx (xxxi) \* ('67) 1867 Pun Re No. 25 (Cr) page 45 (45) (DB).

[4] The section does not exclude the criminal himself from the obligation thereunder, and he can be prosecuted for not giving such information. (Vol 28) 1941 Rang 324 (331) : 1941 Rang LR 566 : 43 Cri L Jour 873 (DB) \* (Vol 17) 1930 Mad 870 (871) : 54 Mad 68 : 32 Cri L Jour 263 (DB).

[But see (Vol 28) 1941 Pat 550 (558) : 42 Cri L Jour 603 (DB).]

2. "Shall, in the absence of reasonable excuse, ... forthwith give information."—[1] When once information of the fact of a crime has reached the police it is not reasonable that every other person who may possibly be bound to give information should be prosecuted for not having done so. ('79) 4 Cal 623 (624) (DB) \* (Vol 13) 1926 Nag 217 (218) : 26 Cri L Jour 1489.

3. "Information." meaning of.—[1] "Information" means something which the person bound to report knows or has reason to believe to be true and not any hearsay or any vague surmises which the people around him might have put into his head. ('73) 19 Suth WR Cr 57 (65) (DB).

[2] Under S. 182, IPC 'give information' does not necessarily mean voluntary information. (Vol 15) 1928 Pat 56 (57) : 28 Cri L Jour 872.

45. (1) Every village headman, village accountant, village watchman, village police officer, owner or occupier of land, and the agent of any such owner or occupier in charge of the management of that land, and every officer employed in the collection of revenue or rent of land on the part of the Crown or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest police station, whichever is the nearer, any information which he may possess respecting:-

- (a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police officer, or in which he owns or occupies land, or in which he collects revenue or rent;
- (b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects to be a thief, robber, escaped convict or proclaimed offender;
- (c) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under section 113, 114, 115, 117, or 148 of the Indian Penal Code;
- (d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person;
- (e) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely: 231, 232, 233, 234, 235, 236, 237, 238, 302, 304, 305, 306, 307, 309, 402, 435, 436, 419, 450, 457, 458, 459, 460, 480A, 480B, 480C, and 480D;

#### Section 44 (contd.)

[3] Under S 203, IPC "give information" means voluntary information. (13) 14 Cri L Jour 252 (254) : 6 Sind LR 143 (DB).

[4] Where a person who could speak of an offence only from hearsay, gave a report based on such hearsay, it was held that the report could not be used as evidence to corroborate his evidence. (Vol 12) 1925 Lah 418 (419) : 6 Lah 437 : 26 Cri L Jour 1489 (DB).

[5] It is not necessary that the information should be signed by the informant. (10) 11 Cri L Jour 3 (4) : 3 Sind LR 132 (DB).

#### 4. Failure to give information. effect of.—

[1] An intentional omission to give the information under this section is an offence punishable under S. 176 or under S. 202 of the Penal Code. (66) 1 Aggr Cr 37 (39) \* (Vol 3) 1916 Mad 493 (493) : 16 Cri L Jour 219 \* (Vol 7) 1920 Nag 170 (171) : 16 Nag LR 30 : 21 Cri L Jour 486 \* (67) 7 Suth WR Cr 29 (30) (DB).

[2] The giving of a false information of the commission of an offence is also punishable under S. 183 of the Penal Code. (13) 14 Cri L Jour 491 (492) (DB) (Bom) \* (Vol 18) 1931 All 269 (270) : 33 Cri L Jour 256 (DB) \* (Vol 6) 1919 Cal 679 (680) : 46 Cal 427 : 19 Cri L Jour 903 (FB) \* (Vol 19) 1932 Mad 127 (427) : 33 Cri L Jour 452 : 1 U B R 1st QR 131.

[3] Evidence of a person aware of the intention of certain persons to commit an offence or aware of the commission of the offence and not disclosing it to anybody cannot be relied upon without independent corroboration in material particulars. (Vol 24) 1937 Oudh 259 (261) : 13 Luck 115 : 38 Cri L Jour 286 (DB) \* (Vol 6) 1919 Lah 168 (168, 169) : 20 Cri L Jour 191:

1919 Pun Re No. 20 Cr (DB) : Vol 10) 1923 Lah 391 (392) : 25 Cri L Jour 264 (DB).

[4] Mere omission to give information of an offence does not amount to "intentionally aiding" the offender in his offence within the meaning of S 107 of the Penal Code. (63) 11 Cri L Jour 610 (615) (DB) (Low Bur).

[5] Information of murder need not be given if there is reasonable cause for not making the report. (93-1900) 1893-1900 Low Bur Rul 342 (343).

#### SECTION 45 -Synopsis.

1. Object of the section.
2. Village headman.
3. "Owner or occupier of land."
4. Agent.
5. Officer employed in collection of revenue.
6. "Shall forthwith communicate"
7. "Any information which he may possess."
8. "Information," meaning of.
9. Passage of thug, etc., through village—Cause (b).
10. Commission of non-bailable offence—Clause (c).
11. Sudden or unnatural death—Clause (d).
12. Order under sub-section (3), if revisable by High Court.
13. Punishment for non-compliance with the section.
14. Effect of giving false information.

(f) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the <sup>e</sup>[Provincial Government], has directed him to communicate information.

(2) In this section—

(i) “village” includes village-lands; and

(ii) the expression “proclaimed offender” includes any person proclaimed as an offender by any Court or authority established or continued by the <sup>f</sup>[Central Government or the Crown Representative] in any part of India, in respect of any act which if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

Appointment of village headmen by District Magistrate or Sub-divisional Magistrate in certain cases for purposes of this section.

(3) Subject to rules in this behalf to be made by the <sup>e</sup>[Provincial Government], the District Magistrate, <sup>a</sup>[or Sub-divisional Magistrate] may from time to time appoint one or more persons <sup>a</sup>[with his or their consent], <sup>g</sup>[to perform the duties of a village-headman under this section whether a village-headman has or has not been appointed for that village

under any other law.]

[1882—S. 45; 1872—S. 90].

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 9.

[b] *Substituted* by A. O. for “Government”.

[c] *Substituted* by Act 18 of 1923, S. 9, for “obtain”.

[d] *Substituted, ibid*, for “and 460”.

[e] *Substituted* by A. O. for “Local Government”.

[f] *Substituted* by A. O. for “Governor-General in Council”.

[g] *Substituted* by Act 18 of 1923 S. 9, for “to be village-headman for the purposes of this section in any village for which there is no such headman appointed under any other law”.

#### Section 45 (contd.)

1. **Object of the section.**—The object of the section is clearly that the earliest information should be communicated by those, who are in the best position to obtain the same, or who, from their connection with the land, are in some authority and should accordingly be made responsible for this duty, in order that an inquiry may be held. ('85) 11 Cal 619 (623, 624) (SB).

2. **Village headman.**—[1] A village Magistrate in Madras is a village-headman within the meaning of the section. ('09) 9 Cri L Jour 170 (172): 32 Mad 258 (FB).

[2] In Central Provinces a *mukhadam* is a village headman. ('11) 12 Cri L Jour 441 (443, 444): 7 Nag LR 101.

[3] *Kotwar* is a village headman in Central Provinces. (Vol 9) 1922 Nag 87 (88): 23 Cri L Jour 345.

[4] A village *chowkidar* is a village-watchman under this section. (Vol 11) 1924-Pat 691 (693): 25 Cri L Jour 972\* (Vol 16) 1929 All 935 (935): 31 Cri L Jour 12: 52 All 203\* ('81) 3 All 60 (61).

[5] *Zaildar* in the Punjab is not one of the persons described in S. 45, Criminal PC. ('86) 1886 Pun Re No. 19 (Cr) p. 42 (43) (DB)\* ('94) 1894 Pun Re No. 25 Cr p. 84 (85, 86) (DB).

[6] Definite duties have been imposed on village headman with regard to information given or complaint made to him. ('09) Cri L Jour 170 (173): 32 Mad 258 (FB).

3. **“Owner or occupier of land.”**—[1] The owner or occupier of a house is not bound under this section to give the information. ('87) 1 Weir 101

(101, 102) (DB)\* ('75) 23 Suth WR Cr 60 (61) (DB)\* (Vol 16) 1929 Bom 12 (12): 53 Bom 184: 30 Cri L Jour 172 (DB)\* ('89) 12 Mad 92 (93) (DB).

4. **Agent.**—[1] The following persons are not agents within the meaning of this section.

(a) *Kharanchia* of a Zamindar of a village. ('79) 4 Cal 603 (604) (DB).

(b) *Mukhtar* ('75) 23 Suth WR Cr 60 (61) (DB).

(c) More servant of the owner or occupier. ('11) 12 Cri L Jour 425 (426) (DB) (Lah).

[2] A *Dewan*, if he is acting only under the orders of his resident master, will not be liable. ('79) 4 Cal 603 (604) (DB).

5. **Officer employed in collection of revenue.**—[1] A village-accountant is not a person engaged in the collection of revenue. ('76) 1 Mad 266 (267).

6. **“Shall forthwith communicate.”**—[1] It is incumbent on the persons mentioned in the section to give the information specified. ('74) 22 Suth WR Cr 42 (43) (DB)\* (Vol 11) 1924 Pat 691 (693): 25 Cri L Jour 972.

[See (Vol 16) 1929 Bom 12 (12): 53 Bom 184: 30 Cri L Jour 172 (DB).

[2] The word “forthwith” has been held to mean within a reasonable time “having regard to the object of the provisions and the circumstances of the case.” ('95) 1895 Rat Un Re Cri Cas 784 (784, 785) (DB).

7. **“Any information which he may possess.”**—[1] The informant is to give such information as he may possess to his own knowledge and is fit to be communicated to the officer-in-charge of the police station. (Vol 11) 1924 Pat 691 (693): 25 Cri L Jour 972



**Section 45 (contd.)**

[2] Where a person gives information of a dacoity in the village to the village-headman, which is reduced to writing, it is enough if the latter merely communicates the information without transmitting the statement along with it. ('09) 9 Cr L Jour 170 (178, 179) : 32 Mad 258 (FB) (Per Sankaran Nair, J.)

**8. "Information," meaning of.**—[1] "Information" does not mean a person's belief or opinion. See ('82) 4 All 498 (193) (Case under S. 182, 190.)

[2] A mere rumour of an occurrence in a village is not "information". (Vol 11) 1924 Pat 691 (693) : 25 Cr L Jour 972.

[3] Where a zamindar and his agent were told by people in the village, whose names they did not remember, that a certain person had disappeared from the village and had been murdered, it was held that this was not 'information' which either the zamindar or his agent was bound to communicate under this section. (1900) 1900 All WN 207 (208).

**9 Passage of thug etc. through village—Clause (b).**—[1] This clause requires information to be given as to the visit to a village of persons suspected to be dacoits. ('81) 1881 Rat 160 (161) (DB).

[2] The use of the word "includes" shows that the persons included in the expression are persons over and above those to whom the words, in their ordinary signification, apply, and who might, but for this explanation, escape out of the category of 'proclaimed offenders'. (Vol 25) 1938 Oudh 80 (81) : 39 Cr L Jour 154 (DB) \* ('01) 1901 All WN 10 (10).

[3] Where a person is prosecuted for failure to report the movement of a proclaimed offender, the burden is on the prosecution to prove that there was a due proclamation in accordance with the provisions of S. 87 of the Code. ('84) 7 Mad 436 (438).

[But see (Vol 25) 1938 All 220 (221) : ILR (1938) All 386 : 39 Cr L Jour 570].

[4] Where a proclamation has been made in respect of an accused under S. 87, it is sufficient to constitute him a 'proclaimed offender' under this section, although it is not made strictly in accordance with the terms of section 87. (Vol 25) 1938 Oudh 80 (81) : 39 Cr L Jour 154 (DB).

[5] Where a person suspected of a robbery is arrested and brought to a village and then released there, it cannot be said that a suspected robber has "resorted to or passed through" the village. ('87) 1887 Pun Re No. 30 Cr page 59 (60) (DB).

**10. Commission of non-bailable offence—Clause (c).**—[1] There is no duty upon the persons referred to in the section, to communicate information of bailable offences other than those specified in Cl. (c). ('87) 1887 Pun Re No. 30 Cr page 59 (60) (DB) \* ('09) 9 Cr L Jour 224 (225) (DB) (Mad).

[See also ('09) 9 Cr L Jour 170 (175) : 32 Mad 258 (FB).]

[2] Persons are not bound to communicate information under the section, if the offence is not committed in or near their village. See ('86) 1886 All WN 65 (65).

**11. Sudden or unnatural death—Clause d.**

[1] The words "sudden or unnatural death" in the ordinary sense mean that there is a suspicion that the death has not occurred from natural causes. ('87) 1 Weir 11 (101).

[2] Death by suicide is an unnatural death. (Vol 16) 1929 Bom 12 (12) : 53 Bom 184 : 30 Cr L Jour 172 (DB).

[3] If a person who had a fall from a tree, lingered for several weeks and then died, solely from the effects of the fall, it cannot be regarded as a case of sudden or unnatural death, within the meaning of the section. (Vol 9) 1922 Nag 87 (88) : 23 Cr L Jour 345.

**12. Order under sub section (3) if revisable by High Court.**—[1] An order passed by a District Magistrate dismissing a village headman from his office, by virtue of the rules framed by the Provincial Government under sub-s. (3) is not open to revision by the High Court. ('07) 29 All 563 (564, 565) : 5 Cr L Jour 476.

**13. Punishment for non-compliance with the section.**—[1] Failure to furnish the information referred to in cl. (a) or cl. (b) or cl. (d) of the section will be punishable under S. 176, Penal Code. (Vol 25) 1938 Oudh 80 (81) : 39 Cr L Jour 154 (DB).

[2] A failure to furnish the information referred to in cl. (c) will be punishable under S. 202 or S. 176, Penal Code. See ('11) 12 Cr L Jour 411 (414) : 7 Nag 101 : ('95) 1895 Rat 782 (783) (DB).

[3] In the case of an owner or occupier of land, he can be prosecuted for an offence under S. 154 when he or his agent or manager fails to report the occurrence of a riot or unlawful assembly on the land. ('01) 28 Cal 504 (515, 516) : 5 Cal WN 771 (81) \* ('90) 12 All 550 (550, 551) (DB) (Agent).

[4] The fact that the person bound to give the information under this section is himself the injured party will not exempt him from criminal liability if he fails to give the information. ('83) 1883 All WN 9 (9).

[5] Where a person is prosecuted for failure to give information of an offence, the prosecution has also to prove that the specified offence was committed, that the accused had knowledge of it and that he intentionally failed to give information. ('74) 22 Suth WR Cr 42 (42, 43) (DB).

[6] This section ought not to be used for purposes of vexation but in order to secure due information to Magistrates and the police of offences committed within their jurisdiction. ('79) 4 Cal 623 (624) (DB) \* (Vol 8) 1921 Oudh 227 (228) : 23 Cr L Jour 162 \* (Vol 16) 1929 Bom 12 (12) : 53 Bom 184 : 30 Cr L Jour 172 (DB).

[7] If information is conveyed to the nearest Magistrate or the police-officer by one of the persons bound to give such information, it will not be reasonable that every other person who may possibly be bound to give the information be prosecuted for not having done so. ('84) 7 Mad 426 (438) \* ('83) 20 Cal 316 (318) (DB) \* ('95) 1895 Rat Un Re Cr Cas 778 (779) (DB) \* (Vol 20) 1933 Lah 515 (516) \* (Vol 8) 1921 Oudh 227 (228) : 23 Cr L Jour 162.

[8] Where the accused had no reason to suppose that information had been given to the authorities by anyone else, he cannot escape liability merely because another person who was also bound to give information under the section was present at the occurrence. (Vol 3) 1916 Mad 493 (493) : 16 Cr L Jour 219.

**14. Effect of giving false information.**—[1] Every information of an offence does not necessarily amount to a charge of an offence, e.g. when a man gives information which he has heard from another

## CHAPTER V.

## OF ARREST, ESCAPE AND RETAKING.

*A.—Arrest generally.*

46. (1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to resist endeavour to evade the arrest, such police-officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life.

[1882—S. 46; 1872—Ss. 177, 178; 1861—Ss. 91, 92.]

## PROVINCIAL AMENDMENT

## PUNJAB.

In any place in which all or any of the provisions of the (Punjab) Frontier Crimes Regulation, 1901 (III of 1901) are for the time being in force, section 46, Criminal P.J., shall be read as if the following sub-section were added thereto, namely:—

“(4) But this section gives a right to cause the death of a person against whom those portions of the Frontier Crimes Regulation, 1901, which are not of general application, may be enforced—

(a) if he is committing or attempting to commit an offence, or resisting or evading arrest, in such

circumstances as to afford reasonable ground for believing that he intends to use arms to effect his purpose; and

(b) if a hue and cry has been raised against him of his having been concerned in any such offence as is specified in clause (a) or of his committing or attempting to commit an offence, or resisting or evading arrest, in such circumstances as are referred to in the said clause.”

—(Punjab) Frontier Crimes Regulation, 1901, section 38.

## Section 45—(contd.)

and the truth of which he does not allege. ('09) 9 Cr L Jour 170 (175): 32 Mad 258 (FB).

[2] Where a person who is legally bound to give information under this section on any matter gives false information knowing it to be false, he will be guilty of an offence under S. 177, Penal Code. But merely giving false information to the police on a matter on which a person is not legally bound to give any information does not make him guilty of such an offence. (Vol 23) 1936 All 788 (799, 800): ILR (1937) All 162: 38 Cr L Jour 57 (DB).

## SECTION 46—Note 1.

[1] An arrest of a person has to be effected either by the actual seizure or touching of the body of that person with a view to his detention. (Vol 6) 1919 Bom 39 (40): 43 Bom 550: 20 Cr L Jour 391 (DB).

[2] There is no difference between the civil and the criminal law regarding the method of making the arrest. (Vol 3) 1916 Sind 19 (20): 9 Sind LR 141: 17 Cr L Jour 87 (DB) \* (Vol 17) 1930 Rang 131 (132): 7 Rang 598 (DB).

[3] An arrest by mere oral declaration is not legal. ('29) 30 Cr L Jour 123 (128) (Nag) \* (Vol 3) 1916 Sind 19 (20): 9 Sind LR 141: 17 Cr L Jour 87 (DB).

[4] A custody of a police-officer within the meaning of this section is “custody” within the meaning of S 27 of the Evidence Act. (Vol 20) 1933 Pat 149 (151): 12 Pat 241: 34 Cr L Jour 349 (SB) \* (Vol 18) 1931 Lah 278 (279): 32 Cr L Jour 650 \* (Vol 9) 1922 Cal 342 (344): 49 Cal 137: 22 Cr L Jour 562 (DB).

[5] A person confessing to a police officer certain acts amounting to an offence submits to his custody

within the meaning of this section. (Vol 28) 1941 Nag 86 (90): ILR (1940) Nag 679: 42 Cr L Jour 390 (DB) \* (Vol 20) 1933 Pat 149 (151): 12 Pat 241: 34 Cr L Jour 349 (SB) (Vol 15) 1928 Pat 491: 7 Pat 411: 29 Cr L Jour 790 overruled).

[6] An arrest on a Sunday is not illegal. ('68) 10 Suth WR Cr 350 (351) (DB) \* ('73) 7 Mad HCR 285 (286, 287) (DB).

[7] An arrest made in respect of a criminal process inside a Court building is not improper. (Vol 32) 1945 Cal 107 (110): ILR (1944) 1 Cal 489 (SB).

[8] In making an arrest no more force is to be used than is necessary. ('94) 1894 Pun Re No. 32 Cr page 106 (106, 108) (DB).

[9] Articles like handcuffs or chain can be used only on the ground that they are means necessary to effect the arrest. (1900-02) 1 Low Bir Bal 173 (174, 175).

(10) The person effecting the arrest is justified under sub-s (2) of the section in using so much violence as is necessary to effect his object. (Vol 22) 1935 Pesh 83 (83, 84): 36 Cr L Jour 1185 \* (1865) 2 Suth WR Cr 9 (9) (Causing wound by spear to prevent escape held justified) \* (Vol 20) 1933 Sind 193 (196): 27 Sind LR 24: 34 Cr L Jour 751 (DB). (Firing shot over the head of the suspect a dangerous and desperate person). \* ('02) 1902 Pun Re No. 29 Cr page 78 (79) (DB). (Fracturing the head of the person after his escape had become impossible held not justified).

[11] The jurisdiction of the Court to try the accused for the offence with which he is charged will not be affected merely because the arrest was made illegally. (Vol 31) 1944 PC 73 (74, 75): 71 Ind App 75: ILR (1944) Kar (PC) 269: 46 Cr L Jour 119 (PC) \* (Vol 32) 1945 Oudh 268 (268): 20 Luck 442 (DB).

47. If any person acting under a warrant of arrest, or any police-officer having authority to search of place entered a rest, has reason to believe that the person to be arrested has entered by person sought to be into, or is within, any place, the person residing in, or being in charge of, arrested. such place shall, on demand of such person acting as aforesaid or such police-officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

[1882—S. 47; 1872—Ss. 90, 179; 1861—Ss. 93, 106.]

48. If ingress to such place cannot be obtained under section 47 it shall be lawful in any Procedure where ingress case for a person acting under a warrant and in any case in which a not obtainable. warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police-officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance :

Provided that, if any such place is an apartment in the actual occupancy of a woman (not Breaking open zanana. being the person to be arrested) who, according to custom, does not appear in public such person or police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

[1882—S. 48; 1872—Ss. 100, 180, 181; 1861—Ss. 91, 95, 107.]

49. Any police-officer or other person authorised to make an arrest may break open any Power to break open outer or inner door or window of any house or place in order to liberate doors and windows for himself or any other person who, having lawfully entered for the purpose purposes of liberation. of making an arrest, is detained therein.

[1892—S. 49]

#### Section 46 (contd.)

[See however (Vol 12) 1925 Bom 131 (133, 134): 49 Bom 212 : 26 Cri L Jour 441 (DB). (Arrest held illegal and also police report on which accused was sent up for trial—Held that the prosecution was without jurisdiction].

[12] The question whether the accused was or was not guilty of the offence for which he was charged will not be affected by an illegal arrest. (03) 26 Mad 124 (125) (DB).

[13] The person making the illegal arrest will become liable under S. 342, Penal Code. (Vol 11) 1924 Bom 333 (333) : 25 Cri L Jour 797 (DB).

[14] Resistance to an illegal arrest is no offence. (97) 24 Cal 320 (324) (DB) \* (Vol 17) 1930 Lah 348 (349, 350) : 31 Cri L Jour 294 (DB).

[15] A rescue from custody under an illegal arrest is not an offence. (12) 13 Cri L Jour 590 (591) (DB) \* (98) 1898 Pun Re No. 12 Cr p. 29 (29)

[16] Rescue from arrest, where the warrant is not illegal but merely defective, will be an offence. (Vol 5) 1918 Lah 332 (333) : 1918 Pun Re No. 9 Cr : 19 Cri L Jour 390.

[17] Arrest sought to be made for an offence not punishable with death or transportation—Accused wounding the Inspector on the latter firing shots at him: Held he did so in self-defence. (Vol 7) 1920 Upp Bur 35 (36) : 3 Upp Rul 176 : 21 Cri L Jour 97.

[18] Resistance or illegal obstruction to a lawful arrest may amount to an offence punishable under S. 224 of the Penal Code. (Vol 19) 1932 Lah 6145 (616) : 34 Cri L Jour 25.

[19] The mere act of running away before arrest or the evasion of arrest does not constitute the offence of resistance or illegal obstruction to lawful apprehension. (91) 1891 All WN 64 (64) : (88) 1 Weir 205 (206).

[20] There is no legal right of private defence against an arrest carried out in the manner provided by this section. (04) 1 Cr L Jour 285 (287). (Kathiawar).

[21] Evidence of arrest should not only state the date but also the place of the arrest and police-officer must always be in a position to provide the Court with the date and the place of the arrest and any special circumstance attending it. (Vol 31) 1944 Mad 483 (484) : ILR (1945) Mad 231 : 46 Cri L Jour 337 (DB).

#### SECTION 47—Note 1.

[1] The section does not restrict the powers of the police to enter the place to be searched without any demand as mentioned in the section. (Vol 1) 1914 Cal 456 (470) : 41 Cal 350 : 15 Cr L Jour 385 (DB).

#### SECTION 48—Note 1.

[1] If difficulties are placed in the way of a police-officer, he may use force to obtain ingress. (Vol 1) 1914 Cal 456 (470) : 41 Cal 350 : 15 Cri L Jour 385 (DB).

[2] A person causing hurt to a police-officer making search is guilty of an offence under section 332, IPC. (Vol 29) 1942 Pat 281 (282) : 43 Cri L Jour 279.

#### SECTION 49—Note 1.

[1] A Magistrate has no jurisdiction to authorise police to break open the door for the purposes of delivering properties alleged to have been wrongly locked up by a person not having any title to it. (Vol 10) 1923 All 478 (478) : 25 Cri L Jour 218.

No unnecessary restraint. 50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

[1882—S. 50; 1872—S. 182; 1861—S. 96.]

51. Whenever a person is arrested by a police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail, and

whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

the officer making the arrest or, when the arrest is made by a private person, the police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing-apparel, found upon him.

[1882—S. 51; 1872—S. 387.]

Mode of searching women. 52. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

[1882—S. 52; 1872—S. 386; 1861—S. 126.]

53. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

[1882—S. 53.]

#### *B.—Arrest without Warrant.*

When police may arrest without warrant. 54. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest—

*first*, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned;

#### SECTION 51—Note 1.

[1] Section deals with search of arrested persons. (Vol 29) 1942 All 424 (425) : ILR (1942) All 914 : 44 Cri L Jour 67.

[2] It is not permissible to forcibly take hold of a prisoner and examine his body medically without his consent: medical evidence thus obtained is not admissible. (Vol 18) 1931 Cal 601 (602, 604) : 33 Cri L Jour 11 (DB).

[See however (10) 11 Cri L Jour 453 (464) : 37 Cal 467 (DB).]

[3] When the prisoner consents to be examined, the evidence of the medical officer who examined him is admissible. (Vol 19) 1932 Cal 723 (725) : 60 Cal 179 : 34 Cri L Jour 177 (DB).

[4] Resistance to a search may amount to an offence under S. 186, Penal Code. (11) 12 Cri L Jour 457 (457) (DB) (Bom).

[5] There is no provision in the Code which requires a panch to be called in cases of searches of persons. (11) 12 Cri L Jour 457 (457) (Bom) (DB).

[6] The procedure under S. 103 does not apply to a search of the person under this section. (Vol 29) 1942 Oudh 221 (224) : 17 Luck 516 : 43 Cri L Jour 418.

#### SECTION 54—Synopsis.

1. Scope of the section.
2. "Any police-officer."
3. "Concerned in any cognizable offence," Clause (1).

4. "Reasonable complaint."

5. "Credible information."

6. "Reasonable suspicion exists of his having been so concerned"

7. Proclaimed offender.

8. Person in possession of implement of house-breaking—Clause (2).

9. Deserter from Army or Navy—Clause (6).

10. Clause 7.

11. Arrest on requisition from another police officer—Clause (9).

12. Sub-section (2).

1. Scope of the section.—[1] An arrest would be illegal, unless the circumstances specified in the various clauses of the section exist. (Vol 13) 1926 Pat 560 (561) : 26 Cri L Jour 1608 \* (Vol 4) 1917 Cal 253 (256) : 44 Cal 76 : 18 Cri L Jour 73.

[2] Arrest under a warrant found to be illegal cannot be supported under this section. (Vol 19) 1932 Pat 171 (174) : 33 Cri L Jour 706 (DB) \* (Vol 5) 1918 Pat 252 (252) : 19 Cri L Jour 1000 (DB) \* (Vol 28) 1941 Oudh 385 (387) : 42 Cri L Jour 501.

[3] When a person is arrested in pursuance of the order of a Magistrate, such order determines the legality or otherwise of the arrest. (Vol 23) 1935 Cal 122 (124) : 62 Cal 399 : 36 Cri L Jour 794 (DB).

[4] A police-officer's power to arrest under this section is discretionary and it may be sometimes desirable

*secondly*, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking ;

*thirdly*, any person who has been proclaimed as an offender either under this Code or by order of the <sup>a</sup>[Provincial Government] ;

*fourthly*, any person in whose possession anything is found which may reasonably be suspected to be stolen property <sup>b</sup>[and] who may reasonably be suspected of having committed an offence with reference to such thing ;

*fifthly*, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ;

*sixthly*, any person reasonably suspected of being a deserter from Her Majesty's <sup>c</sup>[Army, Navy or Air Force] <sup>d</sup>[\* \* \* \*].

<sup>ad</sup>[or from any unit of Indian States Forces declared under the Indian Extradition Act, 1909, to be a unit deserter from which is an extradition offence ;]

*seventhly*, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the <sup>e</sup>[Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India.]

<sup>f</sup> [\*].

*eighthly*, any released convict committing a breach of any rule made under section 505, sub-section (3) ;

<sup>g</sup>[*ninthly*, any person for whose arrest a requisition has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.]

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to simply make a report to the Magistrate instead of arresting the suspected person. ('93-1900) 1893-1900 Low Bur Rul 390 (392).

[5] An officer in charge of a *Thana* is fully empowered to go into the jurisdiction of the neighbouring *Thana* and arrest a person in connection with an offence committed within his *Thana*. (1946) 47 Cri L Jour 352 (353) (Cal) (DB).

2. "Any police-officer"—[1] A private person cannot act under this section even though authorised by a police-officer to do so. ('09) 10 Cri L Jour 118 (120); 5 Low Bur Rul 21.

[2] The following persons are held not to be police-officers:—

(a) A village *chowkidar* (Vol 31) 1944 All 117 (117) : ILR (1944) All 227 : 45 Cri L Jour 643 \* (Vol 27) 1940 Pat 696 (698) : 42 Cri L Jour 199 (DB) \* (Vol 24) 1937 Bom 56 (60) : ILR (1937) Bom 127 : 38 Cri L Jour 267 (DB) \* (Vol 1) 1914 Cal 272 (273) : 41 Cal 17 : 14 Cri L Jour 494 (DB) \* (Vol 3) 1916 Cal 247 (247) : 17 Cri L Jour 164 (164, 165) (DB).

(b) The authorities of a Native State. ('70) 1870 Rat 35 (35) (DB) (They cannot make an arrest in British Territory.) \* ('07) 5 Cri L Jour 277 (277) : 29 All 377 (Do.).

(c) *Abkari* peon ('91) 1 Weir 632 (632).

(d) *Thalayari* ('79) 1 Weir 342 (343).

(e) *Kumbhar*, not appointed under the Act. ('71) 7 Mad HCL App 4 (4).

(f) Village *vetti*, not appointed under the Act. ('82) 1 Weir 197 (198).

(g) *Kotwar* in Central Provinces. (Vol 11) 1924 Nag 29 (31) : 25 Cri L Jour 147 (DB).

[3] A village policeman is included in the word 'police' ('86) 9 Mad 97 (98) (DB).

[4] Police can arrest suspected persons beyond the limits of the police-station to which he is attached. (Vol 1) 1914 Sind 160 (162) : 8 Sind LR 1 : 16 Cri L Jour 15 (DB).

3. "Concerned in any cognizable offence"—  
Clause (1).—[1] A police officer can act under cl. (1) only when the offence is a cognizable offence. (Vol 29) 1942 All 424 (425) : ILR (1942) All 914 : 44 Cri L Jour 67 \* (Vol 29) 1942 Pat 281 (282) : 43 Cri L Jour 279 \* (Vol 23) 1936 Pat 249 (249) : 37 Cri L Jour 318 \* ('69) 11 Suth WR Cr 20 (21) (DB) (Dacoity).

[2] Arrest of a child under seven years of age is illegal. (Vol 3) 1916 Mad 642 (642) : 16 Cri L Jour 602.

4. "Reasonable complaint."—[1] Reasonable complaint can be made to any person entitled to entertain it. (Vol 24) 1937 Bom 56 (59) : ILR (1937) Bom 127 : 38 Cri L Jour 267 (DB).

[2] Where a Magistrate acts upon a complaint of a cognizable offence, there is a "reasonable complaint" of the accused being concerned in a cognizable offence

(2) This section applies also to the police in the town <sup>b</sup>[\*] of Calcutta [\* \*]

[1882—S. 54 ; 1872—S. 92; 1861—S. 100.]

[a] *Substituted* by A. O. for "Local Government".

[b] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923) S. 10, for "or".

[c] *Substituted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I, for "Army or Navy".

[d] The words "or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service" were *repealed* by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Schedule.

[dd] *Added* by the Code of Criminal Procedure (Amendment) Ordinance, 1944 (48 [XLVIII] of 1944), [S. 2 [21-10-1944]]

[e] Collection of Statutes relating to India (See 44 and 45 Vict., C. 80).

[f] The word "and" was *repealed* by Act 10 of 1927, S. 3 and Sch. II.

[g] *Inserted* by Act 18 of 1923, S. 10.

[h] The letter "S" and the words "and Bombay" were *repealed* by the city of Bombay Police Act, 1902 (Bom 4 [IV] of 1902), S. 2 (1) and Sch. A.

### Objects and Reasons.

*Sub-section (1), ninthly.*—We think that the amendment of Section 54, as drafted, might lead to the interpretation that a requisition could only be issued in cases where arrest was lawful under the first Clause of sub-section (1). We do not think that this was the intention, and we would therefore add a separate Clause for arrest on requisition. We agree with those critics

who desire that some safeguard should be provided, and we have, therefore, proposed to lay down that the requisition shall reveal the offence or other cause for which the arrest is to be made, so that the arresting officer can satisfy himself that the arrest could lawfully have been made without warrant by the officer issuing the requisition."—S.C.R., (XVIII of 1923).

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within the meaning of this section. (Vol 9) 1922 All 457 (458).

[3] Where from the circumstances the complaint regarding the commission of a cognizable offence seems suspicious the police should not make an arrest but leave complainant to move the Magistrate for the issue of a warrant. ('95) 1895 Rat 795 (797) (DB).

5. "Credible information.—[1] "Credible information" include any information, which in the judgment of the officer, is entitled to credit and need not be sworn information. ('82) 1882 Pun Re No. 7 Cr p. 3 (FB) \* (Vol 16) 1929 Lah 720 (720) : 30 Cr L Jour 625.

[2] A bare assertion cannot amount to a "credible information" (Vol 12) 1925 Cal 278 (279) : 52 Cal 319 : 26 Cr L Jour 625 (DB).

[3] The "reasonable suspicion" and "credible information" must relate to definite averments which must be considered by the police-officer before he arrests a person. (Vol 21) 1934 Sind 197 (199) : 23 Sind LR 205 : 36 Cr L Jour 332 (DB).

[4] A complaint of a cognizable offence recorded by a Magistrate and sent by him to the police for investigation and report is sufficient information justifying action under this section (Vol 10) 1923 Pat 547 (549) : 2 Pat 379 : 24 Cr L Jour 375 (DB).

[5] An information that a warrant of arrest has been issued against a person in respect of a cognizable offence, may justify action being taken under this section. (Vol 5) 1918 Mad 514 (514) : 40 Mad 1028 : 18 Cr L Jour 709 (DB)\* (Vol 1) 1914 All 205 (206) : 36 All 6 : 15 Cr L Jour 179.

[6] Report that certain persons were dacoits—Police sergeant called them to surrender but the latter resisted and fired shots at him—Sergeant was justified in arresting those persons (1900) 1900 Pun Re No 21 Cr p. 46 (47) (DB).

[7] Vague information that some people about to

them—Held there was no legal justification for the arrest (Vol 13) 1926 Pat 560 (560, 561) : 26 Cr L Jour 1608.

6. "Reasonable suspicion exists of his having been so concerned."—[1] Where a police-officer suspected that a man was carrying stolen property questioned him and having received unsatisfactory answers arrested him, held that he was entitled to do so. ('88) 12 Bom 377 (396, 397) (DB).

[2] A person found armed and lurking at midnight in a village inhabited by persons well known to the police as professional dacoits, held that there was a reasonable suspicion ('69) 1869 Pun Re No. 7 Cr p. 9 (10).

[3] Reasonable complaint or suspicion should be founded on some definite fact tending to throw suspicion on the person arrested (Vol 26) 1939 Pat 129 (133) : 18 Pat 121 : 40 Cr L Jour 500 (DB) : \* (67) 7 Suth WR Cr 3 (5) (DB).

[4] "Reasonable suspicion" means a *bona fide* belief on the part of the police-officer that an offence has been committed or is about to be committed. (Vol 30) 1943 Mad 218 (219, 220).

7. Proclaimed offender.—[1] In order to justify an arrest under the third clause, the proclamation must have been duly published. (Vol 23) 1936 Pat 249 (250) : 37 Cr L Jour 318.

8. Person in possession of implement of house-breaking—Clause (2).—[1] An arrest cannot be justified on the ground that on search an implement of house-breaking was found in the possession of the person arrested, unless the police officer had definite information that the person was in possession of such an implement. (Vol 29) 1942 All 74 (76) : ILR (1942) All 35 : 42 Cr L Jour 338 (DB).

9. Deserter from Army or Navy—Clause (6).—[1] An obstruction to the arrest of a deserter under clause (6) would be punishable under S. 225 B of the Penal Code (Vol 30) 1943 Mad 280 (281) : ILR (1943) Mad 827 : 44 Cr L Jour 465 \* ('12) 13 Cr L Jour 234 (234) : 1911 Pat 200 (DB).

Arrest of vagabonds,  
habitual robbers, etc.

<sup>a</sup>[55. (1) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested—

- (a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or
- (b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or
- (c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

(2) This section applies also to the police in the town <sup>b</sup>[\*] of Calcutta <sup>b</sup>[\* \*]  
[1882—S. 55; 1872—S. 94; 1861—S. 101].

[a] In the N. W. F. P., any Police Officer may exercise the powers conferred by this section on a police-officer in charge of a police-station, *see* the N.W.F.P., Law and Justice Regulation, 1901 (7 [VII] of 1901), S. 13.

[b] The letter "S" and the words "and Bombay" were *repealed* by the City of Bombay Police Act, 1902 (Bom 4 [IV] of 1902) S. 2 (1) and Sch. A.

**56. (1)** When any officer in charge of a police station <sup>a</sup>[or any police-officer making an investigation under Chapter XIV] requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and

#### Section 54 (contd.)

**10. Clause 7.—**[1] To justify arrest there must be in existence as opposed to belief, a warrant issued under the Extradition Act (Vol 26) 1919 Pat 129 (133); 18 Pat 121: 40 Cri L Jour 500 (DB) \* (Vol 20) 1933 Lah 159 (160): 34 Cri L Jour 679 (DB) \* ('91) 1841 Pun Re No. 20 (Cr) page 64 (65) (DB).

[2] There is nothing in this section or elsewhere which justifies the conclusion that a person is liable to arrest without warrant where the offence has been committed outside British India (1947) 1 Mad. Law Jour 2 (3) (DB).

**11. Arrest on requisition from another police-officer—Clause (9).—**[1] This clause does not limit the application of the other clauses (Vol 30) 1943 Mad 207 (207): 44 Cri L Jour 272.

[2] The word 'requisition' in this clause covers a message communicated by a police-officer by means of telephone (Vol 29) 1942 Mad 599 (546): 1LR (1942) Mad 696: 44 Cri L Jour 45 (DB).

**12. Sub-section (2).—**[1] This section does not extend to the police in the town of Bombay. (Vol 12) 1925 Bom 104 (105): 26 Cri L Jour 948 (DB).

#### SECTION 55—Note 1.

[1] The fact that a person is a habitual offender is by itself not an offence, but he may be arrested under this section. (Vol 5) 1918 Mad 514 (514): 40 Mad 1028: 18 Cri L Jour 709 (DB) \* (Vol 13) 1926 Sind 190 (191): 20 Sind L R 85: 27 Cri L Jour 628 (DB).

[2] This section is independent of Chap. VIII of the Code (security sections) although proceeding under Chap. VIII may follow such arrest. ('13) 14 Cri L Jour 618 (818): 35 All 407 \* (Vol 17) 1930 Pat 103 (104): 31 Cri L Jour 717.

[3] A person who is suspected of earning his livelihood by unlawful gaming cannot be arrested under

this section. ('08) 3 Cri L Jour 20 (20): 3 Low Bur Rnl 94.

[4] The section is intended to suppress habitual offenders from committing serious harm before there is time to apply to the Magistrate who can deal with the case under S 112. ('91) 14 All 45 (46).

[5] The words "in like manner" refer to S. 54. ('13) 14 Cri L Jour 618 (618): 35 All 407.

[6] An arrest on mere suspicion that a person is concerned in several offences is not justified. (Vol 11) 1924 Mad 555 (557): 47 Mad 442: 25 Cri L Jour 563.

[7] Arrest and detention of a person acquitted of dacoity without evidence to show he was a habitual offender is illegal. (Vol 6) 1919 All 160 (161): 41 All 483: 20 Cri L Jour 381.

[8] It is illegal for an officer in charge of a police-station to arrest a person under this section out of the limits of his station. ('83) 1883 All W N 223 (223).

[9] The police should give a person arrested under this section, the option of bail on reasonable terms. ('92) 14 All 45 ('47) \* ('36) 97 Cri L Jour 1070 (1071): 63 Cal 189 (DB).

[10] An arrest by an Inspector of Police in Calcutta of a person who has no ostensible means of subsistence or is unable to give a satisfactory account of himself, is quite legal. ('04) 1 Cri L Jour 535 (537): 31 Cal 557 (DB).

#### SECTION 56—Note 1.

[1] Where a police officer who can make an arrest under S. 54 is also ordered under this section makes the arrest without complying with the provisions of this section, the arrest is not illegal merely by reason of such non-compliance. (Vol 24) 1937 Bom 56 (59): 1LR (1937) Bom 127: 38 Cri L Jour 267 (DB) \* (Vol 30) 1943 Mad 207 (208): 44 Cri L Jour 272 \* (Vol 29) 1942 Mad 539 (546, 547): 1LR (1942) Mad 696: 44

the offence or other cause for which the arrest is to be made. a[The officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.]

(2) This section applies also to the police in the town b[\*] of Calcutta b[\* \*].

[1882—S. 56; 1872—S. 102, para. 1; 1861—S. 140.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 11.

[b] The letter "S" and the words "and Bombay" were repealed by the City of Bombay Police Act, 1902 (Bom. 4 [IV] of 1902). S. 2 (1) and Sch. A.

57. (1) When any person who in the presence of a police officer has committed or has been refused to give name accused of committing a non-cognizable offence refuses on demand of and residence. such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required :

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

[1882—S. 57; 1872—S. 93; 1861—S. 108].

#### Section 56 (contd.)

Cri L Jour 45 (DB) \* : (Vol 25) 1938 Pat 229 (230) : 16 Pat 763 : 39 Cri L Jour 563 (DB) \* (Vol 24) 1937 Sind 308 (309) : 32 Sind L R 63 : 39 Cri L Jour 107 (DB) \* (Vol 32) 1945 Pesh 46 (48) (DB).

[But see (Vol 28) 1941 Rang 180 (181) : 1941 Rang L R 148 : 42 Cri L Jour 629 \* (Vol 23) 1936 Rang 119 (120) : 13 Rang 754 : 37 Cri L Jour 462 \* (Vol 26) 1939 Nag 95 (97) : ILR (1939) Nag 488 : 40 Cri L Jour 905].

[2] The fact that a Magistrate has issued a warrant for the arrest of a person under S. 114 is no bar to an order for his arrest under this section. ('96) 18 All 246 (248) 249 (DB).

[3] This section does not apply to a case where a person is arrested by a police officer without a warrant, under the orders of a superior police officer, in the latter's presence. ('69) 11 Suth W R Cr 20 (21) (DB).

[4] This section does not apply where the person arrested is a deserter from Army. (Vol 30) 1943 Mad 280 (281) : ILR (1943) Mad 827 : 44 Cri L Jour 465.

[5] An arrest by a chowkidar in pursuance of an order from an officer in charge of a police station is legal. (Vol 24) 1937 Bom 56 (60) : ILR (1937) Bom 127 : 38 Cri L Jour 267 (DB) \* ('06) 3 Cri L Jour 201 (202) (DB) (Cal).

[6] The mere endorsement of a constable's name on a warrant of arrest issued by a Magistrate and signed by the officer in charge of a police station is not "an order in writing". ('96) 18 All 246 (248, 249).

[7] The endorsement of the name of the constable actually going to make the arrest is not necessary for the validity of an order under this section. (Vol 21; 1934 All 879 (880) : 35 Cri L Jour 1452.

[8] Direction by the police officer, not present on spot asking constable to bring certain persons to the *thana* is not a direction for arrest within the meaning of this section. (Vol 27) 1940 Pat 361 (362) : 41 Cri L Jour 742.

[9] The order for arrest given to a subordinate officer should specify within which category, as given in S. 55, the supposed offender falls. (Vol 13) 1926 Sind 190 (191) : 20 Sind L R 85 : 27 Cri L Jour 628 (DB).

[See however (Vol 21) 1934 All 879 (880) : 35 Cri L Jour 1452. (More specification of S. 55 is enough).]

[10] The substance of the order for arrest must be notified to the person to be arrested. (Vol 13) 1926 Pat 424 (425) : 5 Pat 533 : 27 Cri L Jour 1810 (DB).

[11] Non-compliance with this provision makes the arrest illegal. (Vol 27) 1940 Cal 321 (321) : 41 Cri L Jour 744 (DB).

[12] Order directing arrest need be shown only if required by the person to be arrested. (Vol 12) 1925 Oudh 544 (544) : 26 Cri L Jour 795.

#### SECTION 57—Note 1.

[1] In the case of non-cognizable offences, the power of the police to arrest without warrant arises when the offender refuses to give his name and address or gives a name and address which, the police officer has reason to believe, is false. (Vol 25) 1938 Rang 161 (163) : 39 Cri L Jour 642 (DB) \* (Vol 10) 1923 Mad 523 (526) : 46 Mad 605 : 24 Cri L Jour 599. (FB) \* ('72) 9 Bom HCR 343 (344).

[2] Where no non-cognizable offence is committed in the presence of a police officer, no demand can be made for giving name, and, a person refusing to give his name cannot be arrested under this section. (Vol 28) 1941 Lah 422 (425) : 43 Cri L Jour 127.

[3] When the true name and residence of the person arrested is ascertained, he must be released on bail if he executes the necessary bond (Vol 6) 1919 All 160 (161) : 41 All 488 : 20 Cri L Jour 381.

[4] Constable using abusive language while arresting person for causing disturbance on the public road—Held arrest was justified but use of abuses amounted to an offence under S. 504 IPC ('08) 5 Bom LR 597 (598) (DB).



58. A police-officer may for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India.

[1882—S. 53; 1872—S. 103; 1861—S. 141].

59. [(1) Any private person may arrest any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and without unnecessary delay, shall make over any person so arrested to a police-officer, or, in the absence of a police-officer, take such person or cause him to be taken in custody to the nearest police-station].

(2) If there is reason to believe that such person comes under the provisions of section 54, a police-officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

[1882—S. 59; 1872—Ss. 105, 107.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 12, for original sub-section.

#### SECTION 58—Note 1.

[1] This section authorizes the pursuit of an offender into any place in British India. (Vol 9) 1922 Mad 215 (216); 45 Mad 14; 23 Cri L Jour 490 (DB) \* (46) 47 Cri L Jour 352 (353) (Cal).

[2] Offence committed in British India—Offender arrested on territory belonging to the Nizam's Dominions—Arrest, held, was illegal and without jurisdiction. ('98) 25 Cal 20 (30, 31); 24 Ind App 137; 1897 Pun Re No. 6 Cr (PC) (Reversing 1896 Pun Re No. 1 Cr).

[See however (Vol 6) 1919 Lah 459 (464); 1918 Pun Re No. 31 (Cr); 20 Cri L Jour 65 (DB) (Arrest in railway carriage within limits of Native State where jurisdiction over railway lines is ceded to British Government is lawful).]

#### SECTION 59—Synopsis.

1. Scope.
2. "In his view."
3. "Proclaimed offender."
4. Private person.
5. "May arrest."
6. How an arrest under this section is made.
7. "Take such person or cause him to be taken in custody."
8. "Police officer"
9. Escape from custody.

1. Scope.—[1] A private individual may arrest a person only when the latter in his view, commits a non-bailable and cognizable offence (Vol 32) 1945 Lah 334 (335); ILR (1945) Lah 403 \* (Vol 21) 1934 Cal 610 (615); 61 Cal 991; 35 Cri L Jour 1367 (DB).

[2] The section is not confined in its application to the cases where offence committed in view of a person is a substantive offence but equally applied to an attempt to commit an offence where such attempt is itself an offence and is made in the view of the person arresting. (Vol 32) 1945 Lah 334 (335); ILR (1945) Lah 403.

[3] A private person in India cannot go beyond this

section and invoke the common law of England in the matter of arrest of a person who threatens to commit an offence. (Vol 10) 1923 Mad 523 (526); 46 Mad 605; 24 Cri L Jour 599 (FB).

[4] Under this section, a private person may himself arrest (Vol 24) 1937 Sind 254 (258); 32 Sind L R 41 38 Cri L Jour 1101 (DB).

2. "In his view."—[1] A private person cannot arrest on mere suspicion or information. ('88) 11 Mad 480 (481, 482) (DB) \* ('07) 6 Cri L Jour 10 (12); 29 All 575 (DB).

[2] The words "in his view" mean "in presence of" or "within sight of" and not "in his opinion." (Vol 13) 1926 Pat 53 (53); 26 Cri L Jour 1162 \* (Vol 20) 1933 Pat 508 (511); 35 Cri L Jour 725 (DB).

[3] An arrest made by a private person where the offender has not committed any offence in the sight of the arrestor is not a lawful arrest. ('81) 3 All 60 (61) \* (1900) 27 Cal 366 (367) (DB) \* (Vol 9) 1922 Lah 73 (74); 23 Cri L Jour 3 (DB) \* (Vol 19) 1932 Lah 263 (264); 33 Cri L Jour 640 \* ('01) 23 All 266 (267, 269) (DB) \* ('08) 7 Cri L Jour 188 (190); 35 Cal 361 (DB).

[4] A beating C with cane—D, an onlooker, arresting A—Held that, the arrest was justified. (Vol 7) 192 Pat 502 (504); 5 Pat L Jour 129; 21 Cri L Jour 213.

[5] The words "in his view" should not be given to strained a construction. (Vol 11) 1924 Mad 384 (385) 25 Cri L Jour 792. (Owner of *lope* finding a perso with pot of toddy in his *lope* and two others climbing up the tree—Held that, person with the toddy should be deemed to be committed theft "in the view" of the owner who made the arrest).

3. "Proclaimed offender."—[1] A person does not become a "proclaimed offender" on the declarator either orally or in writing by a police officer unless it has been declared to be so by the Court. (Vol 24) 1937 Sind 254 (258); 32 Sind L R 41; 38 Cri L Jour 1101 (DB).

4. "Private person."—[1] A *chowkidar* is only "private person". (Vol 3) 1916 All 253 (254); 17 Cri Jour 529.

60. A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

[1882—S. 60 ; 1872—S. 101 ; 1861—S. 109.]

61. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

[1882—S. 61 ; 1872—S. 124, para 1 ; 1861—S. 152].

#### Section 59 (contd.)

[2] The private person making an arrest and his escort to the police-station are not "public servants" within the meaning of S. 21 of the Penal Code. (Vol 4) 1917 Upp Bur 8 (9) : 2 Upp Bur Rul 122 : 18 Cri L Jour 351.

5. "May arrest."—[1] Private person may cause offender to be arrested by another person. (Vol 12) 1925 Cal 884 (885) : 52 Cal 615.

6. How an arrest under this section is made.—[1] The arrest must be carried out in the manner provided by S. 46. ('04) 1 Cr L Jour 285 (287) (*Kathia-war*).

7. "Take such person or cause him to be taken in custody."—[1] A private person arresting another person is bound to take him, without unnecessary delay to a police-officer, or in his absence, to the nearest police-station ; Otherwise he will be committing an offence under S. 342 I PC (1928) 27 Cr L Jour 1878 (1881) (Pat).

8. "Police officer".—[1] A *chowkidar* is not a police-officer and is not entitled to receive a person arrested under this section. (Vol 1) 1914 Cal 272 (273) : 41 Cal 17 : 14 Cri L Jour 494 (DB) \* ('81) 3 All 60 (61) \* (Vol 3) 1916 Cal 247 (247) : 17 Cri L Jour 164 (DB).

[See however (Vol 19) 1932 Pat 214 (215) : 33 Cri L Jour 572 (A *chowkidar* under the Chota Nagpur Rural Police Act 1 (I) of 1914 is a police-officer).]

9. Escape from custody.—[1] Where the arrest is lawfully made but the private person places the arrested person in the custody of a *chowkidar* or a *dafadar*, who negligently suffers the arrested person to escape from his custody, the *chowkidar* is not guilty of an offence under S. 223 of the Penal Code. ('42) 46 Cal W N 163 (167).

[2] Where arrest is not lawful, an escape or rescue from the custody is no offence. ('97) 1 Cal W N 98 (98) (DB) \* ('82) 5 Mad 22 (23) (DB).

[3] Where arrest is lawful, an escape will be punishable under S. 224 of the Penal Code. (Vol 32) 1945 Lah 334 (335) : ILR (1945) Lah 403 \* ('94) 17 Mad 103 (104).

[4] A rescue from lawful custody would be punishable under S. 225 of the Penal Code. ('83) 1883 All W N 214 (214) \* ('85) 1 Weir 209 (209).

[See also (Vol 27) 1940 Pat 479 (480) : 41 Cri L Jour 381.]

#### SECTION 60—Note 1.

[1] A person arrested without warrant should be taken or sent without unnecessary delay before a Magistrate having jurisdiction in the case or before the officer-in-charge of a police-station. (Vol 11) 1924 Cal 893 (895) : 25 Cri L Jour 1203 (DB).

[2] A police-officer cannot detain any person in custody without arresting him. ('02) 4 Bom LR 79 (DB).

[3] The practice of keeping, to all intents and purposes, a person in custody but not producing him before a Magistrate under the colourable pretension that no actual arrest has been made, is in defiance of all provisions of law for the protection of liberty of the subject and should not be tolerated. ('85) 1885 All W N 59 (59) (FB) \* (Vol 11) 1924 Rang 173 (176) : 1 Rang 609 : 25 Cri L Jour 381.

[4] Police officer unable to take or send person arrested without warrant before Magistrate—Report submitted to Magistrate and warrant issued—*Held* accused was legally presented before Magistrate. ('68) 5 Bom HCR Cr 99 (99) (DB).

[5] Where a police-officer negligently suffers a person in his custody to escape, he will be guilty of an offence under S. 223 of the Penal Code. ('83) 6 All 129 (133).

#### SECTION 61—Synopsis.

1. Scope of the section.
2. "Detain in custody" meaning of.
3. Place of detention during the 24 hours.
4. Period of 24 hours, computation of.
5. "Exclusive of the time necessary for the journey."

1. Scope of the section.—[1] A police-officer is not justified in detaining a person for one single hour except upon some reasonable ground justified by the circumstances. ('66) 6 Suth WR Cr 88 (89) (DB) \* ('69) 1869 Rat 22 (22).

[2] Detention for more than 24 hours without special order is absolutely unlawful. ('67) 7 Suth WR Cr 3 (6) (DB) \* ('70) 1870 Pan Re No. 36 (Cr) page 56 (57) (DB).

[3] Guilty purpose need not be proved where police-officer is charged with having detained prisoners for more than 24 hours. ('73) 19 Suth WR Cr 36 (36) (DB).

[4] The section has, however, no application where there has not been a continuous detention for 24 hours (1884) 1 Suth WR Cr 5 (5) (DB).

62. Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

[1882—S. 62 ; 1872—S. 132, para 1 ; 1861—S. 160].

63. No person who has been arrested by a police officer shall be discharged except on Discharge of person his own bond, or on bail, or under the special order of a Magistrate apprehended.

[1882—S. 63 ; 1872—S. 132, para 2 ; 1861—S. 160].

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail commit the offender to custody.

[1882—S. 64 ; 1872—S. 108 ; 1861—S. 110].

65. Any Magistrate may at any time arrest or direct the arrest, in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

[1882—S. 65 ; 1872—S. 166, para 2 ; 1861—S. 81].

#### Section 61 (contd.)

[5] The law views with disfavour detention of any person in the custody of the police (Vol 18) 1931 Lah 476 (478) : 12 Lah 635 : 32 Cri L Jour 913 (DB) \* (Vol 18) 1931 Lah 480 (480) : 33 Cri L Jour 162 (DB).

[6] The provisions of this section and of S. 167 are designed to prevent discoveries by means of duress and terror of wrongful confinement. ('86) 1886 Rat 254 (272, 273).

[7] The provisions of this section and of S. 167 are designed to see that an accused person is brought before a Magistrate competent to try or commit with as little delay as possible. (Vol 11) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732 (DB) \* ('88) 11 Mad 98 (102) (DB).

2. 'Detain in custody, meaning of'.—[1] Meaning of the detention of a person by force of an exterior will is an imprisonment. ('66) 2 Mad HCR 396 (898) (DB) \* ('81) 1 Weir 341 (341).

[2] "Custody" does not necessarily mean detention or confinement. (Vol 27) 1940 Lah 129 (146) : ILR (1940) Lah 142 : 41 Cri L Jour 591 (FB) \* (Vol 18) 1931 Lah 278 (279) : 32 Cr L Jour 650 \* (Vol 21) 1934 Lah 150 (151) : 15 Lah 310 : 36 Cr L Jour 14 (DB).

[3] A person is in custody as soon as he comes into the hands of a police officer. (Vol 11) 1924 Rang 173 (176) : 1 Rang 609 : 25 Cri L Jour 381.

#### 3. Place of detention during the 24 hours —

[1] Person arrested should, if possible, be immediately sent to the police-station and be placed in the custody of the officer-in-charge of the station. ('67) 7 Suth WR Cr 3- (6) (DB).

4. Period of 24 hours, computation of.—[1] The 24 hours of detention are to be counted up to the time when the accused person leaves the police-station on the way to the Magistrate. ('69) 1869 Rat 22 (22).

5. "Exclusive of the time necessary for the journey".—[1] The time occupied in the journey to the Magistrate is not to be counted in the 24 hours, but the Magistrate should see that the time so occupied is reasonable. ('69) 1869 Rat 22 (22).

#### SECTION 62—Note 1.

[1] Where the police have power to make an arrest without a warrant, the police must report such arrest. ('02) 26 Bom 150 (158) (FU).

[2] The object of the section is to enable the District Magistrate to prevent illegalities in arrests by examining the reports of arrests made to him. ('86) 1886 Rat 254 (261).

[3] The term "police report" under S. 190 will include a report also under this section. ('10) 11 Cri L Jour 150 (151) : 1910 Pun Re No. 3 (Cr).

[4] The provisions of this section do not apply to the police in the town of Bombay. ('92) 16 Bom 661 (665) (DB).

#### SECTION 64—Note 1.

[1] A Magistrate can arrest a person even in respect of an offence which cannot be taken cognizance of without a complaint by the Provincial Government. (Vol 26) 1939 All 682 (683) : ILR (1939) All 924 : 41 Cri L Jour 85.

[2] The powers of a Magistrate to arrest are prescribed by this section and S. 65 of the Code. (Vol 7) 1920 Pat 516 (517) : 21 Cri L Jour 795.

[3] This section applies only when an offence is committed in the presence of the Magistrate. ('05) 2 Weir 241 (242).

#### SECTION 65—Note 1.

[1] A Magistrate taking cognizance of an offence under S. 190 can himself make the arrest under this section. (Vol 6) 1919 Mad 30 (81) (DB) \* ('07) 6 Cri L Jour 60 (64, 66) : 31 Bom 438 (DB).

[2] Where a Magistrate could issue a warrant of arrest only if he took cognizance of the case under S. 190 but he did not take such cognizance, he is not competent to act under this section ('05) 2 Weir 241 (242).

[3] Where a Magistrate acting under S. 190 (1) makes an arrest under this section his action will be justified only if he acts *bona fide*, i.e. with due care and attention. ('04) 1 Cri L Jour 146 (151) (Kathia-war).

[4] It is improper to arrest a defence witness for perjury while the defence evidence is being taken. ('11) 12 Cri L Jour 465 (467) (Low Bur).

66. If a person in lawful custody escapes or is rescued, the person from whose custody Power, on escape, to he escaped or was rescued may immediately pursue and arrest him in any pursue and retake. place in British India.

[1882—S. 66; 1861—S. 113.]

67. The provisions of sections 47, 48 and 49 shall apply to arrests under section 66, Provisions of sections although the person making any such arrest is not acting under a warrant 47, 48 and 49 to apply and is not a police officer having authority to arrest. to arrest under section 66.

[1882—S. 67; 1861—S. 112].

## CHAPTER VI.

### OF PROCESSES TO COMPEL APPEARANCE.

#### A.—*Summons.*

Form of summons. 68. (1) Every summons issued by a Court under this Code shall be in writing in duplicate, signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time, by rule, direct.

Summons by whom served. (2) Such summons shall be served by a police officer, or subject to such rules as the <sup>a</sup>[Provincial Government] may prescribe in this behalf by an officer of the Court issuing it or other public servant.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

[1882—S. 68; 1872—Ss. 152, 153; 1861—Ss. 69, 70].

[a] *Substituted* by A. O. for "Local Government."

#### SECTION 68—Synopsis.

1. Form and contents of summons.
2. Effect of not observing the formalities.
3. Disobedience of summons.
4. When person summoned can depart.

1. Form and contents of summons.—[1] Summons or warrant should specify the technical designation of the offence and also the acts for which the accused would have to answer. ('75) 24 Suth WR Cr 58 (59) (DB).

[2] The summons should contain particulars of the time, place and nature of the offence and in absence of such particulars, the proceedings if objected to, are invalid. (Vol 15) 1928 All 261 (263) : 29 Cri L Jour 357 (DB).

[See however ('09) 9 Cri L Jour 108 (111) : 32 Mad 3 (DB).]

[3] Summons to a witness must contain the place at which, the day and the time of the day when, his attendance is required. ('83) 5 All 7 (8).

2. Effect of not observing the formalities.—[1] Intentional disobedience of summons is an offence under S. 174, IPC. ('84) 1 Weir 84 (84).

[2] A summons which does not state the particulars of the place, the time, and the nature of the offence charged is illegal. (Vol 15) 1928 All 261 (263) : 29 Cri L Jour 357 (DB) \* (Vol 21) 1934 Oudh 370 (371) : 35 Cri L Jour 1161 \* (Vol 27) 1940 Oudh 77 (79) : 41 Cri L Jour 92 (DB).

[3] A summons not sealed is illegal and a person disobeying it cannot be prosecuted. (Vol 7) 1920 Mad 250 (250).

[4] Failure to attend is not an offence where the summons does not specify the place where or the time when the attendance is required. ('72) 1 Weir 81 (81) \* ('70) 1 Weir 82 (82) \* ('90) 1890 All WN 1 (1).

[5] A summons sent by registered post is invalid and its disobedience is not an offence. ('97) 1 Cal WN 116 (116).

[6] A defect of any kind in the summons is only an "error, omission or irregularity" within meaning of S. 537 Cr PC. ('07) 31 Bom 611 (625) : 6 Cri L Jour 240 (DB).

3. Disobedience of summons.—[1] Disobedience of summons directing appearance at a place outside British India is not an offence under S. 174 IPC. ('93) 16 Mad 463 (463) (DB).

[2] Where on the date specified in the summons, the public officer was himself absent, no offence under S. 174 IPC is committed if the person summoned to appear before such public officer fails to attend. ('97) 20 Mad 81 (82) (DB).

[3] Where the case is not taken up on the date stated in the summons, failure to attend is not an offence. ('09) 10 Cri L Jour 576 (577) : 3 Sind L R 155 (DB).

[4] If the public officer has no authority to issue the summons, a disobedience of such a summons is no offence. (1904) (1) Cri L Jour 497 (499) (DB) (All).

[5] Illness incapacitating a person from attending to his ordinary avocations excuses non-attendance. (Vol 9) 1922 All 82 (82) : 23 Cri L Jour 203.

[6] Failure to appear on adjourned date in accordance with the directions of the magistrate though issued orally on the date of original appearance will be punishable under S. 174 IPC. ('70) 5 Mad HCR (App)

Summons how served. 69. (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Signature of receipt for summons. (2) Every person on whom a summons is so served shall if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation or by registered post letter addressed to the chief officer of the corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

[1882—S. 69; 1872—S. 154; 1861—S. 71].

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a presidency-town, with his servant residing with him; and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

[1882—S. 70; 1872—S. 154; 1861—S. 71].

#### Section 68 (contd.)

4. When person summoned can depart —[1] Where the summons directs that the person summoned should not depart without leave, he cannot leave the Court without such permission. ('83) 5 All 7 (8).

[2] Where there is no direction in summons that person summoned should not depart without leave, person summoned, leaving Court after waiting for reasonable time does not commit offence under S. 174 IPC. ('70) 14 Suth WR Cr 20 (21) (DB).

#### SECTION 69—Note 1.

[1] Unless summons had been properly served conviction cannot be had for disobedience thereof. ('82) 1882 All WN 52 (52).

[2] Substituted service should not be resorted to unless, in spite of reasonable diligence, personal service is not practicable. (Vol 10) 1923 Nag 55 (55); 23 Cri L Jour 739.

[3] A personal service may be made either by delivering or tendering the summons; but the tender must be a real tender of a document which is understood by the person to be served. (Vol 15) 1928 All 118 (119); 29 Cri L Jour 263 \* ('68) 5 Bom HCR Cr 20 (21) (DB).

[4] Merely showing the summons to the person to be served is not sufficient service. ('68) 5 Bom HCR Cr 20 (21) (DB).

[5] Issue of summons to a particular person in proceedings against a Company without showing that it is served on him in a representative capacity or that the proceedings were against the company is incorrect. (Vol 31) 1944 Pat 210 (211); 46 Cri L Jour 168.

[6] Summons in proceedings against a company may be served on the secretary, president and the members of managing committee. (Vol 16) 1929 Bom 433 (436); 54 Bom 35; 31 Cri L Jour 495 (DB).

[7] The mere refusal to receive the summons or to sign the receipt for a summons is, not an offence under S. 173 IP Code. (Vol 5) 1918 All 409 (409); 40 All 577; 19 Cri L Jour 746 \* (Vol 12) 1925 All 322 (323); 26 Cri L Jour 909 \* ('68) 5 Bom HCR Cr 34 (35) (DB) \* ('78) 3 Cal 621 (621) (DB) \* ('93) 20 Cal 358 (359) (DB) \* ('85) 5 Mad 199 (200) (DB) \* (Vol 5) 1918 Oudh 412 (412); 21 Oudh Cas 150; 19 Cri L Jour 801\* (Vol 10) 1923 Rang 146 (147); 1 Rang 49; 24 Cri L Jour 737\* (Vol 7) 1920 Upp Bur 18 (18, 19); 3 Upp Bur Ral 202; 21 Cri L Jour 688.

[8] The question whether there has been a preventing of personal service is in each case, a question of fact. (Vol 15) 1928 All 118 (119); 29 Cri L Jour 263.

[9] A summons sent by registered post is invalid ('97) 1 Cal WN 116 (116).

#### SECTION 70—Note 1.

[1] Service on the person summoned should be proved to have been impossible to make the service on a member of the family or the servant valid. (Vol 19) 1932 Cal 62 (62); 33 Cri L Jour 264.

[2] An affidavit from person entrusted with service averring impossibility of personal service in spite of due diligence should be obtained. ('82) 1882 All WN 170 (170, 171) (DB).

[3] A Summons for attendance as a juror outside the presidency-town, cannot properly be served by leaving it with the servant of the person summoned. ('99) 1899 All WN 13 (14).

[4] A summons for attendance outside the presidency town must be served by leaving the duplicate summons with the adult male member of his family. ('05) 2 Cal L Jour 48n (48n) (DB).

[5] Summons should not be served on female members of the family of person summoned. (Vol 13) 1926 Lah 50 (50); 26 Cri L Jour 1393.

71. If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

[1882—S. 71; 1872—S. 155; 1861—S. 72]

72. (1) Where the person summoned is in the active service of the a[Crown] or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section.

(2) Such signature shall be evidence of due service.

[1882—S. 72; 1872—S. 158 proviso]

[a] *Substituted by A. O. for "Government"*

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

[1882—S. 73]

74. (1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

[1882—S. 74]

#### SECTION 71—Note 1.

[1] Unless the summons cannot after the exercise of due diligence be served personally or on an adult male member or servant resort cannot be had to the provisions of this section. (Vol 13) 1926 Cal 1208 (1209) : 27 Cri L Jour 715 (DB)\* (Vol 10) 1923 Nag 55 (55) : 23 Cri L Jour 739 \* (Vol 5) 1918 Nag 46 (46) : 20 Cri L Jour 816

[2] The law for the service of a summons in Criminal cases is on the same lines as the rules for the service of a summons in a civil case. (Vol 5) 1918 Nag 4\* (46) : 20 Cri L Jour 816.

[3] A person who resides in one place and rarely visits his home in another town cannot be said to "ordinarily reside" in the latter town. (Vol 18) 1931 Pat 160 (160) : 32 Cri L Jour 740.

#### SECTION 72—Note 1.

[1] This section does not apply to orders of police-officers investigating a crime under Chapter XIV of the Code. (Vol 5) 1918 Mad 815 (816) : 18 Cri L Jour 733.

[2] A summons to a Sub-Inspector of Railway Police should be served through the Superintendent of

Railway Police of the District. (Vol 12) 1925 Pat 553 (555) : 26 Cri L Jour 965.

[3] Summons on medical subordinate officer should be served through the head of the office to whom he is subordinate. ('68) 9 Suth W R (Cri cir) 3 (3) (DB).

#### SECTION 73—Note 1.

[1] There is no procedure provided in this Code, for service on a person in a place outside British India as for instance in England. (Vol 14) 1927 Rang 248 (248) : 28 Cri L Jour 861.

[2] When a question arose as to the validity of the service of a rule in proceedings for contempt of Court on a person in the Native State of Baroda it was held that such service, with the Gaikwar's previous assent is valid service, when the parties so served were already represented by counsel in the British Court. and where the only object of the service beyond territory was to effect personal service, ('70) 7 Bom H C R (OC) 172 (175, 176, 177).

#### SECTION 74—Note 1

[1] Where the person summoned denies receipt of summons the serving officer should be examined as a witness. ('89) 1 Weir 85 (85).

*B.—Warrants of Arrest.*

Form of warrant of arrest. 75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench, and shall bear the seal of the Court.

Continuance of warrant of arrest. (2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

[1882—S. 75; 1872;—S. 159; 1861—S. 76].

## SECTION 75—Synopsis.

1. Difference between summons and warrant.
2. Requisites of a valid warrant of arrest.
3. Form of warrant.
4. General warrant.
5. Special warrant.
6. Conditional warrant.
7. Effect of illegal warrant.
8. "Until it is cancelled by the Court issuing it."
9. "Or until it is executed."
10. Mode of executing a warrant.

## 1. Difference between summons and warrant.

[1] A warrant is an order addressed to a person, usually a police-officer, to do any particular act such as the apprehension and production of an offender, or the search for a thing. ('66) 5 *Suth W R Cr* 71 (72) (DB) \* ('72) 4 *N W P H C R* 97 (99).

[2] A summons is always addressed to the person who is required either to attend or to produce a document or a thing. [See ('70) 1870 *Pun Re No. 6 Cr* page 11 (11) (DB).]

[3] A warrant addressed to a police officer to apprehend an offender and to bring him before a Magistrate is not a "a summons, notice, or order" within the meaning of S. 172 of the Penal Code. (Vol 15) 1928 *All* 232 (232) : 50 *All* 666 : 30 *Cri L Jour* 203 \* ('06) 3 *Cri L Jour* 117 (118) (DB) (Cal) \* ('90) 1890 *Pun Re No. 28 Cr P* 95 (95, 96) \* ('81) 1881 *Rat* 152 (152, 153).

## 2. Requisites of a valid warrant of arrest.

[1] Any arrest made in execution of warrant not signed by issuing authority is illegal. (Vol 5) 1918 *Pat* 252 (253) : 19 *Cri L Jour* 1000 (DB) \* ('96) 23 *Cal* 896 (898) (DB) \* ('95) 1895 *Pun Re No. 11 (Cr)* p 38 (39).

[2] The official designation of the person signing and the place of signing should appear on the face of the warrant. ('72) 9 *Bom H C R* 154 (159, 160).

[3] A warrant signed by a Magistrate at a place outside the limits of his jurisdiction is illegal. ('10) 11 *Cri L Jour* 570 (571) : 1910 *Pun Re No. 23 Cr* (DB).

[4] A warrant signed by a Magistrate, not being the presiding officer, and who has not taken cognizance of the offence is invalid. (Vol 4) 1917 *Pat* 17 (18) : 2 *Pat L Jour* 487 : 18 *Cri L Jour* 526 (DB).

[5] The signature contemplated is that of the officer who is actually presiding at the time of the issue of the warrant. (Vol 19) 1932 *Pat* 175 (176) : 34 *Cri L Jour* 297 \* (Vol 19) 1932 *Pat* 171 (175) : 33 *Cri L Jour* 706 (DB).

[6] The affixing of a signature by a stamp is only an irregularity, which does not vitiate the warrant. ('83) 6 *Mad* 396 (398) (DB).

[7] An omission to affix the seal renders the warrant invalid. (Vol 2) 1915 *Cal* 737 (738) : 42 *Cal* 708 : 16 *Cri L Jour* 336 (DB) \* (Vol 15) 1928 *Lah* 332 (333) : 9 *Lah* 424 : 29 *Cri L Jour* 265 \* ('91) 18 *Bom* 636 (668, 669) (DB) (Warrant under Act 3 (III) of 1864).

[But see ('10) 11 *Cri L Jour* 570 (571) : 1910 *Pun Re No. 23 (Cr)* (DB).]

[8] A blank warrant without specifying the addressee thereof is invalid. ('13) 14 *Cri L Jour* 142 (143) : 1913 *Pun Re No. 16 Cr* (DB) \* (Vol 11) 1924 *All* 128 (129) : 24 *Cri L Jour* 630 : (Vol 19) 1932 *All* 692 (692) : 55 *All* 109 : 34 *Cri L Jour* 455 (DB).

[9] A warrant addressed to "the bailiff of the Court" without naming the bailiff is perfectly legal. (Vol 2) 1915 *Mad* 225 (225, 226) : 15 *Cri L Jour* 576.

[10] An endorsement of a warrant under S. 79 should be made by name to the person to whom it is endorsed. (1900) 4 *Cal W N* 85 (86) (DB) \* (Vol 8) 1921 *Lah* 236 (236) : 22 *Cri L Jour* 145.

[11] A warrant should contain a distinct and unequivocal intimation to the person to be arrested that he is the individual meant to be apprehended. ('72) 9 *Bom H C R* 154 (159).

[12] A warrant should not merely bear the full name of the person to be arrested but also his description i.e. the place where he resides, if not also his occupation, so that there may be no doubt as to his identity. (Vol 27) 1940 *Bom* 397 (399) : *ILR* (1941) *Bom* 16 : 42 *Cri L Jour* 205 (DB) \* ('94) 18 *Bom* 636 (669) (DB).

[See also (Vol 11) 1924 *Cal* 959 (959, 960) : 51 *Cal* 902 : 26 *Cri L Jour* 2 (DB).]

[See however (Vol 30) 1943 *Pat* 366 (368) : 22 *Pat* 504 : 46 *Cri L Jour* 322 (DB).]

[13] Where arrest was not legal the accused cannot be guilty of disobedience of a warrant. ('01) 28 *Cal* 399 (400, 401) (DB).

[14] A warrant which does not specify a punishable offence, and which has been issued upon a statement, not sufficient to make out any offence, is illegal. ('71) 6 *Beng L R App* 129 (130) (DB) \* ('75) 24 *Suth W R Cr* 58 (59) (DB).

[15] The arrest is not legal if the person executing the warrant does not notify its substance to the person arrested. ('96) 23 *Cal* 896 (898) (DB) \* ('99) 26 *Cal* 748 (750) (DB) \* (Vol 11) 1924 *Mad* 555 (556) : 47 *Mad* 442 : 25 *Cri L Jour* 563.

[See ('30) 1930 *Mad W N* 1215 (1215).]

3. Form of warrant.—[1] A strict adherence to the form prescribed tends to prevent the warrant being granted irregularly and without enquiry as to whether the circumstances justify its issue. (1864) 1 *Suth W R Cr* 7 (7) (DB).

76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

(2) The endorsement shall state—

(a) the number of sureties ;

(b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound ; and

(c) the time at which he is to attend before the Court.

Recognizance to be forwarded. (3) Whenever security is taken under this section the officer to whom the warrant is directed shall forward the bond to the Court.

[1882—S. 76; 1872—S. 160; 1861—S. 181].

#### Section 75 (contd.)

[2] Where any special or local Act does not provide a form of the warrant of arrest, the form prescribed by the Code should be adopted. ('94) 18 Bom 636 (668) (DB).

4. **General warrant.**—[1] A general warrant or a warrant to apprehend all persons committing a particular offence is not authorised by the Code and is illegal. ('72) 9 Bom H C R 154 (159, 160) \* ('95) 1895 Pun Re No. 11 Cri p. 38 (39).

[2] A warrant to search any house, which the police-officer to whom it is directed may think fit, is illegal. ('12) 13 Cri L Jour 832 (832) : 35 All 1 : \* (Vol 11) 1924 Lah 247 (248) : 24 Cri L Jour 633.

5. **Special warrant.**—[1] A warrant which can be endorsed over to another officer for execution is not a special warrant. (Vol 16) 1929 Bom 157 (160) : 53 Bom 367 : 30 Cri L Jour 595 (DB).

6. **Conditional warrant.**—[1] A warrant which provides that the person against whom it is issued should do a particular thing and that if he does not do so, he should be arrested is invalid. ('94) 18 Bom. 636 (659, 667) (DB).

7 **Effect of illegal warrant.**—[1] Proceedings in pursuance of an illegal warrant are void. ('07) 6 Cri L Jour 38 (39) (DB) (Cal)\* ('97) 24 Cal 320 (324) (DB) \* (Vol 15) 1928 Mad 624 (625) : 51 Mad 873 : 29 Cri L Jour 541\* (Vol 21) 1934 Mad 206 (207) : 35 Cri L Jour 782\* (Vol 20) 1933 All 759 (761, 762) : 55 All 985 : 34 Cri L Jour 1211 (DB).

[See (Vol 5) 1918 Lah 332 (333) : 1918 Pun Re No. 9 Cr: 19 Cri L Jour 390.]

[2] Proceedings on the basis of warrant issued without jurisdiction, are void. (Vol 15) 1928 Bom 184 (185, 186) : 52 Bom 151 : 29 Cri L Jour 317. (DB)\* ('26) 27 Cri L Jour 1344 (1344) All.

8. "Until it is cancelled by the Court issuing it."—[1] A warrant of arrest remains in force until it is cancelled by the Court issuing it. (Vol 14) 1927 Lah 744 (745) : 28 Cri L Jour 326.

[2] The Court has a discretion to cancel the warrant and issue a summons instead. ('08) 8 Cri L Jour 187 (187) : 1 Sind L R 69 (DB) \* ('08) 8 Cri L Jour 454 (454) (Lah).

[3] A District Magistrate has no power to direct a Sub-Divisional Magistrate to re-issue a warrant cancelled by him. ('97) 1 Cal W N 650 (651) (DB)\* (Vol 4) 1917 Cal 185 (186) : 18 Cri L Jour 1001 (1001) (DB).

[4] The section does not require that there should be a formal order on the record cancelling the warrant. (Vol 27) 1940 All 178 (179) : 41 Cri L Jour 500.

9. "Or until it is executed."—[1] The fact that the returnable date mentioned in the warrant has expired does not affect its executability after that period. (Vol 15) 1928 Pat 466 (466) : 7 Pat 478 : 29 Cri L Jour 1007 (DB).

[2] When the law has not fixed any period, the presumption is that a warrant retains its validity until it is executed. ('04) 1 Cri L Jour 227 (231, 239) : 28 Bom 129 (SB).

[3] A warrant on which there is an endorsement for bail to be taken for the appearance of an accused on a certain date, does not lapse on the expiry of that date though the discretion to take bail lapses. ('09) 10 Cri L Jour 479 (480) (DB) (Cal).

[4] The force of a warrant of arrest is at an end when the accused is arrested and brought before the Magistrate. ('72) 17 Suth W R Cr 55 (55) (DB) \* ('69) 13 Suth W R Cri I (5) (DB).

[5] A person should not be arrested after he had surrendered and been released on bail. (Vol 4) 1917 Pat 17 (18) : 2 Pat L Jour 487 : 18 Cri L Jour 526 (DB).

15. **Mode of executing a warrant.**—[1] The provisions of the Code relating to the issue and execution of a warrant apply in general to warrants issued under special Acts in the absence of any contrary provisions thereunder. ('08) 7 Cri L Jour 19 (21) : 30 All 60.

#### SECTION 76—Note 1.

[1] A warrant of arrest issued against a recalcitrant witness may direct release on security. ('81) 2 Weir 39 (39).

[2] A warrant not complying with the requirements of sub-S (2) is not in proper form. ('70) 7 Bom H C R Cr 50 (55) (DB).

[3] Date on which person to be arrested is to attend Court, passing without his being arrested—Discretion for bail lapses—Person may be arrested even after that date. ('09) 10 Cri L Jour 479 (480) (DB) (Cal).

[4] Where an endorsement directs the release of the arrested person on his personal recognizance, the police officer executing the warrant is not authorised to take security from any person and a bond so taken will be void. ('06) 6 Cri L Jour 275 (276) (Lah).



77. (1) A warrant of arrest shall ordinarily be directed to one or more police-officers, and, Warrants to whom when issued by a Presidency Magistrate, shall always be so directed; but directed. any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

Warrants to several (2) When a warrant is directed to more officers or persons than one, persons. it may be executed by all, or by any one or more, of them.

[1882—S. 71; 1872—Ss. 161, 161; 1861—Ss. 77, 79].

78. (1) A District Magistrate or Sub-divisional Magistrate may direct a warrant to any Warrant may be directed to landholder, farmer or manager of land within his district or sub-division to landholders, etc. for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit.

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, his land or farm, or the land under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

[1882—S. 78; 1872—S. 162].

Warrant directed to police officer. 79. A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

[1882—S. 79; 1872—S. 165; 1861—S. 80].

#### Section 76 (contd.)

[5] The arresting officer has no power to enquire whether the person under arrest is good for the amount of the security or whether the sureties can keep control over the person arrested. (Vol 13) 1926 Cal 961 (962); 58 Cal 962; 28 Cri L Jour 10 (DB).

[6] A Magistrate cannot issue a warrant of arrest for production of a person before a police officer. (97) 24 Cal 320 (323) (DB).

[7] It is not necessary that a warrant issued for the arrest of a person charged with a bailable offence must contain an endorsement under this section. (Vol 26) 1939 All 156 (156, 157); ILR (1939) All 272; 40 Cri L Jour 283 & (11) 12 Cri L Jour 430 (431) (DB) (Mad).

#### SECTION 77—Note 1.

[1] A warrant addressed to "the sub-inspector of police of X" without mentioning him by name, is perfectly legal. (Vol 5) 1918 Pat 613 (614); 3 Pat L Jour 493; 19 Cri L Jour 747 (DB) & (Vol 11) 1924 Rang 383 (384); 26 Cri L Jour 845 & (Vol 9) 1922 Oudh 224 (225); 25 Oudh Cas 111; 24 Cri L Jour 14.

[2] The section is directory and substantial compliance is sufficient. (96) 1896 Pun Re No. 1 (Cr) page 1 (7) (DB).

[3] The provisions of S. 83 override the express direction contained in this section when the warrant is issued by the Presidency Magistrate. (Vol 27) 1940 Bom 397 (398); 42 Cri L Jour 205; ILR (1941) Bom 16 (DB).

[4] A warrant issued to persons other than police-officer without all conditions in sub-S. (1) being satisfied is illegal. (Vol 15) 1928 Mad 624 (625); 51 Mad 873; 29 Cri L Jour 541 & (70) 5 Beng L R 274 (291) (DB).

#### SECTION 79—Note 1.

[1] The section does not apply to warrants under the following Acts:—

(a) Madras Forest Act. (Vol 15) 1928 Mad 624 (625); 51 Mad 873; 29 Cri L Jour 541.

(b) Burma Gambling Act. (Vol 7) 1920 Low Bur 49 (49, 50); 21 Cri L Jour 9.

(c) Bombay Prevention of Gambling Act, (1909) 10 Cri L Jour 3 (5); 3 Sind L R 56 (DB).

[2] The section applies to warrants issued under the Public Gambling Act, 1867. (108) 7 Cr L Jour 19 (20, 21); 30 All 60 & (Vol 7) 1920 All 150 (151); 42 All 385; 21 Cr L Jour 737 & (Vol 32) 1945 Nag 216 (217); ILR (1915) Nag 649; 47 Cr L Jour 148.

[But see 1895 Pun Re No. 22 Cr p. 59 (60) (DB).]

[3] A special warrant can be executed only by the officer named in it. (Vol 16) 1929 Bom 157 (160); 53 Bom 367; 30 Cr L Jour 595 (DB).

[4] Process servers cannot be regarded as police-officers. (1900) 27 Cal 457 (460) (DB).

[5] An endorsement to the Sub-Inspector of a particular thana will not enable a head constable who is temporarily in charge of the thana to execute the warrant. (13) 14 Cri L Jour 142 (143); 1913 Pun Re No. 16 Cr (DB).

[6] It is not necessary that the authorization should be addressed to the endorsee so long as the authorization is clear. (Vol 18) 1931 Sind 89 (92, 93, 94); 25 Sind L R 117; 32 Cri L Jour 916 (DB).

[7] The official designation of the endorsee is not necessary when his name is given. (Vol 19) 1932 Pat 171 (172, 173); 33 Cri L Jour 706 (DB).

Notification of substance of warrant.

80. The police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

[1882—S. 80; 1872—S. 176; 1861—S. 90.]

81. The police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

[1882—S. 81; 1872—S. 183; 1861—S. 97].

Where warrant may be executed.

82. A warrant of arrest may be executed at any place in British India.

[1882—S. 82; 1872—S. 167; 1861—S. 83].

### Section 79 (contd.)

[8] An endorsement to "the officer in charge of a police-station" without the name of such officer being given is not sufficient. ('99) 4 Cal W N 85 (86) (DB).

[9] An endorsement by merely subscribing initials is not invalid. ('01) 5 Cal W N 447 (448) (DB).

[10] A warrant directed to a Sub-Inspector cannot be endorsed by the head-constable unless he was at that time actually filling the office of the Sub-Inspector. (1900) 27 Cal 457 (459) (DB).

### SECTION 80—Synopsis

1. Shall notify the substance.
2. Show him the warrant if so desired.
3. Effect of non-compliance with the section.

1. Shall notify the substance.—[1] The police officer or other person executing a warrant of arrest is bound to notify the substance of the warrant to the person sought to be arrested. ('96) 23 Cal 896 (898) (DB).

[2] An arrest made without notifying the substance of the warrant is illegal. ('12) 13 Cri L Jour 590 (590) (DB) (Cal).

[3] Where the person arrested has a reasonable opportunity of knowing on what charge he is being arrested, the police-officer need not explain the particulars of the warrant to the accused. (Vol 5) 1918 Pat 613 (615) : 3 Pat L Jour 493 : 19 Cri L Jour 747 (DB) \* (Vol 19) 1932 Pat 171 (175) : 33 Cri L Jour 706 (DB).

[4] It is not necessary that the officer should in his report state the fact of his having notified the substance of the warrant. (Vol 19) 1932 Pat 171 (173) : 33 Cri L Jour 706 (DB).

[5] It is not necessary for the prosecution to prove that the police-officer notified the substance of the warrant to the accused or showed him the warrant. (Vol 27) 1940 Pesh 10 (11) : 41 Cri L Jour 543.

2. Show him the warrant if so desired.—[1] The person sought to be arrested is entitled to see if the person arresting has authority to do so and to ask for inspection of the warrant. ('96) 18 All 246 (248) (DB) \* (Vol 11) 1924 Mad 555 (556) : 47 Mad 442 : 25 Cri L Jour 563 \* ('10) 11 Cri L Jour 128 (129) : 37 Cal 122 (DB).

[2] The police-officer should not proceed to arrest without having the warrant in his possession. (Vol 3) 1916 All 53 (54) : 17 Cri L Jour 413 : 38 All 506.

[3] It is not necessary to show the warrant unless so required by the person sought to be arrested (Vol 26)

1938 All 120 (121) : 39 Cri L Jour 360 \* (Vol 5) 1918 Oudh 162 (162) : 19 Cri L Jour 641.

[4] Where the police-officer merely held the warrant in his hand along with other warrants without showing the person arrested to read the same, it was held that the requirements of the section were not satisfied. ('99) 26 Cal 748 (750) (DB).

[5] For the arrest of a deserter from Army, the production of the written report of the commanding officer before the arrest is made is sufficient compliance with this section. (Vol 30) 1943 Mad 280 (281) : ILR (1943) Mad 827 : 44 Cri L Jour 465.

3. Effect of non-compliance with the section.—[1] An arrest made without complying with the requirements of the section is illegal and a resistance or obstruction thereto is no offence. ('96) 23 Cal 896 (898) (DB) \* ('99) 26 Cal 748 (749, 750) (DB) \* ('12) 13 Cri L Jour 590 (591) (DB) (Cal).

[2] Police-officer entrusted with warrant for arrest of witness—Witness found in the house of A who asked the police-officer to wait when told purpose of his visit—A with help of B endeavouring to remove witness—Police-officer seized witness—Held though provisions of S. 80 were not complied with arrest was legal. (Vol 16) 1929 Cal 174 (175) : 56 Cal 831 : 30 Cr L Jour 703 (DB).

[3] The illegality of an arrest will not vitiate a conviction for any substantive offence with which the person arrested is charged, unless there is a failure of justice within S. 537 of the Code. (Vol 4) 1917 All 85 (86) : 18 Cri L Jour 666.

### SECTION 81—Note 1.

[1] Under the City of Bombay Police Act (4 (IV) of 1902) a person, though arrested under a requisition from the Presidency Magistrate, is in the custody not of the Magistrate but of the police. (Vol 12) 1925 Bom 387 (389) : 49 Bom 623 : 26 Cri L Jour 1181 (DB).

[2] The Court may order the fetters to be removed unless satisfied by a representation from the proper officer that they are necessary. ('69) 4 Mad H C R App lxix (lxix) \* ('71) 8 Bom H C R Cr 126 (151) (DB).

### SECTION 82—Note 1.

[1] Warrants issued by Courts in British Baluchistan can be executed in any place in British India. (Vol 28) 1941 Sind 20 (22) : ILR (1941) Kar 247 : 42 Cri L Jour 326 (FB) (Vol 27) 1940 Sind 154 : 42 Cri L Jour 49 (overruled).

83. (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction it is to be executed.

a(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction.

[1882—S. 83; 1872—S. 168, paras 1, 2 and S. 170, para 1; 1861—Ss. 86, 87].

[a] This sub-section, so far as it applies to the police in the town of Bombay, was repealed by the City of Bombay Police Act, 1902 (Bom. 4 [IV] of 1902) S. 2 (1) and Sch. A.

84. (1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police-officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

(4) This section applies also to the police in the town [\*] of Calcutta a[\* \*].

[1882—S. 84; 1872—S. 168, 170; 1861—S. 84].

[a] The letter "S" and the words "and Bombay" were repealed by the City of Bombay Police Act, 1902 (Bom. 4 [IV] of 1902), S. 2 (1) and Sch. A.

a85. When a warrant of arrest is executed outside the district in which it was issued, the procedure on arrest of person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Commissioner or District Superintendent.

[1882—S. 85; 1872—S. 169; 1861—S. 85].

(a) Ss. 85 and 86, so far as they apply to the police in the town of Bombay, were repealed by the City of Bombay Police Act, 1902 (Bom. 4 [IV] of 1902), S. 2 (1) and Sch. A.

#### SECTION 83—Note 1.

[1] The power of directing the arrest of some person at a place outside the local limits of the jurisdiction of a Court, particularly when that place is far removed from the local limits, should be exercised with the utmost circumspection. (Vol. 27) 1940 Bom. 397 (398); ILR (1941) Bom. 16 : 42 Cri. L. Jour. 205 (DB).

[2] A Magistrate outside British India cannot issue a warrant under this section for the arrest of a person in British India. (Vol. 26) 1939 Pat. 129 (131) : 18 Pat. 121 : 40 Cri. L. Jour. 500 (DB) (Magistrate in Native State) \* (Vol. 28) 1941 Sind. 20 (23); ILR (1941) Kar. 247 : 42 Cri. L. Jour. 326 (FB) (Magistrate in Agency Territories in Baluchistan) \* (Vol. 27) 1940 Pesh. 30 : 41 Cri. L. Jour. 857.

[3] Where a warrant is sent for execution to the Magistrate of a district where a different language from that in use in the district of the issuing Magistrate is in ordinary use, the warrant should be accompanied by a translation, certified by the transmitting Magistrate to be correct, into such other language, or into English. (72) 18 Suth. WR (Cr) Cir. Order No. 2, p. 9. (SB).

[4] Non-bailable warrant issued and addressed to "O-C concerned" without any address, description or occupation of accused—Forwarding not endorsed on margin directing it to the Magistrate of the other Court under a designation by which designation no Magistrate existed—Held in the circumstances that the warrant was invalid. (Vol. 27) 1940 Bom. 397 (399); ILR (1941) Bom. 16 : 42 Cri. L. Jour. 205 (DB).

a86. (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court.

Procedure by Magistrate before whom person arrested is brought. Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76.

1882—S. 86; 1872—S. 170; 1861—[S. 84].

[a] See S. 85, foot-remark (a).

### C.—Proclamation and Attachment.

87. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; and

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

[1882—S. 87; 1872—Ss. 171, 353, para 1; 1861—Ss. 183, 189].

### SECTION 86—Note 1

[1] The Magistrate has to satisfy himself that the person arrested appears to be the person intended by the Court which issued the warrant, and when so satisfied, to direct the removal of the arrested man in custody to the Court which issued the warrant. (Vol 27) 1940 Bom 397 (398) : ILR (1941) Bom 16 : 42 Cri L Jour 205 (DB). (Magistrate not entitled to institute an enquiry under S. 186).

### SECTION 87—Synopsis.

1. Proclamation, when can be issued.
2. Proof of issue of warrant.
3. "Has absconded or is concealing himself."
4. "Not less than thirty days from the date of publishing."
5. Publication of the proclamation—Sub-Section (2).
6. Statement in writing by Court—Sub-Section (3).
7. Revision.

1. Proclamation, when can be issued.—[1] The processes of proclamation and attachment are exceptional remedies and should not be issued as a matter of

course whenever a warrant fails of its effect. (1865) 3 Suth WR Cr 63 (63) (DB).

[2] The issue of proclamation would be illegal where:—

(a) The warrant issued by Magistrate was without jurisdiction. (12) 13 Cri L Jour 796 (797) (DB). (Bom) \* ('93) 1893 Pun Re No. 15 Cr page 67 (69).

(b) The warrant issued did not fulfil the requirements of law. ('09) 5 Nag LR 125 (127, 128) : 10 Cri L Jour 306.

[3] The simultaneous issue of a warrant and proclamation is not legal. (Vol 30) 1943 Pat 366 (369) : 22 Pat 504 : 46 Cri L Jour 322 (DB).

[4] The Court issuing the proclamation must satisfy itself by evidence or otherwise that the person against whom the warrant has been issued has absconded or is concealing himself for the purpose of avoiding the execution of the warrant. (Vol 29) 1942 Mad 289 (290) : 43 Cri L Jour 11 \* (Vol 9) 1922 Lah 475 (476, 477) : 23 Cri L Jour 454 \* ('73) 10 Beng LR App 14 (17) (DB).

2. Proof of issue of warrant.—[1] A warrant of arrest can only be proved by the production of the original or by secondary evidence and not by merely proving a proclamation. (Vol 31) 1944 PC 54 (57) : 71 Ind App 83 : ILR (1945) Mad 237 : ILR (1944) Kar (PC) 273 : 45 Cri L Jour 721 (PC).

88. (1) The court issuing a proclamation under section 87 may at any time order the attachment of property attachment of any property, movable or immovable, or both, belonging to the person absconding. to the proclaimed person.

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Civil Presidency Magistrate within whose district such property is situate.

#### Section 87 (contd.)

##### 3. "Has absconded or is concealing himself"—

[1] A person is said to "abscond" if he conceals himself no matter if he departs from his place or remains in it. (Vol 30) 1913 Oudh 325 (328) : 19 Luck 149 : 44 Cri L Jour 804.

[2] From the mere fact that a person is absent it should not be readily assumed that he is an absconder without due enquiry and notice ('86) 2 Weir 40 (40).

[3] Person taking steps in superior court against issue of warrant cannot be said to be absconding or concealing himself. (Vol 9) 1922 Lah 475 (476, 477) : 23 Cri L Jour 451.

[4] The mere fact that an accused person absconded is not sufficient proof of his guilt. ('10) 11 Cri L Jour 557 558 (DB) (Cal) \* (Vol 2) 1915 Lah 106 (107) : 16 Cri L Jour 155 (DB) \* (Vol 38) 1931 Lah 38 (41) : 32 Cri L Jour 522 (DB) \* (Vol 17) 1930 Oudh 324 (327) : 31 Cri L Jour 1081 \* (Vol 11) 1927 Pat 257 (260) : 28 Cri L Jour 497 (DB).

[5] A person having concealed himself before process is issued and continues to do so after it is issued is said to abscond. ('82) 4 Mad 393 (397) (DB).

4. "Not less than thirty days from the date of publishing"—[1] The proclamation should fix a date not less than thirty days from the date of publication for the appearance of the absconder. Otherwise the proclamation is illegal (05-06) 3 Low Bur Rul 116 (116) \* ('73) 10 Beng LR App 14 (18) (DB) \* (Vol 6) 1919 Lah 57 (59) : 21 Cri L Jour 210 : 1919 Pun Re No. 32 (Cr) (DB) \* ('07) 6 Cri L Jour 332 (333) (Mad) \* (Vol 21) 1934 Lah 987 (988) : 16 Lah 466 : 36 Cri L Jour 457 (DB).

[2] The section being imperative non-compliance with its requirements will render the proclamation and all further proceedings in pursuance thereof null and void. ('95) 5 Mad L Jour 215 (217, 218) (DB) \* ('05) 9 Cal WN coxvi (cecevi) \* ('95) 19 Mad 3 (4, 5) (DB).

5. Publication of the proclamation—Sub-section (2)—[1] The requirements as to publication is mandatory and a non-compliance therewith will render the proclamation null and void. (Vol 6) 1919 Lah 57 (59) : 1919 Pun Re No. 32 Cr : 21 Cri L Jour 210 (DB) \* (Vol 3) 1916 Lah 49 (51) : 1917 Pun Re No. 6 Cr : 17 Cri L Jour 414 \* '95) 19 Mad 3 (4, 5) (DB) \* (1900) 22 All 216 (218) \* ('12) 13 Cri L Jour 293 (294) (DB) (Bom) \* (Vol 25) 1938 Oudh 80 (81) : 39 Cri L Jour 154 (DB).

[See however (Vol 4) 1917 Lah 438 (439) : 1917 Pun Re No. 39: 18 Cri L Jour 979 (DB) (Non-compliance with clause (c) is only an irregularity curable under S. 537 of the Code when there is compliance with Cl (a) and (b) and the absconder is not prejudiced by non-compliance with Cl (c)).

[2] No presumption under S. 114, illustration (e) of the Evidence Act can be drawn that the requirements of the section have been duly observed and proclamation published as provided therein. ('84) 7 Mad 436 (438) \* ('86) 13 Cal 197 (199) (DB).

[See however (Vol 29) 1942 Lah 214 (214) : 43 (L Jour 791 \* (Vol 25) 1938 All 220 (221) : ILR (19: All 386 : 39 Cri L Jour 570.)]

6. Statement in writing by Court—Sub-section (3)—[1] Where no statement in writing is record under sub-s. (3) and there is nothing to show that the provisions of sub-s. (2) have been complied with, the proclamation cannot be considered to be in accord with law. (1900) 22 All 216 (218).

[2] Where neither the proclamation nor a copy it is preserved and the record does not show that all the legal formalities have been complied with, an order confiscation passed under S. 88 would be illegal. ('13 Cri L Jour 293 (294) (DB) (Bom).

[3] The burden of proving that there was due proclamation is upon the prosecution ('84) 7 Mad 436 (4 \* (Vol 4) 1917 Mad 652 (652) : 17 Cri L Jour 78 (D

[4] Court's statement failing to state that proclamation was published on a specified date—Proclamation held was not conclusively proved and Court questioned its legality. (Vol 23) 1936 Pat 249 (250) : Cri L Jour 318 \* (Vol 6) 1919 Lah 57 (59) : 1919 F Re No. 32 Cr : 21 Cri L Jour 210 (DB).

[5] This section does not expressly or by implication make the proclamation equivalent to notice to public of its contents or even to the inhabitants of town or village where it is published. (Vol 31) 1944 54 (57) 71 Ind App 83 : ILR (1944) Mad 237 : I (1944) Kar PC 273 : 45 Cri L Jour 721 (PC).

7. Revision.—[1] Proclamation not complying with requirements—Proceedings can be set aside in revision. ('95) 19 Mad 3 (6) (DB) \* (Vol 6) 1919 Lah (59) : 1919 Pun Re No. 32 (Cr) : 21 Cri L Jour 210 (I \* (Vol 4) 1917 Lah 438 (439) : 1917 Pun Re No. Cr : 18 Cri L Jour 979 (DB).

[2] High Court will not entertain any application on behalf of an accused, against whom a proclamation has been issued, until he has surrendered. ('70) 2 N W JCR 441 (443) (FB).

[3] After surrendering, the proper procedure the accused is to apply to the Magistrate himself in first instance and a revision will lie from the Magistrate's decision on such application. ('70) 2 N W CR 441 (443) (FB).

#### SECTION 88—Synopsis.

1. Object of the Section.
2. Which Court can order attachment.
3. Stage at which attachment can be ordered.
4. Property which can be attached.
5. Mode of attachment.
6. Attachment by Civil Court.
7. Forfeiture of attached property.
8. Sale of attached property.
9. Setting aside sale.
10. Suit to recover property from Government or auction-purchaser, whether lies.
11. Order on claim, whether open to revision.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made—

- (a) by seizure; or
- (b) by the appointment of a receiver; or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or
- (d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to a [the Provincial Government], be made through the Collector of the district in which the land is situate, and in all other cases—

- (e) by taking possession; or
- (f) by the appointment of a receiver; or
- (g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or
- (h) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure.<sup>b</sup>

#### Section 88 (contd.)

1. Object of the section.—[1] The object of the section is to compel an accused person to appear in obedience to a summons or warrant issued by Criminal Courts. (Vol 24) 1937 Pat 642 (642).

2. Which Court can order attachment.—[1] It is only the Court issuing the proclamation that is empowered to order an attachment under this section. (Vol 17) 1930 Pat 347 (347): 31 Cri L Jour 494.

3. Stage at which attachment can be ordered.—[1] The Court can issue a proclamation against an absconding offender under S. 87 and simultaneously order the attachment of his property under this section. (Vol 30) 1943 Pat 366 (366): 22 Pat 504: 46 Cri L Jour 322 (DB) \* (1902) 29 Cal 417 (420) (DB).

[2] Before an order for attachment can be passed a warrant for arrest must have been issued and it must be established that the accused has absconded or concealed himself for the purpose of evading arrest. (Vol 29) 1942 Mad 289 (289, 290): 43 Cri L Jour 11 \* (Vol 30) 1943 Oudh 325 (328): 19 Luck 149: 44 Cri L Jour 804.

[3] When a warrant of attachment is issued under this section a presumption that the proclamation under S. 87 has been issued arises under Evidence Act S. 114, illustration (e). (Vol 25) 1938 All 220 (220): ILR (1938) All 386: 39 Cri L Jour 570.

4. Property which can be attached.—[1] Property subject to a mortgage at the time of attachment—Attachment will operate only in respect of the equity of redemption—Rights of the mortgagee, will not be affected. (Vol 24) 1937 Pat 642 (642).

[2] The share of the defaulting member of an undivided family can be attached and may be realized by a receiver in a suit for partition or otherwise. (Vol 4) 1917 Mad 366 (367): 39 Mad 831: 17 Cri L Jour 296 (FB). (Approving Cr Rev Case No. 560 of 1893 and overruling 2 Weir 43).

[See also (Vol 4) 1917 Pat 505 (505): 18 Cri L Jour 1037.]

[3] A son born to the absconder subsequent to the attachment of his share and before sale is entitled to have his share freed from the attachment. (Vol 4) 1917 Mad 366 (367, 368): 39 Mad 831: 17 Cri L Jour 296 (FB).

[4] The widow of a Hindu coparcener is entitled to maintenance out of the property in the hands of the surviving coparceners and such right can be enforced against the property even after its attachment under this section. (Vol 25) 1938 Bom 321 (324): ILR (1938) Bom 454.

[5] According to the customary law of Punjab, life interest of the absconder alone can be attached under this section. (Vol 12) 1925 Lah 629 (630): 26 Cri L Jour 1148.

[6] A suit by the collaterals after the death of the absconder to recover back the properties from the purchaser is competent. (Vol 2) 1915 Lah 12 (13): 1915 Pun Re No. 52 (DB).

5. Mode of attachment.—[1] The action of a police-officer executing a warrant of attachment under this section in digging the walls or floor to remove the frames embedded therein is not correct and amounts to an irregularity. (Vol 17) 1930 Pat 387 (387): 31 Cri L Jour 937.

6. Attachment by Civil Court.—[1] Attachment by the Criminal Court made subsequent to an attachment by the Civil Court—Sale in pursuance of the former cannot affect the rights of the attaching decree-holder under the latter. (Vol 16) 1929 Bom 200 (200)\* (12) 18 Cri L Jour 568 (569): 6 Low Bur. Rul 57.

[2] If the attachment by the Criminal Court is prior to that of the Civil Court, the former prevails over the latter. (83) 9 Cal 861 (863) (DB).

7. Forfeiture of attached property.—[1] The words "at the disposal of the Provincial Government"

c(6A) If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part:

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by legal representative.

(6B) Claims or objections under sub-section (6A) may be preferred or made in the Court to which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance with the provisions of sub-section (2), in the Court of such Magistrate.

(6C) Every such claim or objection shall be inquired into by the Court in which it is preferred or made:

Provided that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate, as the case may be, subordinate to him.

(6D) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (6A) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but suit shall not be the result of such suit, if any, the order shall be conclusive.

#### Section 88 (contd.)

mean that the properties come under the absolute control of the Provincial Government to dispose of or deal with them in whatever manner it may seem most appropriate and convenient. ('83) 9 Cal 861 (863) (DB) \* ('75) 23 South W R Cr 30 (31) (DB).

[2] The absconder cannot maintain a suit for possession of the confiscated property unless he has otherwise acquired a title to the property subsequent to the order of confiscation. (Vol 10) 1923 Bom 198 (198, 199) (DB).

[3] The Government is a necessary party in a suit brought to enforce a mortgage over the attached property and even if the Government is not impleaded as a party to such a suit, the right of the Government as well as a purchaser from the Government to redeem the mortgage is not lost. (Vol 24) 1937 Pat 642 (642) \* (Vol 17) 1930 Mad 1017 (1020) (DB).

[4] Where the Government has sold the property to a third person before the suit on the mortgage, the purchaser is a necessary party to the suit but not the Government. (Vol 24) 1937 Pat 642 (642).

[5] If the proclaimed person appears or is arrested within the time specified in the proclamation, the attachment ceases (Vol 21) 1934 Pat 181 (182): 13 Pat 317: 35 Cri L Jour 682 (SB).

**8. Sale of attached property.**—[1] Lease in favour of a third person at the time of attachment—Lessee preferring a claim—Sale of the property subject to the right of the lessee to remain in possession until the expiry of the term of the lease should be ordered. ('08) 8 Cri L Jour 260 (261): 1908 Pun Re No. 9 Cr (DB).

**9. Setting aside sale.**—[1] Sales once held under the section cannot be set aside. (1900) 22 All 216 (219) \* ('11) 12 Cri L Jour 142 (143): 1911 Pun Re No. 8 Cr

[But see ('66) 6 South W R Cr 79 (79) (DB).]

[2] The absconder can apply under the next following section for the recovery of the net sale proceeds, provided the requirements of that section are satisfied. (Vol 11) 1924 Lah 420 (421): 24 Cri L Jour 573 \* ('83) 9 Cal 861 (863) (DB).

**10. Suit to recover property from Government or auction-purchaser, whether lies.**—[1] Different views are held as to whether a suit lies at the instigation of the proclaimed offender on the ground that the attachment and sale are in contravention of the provisions of Ss. 87 and 88:—

(a) Suit lies. ('05) 27 All 572 (573, 574): 2 (C) Jour 247 (DB).

(b) Suit does not lie (Vol 15) 1928 Lah 562 (565, 566): 10 Lah 338 (DB) \* ('67) 8 South W R 207 (208) (DB).

[But see (Vol 6) 1919 Lah 57 (59): 1919 Pun No. 32 Cr: 21 Cri L Jour 210 (DB).]

(c) Suit lies if Court exercises powers in excess of powers conferred. ('90) 17 Cal 604: 17 Ind App 40 (PC).

[2] The remedy of preferring a claim by third person under the section is not exclusive, but merely missive. ('13) 40 Ind App 56 (64): 40 Cal 598 (PC).

[3] A third person is not bound to prefer a claim but he can file a suit to set aside the sale proceeds. (Vol 32) 1945 Oudh 104 (104): 20 Luck 254 (I) (Vol 26) 1939 Cal 746 (747): ILR (1939) 2 Cal 52 (Vol 1) 1934 Cri L Jour 134 \* (Vol 25) 1938 Bom 321 (323): (1938) Bom 454.

[4] A third person can maintain a suit against the Government and can recover mesne profits for the period during which the property was at its disposal. ('01) 28 Cal 540 (544, 545) (DB).

[5] Any party, claiming an interest in the property before sale, can obtain a decree of a Civil Court and such decree would be binding against Government. (Vol 1) 1938 Bom 321 (323): ILR (1938) Bom 454.

[6] A suit by a claimant for recovery of money from the sale of attached property comes within the purview of sub-s. (6D). (Vol 29) 1942 Mad 93 (94): 43 Jour 325.

**11. Order on claim, whether open to revision**

[1] Revision lies from an order refusing to return property from attachment on a claim by a third person. (Vol 11) 1924 Lah 617 (618): 25 Cri L Jour 82 \* (Vol 1) 1934 Cri L Jour 260 (262): 1908 Pun Re No. 9 Cr

(6E) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment].

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of a[the Provincial Government], but it shall not be sold until the expiration of six months from the date of the attachment d[and until any claim preferred or objection made under sub-section (6A) has been disposed of under that sub-section], unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

[1882—S. 88; 1872—Ss. 172, 353, paras 2, 3; 1861—Ss. 184, 189].

[a] *Substituted* by A. O. for "Government."

[b] *See now* the Code of Civil Procedure. 1908 (Act 5 [V] of 1908).

[c] Sub-sections (6A) to (6E) were *inserted* by the Code of Criminal Procedure (Amendment) Act, 1928 (18 [XVIII] of 1928, S. 13.

[d] *Inserted, ibid.*

#### Objects and Reasons.

*Sub-sections (6A) to (6E).*—"The sub-sections which the Bill adds to Section 88 imply that the Court which issues an order of attachment or endorses the same under sub-section (2) is to investigate and determine a claim or objection. We think that a limited power to transfer claims and objections for disposal to subordinate Magistrates would be useful, and we have therefore provided [see proviso to sub-section (6c)] that

District Magistrates may transfer such cases to Magistrates not below the rank of Second Class Magistrates, and that Chief Presidency Magistrates may likewise transfer cases to Presidency Magistrates subordinate to them. The other amendments that we have made in this Clause are consequential upon this." S. C. R., [XVIII of 1923].

89. If, within two years from the date of the attachment, any person whose property is or Restoration of attached has been at the disposal of a[the Provincial Government], under sub-section (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

[1882—S. 89; 1872—Ss. 173, 354; 1861—Ss. 185, 190].

[a] *Substituted* by A. O. for "Government".

#### SECTION 89—Synopsis.

##### 1. Scope of the section.

##### 2. "Within two years from the date of the attachment."

##### 3. Who can apply under the section.

1. *Scope of the section*—[1] The burden of proving that he had not such notice of the proclamation as to enable him to attend within the time specified therein lies on the absconder. (Vol 30) 1948 Oudh 325 (328): 19 Luck 149: 44 Cri L Jour-804 \* ('37) 38 Cri L Jour 99 (99) (Pesb) \* (Vol 13) 1926 Lah 662 (663): 27 Cri L Jour 1025 \* (Vol 21) 1934 Lah 987 (988): 16 Lah 466: 36 Cri L Jour 457 (DB) \* ('67) 7 Suth WR Cr 40 (40) (DB) \* ('68) 9 Suth W R Cr 27 (28) (DB).

[2] If the prescribed conditions are satisfied, the absconder is entitled to a restoration of the property attached where it has not been sold, or to the net sale proceeds if the property has already been sold. (Vol 11) 1924 Lah 420 (421): 24 Cri L Jour 573 \* ('11) 12 Cri L Jour 142 (143): 1911 Pun Re. No. 8 Cr.

[3] This section prescribes a remedy where there is a good and legal proclamation but affords no facility for contesting the legality of the proclamation (1900) 22 All

216 (219) \* (Vol 29) 1942 Lah 214 (214): 43 Cri L Jour 791 \* (Vol 21) 1934 Lah 987 (988): 16 Lah 466: 36 Cri L Jour 457 (DB).

[But See (Vol 4) 1917 Lah 438 (439): 1917 Pun Re No. 39 (Cr): 18 Cri L Jour 979 (DB)].

[4] Independently of this section, High Court can in the exercise of its *revisional jurisdiction* go into the question of the legality of proclamation and order restoration of attached property or the delivery of the net sale proceeds. (Vol 29) 1942 Lah 214 (215): 43 Cri L Jour 791 \* (Vol 6) 1919 Lah 57 (59): 1919 Pun Re No. 32 (Cr): 21 Cri L Jour 210 (DB).

[5] The High Court can also under its inherent powers order the attachment to be raised and the property restored in proper cases. (Vol 13) 1926 Lah 662 (663): 27 Cri L Jour 1025 (Land attached without any warrant).

[6] Where the attached property has been sold the applicant for restoration is only entitled to the sale proceeds. (Vol 11) 1924 Lah 420 (421): 24 Cri L Jour 573.

2 "Within two years from the date of the attachment."—[1] The words "within two years from the date of the attachment" qualify not only the word "appears" but also the word "proves" which



*D.—Other Rules regarding Processes.*

Issue of warrant in lieu of, or in addition to summons.

for his arrest—

53. A Court may, in any case in which it is empowered by Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

[1882—S. 90; 1872—S. 118, para 2, Ss. 150, 156, 352, 355, 494, para 1; 1861 Ss. 73, 188, 191, 257, 260,

**Section 89 (contd.)**

is connected with the word "appears" by the conjunction "and" ('13) 11 Cri L Jour 237 (237) (DB) (Bom).

[2] The absconder should not only appear but also "prove" to the satisfaction of the Court within the period of two years that he did not abscond or conceal himself for the purpose of avoiding execution of warrant and that he had no notice of the proclamation. ('13) 14 Cri L Jour 237 (237) (DB) (Bom) \* (Vol 13) 1926 Lah 662 (663) : 27 Cri L Jour 1025.

[3] Where no application is made under this section within two years from the date of the attachment the proper remedy is to apply to the Government. (Vol 11) 1924 Bom 485 (485, 486) : 25 Cri L Jour 1293 (DB).

[Compare (Vol 13) 1926 Lah 662 (663) : 27 Cri L Jour 1025]. (High Court has inherent power to remove attachment when provisions of S 87 have not been complied with).

[4] Where property is forfeited to the Government, it can regret it to any one it thinks fit. (Vol. 10) 1923 Bom 198 (199) (DB).

**3. Who can apply under the section**—[1] The absconder should himself appear and prove that he did not abscond or conceal himself for the purpose of avoiding execution of warrant or that he did not know of the proclamation. ('09) 10 Cri L Jour 260 (260) (DB). (Mysore) \* ('13) 14 Cri L Jour 237 (237, 238) (DB). (Bom). (Even if an application is made on his behalf under this section). \* ('09) 10 Cri L Jour 260 (260) (DB). (Mysore) (Application must be made by absconder himself. His legal representatives have no *locus standi* to do so.)

**SECTION 90—Synopsis.****1. Scope.**

2. "May . . . issue, . . . a warrant for his arrest."

3. "After recording its reasons in writing."

4. Form of warrant.

**1. Scope.**—[1] District Magistrate has no power to issue a summons to the accused while an order of discharge by a Subordinate Magistrate remains in force. ('93) 1893 Pun Re No. 15 Cr p 67 (69).

[2] Court cannot issue a summons for the appearance of a witness before a police-officer. ('97) 24 Cal 320 (323) (DB).

[3] The Court cannot issue a warrant of arrest against a party who fails to appear in pursuance of an order passed under S 145, sub-s. (1) of the Code. (1901) 5 Cal W N 71 (72). (DB).

[See also (Vol 12) 1925 Cal 822 (824) : 52 Cal 721 : 28 Cal L Jour 1194 (F B)].

2. "May . . . issue . . . a warrant for his arrest".—[1] This section does not authorise Court to issue warrant without discrimination. 13 South W R Cr 1 (5, 6) (DB).

[2] Where the discretion is improperly exercised and none of the conditions contained in clause (b) is present, the issue of a warrant is ill. ('09) 10 Cri L Jour 266 (309) : 5 Nag L R ('70) 11 South W R Cr 20 (20) (DB).

[3] The Court ought not, in a case under S. 4 of the Penal Code, straightway, without issuing a summons, issue a warrant of arrest to procure the appearance of the complainant's wife as a witness. ('07) 11 Jour 275 (275) (Lah).

[4] Where summons has been served and the named persons does not appear, the Court must, in issuing a warrant of arrest be satisfied that the summons has been served in good time and duly. (V 1941 Pat 266 (207) : 42 Cri L Jour 103.

[5] The report of a police-station writer is admissible as evidence of due service under clause ('05) 663 3 Low Bar Bul 116 (116).

(6) Where a person is absenting himself in respect to a summons on the ground that he has sent a telegram intimating to the Court through his mother that the High Court has stayed further proceedings in the matter the Court will be justified in issuing a warrant for arrest in the case. ('13) 14 Cri L Jour 238 (238) (DB) (Cal).

[7] A witness arrested under a warrant and brought before a Magistrate can be enlarged on bail. (Weir 39 (39)).

**3. "After recording its reasons in writing".**—[1] As to whether recording of reasons in writing before issuing a warrant of arrest is mandatory and whether omission to do so is illegality, following views are held :—

(a) It is mandatory and omission to do so vitiates a warrant. (Vol 3) 1916 Mad 1063 (1064, 1065) Mad 1088 : 17 Cri L Jour 132 \* (Vol 6) 1919 F (68) : 19 Cri L Jour 443 (This case was decided on the authority of 38 Cal 789 : 12 Cri L Jour 409 has been overruled by (Vol 11) 1924 Cal 1 : 51 Cal 24 Cri L Jour 881 (F B)).\* Oudh S C 99 (113).

(b) It is directory and omission to do so is irregularity. (Vol 7) 1920 All 245 (246) : 22 Jour 111 \* (Vol 11) 1924 Cal 1 (8, 9, 17) : 51 Cal Cri L Jour 881 (FB) (38 Cal 789 : 12 Cri L Jour overruled).

**4 Form of warrant.**—[1] Warrant issued against person charged with bailable offence—Direction for of arrested person on furnishing security for appearance is in discretion of Court. (Vol 26) 1939 A (158, 157) : 11 R (1989) All 272 : 40 Cal T. Jm

91. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court.

[1882—S. 91.]

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

[1882—S. 92; 1872—S. 208, para 2.]

Provisions of this Chapter generally applicable to summonses and warrants of arrest.

93. The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

[1882—S. 93; 1872—S. 158 para 1, 185; 1861—Ss. 75, 99.]

*a[E—Special Rules regarding processes issued for service or execution outside British India and processes received from outside British India for service or execution within British India.]*

93-A. (1) Where a Court in British India desires that a summons issued by it to an accused person shall be served at any place outside British India within the local limits of the jurisdiction of a Court established or continued by the authority of the Central Government or the Crown Representative in any part of India, it shall send such summons, in duplicate, by post or otherwise, to the presiding officer of that Court to be served.

(2) The provisions of section 74 shall apply in the case of a summons sent for service under this section as if the presiding officer of the Court to whom it was sent were a Magistrate in British India.]

[a] Sections 93-A to 93-C and the heading E were inserted after section 93 by the Code of Criminal Procedure (Amendment) Act, 1941 (14 [XIV] of 1941), S. 2. [20-11-1941]

#### Objects and Reasons.

In the decision reported in (Vol 27) 1940 Sind 154 the Court of Judicial Commissioner of Sind pointed out that under the law as it stood there was no legal means short of extradition for enforcing the presence in British Indian Courts (or in Courts in any part of India outside British India) of accused persons who were for the time being in any part of India outside British India (or in British India as the case might be). Extradition was a cumbersome procedure and a recourse to it is not satisfactory from the practical standpoint

of the administration of criminal justice as cases of this kind are of daily occurrence. The new sections 93-A to 93-C inserted by Act 14 of 1941 provide for an efficient and expeditious method to secure the presence of an accused person in a Court in British India who for the time being is in a part of India outside British India but within the local limits of the jurisdiction of a Court established or continued by the authority of the Central Government or the Crown Representative and *vice versa*.—See S.O R. 1641,

#### SECTION 91—Note 1.

[1] A bond for appearance may be taken from an accused person charged with an offence or from a witness. (Vol 6) 1919 All 158 (158) : 20 Cri L Jour 384.

[2] A bond may be taken even from a *mukhtear* for the appearance of a witness. ('01) 1901 All W N 35 (35, 36).

[3] There are other provisions in the Code enabling one Magistrate to take a bond from a person for appearance before another Court. (1900) 2 Bom L R 589 (591) (DB).

[4] The section does not empower the Magistrate to go to the houses of persons and compel them to execute bonds for appearance in Court. ('86) 37 Cri L Jour 887 (887) (Nag).

[5] In the case of a witness who is not disinclined to appear when called for, an ordinary recognisance is

enough and he should not be called upon to furnish bail for his appearance. ('94) 21 Cal 642 (663, 664) (DB).

[6] A verbal order to a witness to attend on a particular day is a valid order, the disobedience of which will be punishable under S. 174 of the Penal Code. ('05) 1 Weir 88 (88).

#### SECTION 92—Note 1.

[1] The section will not apply to a case where prior to the time fixed for the appearance, arrest by warrant is sought to be effected. (Vol 3) 1916 Mad 1063 (1064) : 38 Mad 1088 : 17 Cri L Jour 132.

[2] Where a witness who is bound over fails to appear in Court, it is for the court and not for the party to take steps to compel his attendance. (Vol. 25) 1938 Nag 103 (105) : 39 Cri L Jour 62.

#### SECTION 93—Note 1.

[1] A Magistrate can admit to bail a recalcitrant witness arrested under S. 90. ('05) 2 Weir 39 (39).

a[93.B] Notwithstanding anything contained in section 82, where a Court in British India desires that a warrant issued by it for the arrest of an accused person should be executed at any place outside British India within the local limits of the jurisdiction of a Court established or continued by the authority of the Central Government or the Crown Representative in any part of India, it may send such warrant, by post or otherwise, to the presiding officer of that Court to be executed.]

[a] Sections 93-A to 93-C and the heading E were inserted after Section 93 by the Code of Criminal Procedure (Amendment) Act, 1941 (14 [XIV] of 1941), S. 2. [20-11-1941]

a[93.C. (1) Where a Court has received for service or execution a summons to, or a warrant for the arrest of an accused person, issued by a Court established or continued by the authority of the Central Government or the Crown Representative in any part of India outside British India, it shall cause the same to be served or executed as if it were a summons or warrant received by it from a Court in British India for service or execution within the local limits of jurisdiction.

(2) Where any warrant of arrest has been so executed the person arrested shall so far possible be dealt with in accordance with the procedure prescribed by sections 85 and 86.]

[a] Sections 93-A to 93-C and the Heading E were inserted after Section 93 by the Code of Criminal Procedure (Amendment) Act, 1941 (14 [XIV] of 1941), S. 2. [20-11-1941]

## CHAPTER VII.

### OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

#### A.—Summons to produce.

94. (1) Whenever any Court, or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to any person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

#### SECTION 93C—Note 1.

[1] Courts in British Baluchistan cannot send their warrants for execution to Courts in British India, even though the Code had been extended to that territory. (Vol. 28) 1941 Sind 20 (23): ILR (1941) Kar 247: 42 Cri L Jour 326 (FB).

#### SECTION 94—Synopsis.

1. Scope of the Section.
2. "Court" meaning of.
3. "Document or thing".
4. Effect of converting the thing, the subject-matter of an offence, into cash.
5. "Is necessary or desirable".
6. "Such Court".
7. "May issue summons."
8. To whom summons or order should be issued.
9. Where the document or thing is in the possession of an accused person.
10. Person having a lien on the thing ordered to be produced.
11. Summons or order to attend and produce.
12. Person summoned, if a witness.
13. Seizure of account books by the police.
14. Inspection of things or documents produced.
15. Documents produced, if can be compelled to be put in evidence.
16. Security for production.
17. Document protected under S. 126, Evidence Act.
18. Bankers' books.
19. Effect of non-compliance with an order under the section.
20. Revision.

1. Scope of the section.—[1] In order to compel the production of a document or thing before a Court or a police-officer, it is essential that such production is considered necessary or desirable for the purpose of any investigation, inquiry trial or other proceeding under the Code by or before such Court or officer.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

[1882—S. 94; 1872—S. 365.]

#### Section 94 (contd.)

(10) 11 Cri L Jour 525 (526) : 38 Cal 68 (DB) \* (11) 12 Cri L Jour 175 (177) : (All \* ('03) 7 Cal WN 522 (524) : (DB)\* (Vol 21) 1934 Nag 142 (143) : 30 Nag LR 298 : 85 Cri L Jour 991 \* (Vol 22) 1935 Sind 13 (19) : 29 Sind LR 92 : 36 Cri L Jour 581 (FB).

[2] It is not necessary that investigation, inquiry, trial or other proceeding should be pending before Court or officer, at the time the process for production is issued. It may be issued even before proceedings of any kind are initiated and in view of an enquiry about to be made by him under the Code. (12) 13 Cri L Jour 693 (700) : 39 Cal 952 : 39 Ind App 163 (PC) \* (Vol 22) 1935 Sind 13 (19) : 29 Sind LR 92 : 36 Cri L Jour 581 (FB).

[3] Section 257 does not control or limit the power of the Court to exercise its discretion in using the machinery provided by this section. (Vol 22) 1935 Sind 13 (18, 19) : 29 Sind LR 92 : 36 Cri L Jour 581 (FB).

[4] Discretion given by this section may be exercised in a trial under the provisions of chapter XXI, before the trial has reached the stage indicated by section 257. (Vol 22) 1935 Sind 13 (18, 19) : 29 Sind LR 92 : 36 Cri L Jour 581 (FB).

2. "Court", Meaning of.—[1] It has been held that a Civil Court conducting an enquiry under S. 476 of the Code, does not cease to be a Civil Court and therefore, cannot have recourse to this section in such proceedings. (Vol 29) 1942 Nag 73 (73) : ILR (1942) Nag 667.

3. "Document or thing".—[1] The words "document or thing" are general and cover every document or thing provided the production and inspection thereof are considered necessary or desirable or will serve the ends of justice in any investigation inquiry, trial or other proceeding before a Court or police-officer. (Vol 1) 1914 Lah 587 (590) : 1914 Pun Re No. 36 (Cri) : 16 Cri L Jour 225. \* ('92) 19 Cal 52 (64) (DB).

[See also ('89) 13 Mad 18 (21) (DB).]

[2] The words "document or thing" "will include not only documents or things which form the subject of the offence under investigation but also those which are or can be used as evidence in support of the prosecution. ('08) 5 Bom LR 980 (982) (DB) \* (Vol 21) 1934 Bom 74 (76) : 58 Bom 152 : 35 Cri L Jour 1028 (DB).

4. Effect of converting the thing, the subject matter of an offence, into cash.—[1] A paid Rs. 1,70,000 in 17 notes of Rs. 10,000 each—In respect of notes A accused of criminal breach of trust—Accused thereafter cashed five of these notes through third party—On application under this section against accused and third person for production of this amount. Held that if the proceeds could be reasonably connected with subject-matter of the charge, Magistrate has power to order their production in Court. ('92) 19 Cal 52 (61, 62) (DB).

5. "Is necessary or desirable".—[1] Whether production of document or thing is necessary or desirable is to be decided by Court before issuing summons. (Vol 30) 1943 Sind 51 (53) : 44 Cri L Jour 324 : ILR (1942) Kar 292. (DB)\* ('08) 5 Bom LR 980 (982) (DB)\* ('88) 15 Cal 109 (141) (DB).

[See also (Vol 7) 1920 Cal 349 (349) : 47 Cal 647 : 21 Cri L Jour 577 (DB).]

[2] Document or thing called for may turn out to be wholly irrelevant to the inquiry; but no long as it is considered necessary or desirable for purposes of inquiry the power is there. ('92) 19 Cal 52 (64) (DB).

[3] Where the relevancy of the documents asked for does not speak for itself, and the application itself discloses no grounds why production of the documents is necessary or desirable, it is the duty of the Magistrate to consider whether their production is necessary or desirable, and it is not open to him to evade his responsibility on the plea that he might have to hear the nature of the defence of accused. (Vol 30) 1943 Sind 51 (54) : 44 Cri L Jour 324 : ILR (1942) Kar 292 (DB).

6. "Such Court".—[1] Magistrate cannot, on a telegram from another Magistrate requesting him to seize certain books of account of a person in the jurisdiction of the former, issue a summons for their production before himself ('97) 1897 Rat 880 (880).

7. "May issue summons".—[1] The issue of a summons under this section is in the discretion of Court to be exercised judicially (Vol 27) 1940 Bom 361 (361) : ILR (1940) Bom 768 : 42 Cri L Jour 58 (DB).

[2] In determining whether production of a particular document or thing is necessary or desirable, Court has to satisfy itself that the document or thing has a bearing upon, and is relevant to the case. (Vol 28) 1941 Bom 259 (260) : ILR (1941) Bom 492 : 42 Cri L Jour 831 (FB)\* (Vol 23) 1936 Nag 250 (251) : ILR (1937) Nag 165 : 38 Cri L Jour 482 \* ('08) 5 Bom LR 980 (982) (DB) \* (Vol 21) 1934 Bom 74 (76) : 58 Bom 152 : 35 Cri L Jour 1028 (DB).

[3] The exercise of discretion should not conflict with policy of Legislature, as disclosed in S. 162 of the Code and in Ss. 123 to 125 of the Evidence Act. (Vol 27) 1940 Bom 361 (361) : ILR (1940) Bom 768 : 42 Cri L Jour 58 (DB).

8. To whom summons or order should be issued.—[1] Any person in whose possession or power a document or other thing is believed to be, the production of which is considered necessary or desirable, may be summoned to produce it ('88) 15 Cal 109 (122) (DB).

[2] A person need not be a party to the proceedings ('92) 19 Cal 52 (64) (DB).

[3] The Court can take an order for discovery against the following persons:

(a) Person suspected though not accused. (Vol 6) 1919 All 207 (208) : 20 Cri L Jour 174.

## Section 94 (contd.)

(b) Third party such as a solicitor. ('26) 37 Cri L Jour 825 (825) : 62 Cal 1037 (DB) \* ('92) 19 Cal 52 (64) (DB).

(c) Police (Vol 12) 1925 Mad 424 (425) : 26 Cri L Jour 426.

(d) Public officer. (Vol 27) 1910 Mad 746 (747).

9. Where the document or thing is in the possession of an accused person.—[1] The word "person" includes accused persons also. (Vol 1) 1914 Lah 587 (588, 589) : 1914 Pun Re No 36 Cr : 16 Cri L Jour 225 \* (Vol 5) 1918 Pat 590 (592) : 19 Cri L Jour 217 \* ('92) 19 Cal 52 (64) (DB) \* (Vol 1) 1914 Cal 256 (258) : 41 Cal 261 : 14 Cri L Jour 405 (DB).

[But see ('08) 8 Cri L Jour 224 (225) (DB).]

[2] Order for production can be made against accused persons notwithstanding that such production might tend to incriminate them (Vol 2) 1915 Mad 17 (17) : 37 Mad 112 : 13 Cri L Jour 193.

10. Person having a lien on the thing ordered to be produced.—[1] Person in possession of articles ordered to be produced having lien over them—Power of Court to order their production not affected—No sufficient reason for their non production. ('36) 37 Cri L Jour 825 (826) : 62 Cal 1037 (DB) \* ('92) 19 Cal 52 (61) (DB).

11. Summons or order to attend and produce.—[1] Magistrate should not make an order for production unless there are materials before him to justify his doing so ('89) 15 Cal 109 (111) (DB).

[2] The summons should distinctly specify the particulars of the document or thing called for. ('84) 15 Cal 109 (135) (DB) \* ('11) 12 Cri L Jour 8 (9) : 38 Cal 304 (DB).

[3] Police officer desiring to make order for production of documents must issue written order for that purpose. (Vol 30) 1943 Lah 28 (31) : I L R (1943) Lah 805 : 44 Cri L Jour 301 (DB).

12. Person summoned, if a witness.—[1] Person summoned merely to produce document or thing appearing in Court for its production—He does not thereby become witness—He cannot be cross examined unless and until cited as a witness in the proceedings. See (Vol 24) 1937 Oudh 381 (347) : 34 Cri L Jour 491.

13. Seizure of account books by the police.—[1] Magistrate on taking cognizance of a complaint thinking that any account books forming subject-matter of the charge are necessary or desirable for purposes of an enquiry or trial thereon—He may issue a summons for their production—But he is not competent to pass order directing police to take possession of the same. ('10) 11 Cri L Jour 525 (526) : 38 Cal 68 (DB).

14. Inspection of things or documents produced.—[1] The jurisdiction of the Court to order the production of a document or thing carries with it the jurisdiction to allow the parties to inspect the documents or things produced. ('88) 15 Cal 109 (128, 143) (DB) \* (Vol 1) 1914 Lah 587 (589) : 1914 Pun Re No. 36 (Cr) : 16 Cri L Jour 225 \* (Vol 22) 1935 Sind 13 (20) : 29 Sind L R 92 : 36 Cri L Jour 581 (FB).

[2] Accused keeping his account books in his solicitor's office—Magistrate cannot make order for inspection thereof in solicitor's office—They must first be produced in Court. ('03) 5 Bom L R 978 (979) (DB).

[3] The inspection ought to be made in the presence of the person producing document or thing and

the Magistrate should give definite instructions as where and when the inspection is to be held and which officer. (Vol 7) 1920 Cal 349 (350) : 47 : 847 : 21 Cri L Jour 577 (DB).

[4] Usually, inspection should only be allowed of particular documents shown to be relevant and of documents in bulk. (Vol 28) 1941 Bom 259 (260) 1LR (1941) Bom 492 : 42 Cri L Jour 831. (F (Decision of Broomfield and N. J. Wadia JJ. on p. 1192 in 39 Bom L R 1187 overruled) \* (Vol 25) 19 Bom 33 (35) : I L R (1938) Bom 119 : 39 Cri L Jour 207 (SB). (Dissenting from I L R (1938) Bom 31).

[5] Party producing documents in compliance with Court's order is not precluded from objecting to the subsequent inspection. (Vol 25) 1938 Bom 33 (34) 1LR (1938) Bom 119 : 39 Cri L Jour 207 (SB).

[6] Person making specific charge against another. This does not entitle him to an inspection of letters or of books of a third party—Party seeking inspection must make out a *prima facie* case in support of his charge and in support of his allegation that documents in question would be relevant to support that charge. (Vol 28) 1941 Bom 259 (260) : 42 Cri L Jour 831 : I L R (1941) Bom 492 (FB) \* (Vol 25) 19 Bom 33 (36) : I L R (1938) Bom 119 : 39 Cri L Jour 207 (SB). (Dissenting from I L R (1938) Bom 31).

15. Documents produced, if can be compelled to be put in evidence.—[1] Accused summoned produce a document and the same inspected by prosecution—Accused cannot insist upon prosecution putting it in evidence—It is for prosecution to determine whether it is to be put in evidence or not. ('88) 15 Cal 109 (126, 143) (DB).

[See also (Vol 20) 1933 Cal 65 (66) : 60 Cal 34 34 Cri L Jour 283 (DB).

16. Security for production.—[1] The section does not enable a Court to demand security for production of the articles when required. The Court cannot issue a summons for their production in Court. ('02) Cal W N 522 (524) (DB).

17. Document protected under S. 126, Evidence Act.—[1] Sub-section (2) does not exempt documents protected under S. 126, Evidence Act, and the production of such documents is incumbent under S. 126 of the Evidence Act, notwithstanding any objection which there may be as to the production or admissibility. The validity of the objection has to be decided by the Court after production. (Vol 26) 1939 A 911 (914) : 41 Cri L Jour 186.

18. Bankers' Books.—[1] Officer in charge of police-station conducting an investigation is entitled to inspect bankers' books even without an order of Court. Section 5, Bankers' Books Evidence Act does not prevent him from doing so. (Vol 24) 19 Lah 160 (162) : 17 Lah 593 : 38 Cri L Jour 435.

[2] Enquiry or trial before a Magistrate.—Question of production and inspection of bankers' books in a proceeding would be governed by the Bankers' Books Evidence Act, and not by this section. (Vol 1938 Bom 33 (35) : I L R (1938) Bom 119 : 39 Cri L Jour 207 (SB). (Dissenting from I L R (1938) Bom 31).

[3] Inspection of banker's books under the Bankers' Books Evidence Act—*Prima facie* case must be made out for thinking that there is some matter on which the books of the bank are bound to be relevant. (Vol 1938 Bom 33 (37) : I L R (1938) Bom 119 : 39 Cri L Jour 207 (SB).

95. (1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

[1882—S. 95 ; 1872—S 369].

#### B.—Search-warrants.

96. (1) Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition,

or where such document or thing is not known to the Court to be in the possession of any person.

or where the Court considers, that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

#### Section 94 (contd.)

[4] Commercial concerns other than banks are equally entitled to protection from disclosure of matters which have nothing to do with the case before the Court. (Vol 30) 1943 Sind 51 (53) : 1 L R 1942 Kar 292 : 44 Cri L Jour 324 (DB).

19 Effect of non-compliance with an order under the section.—[1] Summons under this section not complied with—Search-warrant may be issued under S. 96, ('03) 5 Bom L R 978 (979) & ('88) 15 Cal 109 (122) (DB) & (Vol 1) 1914 Lah 587 (589) : 1914 Pun Re No. 36 Cr: 16 Cr L Jour 225 & (Vol 2) 1915 Mad 17 (18) : 37 Mad 112 : 13 Cri L Jour 493.

[2] Summons issued without Court considering it necessary or desirable for the purposes of any investigation, trial or other proceeding—It is illegal and a disobedience thereof is not punishable under S. 175, Penal Code. (Vol 5) 1918 Pat 590 (592) : 19 Cri L Jour 217.

20. Revision.—[1] Magistrate either refusing to exercise discretion vested in him by law or exercising that discretion in an improper manner or on improper grounds—High Court can interfere in revision. (Vol 27) 1940 Bom 361 (361, 362) : 1 L R (1940) Bom 768 : 42 Cri L Jour 58 (DB).

[2] Magistrate refused erroneously to make an order for production of certain currency notes in the possession of the accused and his solicitor—High Court set aside order and directed the Magistrate to proceed according to law. ('92) 19 Cal 52 (60) (DB).

#### SECTION 96—Synopsis.

1. Scope of the section.
2. "Court".
3. "Has reason to believe."
4. Record of reasons.

5. "Person," if would include an accused person.

6. "Document or thing."

7. General search or inspection.

8. "May issue a search-warrant."

9. Seizure without search-warrant.

10. Search-warrants for the purposes of attachment.

11. Search-warrants under special or local laws.

12. Security for production.

13. Inspection.

14. Power to search includes power to take into possession.

15. Power to invoke aid in reading documents.

16. Form of search-warrant.

17. Who may make the search.

18. Resistance to illegal search.

19. Revision.

1. Scope of the Section.—[1] The first two clauses of sub-s. (1) relate back to and are governed by the provisions of Ss 94 and 95. ('98) 22 Bom 949 (956) (Overruled on another point by 39 Cal 953 : 39 Ind App 163 : 13 Cri L Jour 693 (PC)) \* ('90) 13 Mad 19 (20).

[2] Third clause of sub-s. (1) which provides for a general search is independent of sections 94 and 95. (Vol 21) 1934 Bom 104 (108) : 35 Cri L Jour 1024 (DB).

[3] Breach of a hire-purchase agreement in respect of a motor bus is not a criminal matter and an order of a Magistrate for the issue of a search-warrant for the

(2) Nothing herein contained shall authorize any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the Postal or Telegraph authorities.

[1882—S. 96; 1872—Ss. 366, 368 paras 1 to 3369 para 1; 1861—S. 114.]

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

[1882—S. 97; 1872—S. 366 para 4; 1861—S. 114.]

#### Section 96 (contd.)

seizure of the bus is without jurisdiction. (Vol 26) 1939 Cal 45 (45, 46) : 10 Cri L Jour 216 (DB).

2. **Court.**—A Magistrate acting judicially is a Court within the meaning of the Code. (Vol 6) 1919 Mad 620 (622) : 42 Mad 96 : 20 Cri L Jour 90 \* (12) 13 Cri L Jour 693 (700) : 39 Cal 953 : 39 Ind App 163 (PC). (Reversing : 36 Cal 433 which confirmed on appeal 12 Cal WN 973). \* (Vol 3) 1916 Lah 231 (233) : 1916 Pun Re No. 34 Cr : 17 Cri L Jour 491 (DB).

[2] In order that action may be taken under this section, there need not be any proceedings pending before a Magistrate. Schedule V, Form No. 8 shows that a search-warrant may be issued before proceedings of any kind are initiated and in view of an enquiry about to be made. (12) 13 Cri L Jour 698 (700) : 39 Cal 953 : 39 Ind App 163 (PC).

3. **"Has reason to believe."**—Act of issuing a search-warrant is a judicial act. (12) 13 Cri L Jour 693 (700) : 39 Cal 953 : 39 Ind App 163 (PC).

[2] Before issuing search warrant Magistrate is bound to apply his mind to the facts and weigh the circumstances and then make up his mind on the question (Vol 5) 1918 Mad 587 (587) : 18 Cri L Jour 837. \* (88) 15 Cal 109 (134) \* (Vol 7) 1920 Cal 43 (44) : 47 Cal 597 : 21 Cri L Jour 313 (DB) \* (03) 5 Bom L R 980 (982) (DB).

[3] Mere statement in an affidavit that, in the opinion of deponent, a summons may not have the desired effect or a mere statement by a police-officer that it is necessary to issue a search-warrant does not justify issue of search-warrant (Vol 5) 1918 Mad 587 (587) : 18 Cri L Jour 837 \* (Vol 7) 1920 Cal 43 (44) : 47 Cal 597 : 21 Cri L Jour 313 (DB) \* (Vol 16) 1929 Lah 837 (838) : 31 Cri L Jour 272.

[4] It is a condition precedent to the issue of a search-warrant under this section that one or other of the circumstances mentioned in the section should exist. In absence of any such circumstances issue of search-warrant is illegal. (03) 5 Bom LR 1032 (1033) (DB) \* (11) 12 Cri L Jour 175 (177) (All) \* (Vol 3) 1916 Lah 274 (275) : 17 Cri L Jour 60 \* (88) 15 Cal 109 (141) (DB) \* (Vol 7) 1920 Cal 352 (353) : 21 Cri L Jour 573 (DB).

4. **Record of reasons.**—[1] It is necessary that some record ought to be kept by the Magistrate to enable the High-Court to form an opinion as regards the materials upon which the Magistrate has acted, in issuing search-warrant under this section. (Vol 7) 1920 Cal 352 (353) : 21 Cri L Jour 573 (DB) (Per Choudhury J.) \* (Vol 3) 1916 Lah 274 (275) : 17 Cri L Jour 60.

[See also (Vol 5) 1918 Mad 587 (587) : 18 Cri L Jour 837.]

5. **"Person," if would include an accused person**—[1] A search warrant can be issued against accused person also if circumstances specified in the section exist (Vol 1) 1914 Lah 587 (588, 589) : 1914 Pun Re No. 36 Cr : 16 Cri L Jour 225 (DB) (Dissenting from 12 Cri L Jour 98 \* (88) 15 Cal 109 (123, 125, 141) (DB).

6. **"Document or thing."**—[1] When the premises to be searched are those of an accused person, the warrant need not be only for the finding of the document, etc., in respect of which the alleged offence has been committed but also may be for any document or thing, the production and inspection of which are necessary and desirable or will serve the ends of justice. (Vol 1) 1914 Lah 587 (590) : 1914 Pun Re No. 36 Cr : 16 Cri L Jour 225.

[2] A warrant for the production of a person cannot be issued under this section (07) 6 Cri L Jour 38 (39) (DB).

[3] The word "thing" would not include the configuration of a wall or any place inside a house. (Vol 15) 1928 All 185 (186) : 29 Cri L Jour 272.

7. **General search or inspection**—[1] A general search-warrant can only be issued if the Court considers that the purposes of any enquiry, trial or other proceeding under the Code would be served by such search. (Vol 21) 1924 Bom 101 (107) : 35 Cri L Jour 1024 (DB).

[2] A warrant may be issued for the purposes of an enquiry about to be made. (Vol 27) 1940 Cal 97 (100) : ILR (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB) \* (Vol 21) 1931 Bom 101 (107) : 35 Cri L Jour 1024 (DB) \* (Vol 7) 1920 Cal 352 (353) : 21 Cri L Jour 573 (DB) (Newbould, J. Search warrant may be issued during police investigation. Chaudhuri, J., contra.)

[3] The words "inquiry, trial or other proceeding under this Code" in cl (3) subs. (1) will not include an investigation. (Vol 27) 1940 Cal 97 (100) : ILR (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB) \* (Vol 21) 1937 Rang 203 (208) : 38 Cri L Jour 983.

8. **"May issue a search-warrant"**.—[1] Issue of a search-warrant under this section is in the discretion of the Court. The power to issue search-warrant should not be exercised without full appreciation of the gravity of the step and without coming to the conclusion that it is really necessary for the ends of justice; where search warrant is sought to be issued on the basis of any information furnished to the Magistrate he should, if possible, examine the information oath. (11) 12 Cri L Jour 175 (177) All \* (10) 11 Cri L Jour 535 (536) (DB) (Mad) \* (Vol 27) 1940 Cal 97 (101) : ILR (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB).

[2] A mere statement of counsel on behalf of a prosecuting complainant or a mere application by the

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police based on a telegram received by them should not be treated as information on which a magistrate is entitled to act. ('11) 12 Cri L Jour 175 (178) (All) \* ('98) 22 Bom 949 (956) (DB) \* (Vol 27) 1940 Cal 97 (101) : ILR (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB).

[3] Where action is taken on a complaint the Magistrate need not wait until a preliminary enquiry is held and all witnesses for prosecution are examined and cross-examined. Sometimes a delay in issuing the warrant may tend to defeat the purpose for which the warrant is issued. In such cases it should be issued as early as possible ('90) 13 Mad 18 (20) (DB).

[4] Case of theft—Application made for issue of a search warrant with the object of securing for the purpose of the trial, identification of the property and to ascertain whether it was really in the possession of the accused—*Held* that, delay of three weeks in the issue of the warrant was not proper. (Vol 6) 1919 Cal 959 (960) : 19 Cri L Jour 707 (DB).

9. Seizure without search-warrant.—[1] Order calling upon the police to take possession of account books in the possession of a certain person without issuing a search-warrant is illegal. ('10) 11. Cr. L Jour 525 (526) : 38 Cal 68 (DB).

[2] Sub-divisional Magistrate making order for search and seizure of certain articles without issuing a search-warrant *held* though order illegal, it was within the jurisdiction of the sub-divisional Magistrate under S. 1 of the Judicial Officers' Protection Act [18 (XVIII) of 1850]. (Vol 25) 1938 Cal 177 (178) : ILR (1938) 1 Cal 581 (DB).

[3] Properties not mentioned in the warrant also seized and produced before the Court.—They cannot be considered to be properly before the Court ('88) 15 Cal 109 (144) (DB).

10. Search-warrants for the purposes of attachment.—[1] Property not alleged to be stolen being in the hands of third parties—Search-warrant for its production can only be for purpose of evidence.—It ought not to be granted for sole purpose of attaching property the title to which is in dispute. ('93) 1898 Rat 677 (679) (DB).

11. Search-warrants under special or local laws.—The procedure under this Code has been held to apply to searches held in pursuance of the provisions of the following Acts.

(a) The Indian Arms Act, 11 (XI) of 1878, Ss. 25 and 30 (Vol 6) 1919 Mad 620 (621) : 42 Mad 96 : 20 Cri L Jour 90 (DB) \* ('39) 36 Cal 433 (475) (SB) (Reversed on another point by the Privy Council in 13 Cri L Jour 693).

(b) The Indian Copyright Act, 3 (III) of 1914 (Vol 7) 1920 Cal 83 (85, 86) : 47 Cal 164 : 21 Cri L Jour 391 (DB).

(c) The Indian Public Gambling Act, 3 (III) of 1867 S. 5 ('08) 7 Cri L Jour 19 (21) : 30 All 60.

[But see (Vol 9) 1922 Lah 458 (458, 459) : 3 Lah 659 : 23 Cri L Jour 621 \* ('95) 1895 Pun Re No. 22 Cr Page 59 (60) (DB).]

[2] In respect of the abovementioned Acts the procedure to be adopted is that prescribed by this Code subject to the provisions of the said Act. ('07) 6 Cri L Jour 60 (66) : 31 Bom 438 (DB) \* (Vol 22) 1935 Mad 98 (100) : 58 Mad 367 : 36 Cri L Jour 566.

[3] As a preliminary condition to the exercise of the power of a Magistrate to cause a search to be

made under S. 25 of the Indian Arms Act. Magistrate has to record his grounds of belief that arms are kept for an unlawful purpose. ('09) 36 Cal 433 (439) (DB) (Reversed on another point in 13 Cri L Jour 693).

[4] A Magistrate issuing a search-warrant under S. 25 of the Arms Act, acts as a Court. (Vol 6) 1919 Mad 620 (621, 622) : 42 Mad 96 : 20 Cri L Jour 90 (DB)

12. Security for production.—[1] This section does not enable Court to demand security for production of article when required. ('03) 7 Cal W N 522 (524) (DB).

[2] Court acting under this section and issuing search-warrant can stay execution of warrant conditionally on execution of bond by such person to production of articles in Court whenever called upon (Vol 7) 1920 Cal 83 (85) : 47 Cal 164 : 21 Cri L Jour 391 (DB).

13. Inspection.—[1] The word "inspect" in the third clause of sub-S. (1) applies only to a locality or place but not to a document or other thing. ('88) 1. Cal 109 (124) (DB).

[2] Right of seizure of documents or things carried with it the right of inspection. ('03) 5 Bom L R 98 (982) (DB) \* ('88) 15 Cal 109 (128, 143) (DB) (Vol 16) 1929 Cal 176 (176) : 30 Cri L Jour 705 (DB) (Vol 1) 1914 Lah 587 (590) : 1914 Pun Re No. 36 Cr 16 Cri L Jour 225.

[3] Documents or things must be brought to Court before they are allowed to be inspected—Inspection should be allowed in Court or where and when Court orders and in presence of person concerned. ('88) 1 Cal 109 (143) (DB) \* (Vol 7) 1920 Cal 349 (350) : 4 Cal 647 : 21 Cri L Jour 577 (DB) \* ('08) 5 Bom L R 978 (980).

[4] Inspection must be limited to books, etc. named in search-warrant and cannot be had of other books, etc., seized under it. ('88) 15 Cal 109 (134) (DB).

14. Power to search includes power to take into possession.—[1] Power to search includes power to take into possession the thing found on search ('93) 1893 Rat 677 (678) (DB) \* ('88) 15 Cal 109 (141) (DB).

15. Power to invoke aid in reading documents.—[1] A Criminal Court has power to invoke the aid of persons capable of helping it to read and understand contents of document, books, etc., seized and produced before it. (Vol 1) 1914 Lah 587 (590) : 1914 Pun Re No. 36 Cr : 16 Cri L Jour 225.

16. Form of search-warrant.—[1] Description of search-warrant otherwise adequate to identify place without ambiguity—Boundaries of place need not be mentioned. (Vol 28) 1941 Nag 16 (16) : ILR (1941) Nag 34 : 42 Cri Jour 32.

17. Who may make the search.—[1] A warrant to a collectorate nazir where a police-officer is available is illegal. ('67) 8 Suth W R Cr 74 (74, 77, 78) (DB).

[2] A Magistrate competent to issue search-warrant is competent to conduct search himself or in his presence ('84) 1884 All W N 213 (214) \* ('12) 13 Cri L Jour 693 (700) : 39 Cal 953 : 29 Ind App 163 (PC).

18. Resistance to illegal search.—[1] Resistance even to an illegal search is not justified if the officer was acting in good faith under colour of his office within the meaning of S. 99 of the Penal Code ('70) 7 Bom H C R Cr 50 (52) (DB) \* (Vol 1) 191 Sind 160 (162, 163) : 8 Sind L R 1 : 16 Cri L Jour 1



Search of house suspected to contain stolen property, forged documents, etc.

93. (7) If a District Magistrate, Subdivisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place

a[or, if a District Magistrate, Subdivisional Magistrate or a Presidency Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit, sale, manufacture or production of any obscene object such as is referred to in section 292 of the Indian Penal Code or that any such obscene objects are kept or deposited in any place;]

he may by his warrant authorize any police-officer above the rank of a constable -

(a) to enter, with such assistance as may be required, such place, and

(b) to search the same in manner specified in the warrant, and

(c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials a[or of any such obscene objects] as aforesaid, and

(d) to convey such property, documents, seals, stamps, coins, instruments or materials a[such obscene objects] before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and

(e) to take into custody and carry before a Magistrate, every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials a[such obscene objects] knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging a[or the said obscene objects to have been or to be intended to be sold, let to hire, distributed, publicly exhibited, circulated, imported or exported.]

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(DB) \* ('13) 14 Cri L Jour 142 (144) (DB) (Lah) (Vol 2) 1915 All 430 (433) : 38 All 14 : 16 Cri L Jour 819 (DB) \* (Vol 20) 1933 All 620 (621) : 55 All 617 (DB).

[See also (Vol 16) 1929 All 903 (904) : 30 Cri L Jour 1145 \* (Vol 23) 1936 All 306 (308) : 37 Cri L Jour 548 \* (Vol 20) 1933 All 759 (761) : 55 All 985 : 34 Cri L Jour 1211 (DB) \* ('11) 12 Cri L Jour 8 (9) : 38 Cal 304].

[But see ('12) 13 Cri L Jour 764 (765) (Cal) \* ('97) 24 Cal 324 (329, 330) (DB) \* ('12) 13 Cri L Jour 65 (75) \* ('07) 6 Cri L Jour 38 (39, 40) (DB) \* (Vol 5) 1918 Cal 74 (75) : 45 Cal 905 : 20 Cri L Jour 47 (DB) \* ('12) 13 Cri L Jour 186 (187) : 39 Cal 403 (DB)].

[2] Officer having under the Abkari Act, power to make search after recording reasons—Officer making search without making such record—Resistance thereto held not justified. ('96) 19 Mad 349 (350) (DB).

19. Revision.—[1] Where an order for issue of search-warrant is neither illegal nor vitiated by material irregularity, High Court will not in the interest of justice interfere in revision and prevent collection of material evidence. ('90) 13 Mad 18 (21) (DB).

[2] High Court will interfere in revision where Magistrate has not applied his mind in exercising a proper discretion and has acted on insufficient materials. (Vol 27) 1940 Cal 97 (101) : ILR (1940) Cal 231 : 41 Cri L Jour 529 (DB).

#### SECTION 98—Note 1.

[1] The pendency of any proceeding before a Magistrate is not a condition precedent to the issue of a search-warrant. ('08) 8 Cri L Jour 235 (240) 35 Cal 1076 (DB).

[2] A Magistrate about to issue search-warrant the strength of information as distinguished from complaint. He should, if possible, examine the informant on oath, and if evidence cannot be taken on oath he should act with a due appreciation of the fact that he is taking upon himself the responsibility of considering the weight of the information, as information preparatory to issuing an order of a very serious nature. ('11) 12 Cri L Jour 175 (177, 178) (All).

[3] As a rule form under this section is used for warrant under S. 100 with necessary alterations. Defect if any is only one of form and not in substance and a resistance to such a warrant is not justified. ('13) 13 Cri L Jour 186 (187) : 39 Cal 403 (DB).

(2) The provisions of this section with respect to—

- (a) counterfeit coin,
- (b) coin suspected to be counterfeit, and
- (c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply respectively to—

- (a) pieces of metal made in contravention of the Metal Tokens Act, 1889, or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878,
- (b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and
- (c) instruments or materials for making pieces of metal in contravention of that Act.

[1882—S. 98 ; 1872—S. 377 ; 1861—S. 127.]

[a] Inserted by the Obscene Publications Act, 1925 (8 [VIII] of 1925), S. 3.

99. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things found in search beyond jurisdiction, which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate ; and, unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court.

[1882—S. 99 ; 1872—S. 373 paras 2, 3, 374 ; 1861—Ss. 118, 119.]

a[99-A. aa(1) Where—

Power to declare certain publications forfeited and to issue search-warrants for the same.

- (a) any newspaper, or book as defined in the Press and Registration of Books Act, 1867, or
- (b) any document,

wherever printed, appears to the b[Provincial Government] to contain any seditious matter c[or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects] d[or which is deliberately and maliciously intended to outrage

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[4] Under S. 79 a warrant issued under this section can be endorsed over to any other police-officer of the same rank for execution. ('09) 10 Cri L Jour 3 (5) : 3 Sind LR 56 (DB).

[5] A search under this section made without a search warrant is illegal. ('11) 12 Cri L Jour 8 (9) : 38 Cal 304 (FB).

[6] Police-officer investigating into a charge of theft is entitled under S. 165 to search without a warrant (Vol 6) 1919 All 41 (42) : 20 Cri L Jour 695 : 42 All 67.

[7] A warrant issued illegally under S. 96 is not valid under this section. ('08) 8 Cri L Jour 235 (240) : 35 Cal 1076 (DB).

#### SECTION 99—Note 1.

[1] Presidency Magistrate on being requisitioned by a telegram by a District Magistrate to take possession of certain books of a person, within the jurisdiction of the former, and to send them to the latter, summoned the person to produce the same and when they were produced sent them to the District Magistrate—*Held* that, as the things were not found in execution of a search-warrant, this section did not apply to the case

and that sending of the books in accordance with the requisition was not justified. ('97) 1897 Rat 880 (880) (DB).

#### SECTION 99A—Note 1.

[1] "Newspaper" involves the idea of periodicity and also the fact that what is contained in the paper is public news or comment thereon. ('10) 11 Cri L Jour 515 (518) : 38 Cal 202 (DB). (Case under Newspapers Act of 1908).

[2] The document sought to be forfeited need not, by itself, disclose seditious intent. It may be read in the light of other documents, whether prior or subsequent in date, and the seditious nature of the document may be apparent from those other documents. (Vol 17) 1930 All 401 (402) : 52 All 775 : 31 Cri L Jour 840 (FB).

[3] Advertisement of a forthcoming book is not protected from forfeiture if it contains seditious matter—Absence of such matter—Fact that it is intimately connected with the book which contains seditious matter is not sufficient to entail forfeiture thereof. (Vol 17) 1930 All 401 (402, 408) : 52 All 775 : 31 Cri L Jour 840 (FB).

[4] It must appear to the Provincial Government that the newspaper, book or document contains any

the religious feelings of any such class by insulting the religion or the religious beliefs of that class; that is to say, any matter the publication of which is punishable under section 121-A <sup>a</sup>[or section 153-A] <sup>d</sup>[or section 295-A] of the Indian Penal Code, the <sup>b</sup>[Provincial Government] may, by notification in the <sup>e</sup>[Official Gazette], stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to His Majesty, and thereupon any police officer may seize the same wherever found in British India and any Magistrate may by warrant authorize any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In sub-section (1) "document" includes also any painting, drawing or photograph, or other visible representation.]

[a] *Inserted* by the Press Law Repeal and (Amendment) Act, 1922, (14 [XIV] of 1922), S. 5 and Sch II

[aa] As to the application of sections 99-A to 99-G in respect of book, newspaper or other document containing matter defamatory of a Ruler of a State or Minister of such Ruler, etc., and tending to prejudice the relations between His Majesty's Government and the Government of such State, *See* section 3 of the Foreign Relations Act, 1932 [12 (XII) of 1932] which further provides that for such application of these sections, the provisions of Section 3 of Act, 12 of 1932 shall be construed as if for the words "Provincial Government", wherever they occur in these sections, the words "Central Government" were substituted.

[b] *Substituted* by A. O. for "Local Government".

[c] *Inserted* by the Code of Criminal Procedure (Third Amendment) Act, 1926 (36 [XXXVI] of 1926), S.

[d] *Inserted* by the Criminal Law (Amendment) Act, 1927 (25 [XXV] of 1927), S. 3.

[e] *Substituted* by A. O. for "Local Official Gazette."

<sup>a</sup>[99B. Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any <sup>b</sup>seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A ].

[a] *Inserted* by Act 14 of 1922—S. 5 and Schedule III.

[b] *Substituted* by the Code of Criminal Procedure (Third Amendment) Act, 1926 (36 [XXXVI] of 1926), S. 3, for "seditious matter".

<sup>a</sup>[99C. Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.]

[a] *Inserted* by Act 14 of 1922—S. 5. and Schedule III.

#### Section 99A (contd.)

seditious matter. The condition implies that the publication had been seen and read by the Provincial Government prior to its declaration of forfeiture. (Vol 1) 1914 Cal 242 (243); 41 Cal 466; 14 Cri L Jour 497 (SB).

[5] A notification which does not state the grounds of opinion is not in compliance with the terms of the section. (Vol 1) 1914 Cal 242 (243); 41 Cal 466; 14 Cri L Jour 497 (SB).

[6] A mere citation of the words of the section is not a statement of the grounds of opinion. (Vol 1) 1914 Cal 242 (243); 41 Cal 466; 14 Cri L Jour 497 (SB).

[7] This section is wider in its applicability than S. 153-A of the Penal Code because intention to promote enmity of hatred between different classes of the community is a ground of action under this section, while under S. 153-A it is the actual promotion or attempt to promote enmity or hatred that constitutes

the offence. (Vol 23) 1936 All 314 (317); 58 All 837 Cri L Jour 599 (SB).

[8] It cannot be laid down as a general proposition that translations should be permissible when the originals have not been proscribed. Translations in Indian vernaculars may become accessible to a very large population and the danger arising therefrom may be immensely greater calling for the intervention of Government. (Vol 23) 1936 All 561 (564); ILR [1936] All 69; Cri L Jour 943 (SB).

#### SECTION 99B—Note 1.

[1] The words "within two months from the date of such order" are not to be read as meaning "within two months from the date on which notice of the order was served." S. 5 of the Limitation Act cannot be applied to an application under this section so as to enable the Court to extend the period of two months for sufficient cause. (Vol 1) 1914 Lah 8 (8,9); Pun Re No. 16 Cri : 15 Cri L Jour 222 (SB);

a[99D. (I) On receipt of the application, the Special Bench shall, if it is not satisfied that Order of Special Bench the issue of the newspaper, or the book or other document, in respect of setting aside forfeiture. which the application has been made, contained b[seditious or other matter of such a nature as is] referred to in sub-section (I) of section 99A set aside the order of forfeiture.

(2) Where there is a difference of opinion among the Judges forming the Special Bench the decision shall be in accordance with the opinion of the majority of those Judges].

[a] *Inserted by Act 14 of 1922—S. 5 and Schedule III.*

[b] *Substituted by the Code of Criminal Procedure (Third Amendment) Act, 1926 (36 [XXXVI] of 1926)—S. 4, for "seditious matter of the nature".*

a[99E. On the hearing of any such application with reference to any newspaper, any copy Evidence to prove of such newspaper may be given in evidence in aid of the proof of the nature or tendency of nature or tendency of the words, signs or visible representations contained newspapers. in such newspaper, b[in respect of which the order of forfeiture was made] ].

[a] *Inserted by Act 14 of 1922—S. 5 and Schedule III.*

[b] *Substituted by the Code of Criminal Procedure (Third Amendment, 1926 (36 [XXXVI] of 1926)—S. 5, for "which are alleged to be seditious matter".*

#### SECTION 99D—Note 1.

[1] Where an application made to High Court under S. 99-B in respect of a document—the Special Bench is precluded by this section from considering any other point than the question whether, in fact, the matters contained in the document were seditious—It cannot enter into the question whether requirements of S. 99-A as to the statement of grounds in the notification have been complied with. (Vol 12) 1925 All 195 (196) 47 All 298 : 26 Cri L Jour 679 (FB). 1919 Pat 84 (86).

[See also (Vol 6) 20 Cri L Jour 177 : 4 Pat L Jour 174 (SB).]

[2] Series of books published—Whole series must be looked to in order to determine whether passages contained therein are seditious. (Vol 12) 1925 All 195 (196) : 47 All 298 : 26 Cri L Jour 679 (FB).

[3] Under this section High Court is not concerned with the policy underlying forfeiture. The sole consideration is whether the books contain any objectionable matter referred to in S. 99-A. (Vol 23) 1936 All 561 (564) : ILR (1937) All 69 : 37 Cri L Jour 943 (SB).

[4] That the translation is proscribed by Government while original not proscribed is no ground for setting aside order of Government. (Vol 23) 1936 All 561 (564) : ILR (1937) All 69 : 37 Cri L Jour 943 (SB).

[5] Book or other document proscribed by Government on the ground of its containing matter which promotes feelings of class hatred—To sustain the order it is not necessary that author's intention to promote such feelings should be established (Vol 23) 1936 All 314 (316) : 58 All 849 : 37 Cri L Jour 599 (SB).

[6] After hearing application, High Court in doubt as to the book or other document containing objectionable matter of the nature specified in S. 99-A—High Court must set aside order of forfeiture and not confirm it. (Vol 23) 1936 All 314 (315) : 58 All 849 : 37 Cri L Jour 599 (SB) \* (Vol 14) 1927 All 649 (653) : 49 All 856 : 29 Cri L Jour 968 (SB).

[7] The following case holds that, the onus of proving that the order of the Government is wrong, is on the applicant and that he has the right to begin. (Vol 23) 1936 All 314 (315) : 58 All 849 : 37 Cri L Jour 599 (SB); (Referring to and discussing. (Vol 12) 1925 All

195 : 47 All 298 : 26 Cri L Jour 679 (SB)) \* (Vol 14) 1927 All 649 : 49 All 856 : 29 Cri L Jour 968 (SB) \* (Vol 17) 1930 All 401 : 52 Cri L Jour 840 (FB).]

[8] It has been held in the following case that the onus is on the Government to justify its order. (Vol 15) 1928 Lah 245 (246) : 9 Lah 663 : 29 Cri L Jour 899 (SB).

[9] Where the language is such as to produce or promote feelings of enmity or hatred the writer must be presumed to have intended the effect which his act was likely to produce. (Vol 23) 1936 All 314 (316) : 58 All 849 : 37 Cri L Jour 599 (SB) \* (Vol 14) 1927 All 649 (652) : 49 All 856 : 29 Cri L Jour 968 (SB) \* (Vol 19) 1932 Lah 99 (99) : 13 Lah 152 : 34 Cri L Jour 473 (SB).

[10] Whatever be the ostensible motives, if the effect of the article is seditious, Government cannot be said to be wrong in ordering a forfeiture under section 99-A. See. (Vol 1) 1914 Lah 1 (4) : 1914 Pun Re No. 27 : 15 Cri L Jour 490 (SB) \* (Vol 7) 1920 Cal 478 (482, 491) : 47 Cal 190 : 21 Cri L Jour 98 (SB) \* (Vol 2) 1915 Lah 1 (4) : 1915 Pun Re No. 19 Cr : 16 Cri L Jour 274 (SB).

[11] Application under S. 99-B—Plea that the statements contained in the publication are supported by authority or are true can neither be pleaded nor proved and is immaterial. (Vol 14) 1927 All 649 (653) : 49 All 856 : 29 Cri L Jour 968 (SB) \* (Vol 19) 1932 Lah 99 (99) : 13 Lah 152 : 34 Cri L Jour 473 (SB).

[12] In a prosecution for an offence under S 124-A or S. 153-A or S 295-A of the Penal Code, a judgment under this section refusing to set aside an order of forfeiture is admissible as evidence under S. 11 or under S. 13 of the Evidence Act, 1872. (Vol 14) 1927 All 654 (656) : 50 All 157 : 28 Cri L Jour 785.

#### SECTION 99E—Note 1.

[1] This section is wider than S. 14 of the Evidence Act. (Vol 7) 1920 Cal 478 (492) : 47 Cal 190 : 21 Cri L Jour 98 (SB).

[2] The section does not exclude any other evidence that may be otherwise admissible. (Vol 7) 1920 Cal 478 (493) : 47 Cal 190 : 21 Cri L Jour 98 (SB).

[3] The section applies only where, if the article stood alone, there may be doubt or ambiguity as to the

a[99F. Every High Court shall, as soon as conveniently may be, frame rules to regulate Procedure in High the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Courts in proceedings other than suits and appeals shall apply, far as may be practicable, to such applications].

[a] Inserted by Act 14 of 1922—S. 5 and Schedule III.

^a[99G. No order passed or action taken under section 99A shall be called in question Jurisdiction barred. any Court otherwise than in accordance with the provisions of section 99B.

[a] Inserted by Act 14 of 1922—S. 5 and Schedule III.

*C.—Discovery of Persons wrongfully confined.*

100. If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate Search for persons has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue search-warrant, and the person to whom such warrant is directed may search for the person confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances the case seems proper.

[1882—S. 100.]

**Section 99E (contd.)**

character, nature or tendency of the words used and not when the meaning of the article is apparent on its face. (Vol 7) 1920 Cal 478 (485): 47 Cal 190: 21 Cri L Jour 98 (SB).

[See (Vol 8) 1921 Sind 190 (200): 26 Cri L Jour 304.]

[4] The section does not apply to publications other than newspapers. (Vol. 7) 1920 Cal 478 (493): 47 Cal 190: 21 Cri L Jour 98 (SB).

[5] The section may be utilised by the person affected by the order of forfeiture, precisely in the same manner as by the Crown. (Vol 7) 1920 Cal 478 (485, 493): 47 Cal 190: 21 Cri L Jour 98 (SB) \* (Vol 5) 1918 Mad 1210 (1253): 39 Mad 1085: 18 Cri L Jour 157 (SB).

[6] A copy of the newspaper other than the one forfeited is admissible in evidence under this section only "in aid of the proof of the nature or tendency of the words," etc. and for no other purpose. (Vol 7) 1920 Cal 478 (485) (497): 47 Cal 190: 21 Cri L Jour 98 (SB) \* (Vol 2) 1915 Lah 883 (884): 1915 Pun Re No. 15 Cr: 16 Cri L Jour 555 (SB) \* (Vol 14) 1927 All 649 (652): 49 All 856: 29 Cri L Jour 968 (SB) \* (Vol 1) 1914 Lah 1 (4): 1914 Pun Re No. 27 Cr: 15 Cri L Jour 490 (SB).

[7] Copy must be such that a perusal of the same throws appreciable light on the nature or tendency of the article forfeited. (Vol 5) 1918 Mad 1210 (1243): 39 Mad 1085: 18 Cri L Jour 157 (SB).

[18] The use of the word "tendency" does not show that intention is an essential element in the determination of the true character of the words. (Vol 7) 1920 Cal 478 (490): 47 Cal 190: 21 Cri L Jour 98 (SB).

**SECTION 99F—Note 1.**

[1] The exclusion of the practice in "suits" and the provision for an order for the payment of costs suggest that regard is intended to be had to the practice in miscellaneous civil proceedings. (Vol 17) 1930 All 401 (406) 52 All 775: 31 Cri L Jour 840 (FB).

costs was due. (Vol 17) 1930 All 401 (406): 52 All 775: 31 Cri L Jour 840 (FB).

**SECTION 100—Note 1.**

[1] The section is limited to persons wrongfully confined and is not as wide as the powers of the Courts under S. 491 to issue directions in the name of *habeas corpus*. ('96) 1896 Rat 839 (839) (DB).

[2] A Magistrate issuing warrant must have reason to believe that a person is wrongfully confined. (Vol 1936 All 306 (308): 37 Cri L Jour 548 \* (Vol 3): Lah 281 (285): 1916 Pun Re No. 34 Cr: 17 Cri L Jour 491 (DB).

[3] Magistrate is not bound to hold a regular enquiry before issuing warrant. He may act merely on application of the complainant. (Vol 15) 1928 550 (550): 30 Cri L Jour 175.

[4] It would be wise to hold some enquiry or give notice to opposite party. ('97-98) 2 Cal 800 (800) (DB) \* (Vol 3) 1916 Lah (285): 1916 Pun Re No. 34 Cr: 17 Cri L Jour (DB).

[5] Magistrate should not merely rely on allegation of an interested person of whom he knows not (Vol 32) 1945 Oudh 170 (171): 47 Cri L Jour \* (Vol 3) 1916 Lah 281 (285): 1916 Pun Re No. 17 Cri L Jour 491 (DB).

[6] It is not open to the police officer to whom a warrant is addressed to disregard the finding of the Magistrate and abstain from searching and taking the Magistrate the person for whose search the warrant has been issued, on the ground that such person has not been unlawfully detained as supposed by the Magistrate. (Vol 23) 1936 All 306 (308): 37 Cri L Jour 548.

[7] Magistrate can issue a warrant only in cases where the confinement amounts to an offence. (Vol 32) 1945 Oudh 170 (171): 47 Cri L Jour (Vol 25) 1936 Cal 704: 40 Cri L Jour 58 (DB).

[8] Boy taken away by natural father from

*D.—General Provisions relating to Searches.*

101. The provisions of sections 48, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to Direction, etc. of all search-warrants issued under section 96, section 98, <sup>a</sup>[section 99A] or search warrants. section 100.

[1892—S. 101; 1872—Ss. 370, 371, 372, 373, para 1, 375, 376; 1861—Ss. 115 to 118, 120, 121.]

[a] Inserted by the Press Law Repeal and Amendment Act, 1922 (14 [XIV] of 1922), S. 5 and Sch III.

102. (1) Whenever any place liable to search or inspection under this Chapter is closed, Persons in charge of any person residing in, or being in charge of such place shall, on demand closed place to allow of the officer or other person executing the warrant, and on production of search, the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed.

[1882—S. 102; 1872—Ss. 382 to 384; 1861—Ss. 122 to 124.]

103. (1) Before making a search under this Chapter, the officer or other person about to Search to be made in make it shall call upon two or more respectable inhabitants of the presence of witnesses. locality in which the place to be searched is situate to attend and witness the search a[and may issue an order in writing to them or any of them so to do].

**Section 100 (contd.)**

[9] There is no form prescribed for a warrant under the section and there is nothing illegal in the Magistrate using a form prescribed under S. 96 or S. 98 with the necessary alterations suited to this section. (Vol 5) 1918 Cal 74 (74, 75): 44 Cal 905: 20 Cri L Jour 47 (DB). (6 Cri L Jour 38 distinguished) \* (12) 13 Cri L Jour 186 (187): 39 Cal 403 (DB) (6 Cr. L. Jour 38 distinguished).

[10] Particular place specified in warrant—Officer to whom warrant is directed has no power to search outside that place and take the person into custody. He has also no power to endorse it to another officer, authorising him to execute the same, outside the place specified in the warrant. (Vol 15) 1928 Pat 550 (551): 80 Cri L Jour 175.

[11] Investigation of a case under S. 363, Penal Code—Police officer searching house, without a warrant under this section, but with a reasonable suspicion that the persons concerned in the offence according to his information, were in the house—*Held*, search was not illegal, as the police officer had authority to act as he did, under Ss. 54, 47 and 48 of the Code. (Vol 29) 1942 Pat 281 (282): 43 Cri L Jour 279.

[12] When a person wrongfully confined is taken before Magistrate—He is bound to hear parties concerned, and should, after such enquiry, as may be necessary, pass such orders as may seem proper. (10) 11 Cri L Jour 450 (450) \* (98) 2 Cal W N cccxxiii (cccxxiv).

[13] Where person, for whom search warrant is issued, voluntarily appears before the Magistrate he should decline to take further action under this Section. (09) 10 Cri L Jour 219 (220): 2 Sind L R 2 (DB).

**SECTION 102—Note 1.**

[1] This section relates only to formal searches under search warrants issued under Ss. 96 and 98. (Vol 32) 1945 Mad 523 (524) (DB).

[2] The provisions of this section have also been made applicable, so far as many be, to searches under S. 165. (Vol 14) 1927 All 516 (517): 28 Cri L Jour 652.

[3] Neither this section nor S. 48 justifies the search-officer to scale the outer wall and effect a burglarious entry into the house. (Vol 2) 1915 All 208 (208): 37 All 353: 16 Cri L Jour 495. An entry was effected by scaling wall—An obstruction thereto was held to be an offence. (Vol 20) 1933 All 488 (439): 55 All 557: 34 Cri L Jour 641.

**SECTION 103—Synopsis.**

1. Scope and object of the section.
2. Place of search.
3. Search witnesses.
4. Who can call search witnesses.
5. Respectable inhabitants.
6. Of the locality.
7. Search shall be made in their presence.
8. Shall not be required unless summoned.
9. Duty of prosecution to call search witnesses.
10. Refusal or neglect to attend and witness a search.
11. List of things seized.
12. Signed by the witnesses.
13. Occupant of the place searched.
14. Right of occupant to be present.
15. Irregularities in search.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list so prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 132, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

[(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered and tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code.]

[1882—S. 103; 1872—S. 335; 1861—S. 125.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 14.

#### Objects and Reasons.

*Subsection (4).*—"We have added a new sub-section (4), so as to provide that where a person is searched under a search-warrant he shall be entitled to a list of all things taken from him."—S.O.R., 1898.

#### Section 103 (contd.)

1. Scope and object of the section.—[1] The section is enacted with the following objects:

(a) Prevention of possible chicanery and unfair dealings on the part of the officers entrusted with search-warrants. ('06) 4 Cri L Jour 390 (393): 12 Bur L R 248 (Vol 1) 1914 Low Bur 128 (134): 8 Low Bur Bul 32: 15 Cri L Jour 441 (FB) \* ('26) 27 Cri L Jour 73 (73) (Lah.).

(b) Safeguarding rights of the subject and ensuring conduct of search honestly. (Vol 6) 1919 All 41 (42): 42 All 67: 20 Cri L Jour 695.

(c) Ensuring confidence in the neighbours and in the public generally that anything incriminating which may be found in the premises searched shall be really 'found' and shall not be 'planted' (Vol 4) 1917 Low Bur 91 (92): 18 Cri L Jour 1003 \* (Vol 6) 1919 Pat 452 (453, 454): 20 Cri L Jour 742. \* ('08) 7 Cri L Jour 479 (487): 4 Low Bur Bul 213: 14 Bur L R 81 (FB).

(d) Obtaining as reliable evidence as possible of the search and excluding the possibility of any concoction or malpractice of any kind. (Vol 17) 1930 Cal 141 (143): 31 Cri L Jour 667 (DB) \* ('03-04) 2 Low Bur Bul 43 (45) \* ('10) 11 Cri L Jour 746 (747) (Low Bur.).

[2] The provisions of the section are enacted for greater certainty and security and not because the statements of certain officers can, under no circumstances, be accepted. (Vol 28) 1936 Rang 15 (17): 37 Cri L Jour 331 (DB).

[3] The provisions of this section will apply so far as may be to search under S. 165. (Vol 14) 1927 All 516 (517): 28 Cri L Jour 652.

[4] The officer, who intends to search a person, cannot issue an order in writing to any inhabitants of the locality to be witnesses for such a search. (Vol 28) 1941 Rang 333 (334): 48 Cri L Jour 217: 1941 Rang L R 552 \* (Vol 30) 1943 Rang 231 (234): 48 Cri L

Jour 416: 17 Luck 516 \* (Vol 20) 1933 Nag 99 (100) 29 Nag LR 67: 34 Cri L Jour 721.

2. Place of search.—[1] A cart is not a place such as is contemplated in this section. Cr Bg 18-6-188

3. Search witnesses.—[1] Under this section it is obligatory on the officer, about to execute a search-warrant, to call on and get two or more respectable inhabitants of the locality to witness the search ('08) 7 Cri L Jour 479 (482, 483): 4 Low Bur R 213: 14 Bur L R 81 (FB) \* (Vol 8) 1921 Pat 51 (508, 509).

[2] Witnesses must be called before the search is started. ('03) 2 Low Bur Bul 43 (45) \* ('08) 7 Cri L Jour 479 (481): 4 Low Bur Bul 213: 14 Bur L R 81 (FB).

[3] Court is not bound to accept evidence of witnesses for the search as true where they are shown to be false or where there are discrepancies therein. (Vol 2) 1936 Rang 15 (16): 37 Cri L Jour 331 (DB) \* (Vol 2) 1918 All 113 (114): 19 Cri L Jour 949 \* (Vol 10) 1922 Lah 683 (683, 684): 25 Cri L Jour 495.

[4] Evidence of a person cannot be distrusted solely on the ground that on a previous occasion he has acted as a witness in another search. (Vol 20) 1933 Nag 99 (100): 29 Nag L R 67: 34 Cri L Jour 721.

[5] It is objectionable to be constantly calling on the same person to witness searches. (Vol 28) 1941 Rang 333 (334): 48 Cri L Jour 217: 1941 Rang L R 552 \* ('08) 7 Cri L Jour 87 (88): 4 Low Bur Bul 121: 4 Bur L R 202.

[6] Witnesses for search helping police in making search—Search is not invalid. (Vol 14) 1927 Rang 241 (242): 5 Rang 221: 28 Cri L Jour 701.

4. Who can call search witnesses.—[1] It is only the officer about to make the search that can call witnesses for search. ('08) 21 Mad 83 (89): 2 Weir 50 (1908).

Section 103 (*contd.*)

5. **Respectable inhabitants.**—[1] The search should be conducted in the presence of two or more respectable inhabitants of the locality. (Vol 30) 1943 Lah 5 (7) : 44 Cri L Jour 62 \* (Vol 25) 1938 Cal 701 (701) : 40 Cri L Jour 52 (DB) \* (Vol 22) 1935 All 520 (520) : 36 Cri L Jour 551.

[2] Respectability of a witness does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way. (Vol 23) 1936 All 707 (707) : 37 Cri L Jour 1108.

[3] The persons selected must be absolutely unprejudiced and uninterested in the result of what they have to take part in. (Vol 25) 1938 Cal 701 (701) : 40 Cri L Jour 52 (DB) \* ('08) 7 Cri L Jour 479 (482, 483) : 4 Low Bur Rul 213 : 14 Bur LR 81 (FB) \* ('11) 12 Cri L Jour 251 (253) (FB) (Low Bur) \* (Vol 10) 1923 Lah 79 (80) : 23 Cri L Jour 609.

[4] Selection of officers connected with the police is not contemplated by the section. ('08) 7 Cri L Jour 479 (483) : 4 Low Bur Rul 213 : 14 Bur LR 81 (FB) \* ('06) 4 Cri L Jour 390 (393) : 12 Bur LR 248 \* (Vol 16) 1929 All 901 (902) : 31 Cri L Jour 10 \* (Vol 18) 1931 Lah 408 (416) : 32 Cri L Jour 818.

[See (Vol 15) 1928 Cal 27 (35) : 29 Cri L Jour 49 (SB) \* (Vol 21) 1934 Oudh 90 (91) : 9 Luck 355 : 35 Cri L Jour 397 \* (Vol 1) 1914 Low Bur 128 (130, 133, 134) : 8 Low Bur Rul 38 : 15 Cri L Jour 441 (FB) \* ('08) 8 Cri L Jour 413 (416) : 1908 Upp Bur Rule 2nd Quarter Gambling 1].

[5] Having been a prosecution witness is not sufficient to deprive one of one's title to respectability. (Vol 23) 1936 All 707 (707) : 37 Cri L Jour 1108.

6. **Of the locality.**—[1] Only respectable persons of the locality are to be selected as witnesses for the search. ('98-99) 2 Oudh Cas 99 (102) \* (Vol 21) 1934 Nag 156 (157) : 35 Cri L Jour 1163 \* (Vol 21) 1934 All 374 (375) : 36 Cri L Jour 742.

[2] The words "of the locality" do not mean that the persons should be living within a stone's throw of the house to be searched. (Vol 4) 1917 Low Bur 91 (92) : 18 Cri L Jour 1009 (1009) \* (Vol 21) 1934 Oudh 90 (91) : 9 Luck 355 : 35 Cri L Jour 397 \* (Vol 21) 1934 All 873 (874) : 36 Cri L Jour 362 (DB).

[3] The words 'of the locality' are not restricted to mean the same quarter. ('11) 12 Cri L Jour 479 (479) (Low Bur) \* (Vol 21) 1934 Sind 159 (161) : 28 Sind LR 41 : 36 Cri L Jour 704 (DB).

[4] The words 'of the locality' include places even within three or four miles of the place of search. (Vol 18) 1931 Oudh 115 (116) : 6 Luck 472 : 32 Cri L Jour 699 (DB) \* ('08) 8 Cri L Jour 413 (416, 417) : 1908 Upp Bur Rul 2nd Qr Gambling 1. \* ('10) 11 Cri L Jour 746 (747) (Low Bur) \* ('01) 23 All 420 (421).

[See also (Vol 24) 1937 Rang 434 (436) : 39 Cri L Jour 278.]

[5] In a densely populated city like Rangoon "Locality" has been held to mean the immediate vicinity and not a place a couple of miles away. (Vol 12) 1925 Rang 205 (205) : 26 Cri L Jour 827.

[6] Where witnesses are from a different locality, the search is not necessarily invalid nor evidence of such witnesses were inadmissible. (Vol 19) 1932 Pat 66 (68) : 10 Pat 821 : 33 Cr L Jour 233 (DB).

[See (Vol 15) 1928 Cal 27 (35) : 29 Cri L Jour 49.

(SB) \* (Vol 27) 1940 Cal 85 (86) : ILR (1939) 1 Cal 210 41 Cri L Jour 316 (DB).

[7] Emphasis of the section is on the word "respectable" and not on the word "locality". (Vol 28) 1941 Lah 297 (299) : 42 Cri L Jour 812 : ILR (1941) Lah 370. (DB) \* ('10) 11 Cri L Jour 746 (747) (Low Bur) \* (Vol 4) 1917 Low Bur 91 (92) : 18 Cri L Jour 1009 \* (Vol 19) 1932 Pat 66 (68) : 10 Pat 821 : 33 Cri L Jour 233 (DB) \* (Vol 21) 1934 Sind 159 (161) : 28 Sind LR 41 : 36 Cri L Jour 704 (DB).

7. **Search shall be made in their presence.**—[1] The witnesses should actually accompany the person making the search and should be actual witnesses to the fact of finding of the property. (Vol 17) 1930 Bom 169 (170) : 54 Bom 471 : 31 Cri L Jour 927 (DB).

[See (Vol 25) 1938 Pat 403 (406, 407) : 39 Cri L Jour 796 : 17 Pat 632 (FB).]

[2] Where the place searched is visible to witnesses from outside the room or house, the search is not bad on the ground that witnesses were not on the exact spot. ('14) 15 Cri L Jour 19 (21) : 35 All 575.

[3] Witnesses not present throughout the search and not witnessing every detail of it—Setting aside of the conviction not justified—Such circumstance leading to reasonable doubt as to whether article found was really in possession of accused — Conviction cannot be sustained. (Vol 17) 1930 Bom 169 (172) : 54 Bom 471 : 31 Cri L Jour 927 (DB).

[4] It is sufficient compliance with the section that search witnesses arrive on the scene before the search begins though not before the officer. (Vol 25) 1938 Pat 403 (406) : 39 Cri L Jour 796 : 17 Pat 632 (FB) \* (Vol 21) 1934 Bom 16 (20) : 35 Cri L Jour 523 (DB).

8. **Shall not be required unless summoned**—[1] A person called upon to attend and witness a search cannot be compelled by the officer conducting search to attend Court to give evidence without a summons in that behalf. (Vol 7) 1920 Mad 286 (286) : 21 Cri L Jour 83 (DB) \* ('06) 23 All 62 (69) : 2 Cri L Jour 395 : 2 All L Jour 498 (DB).

9 **Duty of prosecution to call search witnesses.**—[1] An officer connected with the investigation cannot be deemed to be an entirely satisfactory witness for the purpose of proving the search. (Vol 17) 1930 Cal 141 (143) : 31 Cri L Jour 667 (DB).

[2] Prosecutor not producing search witnesses would be guilty of suppressing material evidence. (Vol 19) 1932 All 185 (186) : 33 Cri L Jour 943.

[3] It is not the duty of the prosecutor to put every search witness in witness box. The discretion is left to the Court to require or not the attendance of such witnesses. (Vol 15) 1928 Cal 27 (35) : 29 Cri L Jour 49 (SB) (Dissenting from and disapproving (9 Cal WN 438) \* (Vol 19) 1932 Cal 474 (477) : 59 Cal 1361 : 33 Cri L Jour 854 (DB) \* (Vol 20) 1933 Pat 100 (102) : 11 Pat 807 : 34 Cri L Jour 427 (DB).

[4] Officer desiring that evidence of the witnesses is required to fortify his own evidence must call those witnesses. (Vol 19) 1932 Bom 181 (183) : 33 Cri L Jour 339 (DB).

[5] Police holding panchnama and not offering to call panch — Inference may be drawn against them from the fact that panch is not submitted for cross-examination. (Vol 28) 1941 Bom 149 (151) : 43 Cri L Jour 556 (DB).

10. **Refusal or neglect to attend and witness a search.**—[1] Words "attend and witness a search" in



*E.—Miscellaneous.*

104. Any Court may, if it thinks fit, impound any document or thing produced before it Power to impound under this Code. document etc. produced.

[1882—S. 104; 1872—S. 367.]

**Section 103 (contd.)**

sub-s. (5) will not include signing the search list. (Vol 25) 1938 Pat 403 (407) : 39 Cri L Jour 796 : 17 Pat 632 (FB).

[2] Refusal to sign the search list does not amount to a refusal to render assistance to a public servant within the meaning of S. 187, Penal Code. (Vol 25) 1938 Pat 403 (412) : 39 Cri L Jour 796 : 17 Pat 632 (FB) \* (1903) 26 Mad 419 (420, 421) (FB).

[3] Witnesses attending and witnessing search on a verbal request of the officer concerned but refusing to sign the search list—They are not guilty of any offence under S. 187, Penal Code (Vol 25) 1938 Pat 403 (412) : 39 Cri L Jour 796 : 17 Pat 632 (FB).

11. List of things seized.—[1] An officer conducting a search should strictly comply with the provision of preparing a search list in the manner specified. (Vol 2) 1915 Low Bur 64 (66) : 16 Cri L Jour 264.

[2] Officer conducting search should exercise the greatest caution in fulfilling the formalities of the law for making a search and providing for every possible safeguard so as not to leave any scope for adverse criticism. (Vol 16) 1929 All 901 (903) : 31 Cri L Jour 10.

[3] The properties found and places searched should ordinarily be proved by the production of the search list. (11) 12 Cri L Jour 489 (493) : 5 Sind LR 31 (DB) \* (Vol 20) 1933 Sind 220 (222) : 34 Cr L Jour 848 (DB).

[4] Other evidence of contents of the list is also admissible. Section 91 of the Evidence Act does not apply to such cases. (Vol 25) 1938 Pat 403 (409) : 39 Cri L Jour 796 : 17 Pat 632 (FB) \* (10) 11 Cri L Jour 136 (136) : 33 Mad 416 (DB) \* (10) 11 Cri L Jour 576 (577) (FB) (Mad) \* (Vol 11) 1927 Lah 149 (151) : 28 Cri L Jour 17.

[See (Vol 19) 1932 All 185 (186) : 33 Cri L Jour 943].

[5] Prohibited articles found in the possession of the accused—Conviction based thereon will be valid. (Vol 20) 1933 Rang 146 (147) : 11 Rang 107 : 34 Cri L Jour 652.

[6] Articles of same kind seized on search—Exhibit numbers should be given to articles identified by witnesses. (Vol 21) 1934 Rang 80 (81,82) : 35 Cr L Jour 994.

12. Signed by the witnesses.—[1] Search list not signed by the witnesses for the search—No presumption based upon such list can be drawn against the accused. (08) 7 Cri L Jour 411 (412) : 4 Low Bur Rul 134.

13. Occupant of the place searched.—[1] The words "occupant of the place" are not intended to cover any person who may happen to be in the place at the time but they refer back to the person mentioned in S. 102. (Vol. 1) 1914 Cal 456 (470, 471) : 41 Cal 350 : 15 Cri L Jour 385 (DB).

14. Right of occupant to be present.—[1] Occupant present and demanding to be allowed to be present at the search must be permitted to do so. The rule is

one not merely of technicality but of substance. (Vol 1) 1914 Cal 456 (468) : 41 Cal 350 : 15 Cri L Jour 38 (DB).

[2] On search officer insisting on keeping occupant out, the occupant caused hurt to the officer, in attempting to go into his house on physical resistance being offered by officer. He cannot be held guilty of an offence under S. 332, Penal Code. (Vol 19) 1932 All 449 (450) 34 Cri L Jour 439.

[3] Occupant need not be present at the search. This section only says that he should be permitted to do so (Vol 15) 1928 Cal 27 (35) : 29 Cri L Jour 19 (S1).

15. Irregularities in search.—[1] Irregularity in search does not vitiate the trial where the accused is not prejudiced by the defect. (Vol 28) 1941 Rang 33 (333) : 43 Cri L Jour 217 : 1941 Rang LR 552 \* (Vol 16) 1929 All 937 (939) : 31 Cri L Jour 35 \* (Vol 2) 1933 Lah 809 (810) : 34 Cri L Jour 733 \* (Vol 21) 1933 Oudh 321 (323) : 10 Luck 82 : 35 Cri L Jour 93 (DB).

[See (Vol 22) 1935 Rang 233 (233, 234) : 36 Cri L Jour 1298].

[See also (Vol 29) 1942 Oudh 221 (224) : 17 Luck 516 : 43 Cri L Jour 416 \* (Vol 8) 1921 Pat 508 (508, 509) \* (25) 27 Cri L Jour 73 (73) (Lah) \* (12) 13 Cri L Jour 763 (764) (DB) (Mad) \* (Vol 19) 1932 Pat 6 (68) : 10 Pat 821 : 33 Cri L Jour 233 (DB) \* (10) 11 Cri L Jour 453 (464) : 37 Cal 167 (DB) \* (Vol 19) 1933 Com 610 (611) : 33 Cri L Jour 733 (DB) \* (Vol 21) 1933 All 873 (874) : 57 All 256 : 36 Cri L Jour 362 (DB) \* (Vol 21) 1934 Oudh 232 (232) : 35 Cri L Jour 832].

[2] Although the failure to comply with the provisions regulating searches may cast doubt on the bona fides of the officer conducting the search, the evidence of the search witnesses does not become inadmissible on that ground. (Vol 27) 1940 Cal 85 (86) : 41 All (1939) Cal 210 : 41 Cri L Jour 316 (DB).

[3] Irregularity in a search may furnish a reason for distrusting the evidence produced by the prosecution (Vol 20) 1933 Nag 99 (100) : 29 Nag LR 67 : 34 Cri L Jour 721.

[See (Vol 25) 1938 Cal 701 (702) : 40 Cri L Jour 5 (DB)].

**SECTION 104—Note 1.**

[1] High Court can impound an alleged forged document produced in the case before it, on revision (11) 11 Cri L Jour 448 (449) : 38 Cal 106 (DB).

[2] District Magistrate cannot impound any document which is produced in a case pending before a subordinate Magistrate. (04) 1 Cri L Jour 1060 (1061).

[3] Document not produced under the provisions of the Code—it cannot be impounded under this section (04) 1 Cri L Jour 1060 (1061) (All).

[4] Summons to produce issued by Magistrate who had no authority to issue it—Certain account book produced in obedience to such summons—They cannot be said to have been produced "under this Code". (16) 1897 Rat 880 (880).

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant. Magistrate may direct search in his presence.

[1882—S. 105 ; 1872—S. 378, para 2 ; 1861—S. 128.]

## PART IV.

### PREVENTION OF OFFENCES

#### CHAPTER VIII.<sup>a</sup>

#### OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

##### *A.—Security for keeping the Peace on Conviction.*

105. (1) Whenever any person accused of <sup>b</sup>[any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of] assault or other offence involving a breach of the peace, or of abetting the same [ \* \* \* ] or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a

#### SECTION 105—Note 1.

[1] A Magistrate who is competent to issue a search-warrant under this Code can also direct a search to be made in his presence. ('12) 13 Cri L Jour 693 (700, 701); 39 Cal 953 : 39 Ind App 163 (PC) \* (Vol 12) 1925 All 434 (436) : 47 All 575 : 26 Cri L Jour 1112 (DB).

[2] Where the Magistrate does not enter the house or room to be searched, but stands outside it, and sends the complainant or the police inspector to search, he cannot be said "to direct the search to be made in his presence." ('07) 6 Cri L Jour 60 (67) : 31 Bom 438 (DB) \* (Vol 20) 1933 Lah 234 (234) : 34 Cri L Jour 252.

#### SECTION 106—Synopsis.

1. Scope of the Section.
2. "Person accused of any offence."
3. Offence punishable under Section 143 of the Penal Code.
4. Offence punishable under Section 149 of the Penal Code.
5. Offence of rioting.
6. "Assault."
7. "Assault or other offence involving a breach of the peace."
8. "Criminal intimidation."
9. "Is convicted of such offence."
10. Conviction in summary trial.
11. Courts empowered to act under this Section.
12. "Such Court is of opinion.....peace."
13. "At the time of passing sentence."
14. Form and contents of order under the section.
15. "With or without sureties."
16. Setting aside of conviction—Effect of sub-section (2).
17. Alteration of conviction to one under a different section.
18. Power of appellate or revisional Court to order security—Sub-section (3).
19. Appeal.
20. Revision.

1. Scope of the section.—[1] The purpose of an order for security is not to punish but to prevent future commission of offences. If the required security is furnished, this purpose is considered to have been attained. (Vol 29) 1942 Sind 122 (128) : 44 Cri L Jour 367 : ILR (1942) Kar 252 (DB).

2. "Person accused of any offence."—[1] A complainant cannot be ordered to give security under this section. ('02) 1902 Pun Re No. 3 Cr. p. 9 (10).

3. Offence punishable under S. 143 of the Penal Code.—[1] Under the present section, as amended in 1923 on a conviction under S. 143 of the Penal Code the accused cannot be ordered to give security for keeping the peace—(Vol 14) 1927 All 136 (137) : 28 Cri L Jour 140.

4. Offence punishable under S. 149 of the Penal Code.—[1] An offence under S. 149 of the Penal Code read with another section of the Penal Code, is not one on conviction for which the accused can be bound over to keep the peace. (Vol 31) 1944 All 272 (272, 273) : 46 Cri L Jour 118 : ILR (1944) All 541 \* (Vol 12) 1925 Pat 117 (117) : 3 Pat 870 : 26 Cri L Jour 426 (DB) \* (Vol 19) 1932 Lah 489 (489, 490) : 33 Cri L Jour 576 \* (Vol 21) 1934 Oudh 279 (280) : 35 Cri L Jour 1159 : 10 Luck 100.

[2] Separate conviction for an offence involving a breach of the peace in addition to the conviction for an offence under S. 149 of the Penal Code—This section will apply. (Vol 26) 1939 Mad 787 (787) : 41 Cri L Jour 17 \* (Vol 25) 1938 Oudh 95 (96) : 39 Cri L Jour 341.

5. Offence of rioting.—[1] An accused person convicted of rioting can be bound over to keep the peace under this section. (Vol 26) 1939 Mad 787 (787) : 41 Cri L Jour 17 \* (Vol 25) 1938 Oudh 95 (96) : 39 Cri L Jour 341 \* (Vol 10) 1923 Mad 606 (606) : 25 Cri L Jour 139.

6. "Assault."—[1] In the case of an offence of assault, it is not necessary to record an express finding as to a breach of the peace (Vol 10) 1923 Mad 618 (619) : 24 Cri L Jour 455 \* (Vol 11) 1924 All 306 (207) : 46 All 105 : 25 Cri L Jour 906.

[But see (Vol 13) 1926 All 144 (144, 145) : 26 Cri L Jour 1457.]

Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-division Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court [including Court hearing appeals under section 407] or by the High Court when exercising its powers of revision.

[1882—S. 106 ; 1872—S. 489 paras. 1 and 3, 490, 493 ; 1861—Ss. 280, 281, 284]

[a] Ss. 20 to 26 of the Sind Frontier Regulation, 1892 (3 [III] of 1893), are to be read with and construed as part of this Chapter—see S. 27 of that Regulation, and S. 3, *supra*.

[b] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. for "rioting."

[c] The words "or of assembling armed men or taking other unlawful measures with the evident intent of committing the same" were repealed, *ibid*.

[d] *Inserted, ibid*.

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7. "Assault or other offence involving a breach of the peace."—[1] Assault is an offence which involves a breach of the peace within the meaning of the section. (Vol 20) 1933 All 609 (611) : 55 All 850 : 34 Cri L Jour 859 (DB) \* (Vol 6) 1919 Mad 770 (771, 772) : 19 Cri L Jour 929 \* (Vol 11) 1924 All 306 (307) : 46 All 105 : 25 Cri L Jour 906.

[2] The breach of the peace contemplated by the section is not necessarily a breach of the public peace. (Vol 20) 1933 All 609 (611) : 55 All 850 : 34 Cri L Jour 859 (DB) \* (Vol 6) 1919 Mad 770 (771, 772) : 19 Cri L Jour 929 (Dissenting from. (Vol 3) 1916 Mad 929 : 16 Cri L Jour 611).

[3] The following case holds that the mere use of abusive language and causing disturbance by disorderly behaviour, without resort to actual violence or threats of violence, will not amount to a breach of the peace. (Vol 8) 1921 All 35 (36, 37) : 22 Cri L Jour 668.

[4] A contrary view has been taken in the following cases (Vol 27) 1940 Rang 50 (52) : 1940 Rang L R 256 : 41 Cri L Jour 421 \* (Vol 25) 1938 Mad 795 (795) : 40 Cri L Jour 165 \* (Vol 23) 1936 All 140 (141) : 37 Cri L Jour 385.

[5] The words "offence involving a breach of the peace" must mean an offence, one of the constituting elements of which is the commission of or the intention to commit a breach of the peace on the part of the offender. (Vol 27) 1940 Rang 95 (96) : 41 Cri L Jour 495 \* (Vol 26) 1939 Cal 484 (484) : ILR (1939) 2 Cal 261 : 40 Cri L Jour 836 (DB) \* (Vol 6) 1919 Bom 150 (150, 151) : 43 Bom 554 : 20 Cri L Jour 543 (DB) \* (Vol 7) 1920 Bom 402 (406, 407) : 22 Cri L Jour 513 (DB) \* (Vol 11) 1924 Lah 311 (312) : 24 Cri L Jour 271 \* (Vol 11) 1924 Mad 808 (808, 809) : 47 Mad 846 : 25 Cri L Jour 1096 \* ('06) 3 Cri L Jour 461 (462) : 29 Mad 190.

[See however (Vol 27) 1940 Rang 50 (52) : 1940 Rang L R 256 : 41 Cri L Jour 421 (dissenting) (Vol 18) 1931 Cal 645 (DB) \* (Vol 26) 1939 Oudh 45 (47) : 14 Luck 360 : 40 Cri L Jour 183.]

[6] The offence of causing hurt or grievous hurt an offence "involving a breach of the peace". (Vol 1933 All 609 (611) : 55 All 850 : 34 Cri L Jour 8 (DB) \* (Vol 21) 1934 Oudh 425 (426) : 9 Luck 27 35 Cri L Jour 284 \* (Vol 16) 1929 All 349 (350) : All 520 : 30 Cri L Jour 686. ((Vol 14) 1927 All 157 : All 131 : 28 Cri L Jour 88 and (Vol 13) 19 All 144 : 26 Cri L Jour 145 Explained) \* (Vol 19) 19 Lah 435 (436) : 13 Lah 336 : 33 Cri L Jour 746 (Vol 10) 1923 Mad 618 (619) : 24 Cri L Jour 455 \* ('06) 1919 Mad 770 (771, 772) : 19 Cri L Jour 929. ((Vol 1916 Mad 829 : 16 Cri L Jour 611 Dissented from (Vol 14) 1927 Oudh 101 (102) : 28 Cri L Jour 144 (D) (Vol 8) 1921 Oudh 140 (dissenting from.) \* ('05) 2 Cri L Jour 720 (721) : 3 Low Bur Rul 30.

[See however (Vol 8) 1921 Oudh 140 (140, 141).]

[7] Offence of criminal trespass—Entry made with intent to commit offence of hurt or assault—Such criminal trespass will be an "offence involving a breach of the peace." ('03) 7 Cal WN 25 (26) (DB) \* ('73) Suth W R Cr 37 (37) (DB) \* (Vol 12) 1925 Lah 6 (621) : 26 Cri L Jour 1462 \* (Vol 4) 1917 Low Bur (77) : 8 Low Bur Rul 463 : 18 Cri L Jour 8 (Vol 7) 1920 All 164 (164) : 42 All 345 : 21 Cri L Jour 288 \* ('03) 30 Cal 93 (94).

[See however (Vol 26) 1939 Cal 320 (320) : 40 Cri L Jour 721 (DB) \* (Vol 26) 1939 Oudh 45 (47) : Luck 360 : 40 Cri L Jour 183.]

[8] Entry made with intent to commit theft or have sexual intercourse with the complainant's wife. The criminal trespass will not be an offence involving a breach of the peace. ('08) 8 Cri L Jour 476 (478) Low Bur Rul 277 \* ('97) 25 Cal 628 (630) (DB).

[9] An offence under S. 510 Penal Code, is not an offence involving a breach of the peace and a person convicted of it cannot therefore be ordered to execute bond to keep the peace under this section. (Vol 1940 Mad 755 (755) : 42 Cri L Jour 16.

[10] An offence not requiring the commission of, the intention to commit a breach of the peace a necessary element thereof, is not one involving a breach

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of the peace. (Vol 27) 1940 Mad 55 (56): 41 Cri L Jour 235 \* (Vol 26) 1939 Oudh 38 (39): 40 Cri L Jour 138 \* ('97) 1 Cal W N 186 (187) (DB) \* ('93-1900) 1893-1900 Low Bur Rul 630 (630) \* ('92) 1892 Bat 622 (622) \* ('67) 7 Suth W R Cr 57 (58) (DB) \* (Vol 10) 1923 Mad 618 (619): 24 Cri L Jour 455 \* (Vol 14) 1927 All 136 (137): 28 Cri L Jour 140 \* (Vol 13) 1926 Lah 675 (675, 676): 27 Cri L Jour 571 \* (Vol 11) 1924 Lah 311 (312): 24 Cri L Jour 271 \* (Vol 27) 1940 Oudh 323 (324): 41 Cri L Jour 505 \* ('04) 2 Low Bur Rul 125 (125).

[11] In the course of commission of offence not comprising of breach of the peace as a necessary element thereof, the accused, as a matter of fact doing acts involving breach of the peace, or which are likely to lead to a breach of the peace, or which are likely to provoke persons, other than the offender to commit a breach of peace.—Offence itself is not one "involving a breach of the peace." (Vol 26) 1939 Cal 484 (484): ILR (1939) 2 Cal 261: 40 Cri L Jour 836 (DB) \* (Vol 27) 1940 Oudh 323 (324): 41 Cri L Jour 505 \* ('09) 9 Cri L Jour 88 (88) (Mad) \* ('91) 2 Weir 48 (48) \* (Vol 27) 1940 Rang 50 (52): 1940 Rang L R 256: 41 Cri L Jour 421 \* (Vol 27) 1940 Rang 95 (96): 41 Cri L Jour 495 \* (Vol 17) 1930 Cal 802 (803): 32 Cri L Jour 859 \* (Vol 19) 1932 Oudh 33 (33, 34): 7 Luck 573: 33 Cri L Jour 193 (DB) \* (1900—02) 1 Low Bur Rul 262 (262) \* (Vol 8) 1921 Lah 96 (97): 2 Lah 279: 22 Cri L Jour 709 \* ('99) 2 Weir 47 (47).

[12] If, in committing an offence, of which a breach of the peace is not an element, the accused does commit acts amounting to a breach of the peace he should be charged of and convicted for the offence of which such breach of the peace is an element. [See (Vol 19) 1932 Oudh 33 (34): 7 Luck 573: 33 Cri L Jour 193 (DB).

[13] Offences of rape or an attempt to rape which necessarily involves an assault upon the person against whom the offence is committed is one involving a breach of the peace. (Vol 25) 1938 Mad 615 (615): 39 Cri L Jour 816.

8. "Criminal intimidation."—[1] There should be a conviction for criminal intimidation; the mere fact that the facts of the case disclose the commission of such an offence by the accused is not enough ('10) 11 Cri L Jour 680 (681) \* (Vol 8) 1921 Lah 96 (97): 2 Lah 279: 22 Cri L Jour 709 \* ('04) 1 Cri L Jour 447 (449).

9. "Is convicted of such offence."—[1] The jurisdiction to pass an order for security under this section arises only on conviction of an accused person for any of the offences mentioned therein. ('75) 24 Suth W R Cr 10 (10) \* ('06) 3 Cal L Rep 72 (73) (DB).

[2] Accused person acquitted—He cannot be ordered to give security under this section. ('74) 22 Suth W R Cr 9 (10) (DB).

[3] The conviction must be for one of the offences mentioned in this section. (Vol 28) 1941 Mad 488 (489): 43 Cri L Jour 40.

[4] Accused convicted under S. 504 Penal Code—Magistrate passing order for security under this section—Held that as the facts disclosed an offence of assault, the error in the order of the Magistrate was only one of form and not of substance—High Court refused to interfere. (Vol 26) 1939 Cal 484 (485): ILR (1939) 2 Cal 261: 40 Cri L Jour 836 (DB).

[See also (Vol 27) 1940 Rang 50 (53): 1940 Rang L R 256: 41 Cri L Jour 421.]

[5] Accused convicted of an attempt to commit one of the offences mentioned in the section—There is no jurisdiction to pass an order for security against him on such conviction. ('80) 3 Shome L R 33.

10. Conviction in summary trial.—[1] Accused convicted in a summary trial—Order for security under this section can be passed. ('86) 1886 All WN 181 (181) \* ('04) 1 Cri L Jour 1054 (1055): 7 Oudh Cas 338.

11. Courts empowered to act under this section.—[1] A Bench of Honorary Presidency Magistrates having powers of Presidency Magistrate conferred under S. 18 can take action under this section. ('05) 2 Cri L Jour 770 (773, 774) (DB) (Bom).

12. "Such Court is of opinion... peace."—[1] Person convicted and sentenced for one of the offences mentioned in this section—It is necessary that Court should be of opinion that "it is necessary to require such person to execute a bond for keeping the peace." (Vol 14) 1927 Pat 37 (37, 38): 27 Cri L Jour 1112 \* (Vol 20) 1933 All 609 (611): 55 All 850: 34 Cri L Jour 859 (DB) \* (Vol 26) 1939 Cal 320 (320): 40 Cri L Jour 721 (DB).

[2] In forming the opinion the Magistrate must take into consideration only the legal evidence and should not act on the statement made by the prosecution. (Vol 30) 1943 Mad 169 (170): 44 Cri L Jour 321.

[3] If the circumstances indicate that a breach of the peace is likely to recur, an order for security is justified otherwise not. (Vol 30) 1943 Mad 169 (170): 44 Cri L Jour 321 \* (Vol 23) 1936 Pat 36 (37): 37 Cri L Jour 63 \* (Vol 16) 1929 All 349 (350): 51 All 540: 30 Cri L Jour 636 \* ('70) 13 Suth W R Cr 73 (75) (DB) \* (Vol 5) 1918 Pat 252 (253): 19 Cri L Jour 1000 (DB) \* (Vol 3) 1916 Mad 1035 (1035): 16 Cri L Jour 700.

[4] Accused sentenced to a long term of imprisonment or transportation—Order for security is unnecessary. ('09) 10 Cri L Jour 69 (72): 5 Low Bur Rul 34 (FB).

[5] If the order for security would have the effect of preventing the accused from exercising his legal right such an order should not be made. ('07) 6 Cri L Jour 40 (41) \* ('07) 6 Cri L Jour 321 (325) (DB) \* ('07) 5 Cri L Jour 19 (21) (DB).

[6] Offence committed being petty one, this section should be very sparingly invoked. (Vol 30) 1943 Mad 169 (170): 44 Cri L Jour 321 \* (Vol 25) 1938 Mad 795 (795): 40 Cri L Jour 165.

[7] Period for which bond is required to be furnished should be in proportion to gravity of offence committed. (Vol 30) 1943 Mad 169 (170).

[8] It is desirable that Court should record its reasons for forming an opinion that it is necessary to require security though there is no provision for doing so. (Vol 29) 1942 Mad 501 (501) \* (Vol 20) 1933 All 609 (611, 612): 55 All 850: 34 Cri L Jour 859 (DB).

13. "At the time of passing sentence."—[1] An order for security under this section must be passed at the time of the conviction and the passing of a sentence. ('71) 15 Suth W R Cr 56 (56) (DB) \* (Vol 11) 1924 All 230 (231): 25 Cri L Jour 965 \* ('72) 4 N W P H C R 154 (155).

[2] The order must be part of the decision in the main case. (Vol 12) 1925 All 443 (444): 26 Cri L Jour 981.

[3] Court must not only record a conviction but pass a substantive sentence. ('08) 2 Low Bur Rul 53 (54).

*B.—Security for keeping the Peace in other Cases and security for Good Behaviour*

**107.** (1) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public

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[4] Restriction as to order for security being passed at the time of passing a sentence does not apply to appellate or revisional Court ordering security under sub-s (3). (Vol 15) 1928 Bom 134 (135) : 29 Cri L Jour 502 (DB).

[5] No notice to show cause why security should not be required is necessary before an order is passed under this section. (Vol 30) 1943 Mad 406 (406) : 44 Cri L Jour 639 \* (Vol 23) 1936 Pat 36 (37) : 37 Cri L Jour 63 \* (Vol 11) 1924 All 230 (231) : 25 Cri L Jour 965.

[See however (Vol 14) 1927 Pat 37 (38) : 27 Cri L Jour 1112.

**14. Form and contents of order under the section.**—[1] Courts have no power to require security for good behaviour under this section. (71) 1871 Rat 48 (49) (DB) \* (81) 1881 All WN 154 (154, 155) \* (83) 9 Cal 215 (217) \* (Vol 5) 1918 All 95 (95) : 19 Cri L Jour 439.

[2] Order which directs that the prisoner shall, at the conclusion of the term of his imprisonment, execute a bond for keeping the peace would not be a proper order under the section. (75) 7 NWP HCR 328 (329) \* (72) 4 NWP HCR, 154 (155) \* (67) 7 Suth WR Cr 14 (15) (DB).

[3] Order under the section must specify the amount for which security is required. (81) 1881 All WN 86 (86).

[4] Court has no power to order that securities under this section should be furnished in landed property. (04) 1 All L Jour 162n (162n).

**15. "With or without sureties"**—[1] Court cannot direct that a particular person must be one of the sureties. (Vol 5) 1918 All 95 (95) : 19 Cri L Jour 439.

[2] Order requiring a surety for a higher amount than that for which the accused is directed to execute bond is wrong. (12) 13 Cri L Jour 492 (492) (Low Bur).

**16. Setting aside of conviction—Effect of sub-section (2).**—[1] Conviction set aside—The order for security based on such conviction, also automatically falls to the ground. (Vol 4) 1917 Pat 500 (501) : 18 Cri L Jour 987 \* (Vol 12) 1925 Pat 17 (20) : 25 Cri L Jour 919 (DB) \* (Vol 11) 1924 All 696 (698) : 25 Cri L Jour 481 \* (Vol 9) 1922 All 184 (185) : 23 Cri L Jour 72 \* (1900) 27 Cal 566 (570) : 4 Cal WN 546 (DB).

**17. Alteration of conviction to one under a different section.**—[1] Conviction not set aside in appeal but merely altered to one under a different section, also within the ambit of S. 106—The order for security can be allowed to stand. (Vol 8) 1921 All 261 (262) : 22 Cri L Jour 621.

[See also (Vol 27) 1940 Oudh 323 (324) : 41 Cri L Jour 505].

**18. Power of appellate or revisional Court to order security—Sub-section (3).**—[1] This Code, by enacting the sub-s. (3), has expressly empowered an Appellate Court and the High Court in revision to pass an order for security under this section. (Vol 6) 1919 All 375

(375, 376) : 20 Cri L Jour 302 \* (Vol 5) 1918 Nag 6 (65) : 20 Cri L Jour 760 \* (05) 1905 Pun Re No. 2 Cr p. 49 (49) : 2 Cri L Jour 190.

[2] The words "including a Court hearing appeal under S. 407" did not originally occur in the sub-section, but were added by the amendments made in 1923. The amendment makes it clear that an Appellate Court can require security under the section, even in cases where the original trial was before a Magistrate of the second or third class. (Vol 14) 1927 Pat 37 (37) : 27 Cri L Jour 1112.

[3] Power under sub-s (3) cannot be exercised when the offence, for which the accused is convicted does not fall within the purview of sub-section (1). (Vol 10) 192 Mad 133 (133) : 25 Cri L Jour 294 \* (02) 29 Cal 36 (394) : 6 Cal WN 678 (DB) \* (01) 1901 Pun L No. 127 p. 334 (335).

[4] District Magistrate, exercising powers of revision has no power to order security under this section. (V 5) 1918 All 216 (216) : 19 Cri L Jour 732 \* (97-01) Upp Bur 9 (10).

**19. Appeal.**—[1] No appeal will lie against an order to furnish security under this section. (89) 2 We 460 (460).

[2] Where the right of appeal depends on the length of the period to which the accused is sentenced to imprisonment, the mere fact that he has been ordered to give security under this section will not enable him to appeal, if otherwise he cannot do so, although the period of imprisonment, to which he would become liable in case of his non-compliance with the order, added to the substantive sentence passed against him, would reach or exceed the appealable limit. (04) 1 Cri L Jour 1054 (1055) : 7 Oudh Cas 338 \* (Vol 22) 1935 Rang 86 (363) : 13 Rang 287 : 36 Cri L Jour 1510 \* (89) Weir 460 (460).

[3] Appellate Court can while upholding the conviction, set aside the order for security to keep the peace passed against the accused under this section. (03) 3 Cal 101 (102) \* (81) 1881 All WN 154 (155) \* (70) 1 Suth WR Cr 73 (74, 75) (DB).

**20. Revision.**—[1] Question of requiring security for keeping the peace is a matter left largely to the discretion of the Court convicting the accused—High Court in revision will generally be reluctant to interfere with the exercise of such discretion. (Vol 8) 1921 Pat 47 (473) \* (04) 1 Cri L Jour 3 (4) : 6 Bom LR 34 (DB) (Vol 7) 1920 All 164 (164) : 42 All 345 : 21 Cri L Jour 288.

[2] High Court can interfere if the circumstances of any case require such interference. (Vol 13) 1926 All 168 (168) : 27 Cri L Jour 240.

**SECTION 107—Synopsis.**

1. Scope and object of the section.
2. "Is informed."
3. Whether proceedings can be initiated on order of superior Court.
4. Information which has already been subject of judicial proceedings, whether can be basis of action under this section.

tranquillity, the Magistrate a 'if in his opinion there is sufficient ground for proceeding' may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction, and no proceeding shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court, and may send him before a Magistrate empowered to deal with the case, together with copy of his reasons,

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody pending further action by himself under this Chapter].

[1882—Ss. 107, 108 ; 1872—Ss. 491, 494, proviso, 498, para 1 ; 502, para 7 ; 1861—Ss. 282, 285 and 289.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 16.*

[b] *Substituted, ibid., for "this section."*

[c] *Substituted ibid., for "until the completion of the inquiry hereinafter prescribed".*

#### Objects and Reasons

"Clause 107.—We have amended this clause. As it stood, proceedings could not be taken against a person outside the jurisdiction, although he might be instigating a breach of the peace within the jurisdiction but, as such extended power requires careful exercise, we have provided that the power of taking action in such cases shall only be exercised by Chief Presidency

or District Magistrates.

We can find no reason for conferring powers under sub-section (3) of this clause (formerly clause 108), which relates to inferior Courts, on Courts of Session and High Courts ; so we have limited the sub-section to Magistrates not empowered to act under sub-section (1)."—S.C.R., 1898.

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5. Information under this section is not "complaint."
6. Person proceeded against whether entitled to a copy of information received by Magistrate.
7. Whether suit for malicious prosecution lies in respect of information given under this section.
8. Whether suit for defamation lies in respect of information under this section.
9. "Any person is likely to commit a breach of the peace or disturb the public tranquillity."
10. "Wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity."
11. Disturbance of public tranquillity.
12. "If in his opinion there is sufficient ground for proceeding."
13. Power of Magistrate to call for report from Police or Subordinate Magistrate.
14. May require him to show cause.
15. Burden of proof.
16. "With or without sureties."

17. Territorial jurisdiction.

18. Transfer of proceedings to another Magistrate for disposal.

19. Sub-sections (3) and (4).

20. Revision.

1. Scope and object of the section.—[1] Person convicted of an offence falling within section 106—Magistrate failing to avail himself of his powers under that section—He cannot draw up proceedings against the accused under the present section, on the same materials. (71) 3 NWP.HCR 96 (97).

[2] This section is intended to prevent local clashes between persons over property or women or other similar objects of disagreement. (Vol 30) 1948 Pesh 41 (42) : 44 Cri L Jour 478.

[3] The section is not intended for the punishment of past offences, but for the prevention of acts that may amount to or lead to a breach of peace hereafter. (Vol 29) 1942 Sind 122 (128) : 44 Cri L Jour 367 : ILR (1942) Kar 252 (DB) \* (Vol 30) 1943 Mad 394 (394) : 44 Cri L Jour 756 \* (Vol 25) 1938 Cal 583 (583, 584) : 39 Cri L Jour 992 (DB) \* (Vol 24) 1937 Mad 356 (356) : 38 Cri L Jour 699. (Overruled on another point in (Vol 27) 1940 Mad 28 : ILR (1-40) Mad 335 : 41

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Cri L Jour 238 (FB) \* (Vol 18) 1931 Lah 191 (193) : 12 Lah 457 : 32 Cri L Jour 1207 \* ('08) 8 Cri L Jour 123 (129) : 35 Cal 674 : 8 Cal L Jour 68 (DB) \* ('04). 6 Bom LR 683 (664) : 1 Cri L Jour 755.

[See ('95) 1895 Rat 830 (831) (SB).]

[4] Acts alleged as giving rise to an apprehension of breach of peace on the part of a person constituting in themselves specific offences for which he may be punished—Section applies. (Vol 5) 1918 Pat 183 (185) : 19 Cri L Jour 246.

[5] It is not illegal for a Magistrate in proceedings under this section to admit evidence of a specific charge or offence which is the subject of a separate, current trial. (Vol 30) 1943 Mad 394 (394) : 44 Cri L Jour 756.

[6] Magistrate has no power to order attachment of property in proceedings under this section. (Vol 11) 1924 Oudh 345 (346) : 25 Cr L Jour 350.

[7] Institution of proceedings under the section—Information proving false—Court has no power to act under section 250. (Vol 22) 1935 Lah 29 (30).

[8] Question as to the morality or otherwise of actions of contending parties are irrelevant in proceedings under this section. (Vol 26) 1939 Sind 238 (240) : 40 Cri L Jour 803 : I L R (1940) Kar 118.

[9] Dispute as to the possession of certain moveable property—Proceedings under this section started—Elaborate enquiry as to the ownership and title is entirely out of place. ('36) 19 Nag L Jour 264 (267).

2. "Is informed".—[1] A Magistrate has no jurisdiction under this section to proceed against any person where there is no information against him. (Vol 7) 1920 Lah 100 (100) : 21 Cri L Jour 511.

[2] There is no restriction as to the source of the information on which a Magistrate can act under this section. ('81) 3 All 545 (553) (FB) \* ('67) 8 Suth WR Cr 79 (80) \* (Vol 17) 1930 Mad 975 (976) : 54 Mad 422 : 32 Cri L Jour 217 (DB) \* (Vol 19) 1932 All 670 (672) : 54 All 1036 : 34 Cri L Jour 42 \* ('69) 4 Bang LR 46 (51) : 12 Suth WR Cr 60 (FB) \* ('71) 8 Bom H CR Cr 162 (163) (DB) \* ('69) 6 Bom HCR Cr 1 (5) (DB) \* (1864) 2 Mad HCR 240 (242) (DB) \* (Vol 13) 1926 Mad 521 (524) : 49 Mad 315 (DB) \* (Vol 9) 1922 Oudh 273 (274, 275).

3. Whether proceedings can be initiated on orders of superior Court.—[1] An assault case in which the accused was fined was brought to the notice of the High Court by the complainant preferring a petition to it—High Court directed the Magistrate to summon the accused to show cause why he should not be ordered to furnish security to keep peace—*Held* that High Court had power under S. 297 of the Code of 1872 (now S. 439) to do so. ('81) 3 All 545 (548, 553) (FB).

[2] Magistrate should not draw up proceedings merely because the District Magistrate directs him to do so. (Vol 11) 1924 Cal 540 (549) : 24 Cri L Jour 367 (DB).

[3] Sessions Judge cannot set aside in revision order of Magistrate refusing to draw up proceedings and order him to draw up proceedings. (Vol 12) 1925 Cal 262 (262) : 25 Cri L Jour 679 (DB).

4. Information which has already been subject of Judicial Proceeding, whether can be basis of action under this section.—[1] S. 403 or S. 494 does not apply to proceedings under this section. (Vol 29) 1942 Lah 43 Cri L Jour 1942 Pat 183 (185) (FB).

\* (Vol 27) 1940 Rang 189 (190) : 41 Cri L Jour 851 : 1940 Rang LR 236.

[2] On general principles of justice, a person should not be vexed repeatedly with proceedings under it, the same facts as those which formed the foundation for previous proceedings wherein those facts were found insufficient to justify an order for security. ('13) 14 C L Jour 559 (560, 561) : 36 Mad 315 (DB) \* (Vol 5) 19 Mad 556 (556) : 41 Mad 246 : 18 Cri L Jour 878 (DB) (Vol 16) 1929 Mad 842 (844) : 30 Cri L Jour 931.

[See ('71) 3 NWPB CR 96 (97).]

[See also ('13) 14 Cri L Jour 189 (189) (DB).]

[3] Prior order with reference to an "information" not finally disposing of the matter—Proceedings can be started again on the same basis. (Vol 16) 1929 Cal 51 (506, 507) : 31 Cri L Jour 58 (DB) \* ('13) 14 Cri L Jour 559 (560) : 36 Mad 315 (DB) \* (Vol 19) 1932 Cal 81 (865) : 59 Cal 1484 : 33 Cri L Jour 858 (DB).

[4] Criminal prosecution and security proceeding against a person on the same facts—Failure of criminal prosecution is no bar to proceeding under this section (Vol 9) 1922 Oudh 273 (274, 275).

5. Information under this section is not a "Complaint".—[1] An information under this section is not a "complaint" within S. 4 (1) (b). (Vol 19) 1932 All 670 (671) : 54 All 1036 : 34 Cri L Jour 42 \* (Vol 1) 1924 Lah 630 (630) : 25 Cri L Jour 89 \* (Vol 15) 19 Lah 694 (694) : 29 Cri L Jour 886.

6. Person proceeded against, whether entitled to copy of information received by Magistrate.—[1] Information received by a Magistrate does not form "part of the record" within S. 548—Person ordered to show cause why he should not be required to give security not entitled to a copy of information on which order based. (Vol 17) 1930 Mad 975 (977) : 54 Mad 422 : Cri L Jour 217.

7. Whether suit for malicious prosecution lies in respect of information given under this section.—[1] Proceedings under this section are of a quasi criminal nature and can give rise to an action for damages in malicious prosecution. (Vol 6) 1919 All 388 (389) : All 503 (DB) \* (Vol 8) 1921 All 173 (173) : 43 402 (DB) \* (Vol 25) 1938 All 49 (50) : I L R (19 All 89 (DB) \* (Vol 2) 1915 Cal 79 (81) (DB) \* ('17 Cal L Jour 105 (114) (DB).

[But see (1902) 13 Mad L Jour 370 (370) (DB) (Vol 13) 1926 Mad 521 (522, 524) : 49 Mad 315 (DB).

[2] No suit for malicious prosecution lies in respect of proceedings under this section if they have not been started without reasonable and probable cause. (Vol 1925 Pat 469 (470).

8. Whether suit for defamation lies in respect of information under this section.—[1] Statements contained in information to the Magistrate under this section cannot be made the ground of a suit for defamation against the informant. (Vol 13) 1926 Mad 521 (525) : 49 Mad 315 (DB) \* ('13) 17 Cal L Jour 105 (DB) (Cal).]

[2] Statement made by witnesses to a police officer to whom the Magistrate has referred for investigation and report the information—Statements are private (Vol 13) 1926 Mad 521 (524, 525) : 49 Mad 315 (DB).

9. "Any person is likely to commit a breach of the peace or disturb the public tranquillity".—[1] Information on which proceedings can be started under this section must be based on facts which show that such a breach is likely to occur.



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person to be proceeded against is likely to commit a breach of the peace or disturb the public tranquillity or do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. (Vol 30) 1943 Lah 99 (99, 100) : 44 Cri L Jour 506 \* (Vol 26) 1939 Lah 363 (364) : 40 Cri L Jour 901 : ILR (1939) Lah 554 \* ('04) 1 Cri L Jour 696 (697) : 1 All L Jour 418 \* ('66) 6 Suth WR Cr 93 (93) (DB).

[2] The information must be of a clear and definite kind directly affecting the person against whom proceedings are to be drawn up. ('84) 6 All 25 (30) (FB) \* (Vol 9) 1922 Cal 97 (99) : 24 Cri L Jour 230 (DB) \* (Vol 8) 1921 Pat 440 (443) : 22 Cri L Jour 745 \* (Vol 1) 1914 Sind 8 (11) : 8 Sind LR 207 : 16 Cri L Jour 235 (DB).

[See ('04) 1 Cri L Jour 58 (59) : 8 Cal WN 180 (DB)].

[3] The jurisdiction to bind over a person in proceedings commenced under the section arises only when it is proved by definite evidence of facts that he is likely to do any of the acts specified therein. (Vol 18) 1931 Lah 184 (184) : 32 Cri L Jour 693 \* (Vol 7) 1920 Nag 203 (203) : 21 Cri L Jour 560 \* (Vol 7) 1920 Pat 637 (688) : 22 Cri L Jour 86 \* (Vol 1) 1914 All 268 (269) : 37 All 33 : 16 Cri L Jour 46 \* (Vol 18) 1931 Lah 191 (193) : 12 Lah 457 : 32 Cri L Jour 1207 \* (Vol 6) 1919 Pat 22 (24) : 20 Cri L Jour 194 (DB).

[4] Proceedings under this section cannot be commenced on the basis of information merely containing vague recitals borrowed from the words of section. (Vol 16) 1929 Pat 67 (68) : 30 Cri L Jour 492 \* (Vol 18) 1931 Pat 347 (349) : 32 Cri L Jour 1014.

[5] Mere statement that the person in question is using threats of violence to the opposite party is not sufficient to justify action being taken (Vol 19) 1922 Pat 209 (209) : 25 Cri L Jour 369.

[6] Magistrate can start proceedings under this section although information on which he acts does not give details (Vol 27) 1940 Mad 23 (26) : ILR (1940) Mad 335 : 41 Cri L Jour 238 (FB) : ((Vol 5) 1918 All 93 : 19 Cri L Jour 876 followed).

[7] Enmity or ill-feeling between two parties is no ground for instituting proceedings under this section against one or both of them. (Vol 15) 1928 Lah 243 (244) : 29 Cri L Jour 417 \* (Vol 1) 1914 Oudh 305 (306) : 15 Cri L Jour 721 \* ('04) 1 Cri L Jour 696 (697) : 1 All L Jour 418 \* ('94) 7 CPLR Cr 9 (10) (DB) \* (Vol 9) 1922 Cal 97 (99) : 24 Cri L Jour 230 \* (Vol 4) 1917 All 421 (423) : 17 Cri L Jour 484 \* (Vol 15) 1928 Lah 863 (864) : 29 Cri L Jour 714.

[8] Party boycotting another party. He cannot be bound over. ('13) 14 Cri L Jour 238 (238) (All).

[9] Dispute between two parties. No action can be taken against any one of the persons interested in the dispute unless facts show that he is likely to commit a breach of the peace or do any of the other acts mentioned in the section. (Vol 17) 1930 All 408 (409) : 31 Cri L Jour 710 : 52 All 593 \* (Vol 30) 1943 Pat 417 (418) : 45 Cri L Jour 406 \* (Vol 9) 1922 Cal 97 (99) : 24 Cri L Jour 230 \* ('11) 12 Cri L Jour 186 (186) : (Lah) \* (Vol 3) 1916 All 100 (100) : 17 Cri L Jour 400 : 38 All 468 \* (Vol 7) 1920 Pat 637 (688) : 22 Cri L Jour 86 \* ('04) 1 Cri L Jour 58 (59) : 8 Cal WN 180 (DB) \* (Vol 21) 1934 Pesh 21 (21) : 35 Cri L Jour 963 \* ('74) 21 Suth WR Cr 2 (3, 4) (DB).

[10] Proceedings can be drawn up under the

section against persons likely to abet the commission of the acts mentioned in it (Vol 9) 1922 Nag 180 (181) : 23 Cri L Jour 394 \* ('84) 6 All 26 (29) (FB) \* ('12) 13 Cri L Jour 170 (172) : 33 All 775 \* ('04) 1 Cri L Jour 344 (348) : 31 Cal 350 (DB) \* (Vol 8) 1916 Pat 52 (53) : 1 Pat L Jour 361 : 18 Cri L Jour 374 (DB).

[See also (Vol 26) 1939 Lah 363 (364) : ILR (1939) Lah 554 : 40 Cri L Jour 901].

[But see ('12) 13 Cri L Jour 126 (126) : 1912 Pun Re No 4 Cr].

[11] Person cannot be bound over to keep the peace merely because his servants, agents, or partisans are likely to break the peace or disturb the public tranquillity ('82) 10 Cal L Rep 430 (432) (DB) \* ('72) 9 Beng LR 229 (234) : 18 Suth WR Cr 11 (11) (DB) \* ('04) 1 Cri L Jour 696 (697) : 1 All L Jour 418 \* ('10) 11 Cri L Jour 719 (720) (All).

[12] Persons holding respectable position in his community and wielding enormous influence with its members—Proceedings cannot be instituted against him under this section for acts done by such members. (Vol 26) 1939 Lah 363 (364) : ILR (1939) Lah 554 : 40 Cri L Jour 901.

[13] Acts committed by a person under orders of his master. He cannot escape liability. ('05) 2 Cri L Jour 554 (568) : 9 Cal WN 898 : 1 Cal L Jour 616 (SB).

[14] It is only a likelihood of a person's doing acts mentioned in the section that is necessary for taking action. (Vol 30) 1943 Nag 88 (90) : 44 Cri L Jour 82 : ILR (1943) Nag 609 \* (Vol 17) 1930 All 408 (408) : 52 All 593 : 31 Cri L Jour 710 \* ('04) 1 Cri L Jour 58 (59) : 8 Cal WN 180 (DB) \* (1864) 1 Suth WR Cr 45 (46) (DB).

[15] Person was likely to commit or has committed a breach of the peace in the past. This is no ground for proceeding against him under this section. (Vol 30) 1943 Mad 394 (394) : 44 Cri L Jour 756 \* (Vol 27) 1940 Mad 23 (25) : ILR (1940) Mad 335 : 41 Cri L Jour 238 (FB) \* (Vol 26) 1939 Lah 363 (364) : ILR (1939) Lah 554 : 40 Cri L Jour 901 \* ('84) 1884 All WN 54 (55) \* ('97-01) 1 Upp Bur Rul 16 (18) \* ('08) 7 Cri L Jour 232 (232) : 2 Pun WR Cr 90 \* ('97-01) 1897-1901 Upp Bur Rul Cr Pro 15 (15) \* ('04) 1 Cri L Jour 755 (756) : 6 Bom LR 663 (DB) \* (Vol 14) 1927 Pat 231 (232) : 28 Cri L Jour 719 \* ('04) 1 Cri L Jour 360 (361, 362) : 26 All 190.

[16] Apprehension of breach of the peace at the time of the commencement of proceedings under the section—Apprehension ceasing subsequently before final order for security is passed. Proceedings must be cancelled. (Vol 14) 1927 Pat 231 (232) : 28 Cri L Jour 719 \* ('75) 23 Suth WR Cr 19 (21) (DB).

[See however (Vol 27) 1940 Pat 252 (253) : 41 Cri L Jour 764].

[17] Breach of the peace likely to take place in near future—Security should be taken, even though occasion on which ill-feelings between the parties first come to head has passed away. ('11) 12 Cri L Jour 493 (494) (All).

[See also ('04) 1 Cri L Jour 344 (348) : 31 Cal 350 (DB).

[18] In proceedings under this section the Court is entitled to take into consideration the utterance of threats by a party on different occasions, as well as the previous relations of the parties and the antecedent and other existing circumstances. (Vol 28) 1941 Pat 241 (243) : 42 Cri L Jour 296 \* ('11) 13 Cri L Jour 104



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(105) (DB) (Mad) \*('04) 1 Cri L Jour 344 (348) : 31 Cal 350 (DB).

[19] Mere use of bombastic language without any indication of a design to break the peace does not render the person using it liable to be dealt with under the section ('11) 12 Cri L Jour 104 (105) (DB) (Mad).

[20] Mere absence of actual overacts on the part of the person sought to be bound over during the past six months is not conclusive proof that he is not likely to do any of the acts mentioned in the section. (Vol 6) 1919 Cal 469 (470) : 19 Cri L Jour 266 (DB).

[21] For proceedings being drawn up under the section against any person it need not be shown that he intends to do any definite act. (Vol 27) 1940 Mad 23 (25) : ILR (1940) Mad 335 : 41 Cri L Jour 238 (FB). (The decisions in 2 Weir 49 (DB) : (Vol 5) 1918 Mad 555 : 41 Mad 246 : 18 Cri L Jour 878 (DB) ; (Vol 24) 1937 Mad 356 : 38 Cri L Jour 699 ; and (Vol 17) 1930 Mad 859 : 32 Cri L Jour 27 must be deemed as overruled by this full bench decision. \* (Vol 5) 1918 All 93 (93) : 19 Cri L Jour 876.

[But see ('97-01) 1 Upp Bur Rul 16 (18) ].

[22] Reasonable probability and not bare possibility of breach of peace is necessary to justify proceedings under this section. ('80) 3 Shorne LR 37.

[See (Vol 16) 1929 Nag. 328 (332) : 31 Cri L Jour 20]

[23] Evidence that accused attempted to commit a breach of the peace during the pendency of the proceedings under this section, is the best evidence to prove their intention to commit further breach. (Vol 17) 1930 All 408 (409) : 52 All 593 : 31 Cri L Jour 710.

10. "Wrongful act that may probably occasion a breach of peace or disturb the public tranquillity."—

[1] A rightful act cannot be made the subject of proceedings under this section, even though it may provoke a breach of the peace or disturb the public tranquillity (Vol 29) 1942 Pat 331 (333) : 43 Cri L Jour 637 \* (Vol 29) 1942 Nag 45 (46) : 43 Cri L Jour 357 : ILR (1942) Nag 620.

[2] The section must be used to protect persons exercising their legal rights and not to interfere with such rights (Vol 26) 1939 Lah 36\* (364) : ILR (1939) Lah 554 : 40 Cri L Jour 901 \* (Vol 26) 1939 Sind 167 (169, 170) : ILR (1939) Kar 662 : 40 Cri L Jour 703 (DB) \* ('07) 6 Cri L Jour 230 (231) : 34 Cal 935 (DB) \* ('10) 11 Cri L Jour 355 (357) : 32 All 571 (DB) \* ('90) 14 Bom 25 (28) (DB) \* (Vol 16) 1929 Mad 842 (844) : 30 Cri L Jour 931 \* (Vol 2) 1915 Mad 81 (81) : 15 Cri L Jour 661 \* (Vol 13) 1926 Lah 695 (695) : 8 Lah 98 : 27 Cri L Jour 1094 \* ('04) 1 Cri L Jour 940 (941) : 6 Bom LR 862 (DB) \* (Vol 5) 1918 Upp Bur 53 (54 55) : 2 Upp Bur Rul 157 : 18 Cri L Jour 512 \* (Vol 21) 1934 Oudh 179 (180) : 9 Luck 651 : 35 Cri L Jour 809 \* (Vol 21) 1934 Pat 104 (105) : 35 Cri L Jour 1057.

[See ('85) 7 All 461 (477) (FB) ].

[3] "Wrongful Act" means an act forbidden by the penal statutes of India or declared to be penal or wrongful by such statutes and not merely an improper or immoral act. (Vol 7) 1920 Pat 550 (552) : 21 Cri L Jour 453 \* (Vol 15) 1928 Cal 438 (440) : 29 Cri L Jour 844 (DB) \* (Vol 1) 1914 All 268 (271) : 37 All 33 : 16 Cri L Jour 46 \* (Vol 7) 1920 Pat 661 (662) : 21 Cri L Jour 225 \* ('12) 13 Cri L Jour 170 (171) : 33 All 775 \* (Vol 24) 1937 Lah 717 (718) : 39 Cri L Jour 23 \* (Vol 21) 1934 Oudh 179 (181) : 11 Luck 651 : 35 Cri L Jour 809.

[4] The *bona fide* exercise of the right to go procession along a public road without infringing law in any way is not wrongful act. (Vol 1) 1914 All (271) : 37 All 33 : 16 Cri L Jour 46 \* (Vol 16) 1 Lah 138 (140) : 31 Cri L Jour 75 \* ('08) 7 Cri L J 504 (505) : 12 Cal W N 703 (DB) \* ('12) 13 Cri L J 143 (144) (Mad) \* ('12) 13 Cri L Jour 170 (170) All 775. The blowing of a conch in connection with the ceremonial acts of worship in accordance with established usage at a place fixed for the purpose.

[5] Resistance or protest against the invasion one's legal rights, is not wrongful act. (Vol 7) 1 All 28 (29) : 21 Cri L Jour 337 \* ('07) 5 Cri L J 344 (347) : 5 Cal L Jour 447 (DB) \* ('09) 10 Cr Jour 221 (223) : 5 Nag LR 94 \* ('04) 1 Cri L J 1076 (1077) : 14 Mad L Jour 491 \* ('03) 2 Cri L J 338 (339) : 9 Cal W N 618 (DB).

[6] Under S. 497 Penal Code the wife cannot be punished for adultery even as an abettor and can be said to have committed a wrongful act. ('77) 1 Pun Re No. 1 (Cr) p 2 (2) (DB).

[7] In proceedings under this section if the Magistrate finds that the question of respective rights and obligations of the parties is not easy of solution by him he should bind down both of them. (Vol 30) 1943 J 99 (99, 100) : 44 Cri L Jour 506 \* ('07) 6 Cri L J 230 (231) : 34 Cal 935 (DB) \* (Vol 14) 1927 Pat (314, 315) : 28 Cri L Jour 605 \* (Vol 18) 1931 Pat (348) : 32 Cri L Jour 1014 \* ('21) 22 Cri L Jour (701) (All) \* ('08) 7 Cri L Jour 403 (404, 405) : 12 W N 606 (DB).

[See however ('06) 4 Cri L Jour 456 (459) : 11 W N 121 (DB).]

[8] Before taking action against a person on ground of his being likely to do a wrongful act which may provoke a breach of peace, it must be shown that some definite act is in contemplation. ('87) 1887 J Re No. 64 (Cr) p 176 (DB) \* (Vol 7) 1920 Pat 550 (552) 21 Cri L Jour 453 \* ('05) 10 Cal W N xlviii. (xlvii).

[See also (Vol 12) 1925 Lah 625 (626) : 26 Cri Jour 1339].

[9] Breach of the peace or the disturbance of public tranquillity must be not merely possible but a probable result of the wrongful act. (Vol 1) 1914 Lah (394) : 1914 Pun Re No. 22 Cr : 15 Cri L Jour 60 ('08) 4 Cri L Jour 278 (278) : 1906 Pun Re No. 7 (1).

11. Disturbance of public tranquillity.—[1] Person not likely to commit or provoke breach of the peace but likely to disturb public tranquillity can also be proceeded against under this section. (Vol 3) 1 All 276 (277) : 17 Cri L Jour 301 (302).

12. "If in his opinion there is sufficient ground for proceeding."—[1] In each case the Magistrate has to exercise his discretion with reference to the credibility and sufficiency of the information received by him (Vol 27) 1940 Rang 189 (190) : 41 Cri L Jour 8 : 1940 Rang LR 226 \* (Vol 25) 1938 Cal 583 (583) : Cri L Jour 992 (DB) \* ('75) 23 Suth W R Cr 58 (5) (Vol 19) 1932 All 670 (672) : 34 Cri L Jour 42 : 54 1038 \* ('69) 6 Bom H O R (Cr) 1 (5) (DB) \* (Vol 1947 Pat 285 (236)).

[2] If Magistrate comes to the conclusion that apprehension as to breach of the peace is unfounded he need not take any action under this section. (Vol 1934 Lah 630 (630, 631) : 25 Cri L Jour 89.

[3] Magistrate cannot dismiss an application under this section merely on the report of a *saidar*. (Vol 1928 Lah 119 (120) : 29 Cri L Jour 257.

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[4] Proceedings under this section started—Magistrate coming to the conclusion that the person is no longer likely to do anything which might lead to a breach of the peace—He can bring the proceedings to end only by order discharging the person under S. 119. (Vol 27) 1940 Rang 189 (190) : 1940 Rang L R 226 : 41 Cri L Jour 853.

13. Power of Magistrate to call report from police or subordinate Magistrate.—[1] Procedure provided for in Ss. 202 and 203 in terms not applicable to a petition asking for an order for security being passed against a person. (Vol 19) 1932 All 670 (671) : 34 Cri L Jour 42 : 54 All 1036 \* (Vol 15) (1928) Lah 694 (694) : 29 Cri L Jour 866 \* (Vol 13) 1926 Mad 521 (523, 525) : 49 Mad 315 (DB).

[2] Magistrate to whom a petition is addressed is not bound to initiate proceedings in every case—Magistrate has inherent power to refer the matter to police or to a subordinate Magistrate for investigation or enquiry and report, before making up his mind as to whether notice must issue or not. (Vol 25) 1938 Lah 861 (863, 864) : ILR (1938) Lah 640 : 40 Cri L Jour 193 (DB) (Vol 15) 1928 Lah 694 : 29 Cri L Jour 866 Disapproved \* (Vol 19) 1932 All 670 (672) : 34 Cri L Jour 42 : 54 All 1036 \* (Vol 13) 1926 Mad 521 (525) : 49 Mad 315 (DB) \* ('91) 2 Weir 51 (51) (DB).

[But see (Vol 34) 1947 Pat 235 (236). (It is wrong for a Magistrate to direct another Magistrate to hold an enquiry and to report as to whether action under S. 107 was necessary).]

14. May require him to show cause.—[1] An order directing a person to enter into a bond for keeping the peace is illegal, if he was not summoned to show cause why such an order should not be passed against him. ('12) 13 Cri L Jour 844 (845) (All) \* ('82) 5 Mad 380 (380, 381) : 2 Weir 49 (DB) \* ('70) 2 N W P H C R 189 (189) (DB) \* ('74) 21 Suth W R Cr. 37 (38) (DB).

[2] Preliminary hearing for coming to a conclusion that an action under this section should be taken is not necessary. (Vol 28) 1941 Pat 241 (242) : 42 Cri L Jour 296.

15. Burden of proof.—[1] Person required to "show cause" why he should not be ordered to give security for keeping the peace—Subsequent enquiry under S. 117 before final order is passed—Burden of proof is on prosecution and not on person proceeded against to prove innocence. ('87) 9 All 452 (460, 461) \* ('93) 7 C P L R Cr 9 (11).

16. "With or without sureties."—[1] Landed proprietors required to give security for keeping the peace—Their personal security should be considered sufficient. (1921) 22 Cri L Jour 701 (All).

17. Territorial Jurisdiction.—[1] Either person proceeded against or place where breach of the peace or disturbance of the public tranquillity is apprehended to take place, is within local limits of jurisdiction—District Magistrate or Chief Presidency Magistrate only can act—Other Magistrates can do so only if both places where breach of the peace or disturbance of public tranquillity is apprehended and person proceeded against are within local limits of their jurisdiction. (Vol 30) 1943 Nag 88 (89) : 44 Cri L Jour 82 : ILR (1943) Nag 609 \* (Vol 9) 1922 All 337 (337) : 23 Cri L Jour 896 \* (Vol 30) 1943 Pesh 41 (41, 42) : 44 Cri L Jour 478 \* ('05) 2 Cal L Jour 63n (DB) \* ('85) 11 Cal 737 (738) (DB) \* (Vol 21) 1934 Mad 255 (256) : 35 Cri L Jour 626 \* (Vol 22) 1935 Pat 131 (131) : 36 Cri L Jour 580.

[2] Other Magistrate cannot start proceedings against a person who is not within his jurisdiction

even on the express direction of the District Magistrate. ('09) 9 Cri L Jour 148 (149) (DB) (Cal)

[3] Territorial jurisdiction of a Magistrate to take proceedings under this section challenged—It is incumbent upon him to enter into the matter and decide it before proceeding further. ('05) 10 Cal W N xxii (xxiii) (DB).

18. Transfer of proceedings to another Magistrate for disposal.—[1] Proceedings under this section initiated by Magistrate having local jurisdiction to do so—District Magistrate can transfer them to any other Magistrate subordinate to him who, though lacking territorial jurisdiction, is otherwise competent to complete the proceedings. ('01) 24 All 151 (152) \* (Vol 11) 1924 Cal 540 (540) : 24 Cri L Jour 367 (DB) \* ('04) 1 Cri L Jour 344 (347) : 31 Cal 350 (DB) \* (Vol 5) 1918 Cal 892 (892) : 19 Cri L Jour 496 (DB) \* (Vol 17) 1930 Mad 859 (860) : 32 Cri L Jour 27. (Impliedly overruled on another point in (Vol 27) 1940 Mad 28 : ILR (1940) Mad 335 : 41 Cri L Jour 238 (FB) \* (Vol 1) 1914 All 546 (547) : 16 Cri L Jour 55 : 37 All 20.

[2] Proceedings not initiated but only information under the section received—Case cannot be transferred to another Magistrate for disposal. (Vol 5) 1918 Mad 555 (557) : 18 Cri L Jour 878 (DB) : 41 Mad 246 \* (Vol 4) 1917 Pat 8 (9) : 19 Cri L Jour 96.

[See also (Vol 6) 1919 Cal 469 (470) : 19 Cri L Jour 266 (DB).]

[3] High Court has, under S. 526, power to transfer proceedings under this section from one district to another. (Vol 29) 1942 Oudh 186 (189) : 43 Cal L Jour 365.

19. Sub-sections (3) and (4)—[1] Magistrate to whom a person is sent under sub-section (3) must go through all the procedure laid down in Ss. 112 to 118 before he can bind down the person for keeping the peace. ('09) 10 Cr L Jour 309 (311) : 1909 Pun Re No. 7 (Cr) (DB)

[2] Sub-section (4) confers jurisdiction on a Magistrate to detain only a person sent to him under sub-section (3) and not any other person though before the Court. ('08) 7 Cr L Jour 360 (360) : 31 Mad 315 (FB).

20. Revision.—[1] High Court seldom interferes in the preliminary stage with the discretion of the Magistrate in taking action under the preventive sections of the Code. (Vol 26) 1939 Sind 167 (168) : ILR (1939) Kar 662 : 40 Cri L Jour 708 (DB) \* (Vol 21) 1934 Pat 463 (465, 466) : 36 Cri L Jour 257.

[2] Material on which orders are based clearly insufficient to support them—High Court will interfere. (Vol 11) 1924 Cal 114 (114) : 25 Cri L Jour 189 (DB) \* ('67) 8 Suth W R (Cr) 85 (85) (DB) \* (Vol 5) 1918 Upp Bur 53 (54) : 18 Cri L Jour 512 : 2 Upp Bur Rul 157.

[See (Vol 21) 1934 Oudh 179 (182) : 35 Cri L Jour 809 : 9 Luck 551].

[3] Magistrate proceeding on a wrong legal principle applying the section equally to the wrong doers as well as to the wronged—High Court will interfere in revision. (Vol 26) 1939 Sind 167 (169) : ILR (1939) Kar 662 : 40 Cri L Jour 708 (DB).

[4] Application under this section dismissed—Further enquiry cannot be ordered under S. 436. (Vol 12) 1925 Oudh 138 (138) : 25 Cri L Jour 1149 : 28 Oudh Cas 44.

[See also (Vol 12) 1925 Cal 262 (262) : 25 Cri L Jour 679 (DB).]

[5] Persons who come to High Court in revision against an order under this section are expected to do so with the utmost promptitude and certainly within thirty days of the order against which they complain. (Vol 13) 1926 All 767 (768) : 49 All 226 : 27 Cri L Jour 1152.

108. Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate or Magistrate of the first class specially empowered by the a[Provincial Government] in this behalf, has information that there is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing b[or in any other manner intentionally] disseminates or attempts to disseminate, or in anywise abets the dissemination of.—

Security for good behaviour from persons disseminating seditious matter.

(a) any seditious matter, that is to say, any matter the publication of which is punishable under section 124-A of the Indian Penal Code, or

(b) any matter the publication of which is punishable under section 153-A of the Indian Penal Code, or

(c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

such Magistrate, b[if in his opinion there is sufficient ground for proceeding] may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, c[and edited, printed and published] in conformity with the rules laid down in the Press and Registration of Books Act, 1867, b[with reference to any matters contained in such publication] except by the order or under the authority of d[\* \* \* \* \*] the a[Provincial Government] or some officer empowered e[by the Provincial Government] in this behalf.

[a] *Substituted* by A. O. for "Local Government".

[b] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923,) S. 17.

[c] *Substituted, ibid.*, for "or printed or published."

[d] The words "the Governor-General-in-Council or" were *repealed* by A.O.

[e] *Substituted* by A.O. for "by the Governor-General-in-Council".

#### SECTION 108—Note 1.

[1] This section is not intended to provide for punishment of offences already committed, but to prevent the commission of offences. (Vol 27) 1940 Nag 134 (135); 41 Cri L Jour 713 : ILR (1942) Nag 62 \* (Vol 15) 1928 All 344 (344); 50 All 854 : 30 Cri L Jour 216 \* (Vol 29) 1942 Sind 122 (128) : 44 Cri L Jour 367 : ILR (1942) Kar 252 (DB) (Per Weston, J) \* (Vol 19) 1932 Lah 559 (563) : 33 Cri L Jour 831.

[2] Proceedings under this section are not intended to be taken so as to avoid the trouble and possible refusal of the Government to launch prosecutions under S. 153A or 124A of the Penal Code. (Vol 15) 1928 All 344 (344, 345) : 50 All 854 : 30 Cri L Jour 216.

[3] In order that a person may be bound over it must be shown that the person concerned is in the habit of intentionally disseminating or attempts to disseminate any such matter as is referred to in the section. (Vol 28) 1941 Oudh 98 (100) : 42 Cri L Jour 35 : 16 Luck 260 (DB) \* (Vol 19) 1932 Lah 7 (9) : 32 Cri L Jour 1172 \* (Vol 21) 1934 Oudh 70 (72) : 9 Luck 344 : 35 Cri L Jour 562.

[4] The mere writing of the matter disseminated or the authorship thereof is not sufficient to bring a person under this section. (Vol 10) 1923 Bom 255 (257) : 47 Bom 438 : 25 Cri L Jour 150 (DB).

[5] Persons proceeded against were merely volunteers, said to have taken part in parades, and route-marches. No evidence of dissemination of seditious matter by them. An order under this section held not justified.

(Vol 20) 1933 Lah 236 (238, 239) : 35 Cri L Jour 408.

[6] It is essential for the applicability of clause (a) that the matter disseminated must be shown to be seditious. (Vol 3) 1916 Bom 9 (48) : 18 Cri L Jour 567 (DB).

[7] The following are not seditious matters:—

(a) Advocacy of "Home Rule for India" with the object of obtaining for Indians an increased share of political authority. (Vol 3) 1916 Bom 9 (44, 48) : 18 Cri L Jour 567, (DB) \* ('07) 6 Cri L Jour 297 (300) : 34 Cal 991 (DB).

[b] Mere preaching of the boycott of British goods. (Vol 19) 1932 Lah 7 (9) : 32 Cri L Jour 1172.

[c] Speeches and agitation the trend of which is mainly to redress a particular grievance such as an insult of the religious sentiments of the students of a college. (Vol 19) 1932 Lah 559 (563) : 33 Cri L Jour 331.

[8] If there is no attempt to promote enmity, the mere fact that the matter may have a tendency to promote enmity is not enough to proceed against a person under this section. (Vol 13) 1926 Cal 113 (1136, 1137) : 27 Cri L Jour 1154 : 54 Cal 59 (DB) (Dismissing from. (Vol 3) 1916 Cal 921 : 17 Cri L Jour 254 : 43 Cal 591 (DB)).

[9] This section will not apply unless the disseminator himself intended to provoke feelings of enmity or

## Objects and Reasons.

"Clause 108.—We have inserted as clause 108 [now S. 108] the clause of which notice was given by the Government on the 21st December last. In inserting it we have made the following modifications:—

We have confined the jurisdiction to Chief Presidency and District Magistrates and to specially empowered Presidency and First Class Magistrates, and we have provided that the bond may be with or without sureties.

We have cut out the reference to "obscene matter," as we think that that is sufficiently provided for by the ordinary law. We have explained the reference to "seditious matter" by reference to the provisions of the

proposed new Section 124-A of the Indian Penal Code and we have included matter punishable under the proposed new Section 153-A of that Code.

We have cut out the reference to "defamatory matter" as that term is much too wide, and after consideration we have substituted the words "any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code." The term "Judge" will, of course, have the meaning assigned to it by the Indian Penal Code. This perhaps does not protect all the Public Officers who, we think, are entitled to protection, but it is difficult to draw any other satisfactory line. . . . —S. C. R. 1898.

Security for good behaviour from vagrants and suspected persons.

109. Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information—

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(b) that there is within such limits a person who has no ostensible means of subsistence or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

[1882—S. 109 ; 1872—S. 504, paras, 1, 4 and S. 515, para 2 ; 1861—S. 295.]

Section 108 (*contd.*).

hatred between communities. ('12) 12 Ori L Jour 248 (250) (Low Bur).

[10] It must be shown that there is danger of accused continuing the seditious activities unless he is prevented from doing so under this section. (Vol 19) 1932 Lah 7 (9, 10) : 32 Ori L Jour 1172. (Three speeches out of four not seditious.)

[11] The test is whether there is any fear or probability of the repetition of the offence. (Vol 19) 1932 Pat 213 (214) : 33 Ori L Jour 711 \* ('09) 10 Ori L Jour 379 (380) (Bom) (DB) \* (Vol 15) 1928 All 344 (345) : 50 All 854 : 30 Ori L Jour 216 (Notice, contents of which were punishable under S. 153—A, given for affixing in public place, only once.

[12] In order to make the printer liable under this section the knowledge of the contents of the matter printed will have to be proved against him; but as regards the publisher no such proof is necessary. (Vol 10) 1923 Bom 255 (253) : 47 Bom 438 : 25 Ori L Jour 159 (DB).

## SECTION 109—Synopsis.

1. Scope and object.
2. Simultaneous proceedings for substantive offence as well as under this section.
3. "Is taking precautions to conceal his presence within . . . jurisdiction."—Clause (a).
4. Concealment, meaning of.
5. "With a view to committing any offence."
6. "Who has no ostensible means of subsistence"—Clause (b).

7. "Who cannot give a satisfactory account of himself"—Clause (b).

8. What Magistrate can act under this section.

9. Discretion of Magistrate.

10. Revision.

[1] Scope and object.—This section deals with proceedings against persons who, in English law, would be classed as rogues and vagabonds. ('12) 13 Ori L Jour 239 (240) (DB) (Cal) \* ('84) SO Oudh No. 73 P 84 (85).

[2] Charge framed under both clauses (a) and (b) —Evidence must be examined separately. (Vol 30) 1943 All 367 (367) : ILR (1943) All 816 : 45 Ori L Jour 219.

[3] The first part of cl (b) refers to ordinary beggars and vagrants but the latter part deals with cases of persons who cannot give satisfactory account of themselves in general. (Vol 30) 1943 All 367 (368) : ILR (1943) All 816 : 45 Ori L Jour 219.

[4] The object of the section is to frustrate the criminal designs before they are carried out. (Vol 16) 1929 All 33 (36, 37) : 50 All 909 : 30 Ori L Jour 145 (FB).

[5] The section is not intended for taking security from persons suspected of having committed a particular offence. ('72) 1872 Bat 63 (63) (DB).

[6] It is only when the ordinary means of detection and prevention of crime and ensuring good behaviour have been adopted and have failed, resort to the special means provided by this section is justifiable. ('07) 5 Ori L Jour 377 (381) : 13 Bur LR 91.

[7] The section being restrictive of the liberty of the subject must be applied only when it is strictly applicable.



## Section 109 (contd.)

[3] Giving false names in the first instance and then giving correct names does not by itself amount to taking precautions with a view to commit an offence. (Vol 11) 1924 All 202 (203) : 25 Cri L Jour 950.

[4] Where A went about in Madras under an alias alleging falsely that he was going up for the B.A. examination, it was held that in the absence of proof of intention to commit an offence he could not be called upon to furnish security under this section ('32) 1932 Mad WN 1347 (1348, 1349).

[5] The fact that the accused took precautions to conceal his presence together with the fact that he ran away on the approach of the police warranted the inference that he was taking precautions with a view to commit an offence. (Vol 17) 1930 Pat 497 (498) : 31 Cri L Jour 1125.

[6] Person giving false name and delivering letters secretly containing incitement to commit crime or demanding money for the means of committing crime is one under Cl (A). (Vol 1) 1914 Cal 585 (585) : 15 Cri L Jour 255 (DB).

[7] Clause (a) does not apply to a person merely found talking at some time of a night with bad characters in a place which is open to the public. (Vol 13) 1926 Pat 569 (571) : 6 Pat 177 : 27 Cri L Jour 1128 (DB).

[See also (Vol 28) 1941 Pat 478 (479) : 42 Cri L Jour 554].

[8] Where a person falsely personates another with a view to commit an offence, he cannot be said to be so doing by concealing his presence. (Vol 21) 1934 All 45 (51) : 56 All 314 : 35 Cri L Jour 442 (DB).

6. "Who has no ostensible means of subsistence" Clause (b).—[1] Unless, there is reasonable ground for suspecting that a person, who is unable to prove the source of his livelihood, is sustaining himself by dishonest means, he will not come within the purview of this section. (Vol 13) 1926 Cal 648 (649) : 53 Cal 345 : 27 Cri L Jour 497 (DB).

[2] Whether the order for security is really necessary either for keeping the peace or for maintaining good behaviour is a matter for Magistrate's judicial discretion ('94) 1894 Rat Un Re Cri Cas 723 (724) (DB) \* (Vol 13) 1926 Cal 648 (649) : 53 Cal 345 : 27 Cri L Jour 497 (DB).

[3] If a cooly could not show any immediate work, it does not mean he has no ostensible means of livelihood. (Vol 12) 1925 Cal 616 (619) : 26 Cri L Jour 842 (DB).

[4] As long as a young man out of employment is staying in his father's house and the father is a man of substance and able, if necessary, to support him he cannot be said to be in want of ostensible means of subsistence. ('12) 13 Cri L Jour 161 (162) : 39 Cal 456 (DB) \* ('21) 32 Cri L Jour 749 (749) (All).

[5] The following have been held to be not sufficient facts for demanding security.

(a) That a person belongs to a wandering tribe. ('83) 2 Weir 53 (53) (DB).

(b) That a person is a gambler or an opium smoker. ('72-92) 1872-92 Low Bur Rul 246 (246).

(c) That a person does not work at present and was previously convicted of bad livelihood (1900) 5 Cal WN 28 (29) (DB).

(d) That a person has no means of subsistence except through a play of ring game which by itself is not an offence ('13) 14 Cri L Jour 452 (453) : 40 Cal 702 (DB) \* ('09) 9 Cri L Jour 527 (528) (All).

7. "Who cannot give a satisfactory account of himself"—Clause (b).—[1] The words "who cannot give a satisfactory account of himself" have been interpreted in the following different ways.

(a) The words do not mean "explain his conduct" at any particular time or place but mean an explanation of a person's general course of conduct as distinct from a momentary behaviour (Vol 30) 1943 All 367 (368) : ILR (1943) All 816 : 45 Cri L Jour 214 \* (Vol 16) 1929 All 33 (37) : 50 All 909 : 30 Cri L Jour 145 (FB) (Per Sulaiman, CJ ; Boys Kendall and Weir, JJ contra) \* (Vol 5) 1918 Cal 887 (887) : 18 Cri L Jour 825 (DB) \* (Vol 16) 1929 Cal 729 (730) : 34 Cri L Jour 408 (DB).

(b) The expression "satisfactory account of himself" means a satisfactory account of his presence at the place and in the circumstances in which he was found and not merely a satisfactory account of himself generally (Vol 25) 1938 Cal 409 (411) : ILR (1938) 2 Cal 221 : 39 Cri L Jour 647 (DB) \* (Vol 25) 1938 Nag 303 (307) : ILR (1938) Nag 595 : 39 Cri L Jour 747.

(c) The words mean that the person proceeded against has to satisfactorily account for his presence within the limits of the Magistrate's jurisdiction (Vol 12) 1925 Cal 616 (618, 619) : 26 Cri L Jour 842 (DB).

[2] Person belonging to place D found at F—His allegation that he travelled by railway for certain purpose found false, he being without a ticket or any bedding—He was found feeling pockets of other passengers and on being questioned, gave false name and address—*Held*, these facts brought his case within clause (b) as he could not give satisfactory evidence of himself. (Vol 29) 1942 Oudh 246 (247) : 43 Cri L Jour 842.

[3] Where the explanation, if true, is consistent with the circumstances it must be held that a satisfactory account has been given. (Vol 27) 1940 Pat 410 (411) : 41 Cri L Jour 777 (DB) \* (Vol 14) 1927 All 592 (592) : 49 All 844 : 20 Cri L Jour 567 (DB). (Overruled on another point. (Vol 16) 1929 All 33 (FB)). \* (Vol 12) 1925 Cal 616 (619) : 26 Cri L Jour 842 (DB).

[4] Where A fled to avoid an arrest and after the warrant was withdrawn he came back to his house and kept himself in seclusion to avoid curious inquiries it was held that he gave a satisfactory account of himself. ('12) 13 Cri L Jour 161 (162) : 39 Cal 456 (DB).

[5] Where there were really no suspicious circumstances against the accused, the mere fact that he did not give his correct name and tried to run away from the police and declined to explain how he happened to be at a particular place, does not amount to his not being able to give a satisfactory account of himself. (Vol 23) 1936 Oudh 383 (384) : 37 Cri L Jour 888.

[6] Where a person was found in a district other than his own and in the house of a dangerous political conspirator, and gave an account which was in the main false, it was held that he did not give a satisfactory account of himself. ('12) 13 Cri L Jour 239 (240) (DB) (Cal) (Application of the section is not confined to vagrants and vagabonds—Section applies to rogues and persons of any class who cannot give a satisfactory account of themselves.)

110. Whenever a Presidency Magistrate, District Magistrate, or Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the [Provincial Government] receives information that any person within the local limits of his jurisdiction—

- (a) is by habit a robber, house-breaker, [\*] thief, c[or forger], or
- (b) is by habit a receiver of stolen property knowing the same to have been stolen, or
- (c) habitually protects or harbours thieves or aids, in the concealment or disposal of stolen property, or
- (d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code, or under section 489.A, section 489.B, section 489.C or section 489.D of that Code, or
- (e) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or
- (f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

[1892—S. 110; 1872—Ss. 505, 506; 1861—Ss. 296, 297.]

[a] Substituted by A.O. for "Local Government".

[b] The word "or" was repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 18.

[c] Inserted, *ibid.*

[d] Substituted, *ibid.*, for original cl. (d).

#### Section 109 (contd.)

[7] Evidence of previous convictions is relevant in proceedings under this section. (Vol 29) 1942 Oudh 246 (247) : 43 Cri L Jour 342.

[8] Previous convictions do not, by themselves, prove that the person is now leading a life of crime or is dependent on the proceeds of crimes committed by others. (Vol 30) 1943 All 868 (869) : 45 Cri L Jour 157; ILR (1943) All 818.

8. What Magistrate can act under this section.—

[1] Where the account a person gives of his presence within a particular Magistrate's jurisdiction is satisfactory, he cannot be called upon to give an account of his presence within another Magistrate's jurisdiction. (12) 13 Cri L Jour 161 (162) : 89 Cal 453 (DB)

9. Discretion of Magistrate.—[1] In exercising discretion provisions of the section should not be abused. (Vol 13) 1926 Cal 648 (649) : 53 Cal 345 : 27 Cri L Jour 497 (DB).

10. Revision.—[1] Whether the circumstances of a case are auspicious being mainly a question of fact. High Court will rarely interfere in revision. (37) 38 Cri L Jour 889 (890) (DB) (Oudh) \* (Vol 21) 1934 All 24 (25) : 35 Cri L Jour 448.

#### SECTION 110—Synopsis.

1. Scope and object.
2. Registration under Criminal Tribes Act, 6 (VI) of 1924—Whether constitutes a bar to proceedings under this section.
3. Proceedings under Sections 109 and 110.
4. Proceedings under Sections 107 and 110.

5. Proceedings under Sections 108 and 110.

6. Section 401, I.P.C. and Section 110.

7. "Receives information."

8. "Within the local limits of his jurisdiction."

9. General jurisdiction of the Magistrate.

10. "Is by habit a robber, house-breaker," etc.—Clause (a).

11. Habitual receiver of stolen property—Clause (b).

12. "Habitually protects or harbours thieves," etc.—Clause (c).

13. Habitual offender—Clause (d).

14. Offences involving a breach of the peace—Clause (e).

15. Desperate and dangerous character—Clause (i).

16. Practice—Arrest and detention.

17. Bond for security.

1. Scope and object.—[1] The object of the section is preventive and not punitive. (Vol 27) 1940 Bom 416 (416) : 42 Cri L Jour 150 (DB) \* (Vol 29) 1942 Sind 122 (128) : 44 Cri L Jour 367 : ILR (1942) Kar 253 (DB) \* (Vol 20) 1938 All 859 (859) : 35 Cri L Jour 455 \* (Vol 17) 1930 All 23 (24) : 31 Cri L Jour 1 \* (18) 11 Cri L Jour 5 (21) (SE) (Cal) \* (Vol 8) 1921 Lah 179 (179) \* (81) 3 Mad 238 (239, 240) (DB) \* (08) 6 Oudh Cas 199 (199) (DB).

[2] The section is aimed at protecting society from dangerous characters against perpetrating of crimes by placing them under security. (Vol 30) 1943 Pesh 41 (42) 44 Cri L Jour 478 \* (Vol 16) 1929 All 608 (608) : 30 Cri L Jour 756 \* (11) 12 Cri L Jour 328 (328) (Mad).



## Objects and Reasons.

"We notice that Clause (d) of Section 110, as re-drafted by the Bill, omits the reference to the counterfeiting of currency notes, which appears in the present law. We have, therefore, included offences under Sections 489A to 489D of the Indian Penal Code in the clause. We have also included abetment.

We considered a suggestion that Clause (f) of Section 110 should be deleted on the ground that it should be possible to bring every case under Clause (f) within the remaining Clauses of the Section. We decided by a majority to retain the Clause.—S. C. R., [XVIII of 1923].

Section 110 (*contd.*)

[3] The section cannot be used against merely undisciplined people as local bosses and faction leaders. (Vol 25) 1938 Mad 35 (37) : 39 Cri L Jour 230.

[4] Where persons or the acts which they commit are such as to make it difficult to deal with them under the ordinary provisions of law, this section can be used. (Vol 25) 1938 Mad 482 (482) : 39 Cri L Jour 588.

[5] The object of the section is to bring reasonable pressure to bear on bad characters to respect the law. (Vol 1) 1914 Lah 492 (493) : 1914 Pun Re No. 6 Cr : 16 Cr L Jour 337 \* ('01) 1901 Pun Re No. 28 Cr p. 87 (88) \* (Vol 1) 1914 Sind 13 (14) : 8 Sind LR 173 : 16 Cri L Jour 100 (DB).

[6] The section is not intended to provide indirect means of securing conviction for the police where :

(a) Charge for substantive offence has failed. ('09) 9 Cri L Jour 528 (529) \* (Vol 7) 1920 Oudh 226 (227) : 23 Oudh Cas 371 : 22 Cri L Jour 273 \* (Vol 9) 1922 Oudh 26 (26) : 24 Oudh Cas 317 : 23 Cri L Jour 119.

(b) Charge for substantive offence is *likely* to fail. (Vol 15) 1928 All 682 (684) : 51 All 459 : 30 Cri L Jour 694.

[7] Proceedings under the section, following acquittal for a substantive offence, based on the same evidence as formed the basis of the substantive offence, should not be allowed. (Vol 14) 1927 All 473 (474) : 28 Cri L Jour 515 \* (Vol 11) 1924 All 142 (142) : 25 Cri L Jour 45 \* ('07) 5 Cri L Jour 191 (193, 194) (DB) (Cal) \* (Vol 13) 1926 Lah 190 (191) : 27 Cri L Jour 190 \* (Vol 12) 1925 Oudh 49 (49) : 25 Cri L Jour 366 \* (Vol 12) 1925 Oudh 501 (501, 502) : 27 Oudh Cas 327 : 26 Cri L Jour 530.

[8] The powers under this section should be exercised with caution and discretion. ('13) 14 Cri L Jour 5 (21) (SB) (Cal) \* ('81) 6 Cal 14 (16) (DB) \* ('91) 14 All 45 (46) \* ('68-69) 4 Mad HCR (App) xlvii (xlvii) \* ('93-1900) 1893 1900 Low Bur Rul 223 (225, 226).

[9] The security law ought not to be used for oppressive purposes. ('01) 1901 Pun LR No. 18 Cr p. 35 (37) (DB) \* ('98) 1898 Pun Re No. 4 Cr p. (DB) \* ('11) 12 Cri L Jour 542 (544, 545) (Oudh) \* (Vol 17) 1930 All 37 (37) : 31 Cri L Jour 301 (DB).

[10] Person released after undergoing imprisonment either for a substantive offence or for failure to furnish security on earlier order under this section—Before proceedings under the section are taken against him, he should be given sufficient *locus poenitentiae* to reform himself ('05) 2 Cri L Jour 86 (87) (All) \* (Vol 3) 1916 Cal 344 (347) : 17 Cri L Jour 135 : 43 Cal 1128 (DB) \* ('18) 22 Cal WN C (DB) \* (Vol 4) 1917 Oudh 350 (351) : 18 Cri L Jour 710 \* ('06) 3 Cri L Jour 96 (96, 97) : 28 All 306 \* (Vol 3) 1916 Upp Bur 11 (11) : 2 Upp Bur Rul 85 : 17 Cri L Jour 85 \* (Vol 13) 1926 Sind 69 (69) : 19 Sind LR 176 : 26 Cri L Jour 1398 (DB).

[11] Magistrate receiving information of the presence of a habitual offender within his jurisdiction should pass a preliminary order under S. 112, issue a summons

or a warrant to him under S. 114, and then hold a judicial enquiry as to the truth of information received against such person. (Vol 13) 1926 Lah 45 (46) : 26 Cri L Jour 1377 \* (Vol 17) 1930 All 274 (274) : 52 All 448 : 31 Cri L Jour 627 (DB) \* (Vol 7) 1920 All 268 (269) : 42 All 646 : 22 Cri L Jour 228 \* (Vol 14) 1927 Oudh 306 (307, 308) : 2 Luck 157 : 28 Cri L Jour 744 (DB).

[12] Proceedings under this section are judicial and not executive. ('04) 1 Cri L Jour 99 (100) : 1903 Pun Re No. 27 Cr \* (Vol 6) 1919 Mad 633 (634) : 19 Cri L Jour 905.

[13] Court cannot, without any inquiry and following the appropriate proceedings prescribed therefor, order a person to furnish security. ('78) 1 All 666 (668) \* (1865) 3 Bom HCR Cr 39 (40) \* (1862) 1 Bom HCR 91 (92) (DB) \* ('88) 9 Cal 215 (217) (DB) \* ('75) 24 Suth WR Cr 10 (11) (DB) \* ('83) 1883 Pun Re No. 6 Cr p. 8 (DB) \* ('80) 1880 Pun Re No. 21 Cr p. 36 (37) (DB) \* ('93-1900) 1893-1900 Low Bur Rul 254 (254) \* ('72-92) 1 Low Bur Rul 75 (77, 78) \* (Vol 8) 1921 All 145 (146) : 23 Cri L Jour 122.

2. Registration under Criminal Tribes Act (VI) of 1924—Whether constitutes a bar to proceedings under this section.—[1] It is not illegal to take proceedings under this section against person already registered under the Criminal Tribes Act, 6 (VI) of 1924 (Vol 14) 1927 Cal 213 (213, 214) : 54 Cal 279 : 28 Cri L Jour 106 (DB) (Conduct after registration should be considered) \* (Vol 6) 1919 Cal 872 (873) : 20 Cri L Jour 30 (DB) (Do).

3. Proceedings under Sections 109 and 110.—[1] A person cannot be ordered to be bound over in one and the same proceeding and on the same materials both under S. 109 and this section. (Vol 3) 1916 Mad 657 (657) : 16 Cri L Jour 626 : 38 Mad 556n (DB) \* (Vol 3) 1916 Mad 657 (657) : 38 Mad 555 : 16 Cri L Jour 631 (DB) \* ('97) 1897 Rat Un Re Cri Cas 946 (947) (DB) \* ('03) 2 Low Bur Rul 40 (40).

[2] An order under this section cannot be passed while an order under S. 109 is in force. ('04) 1 Cri L Jour 457 (459) (DB) (Cal).

[But see (Vol 16) 1923 Sind 166 (166, 167) : 23 Sind LR 438 : 30 Cri L Jour 849 (DB).]

[3] A person called upon to give security under S. 109 and a person called upon to give security under this section cannot be dealt with together during one and the same inquiry. ('05) 2 Cri L Jour 224 (225) : 8 Oudh Cas 91.

4. Proceedings under Sections 107 and 110.—[1] Where a Magistrate issues notice for a charge under clause (e) of this section he cannot after enquiry pass an order for security under S. 107. ('07) 30 Mad 232 (233) : 5 Cri L Jour 397 (DB).

[2] Notice issued to person for a charge under S. 107—He cannot be directed, after inquiry to execute a bond for good behaviour under this section. ('98) 25 Cal 799 (802) (DB).

[3] After issuing summons under S. 107, Magistrate took proceedings under this section—Evidence



Section 110 (*contd.*)

recorded at length and procedure as to trial of warrant cases followed—No prejudice done to the parties—*Held* that there was a mere irregularity curable under S. 537. ('13) 14 Cri L Jour 65 (65, 66) (Mad).

5. Proceedings under Sections 108 and 110.—[1] The mere fact that the facts of a case fall within the purview of S. 108 does not make this section inapplicable. (Vol 6) 1919 Cal 702 (705) : 46 Cal 215 : 19 Cri L Jour 696 (DB).

6. Section 401, I. P. C. and S. 110.—[1] Order under this section is no bar to a prosecution under section 401 of the Penal Code. (Vol 7) 1920 Cal 87 (88) : 47 Cal 154 : 21 Cri L Jour 386 (DB).

7. "Receives information."—[1] Before a Magistrate can take action under this section he should have information that the person, sought to be proceeded against, is a habitual offender. (1900-02) 1 Low Bur Rul 75 (77, 78).

[2] No such limitations as the following can be placed on the information received.

(a) As to its nature ('04) 1 Cri L Jour 807 (808) : 27 All 172.

(b) As to the manner in which it is communicated. (Vol 29) 1942 Sind 122 (128) : ILR (1942) Kar 252 : 44 Cri L Jour 367 (DB).

(c) As to the source from which it may be derived (Vol 29) 1942 Sind 122 (128) : ILR (1942) Kar 252 : 44 Cri L Jour 367 (DB) \* ('04) 1 Cri L Jour 807 (808) : 27 All 172 \* ('18) 14 Cri L Jour 5 (22) (SB) (Cal) \* (Vol 9) 1922 Pat 586 (587) : 1 Pat 621 : 24 Cri L Jour 31 (DB) \* ('03) 2 Weir 54 (54) (DB).

[3] Any quantum of information is not a necessary condition for the Magistrate to take action. (Vol 14) 1927 Oudh 306 (307) : 2 Luck 157 : 28 Cri L Jour 744 (DB) \* (Vol 33) 1946 Oudh 50 (51).

[4] The Magistrate is bound to enquire judicially into the truth of the information. (Vol 12) 1925 Sind 204 (206) : 25 Cri L Jour 1377 : 19 Sind LR 96 \* (1900-02) 1 Low Bur Rul 75 (77, 78).

[5] The Magistrate can, if he thinks fit, take information on oath. ('05) 2 Cri L Jour 462 (462, 463) : 1905 Upp Bur Rul (Cr) PC 29.

[6] Where a memorandum was sent by the tenants of a zamindar alleging several acts against him and the report of the Sub-divisional Officer thereon did not substantiate the allegations, it was held that the District Magistrate was not justified in taking proceedings on the basis of the same. (Vol 11) 1924 Cal 114 (114, 115) : 25 Cri L Jour 189 (DB).

[See also (Vol 25) 1938 Pat 533 (535, 536) : 39 Cri L Jour 811].

[7] The information on which the Magistrate institutes proceedings cannot be used as evidence against the person sought to be bound over. ('04) 1 Cri L Jour 807 (809) : 27 All 172.

3. "Within the local limits of his jurisdiction."—[1] The person proceeded against should be within the local limits of the Magistrate's jurisdiction at the time when proceedings are taken against him. (Vol 27) 1940 Bom 204 (204, 205) : ILR (1940) Bom 397 : 41 Cri L Jour 686 (DB) \* ('12) 13 Cri L Jour 796 (797) (DB) (Bom) \* (Vol 19) 1931 Cal 65 (65) : 32 Cri L Jour 425 (DB) \* ('28) 29 Cri L Jour 842 (843) (Cal).

[2] A person ordinarily resident within the Magistrate's jurisdiction is a person within such jurisdiction

although he may be temporarily absent. (Vol 30) 1943 Nag 88 (90) : ILR (1943) Nag 609 : 44 Cri L Jour 82 \* (Vol 27) 1940 Bom 204 (205) : ILR (1940) Bom 397 : 41 Cri L Jour 686 (DB).

[3] It is not necessary that the person must be ordinarily resident within the local limits of the Magistrate's jurisdiction. (Vol 30) 1943 Nag 88 (90) : 44 Cri L Jour 82 : ILR (1943) Nag 609 \* (Vol 31) 1944 Sind 106 (107) : 45 Cri L Jour 532 : ILR (1943) Kar 514 (DB) \* ('37) 38 Cri L Jour 144 (145) : 17 Lah 453 \* (Vol 21) 1934 Mad 255 (256) : 35 Cri L Jour 626 \* (Vol 19) 1932 All 162 (163) : 54 All 341 : 33 Cri L Jour 230 \* (Vol 18) 1931 Cal 65 (65) : 32 Cri L Jour 425 (DB) \* (Vol 4) 1917 Low Bur 140 (140) : 8 Low Bur Rul 378 : 17 Cri L Jour 319 \* (Vol 6) 1919 Cal 702 (705) : 19 Cri L Jour 696 : 46 Cal 215 (DB) \* (Vol 9) 1922 All 86 (87) : 23 Cri L Jour 86 \* ('07) 5 Cri L Jour 249 (251) : 9 Bom LR 244 (DB) \* (Vol 14) 1927 Sind 59 (60) : 20 Sind LR 310 : 27 Cri L Jour 1261 \* (Vol 6) 1919 Mad 633 (634) : 19 Cri L Jour 905.

[See however (Vol 27) 1940 Bom 204 (204) : 41 Cri L Jour 686 : ILR (1940) Bom 397 (DB).]

[But see ('01) 1901 Pun'Re No. 12 Cr P 33 (34) : 1901 Pun LR No. 91 \* (1900) 27 Cal 993 (995) (DB)].

[4] Mere temporary presence within the limits of the Magistrate's jurisdiction at the time of institution of proceeding is sufficient. (Vol 30) 1943 Nag 88 (90) : ILR (1943) Nag 609 : 44 Cri L Jour 82 \* (Vol 24) 1937 Cal 520 (521) : 38 Cri L Jour 1078.

[5] The mere fact that a person is undergoing a sentence of imprisonment in jail within the local limits of the jurisdiction of a Magistrate is no ground for holding that he is not within such limits. (Vol 3) 1916 Low Bur 1 (2) : 17 Cri L Jour 88 (90) : 8 Low Bur Rul 53 (FB). (Overruling 4 Low Bur Rul 148 : 7 Cri L Jour 447).

[6] Where a person within the local limits of the jurisdiction of a Magistrate is arrested and brought before him, the latter can take proceedings against such person irrespective of the question whether the arrest was legal or not. ('04) 1 Cri L Jour 535 (537) : 31 Cal 557 (DB).

[7] Different views are held as to whether a Magistrate can take action against an accused who is originally not within his jurisdiction but comes there under compulsion.

(a) Presence must be voluntary and not one under compulsion. (Vol 19) 1932 All 162 (163) : 54 All 341 : 33 Cri L Jour 230 \* ('99) 23 Bom 32 (35) (DB) \* ('85) 1885 Pun Ra No. 43 Cr. p 89 (92) (DB) \* ('84) 1884 All WN 85 (85).

(b) Even a person brought within jurisdiction under compulsion can be proceeded against. (Vol 24) 1937 Nag 70 (71) : ILR (1936) Nag 200 : 38 Cri L Jour 447 \* (Vol 6) 1919 Cal 460 (461) : 20 Cri L Jour 133 (DB) \* (Vol 6) 1919 Cal 702 (705) : 46 Cal 215 : 19 Cri L Jour 626 (DB).

(c) Accused ordinarily residing within jurisdiction but absconding forcibly brought back—Magistrate can proceed against him. (Vol 16) 1929 Sind 166 (168) : 23 Sind LR 434 : 30 Cri L Jour 849 (DB) \* (Vol 6) 1919 Cal 702 : 46 Cal 215 : 19 Cri L Jour 626 followed).

[See also (Vol 4) 1917 Low Bur 140 (141) : 8 Low Bur Rul 378 : 17 Cri L Jour 319].

[8] Proceedings taken by a Magistrate under this section not having local jurisdiction are without jurisdiction and must be set aside. (Vol 5) 1918 Mad 565

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(557) : 41 Mad 246 : 18 Cri L Jour 878 (DB) \* (1909) 9 Cri L Jour 148 (149) (DB) (Cal) \* ('06) 10 Cal W N xxii (xxiii).

[But see (Vol 24) 1937 Nag 70 (71) : ILR (1936) Nag 200 : 38 Cri L Jour 447 \* (Vol 13) 1926 All 767 (768) : 49 All 228 : 27 Cri L Jour 1132].

[9] A Magistrate, whose local jurisdiction has not been defined under S. 12, has jurisdiction throughout the district. (Vol 19) 1932 Cal 864 (864) : 59 Cal 1484 : 33 Cri L Jour 858 (DB) \* (Vol 8) 1921 Oudh 162 (162) : 24 Oudh Cas 255 : 22 Cri L Jour 713 \* ('02) 29 Cal 389 (391) (DB).

9. General jurisdiction of the Magistrate.—[1] Orders made by any Magistrate other than those mentioned in the section are invalid and without jurisdiction. (Vol 3) 1916 All 222 (222) : 17 Cri L Jour 141.

[2] A first class Magistrate, not specially empowered under this section, cannot exercise jurisdiction thereunder. ('96) 1896 Rat 838 (838) (DB) \* ('72-92) 1872 1892 Low Bur Rul 239 (240) \* (Vol 20) 1933 All 676 (677) : 35 Cri L Jour 218.

[3] Where a first class Magistrate before whom proceedings under this section were initiated after recording evidence sent up the proceedings to the District Magistrate the latter held could not place restrictions upon the liberty of the accused. ('12) 13 Cri L Jour 748 (748) (DB) (Bom).

10. "Is by habit a robber, house breaker," etc.—Clause (a).—[1] The person proceeded against must be proved to be, by habit, a robber, a house breaker, thief or forger. (Vol 26) 1939 Lah 269 (270) : ILR (1939) Lah 53 : 40 Cri L Jour 753 \* ('01) 3 Bom LR 269 (270) (DB) \* (80) 1880 Pun Re No. 32 (Cr) p 80 (81) (DB) \* (Vol 11) 1924 Pat 498 (499) : 25 Cri L Jour 35.

[2] The word "habit" implies a tendency or capacity resulting from the repetition of the same acts. (Vol 14) 1927 Pat 126 (128) : 6 Pat 1 : 28 Cri L Jour 359.

[3] Habit can be proved by adducing evidence of the commission of a number of similar acts. (Vol 11) 1924 Nag 19 (21) : 25 Cri L Jour 30.

[4] The evidence proving 'habit' must be specific and relate to particular instances within the knowledge of witnesses. ('28) 29 Cri L Jour 574 (575) (Lah) \* (Vol 17) 1930 Lah 845 (846) : \* 2 Cri L Jour 62 \* (Vol 11) 1924 Pat 498 (499) : 25 Cri L Jour 35 \* (Vol 11) 1924 Pat 500 (501) : 25 Cri L Jour 985 \* ('71) 6 Mad HCR (App) 120 (121) (DB).

[5] By habitual thief or robber is meant a person who has committed thefts or robberies in the past and is ready to commit them again whenever he gets an opportunity. ('98) 189 Rat 639 (642) (DB) \* ('72-92) 1872-1892 Low Bur Rul 542 (543).

[6] The following were held to be *not sufficient reasons in themselves* for binding over a person under this clause:—

(a) That a man was a bad character and had been sent to jail or was once convicted of theft. ('01) 3 Bom LR 269 (270) (DB) \* ('10) 11 Cri L Jour 638 (638) (DB) (Mad) \* (Vol 21) 1934 All 735 (737) : 36 Cri L Jour 33.

(b) That he associated with a thief or a bad character. (Vol 20) 1933 All 859 (860) : 35 Cri L Jour 435 \* ('97) 6 Cri L Jour 403 (404) (DB) (Cal) \* ('11) 12 Cri L Jour 542 (543, 544) (Oudh).

(c) That a police-officer gave it as his opinion that

he was a habitual thief. (Vol 17) 1930 Nag 148 (148, 149) : 31 Cri L Jour 165.

[7] Where the charge against a person is that he is a habitual robber, the fact that he gathers bad characters at his house is not in itself relevant; bad characters should be shown to be robbers or have been gathered for the purposes of committing robbery or theft. (Vol 12) 1925 All 694 (696) : 47 All 733 : 26 Cri L Jour 1130 (1130) (DB).

[8] Person found hiding himself—Certain articles not claimed by him to be his own found upon him for which he was not charged with any offence—*Held* that, he was not a habitual offender. ('11) 12 Cri L Jour 359 (359) (Mad).

[9] It is not necessary that a certain number of previous convictions should be proved against the person sought to be bound over. (Vol 25) 1938 Lah 428 (428) : 39 Cri L Jour 599 \* (Vol 25) 1938 Mad 482 (483) : 39 Cri L Jour 588 \* (Vol 25) 1938 Mad 591 (592) : ILR (1938) Mad 720 : 39 Cri L Jour 898 (DB) \* (Vol 23) 1936 Oudh 238 (239) : 37 Cri L Jour 390 : 12 Luck 36 (DB).

[10] The section does not refer to a person who is by habit a dacoit. (Vol 12) 1925 All 250 (250, 251) : 26 Cri L Jour 746 \* (Vol 16) 1929 All 813 (813) : 30 Cri L Jour 1086.

11. Habitual receiver of stolen property—Clause (b).—[1] To substantiate a charge under this clause, no specific offence need be proved—Evidence of general repute will do. ('92) 1892 Pun Re No. 12 (Cr) p 27 (28) (Lah).

[2] Mere rumours and suspicions are not enough to substantiate charge. (1921) 22 Cri L Jour 269 (270) (Lah).

[3] Where the persons proceeded against belonged to a class of people called *Mewatis* considered to be persons occupying themselves in receiving stolen property and offence of similar nature and the villagers were in considerable terror of these *Mewatis*, it was held that this was not sufficient to sustain a charge under this clause without there being any tangible evidence that they were receivers of stolen property. ('05) 2 Cri L Jour 88 (89) : 2 All L Jour 174.

12. "Habitually protects or harbours thieves," etc.—Clause (c).—[1] Where a man, from motives of humanity and without any intention of enabling the fugitive to escape from justice gives him food and surgical assistance while he was wounded, he is not liable to be bound over. ('10) 11 Cri L Jour 490 (492) : 1910 Upp Bur Rul 1st Qr. Cr P C 4.

[2] The fact that a landlord has tenants of bad character, that he lends money or paddy to them whenever they are in difficulties and that he settles disputes between two men, one of whom is a thief is not sufficient to make him liable. ('07) 6 Cri L Jour 403 (404) (DB) (Cal).

[3] The mere association with a gang of dacoities or the failure to oppose them or give assistance to the police when the gang settled in the neighbourhood is not sufficient to justify action under this clause. (Vol 2) 1915 All 464 (465) : 16 Cri L Jour 805.

[4] The manager of a public shrine cannot be called upon to furnish security although some thieves have been arrested in the shrine on several occasions and it is generally used as a gambling resort visited by bad characters. ('10) 11 Cri L Jour 603 (604) (Lah).

[5] The mere fact that a person derived his subsistence from keeping prostitutes in his house although

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sometimes thieves visited his house—*Held* was not a sufficient ground to justify action. ('81) 1881 Pun Re No. 2 Cr p 2 (2) (DB) (Lah).

[6] Where some persons said to be of bad character had been seen on occasions at the *Kothar* where the accused did his work, Court was not justified in holding that the accused habitually protected and harboured thieves. ('12) 13 Cri L Jour 760 (762) : 15 Oudh Cas 263.

[7] Where thieves have been living with B, his son A cannot be held guilty of harbouring them. (Vol 21) 1931 Lah 62 (63) : 35 Cri L Jour 653.

[8] How many facts have to be proved to enable the Court to draw a reasonable inference of habit depends on the facts and circumstances of each case. (Vol 20) 1933 Pat 189 (190) : 34 Cri L Jour 643.

[9] A person cannot be called upon to give security for harbouring dacoits. (Vol 15) 1928 All 682 (684) : 51 All 459 : 30 Cri L Jour 694.

13. Habitual offender—Clause (d) :—[1] Where a person, repeatedly and persistently committed acts of extortion by compelling the merchants to sign agreements not to import foreign cloth by resort to picketing and the levying of fines, and by also resorting to picketting in the case of merchants who traded in such cloth, it was held that he was liable to be bound over. (Vol 11) 1924 Nag 19 (21) : 25 Cri L Jour 60.

[2] This clause does not apply to a person who has a reputation of habitually persistently bringing false claims in a Civil Court. (Vol 4) 1917 Oudh 117 (118) : 18 Cri L Jour 651 : 20 Oudh Cas 129 \* (Vol 4) 1917 Nag 32 (32) : 19 Cri L Jour 885 \* ('84) 1884 Pun Re No. 25 (Cr) p 43 (43) (DB) (Lah).

14. Offences involving a breach of the peace—Clause (e) :—[1] A person cannot be bound over unless he has habitually committed or attempted to commit or abetted the commission of offences involving breach of peace. (Vol 27) 1940 Rang 95 (96) : 41 Cri L Jour 495 \* (Vol 25) 1938 Mad 591 (592) : ILR (1938) Mad 720 : 39 Cri L Jour 898 (DB).

[2] The nab of two co-sharer zamindars who were brothers had led several riots and been convicted in several cases—Certain Goondas were always employed to help their cause—*Held* that one of the brothers who was the *mukhtear* practising and residing out of the place, and, who was shown not to have been implicated in the acts, ought not to have been bound over, but that, the other whose complicity was established was rightly bound over. ('10) 12 Cri L Jour 164 (166) : 38 Cal 156 (DB).

[3] Where a person being aware that violence is the reasonable outcome of the doctrine he preaches, conducts a propaganda against forces of law and order and instigates breaches of the peace, he can be bound over. (Vol 18) 1931 Cal 18 (19, 22) : 32 Cri L Jour 598 (DB).

[4] Where an order binding over a person under cl. (f) was passed; and, on appeal, the District Magistrate found that cl. (e) was more appropriate, it was held that, the District Magistrate had power to reduce the security and pass an order under this clause. (Vol 7) 1920 Nag 67 (67) : 21 Cri L Jour 352.

15. Desperate and dangerous character—Clause (f) :—[1] A man of desperate and dangerous character means a person who shows such a reckless disregard of the safety of the person or the property of his neighbours

that his being at large without security would be detrimental to the community. ('07) 6 Cri L Jour 1 (3) (DB) (Cal) \* (Vol 5) 1918 All 318 (319) : 19 Cri L Jour 781 \* (Vol 21) 1931 Cal 482 (485) : 61 Cal 588 : 35 Cri L Jour 952 (DB).

[2] Where certain tenants formed themselves into a party to compel the *zamindar* to settle with them certain lands, and many loots and assaults were committed by them against the *zamindar* and the recalcitrant members, it was held that action could be taken against the tenants under this clause. (Vol 14) 1927 Pat 126 (129, 130) : 6 Pat 1.

[3] Where it was proved that a person was associating with a number of persons, who were known to be members of revolutionary party, and there were indications that he was in sympathy with them, it was held that he could be bound over. (Vol 20) 1933 All 674 (674) : 35 Cri L Jour 284.

[4] Person in Court threatening an assessor was held to be a desperate and dangerous character. (Vol 22) 1935 All 638 (638) : 36 Cri L Jour 1142.

[5] Person who threatens and beats people can certainly be called a desperate and dangerous character. (Vol 29) 1912 Oudh 356 (358) : 43 Cri L Jour 398. (Vol 18) 1931 All 437 : 32 Cri L Jour 1070 distinguished).

[6] A person cannot be called a desperate and dangerous character merely because :

(a) He is of a litigious disposition. (Vol 17) 1930 Lah 1051 (1054) : 32 Cri L Jour 271 \* (Vol 5) 1918 All 318 (319) : 19 Cri L Jour 781.

(b) He is a habitual gambler or opium smoker. ('80) 1880 Pun Re No. 33 (Cr) p 81 (82) (DB) (Overruled on another point by 1881 Pun Re No. 38 (Cr) (FB)).

(c) He is of a quarrelsome and turbulent nature. (Vol 18) 1931 All 437 (438) : 32 Cri L Jour 1070 \* ('05) 1 Cri L Jour 710 (712) : 27 All 92 \* ('66) 6 Suth WR Cr 6 (6) (DB).

(d) He is a general nuisance to his neighbours. (Vol 2) 1915 All 352 (353) : 16 Cri L Jour 582 \* (Vol 18) 1931 All 437 (438) : 32 Cri L Jour 1070 \* (1901) 5 Cal WN 249 (250).

(e) He is a smuggler. (Vol 22) 1935 Pesh 80 (82) : 36 Cri L Jour 1127 (DB).

(f) He incites the members of an association to demand a higher rate of wages. (Vol 27) 1940 Rang 95 (96) : 41 Cri L Jour 495.

(g) He was caught while committing adultery. (Vol 17) 1930 Lah 1051 (1054) : 32 Cri L Jour 271.

(h) He committed an assault for which he was tried and acquitted. ('10) 11 Cri L Jour 663 (664) (Mad).

[7] Man-charged as habitual offender under other clauses of this section. It is a mere inference of fact from the nature of the offences as to whether he is not also a dangerous and desperate character. ('09) 10 Cri L Jour 460 (462) (DB) (Cal). (View expressed in 5 Cal WN 249, viz that evidence of repute is inadmissible modified).

[8] A person who is a leader of local factions responsible for constant threat and bullying is not the less dangerous to the community because he lives in a house and owns land. (Vol 25) 1938 Mad 448 (449) : 39 Cri L Jour 595.

16. Practice—Arrest and detention.—[1] Proceedings under the section may follow an arrest under S. 55 (Vol 17) 1930 Pat 103 (104) : 31 Cri L Jour 717 \* ('13) 14 Cri L Jour 618 (618) : 35 All 407.

111. [Proviso as to European vagrants,] *Repealed* by the Criminal Law (Amendment) Act 1923 (12 [XII] of 1923), S. 8.

[1882—S. 111; 1872—S. 517].

a b[112. When a Magistrate acting under section 107, section 108, section 109 or section 110 Order to be made. deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

[1882—S. 112; 1872—Ss. 492, para 1, 509 para 1, 515 para 1; 1861—Ss. 283, 300, 306].

[a] Ss. 112, 113, 115 and 117 *do not apply* to any inquiry under the Sind Frontier Regulation, 1892 (3 [III] of 1892), S. 22 or under the (Punjab) Frontier Crimes Regulation, 1901 (3 [III] of 1901), S. 42.

[b] Ss. 112 to 121 and 123 to 126 and S. 514 *apply* to all cases requiring security for good behaviour under the Punjab Frontier Crossing Regulation, 1873 (7 [VII] of 1873), S. 6.

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[2] Where a police-officer arrests a person with a view to take proceedings under this section, he should specify one of the causes given in S. 55. (Vol 13) 1926 Sind 190 (191): 20 Sind LR 85: 27 Cri L Jour 628 (DB).

[3] Magistrate should not detain a person in custody until the police are able to make out a case against him. (Vol 8) 1921 All 278 (280): 43 All 186: 22 Cri L Jour 115 \* (Vol 6) 1919 All 160 (161): 41 All 483: 20 Cri L Jour 381.

[4] Magistrate can issue a warrant only after he has the necessary information and passes the preliminary order under S. 112. (Vol 13) 1926 Sind 288 (289): 20 Sind LR 122: 27 Cri L Jour 935 \* (Vol 7) 1920 All 268 (269): 22 Cri L Jour 228: 42 All 646.

[5] Where the police reported against a person to the Magistrate and the latter neither issued summons nor warrant, the subsequent arrest by the Police was held unauthorised. (Vol 12) 1925 Lah 623 (623): 26 Cri L Jour 1360.

17. Bond for security.—[1] A police-officer is not authorised to take a bond for the production of a person before the police. (Vol 12) 1925 Lah 152 (152): 25 Cri L Jour 712.

#### SECTION 112—Synopsis.

1. Scope of the section.
2. Substance of the information.
3. Amount of the bond to be executed.
4. Character and class of sureties.
5. Amendment of order.
6. Effect of non-compliance with the section.
7. Joint order against two or more persons.
8. Security against person undergoing imprisonment
9. Order, if a public document.

1. Scope of the section.—[1] Where a Magistrate gets information of the kind specified in S. 107, S. 108, S. 109 or S. 110 and is of opinion that there is sufficient ground for proceeding, the first thing that he should do is to pass an order in writing under this section against the person concerned. (Vol 1) 1914 All 466 (466, 467): 36 All 262: 15 Cri L Jour 288 \* (Vol 7) 1920 All 268 (269, 270): 42 All 646: 22 Cri L Jour 228 \* (Vol 6) 1919 Upp Bur 27 (27): 3 Upp Bur Rul 117: 20 Cri L Jour 321.

[2] The order should be served on person concerned under S. 114 and S. 115 or, if he is present in Court, it should be read out to him under S. 113, so that he may have an opportunity to show cause why the proceedings should not be taken against him. ('74) 22 Suth WR Cr 68 (69) (DB) \* ('76) 25 Suth W R Cr 50 (50) (DB) \* ('85) 11 Cal 13 (14) (DB).

[3] The provisions of the section ought to be strictly complied with. (Vol 11) 1924 All 695 (695): 26 Cri L Jour 430 \* ('72-92) (1872-92) Low Bur Rul 398 (398) \* (Vol 27) 1940 Mad 23 (25): ILR (1940) Mad 335: 41 Cri L Jour 238 (FB).

[4] The order need not set forth a list of the witnesses in support of the proceeding. ('07) 7 Cr L Jour 146 (150): 35 Cal 243 (DB) \* ('13) 14 Cri L Jour 5 (22) (SB) (Cal).

[5] A condition that the persons proceeded against should undertake that no attempt would be made by them or their agents to realise rents by force and that nothing would be done to induce a breach of the peace, could not be imposed in an order under this section. ('06) 4 Cri L Jour 456 (459, 460) (DB) (Cal).

[6] The procedure provided by this section and S. 117 must, with necessary modifications and additions, be followed where it is intended to take preventive action under S. 7 of the Burma Habitual Offenders Restriction Act, 1919. (Vol 12) 1925 Rang 69 (70): 2 Rang 524: 26 Cri L Jour 417.

2. Substance of the information.—[1] A Magistrate acting under this section is bound to set forth in his order in writing the substance of the information on which he purports to act. (1900-02) 1 Low Bur Rul 75 (77)\*('07) 6 Cri L Jour 1 (2) (DB) (Cal)\*('Vol 1) 1914 Sind 8 (10): 8 Sind LR 207: 16 Cri L Jour 235 (DB).

[2] The object of this requirement is to make the person proceeded against clearly understand what the matter is upon which he has to show cause to enable him to come prepared to meet the case against him. (Vol 27) 1940 Nag 134 (135): ILR (1942) Nag 62: 41 Cri L Jour 713 \* ('04) 1 Cri L Jour 807 (809): 27 All 172 \* ('08) 7 Cri L Jour 146 (151): 35 Cal 243 (DB) \* (Vol 17) 1930 Mad 859 (860): 32 Cri L Jour 27 \* (Vol 13) 1926 Sind 69 (71): 19 Sind LR 176: 26 Cri L Jour 1398 (DB) \* ('74) 22 Suth WR Cr 36 (37) (DB).

[3] It is not necessary to state more than will show the person proceeded against the particular section or sub-section on which the Court proposes to proceed against him. (Vol 14) 1927 Oudh 306 (307, 308): 2 Luck 157: 28 Cri L Jour 744 (DB) \* (Vol 13) 1926 All 759: 49 All 5: 29 Cri L Jour 9 (Vol 7) 1920 All 268;

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42 All 616: 22 Cri L Jour 228 (dissented from): (Vol 16) 1929 Cal 739 (740, 742): 31 Cri L Jour 614: 57 Cal 503 (SB) (Vol 7) 1920 Mad 534: 43 Mad 150: 21 Cri L Jour 351 (dissented from) \* (Vol 17) 1930 All 274 (274): 52 All 448: 31 Cri L Jour 627 (DB). (Particular offence should be mentioned) \* (Vol 27) 1910 Nag 184 (185): ILR (1942) Nag 62: 41 Cri L Jour 713 (Do) \* (37) 1937 Mad WN 885 (886) (Sufficient details should be given) \* (Vol 17) 1930 Mad 859 (860): 32 Cri L Jour 27 \* (33) 1933 Mad WN 875 (876) \* (Vol 29) 1942 Sind 122 (126, 129): ILR (1942) Kar 252 (DB). (Whether omission of particulars has any material effect is a question of fact).

[But see (Vol 13) 1926 All 759 (760): 49 All 5 \* (Vol 7) 1920 All 268 (269, 270): 42 All 616.]

[4] An order under this section is something in the nature of indictment or charge and it should contain substantial particulars indicating the grounds upon which the information to the Magistrate is based. (Vol 17) 1930 Mad 331 (335): 53 Mad 173: 31 Cri L Jour 618 (FB) \* (Vol 13) 1926 All 759 (760): 49 All 5: 28 Cri L Jour 9 \* (Vol 7) 1920 All 268 (269, 270): 42 All 616: 22 Cri L Jour 228.

[5] The failure to give details will not necessarily vitiate the notice (Vol 27) 1940 Mad 23 (25, 26): ILR (1940) Mad 335: 41 Cri L Jour 238 (FB).

[6] The extent of the information, which must be set forth depends upon the circumstances of the case. (Vol 26) 1939 Sind 261 (262): 40 Cri L Jour 887 (DB) \* (Vol 27) 1940 Mad 23 (26): ILR (1940) Mad 335: 41 Cri L Jour 238 (FB) \* (84) 6 All 214 (218).

[7] An order setting forth, in such a case, that he has received reliable information that the applicant is a habitual thief or receiver of stolen property, is a sufficient compliance with the law. (96) 1896 All WN 73 (73) \* (Vol 6) 1919 Pat 337 (338): 20 Cri L Jour 436.

[8] It is not enough merely to assert that a person has committed an offence generally under S 110; the clause under which he is charged should be specified. (Vol 13) 1926 Lah 45 (46): 26 Cri L Jour 1377.

[9] Where from the notice it was not clear as to whether accusations which the party had to meet were under S. 109 or S 110 there was no sufficient compliance with the section. (85) 11 Cal 13 (14) (DB).

[See however (Vol 25) 1938 Nag 303 (305): ILR (1938) Nag 595: 39 Cri L Jour 747 (Not imperative to enter actual section and clause).]

[10] The Magistrate shall be careful to see that his order is in the terms of the section which he proposes to apply. (Vol 15) 1928 All 357 (358): 30 Cri L Jour 122 (DB). \* (Vol 16) 1929 All 813 (813): 30 Cri L Jour 1086.

[11] The "substance of the information received" will not include the source of the information which need not be set out in the order. (04) 1 Cri L Jour 807 (808, 809): 27 All 172. \* (13) 14 Cri L Jour 5 (22) (SB) (Cal). \* (Vol 17) 1930 Mad 975 (976): 54 Mad 422: 32 Cri L Jour 217. (Person proceeded against not entitled to copy of information).

[12] The Magistrate has the right to test the accuracy of the information received by him before issuing notice by:—

(a) Calling for a report from the police. (Vol 19) 1932 All 670 (672): 34 Cri L Jour 42: 54 All 1036.

(b) Calling for a report from the subordinate Magistrate. (91) 2 Weir 51 (51) (DB).

(c) Taking information on oath in the presence of the accused. (05) 2 Cri L Jour 132 (162): 1905 Upp Bur Rul (Cr) (PC) 29.

3. Amount of the bond to be executed.—[1] It is reasonable and just that the individual should be afforded a fair chance of complying with the required condition of furnishing security before he is awarded imprisonment for default. (69) 1 Mad HCR app xlv (xlvii) \* (01) 1901 Pun Re No 28 Cr p 87 (88). \* (1900) 1900 Pun Re No 24 Cr p 53 (53) \* (Vol 20) 1933 All 674 (676): 35 Cri L Jour 183.

[2] Where an order directed the suspect to execute a bond for Rs. 100 and to furnish two sureties for Rs. 300, it was held that there was only one penalty of a bond and that the principal being bound in that amount, the sureties were bound for the same amount. (97-01) 1 Upp Bur Rul 24 (25).

[3] Where an order required the suspect to furnish a bond for Rs. 1,000 "with respectable sureties" it was held that it was necessary to specify whether each and all the sureties are liable for the amount of Rs 1,000 or whether they are liable for Rs. 1,000 between them. (Vol 1) 1914 Lah 492 (492): 1914 Pun Re No 6 Cr: 16 Cri L Jour 337.

4. Character and class of sureties.—[1] The order under this section should specify the character and class of sureties, if any, required. (03-04) 2 Low Bur Rul 40 (41) (Respectable householders) \* (10) 11 Cri L Jour 198 (198): 3 Sind LR 168 (DB) (Do) \* (Vol 1) 1914 Bom 5 (5): 15 Cri L Jour 268 (DB) (Land holders) \* (Vol 1) 1914 Sind 139 (140): 8 Sind LR 229: 16 Cri L Jour 252 (DB) (Do) \* (Vol 11) 1924 Sind 120 (121): 17 Sind LR 160: 26 Cri L Jour 179 (Do).

[But see (Vol 2) 1915 Upp Bur 13 (14): 16 Cri L Jour 553. (Restriction of sureties to land holders should not be imposed). \* (07) 5 Cri L Jour 148 (151): 1906 Pun Re No 18 (Cr) (Magistrate cannot ask for security by a particular class of persons—Submitted not correct).]

[2] The Court cannot in its order direct that the sureties shall be residents of a particular locality. (Vol 1) 1914 Cal 445 (446): 15 Cri L Jour 254 (DB) \* (03) 6 Oudh Cas 199 (202) (DB). \* (80) 1880 Pun Re No 38 Cr p 92 (93) (DB). \* (Vol 9) 1922 All 489 (489): 23 Cri L Jour 400 \* (99) 1 Bom LR 520 (521) (DB) \* (Vol 1) 1914 Upp Bur 33 (34): 2 Upp Bur Rul 44: 16 Cri L Jour 422 \* (74) 22 Suth WR Cr 37 (38) (DB) \* (11) 12 Cri L Jour 472 (472) (All).

[But see (Vol 11) 1924 Sind 120 (121): 17 Sind LR 160: 26 Cri L Jour 179 (DB) \* (02) 24 All 471 (472).]

[3] The Court cannot direct that the sureties should be able to control the persons for whom they are sureties. (Vol 1) 1914 Bom 5 (6): 15 Cri L Jour 268 (DB).

[4] The order must be such that if a suspect has a bona fide intention to be of good behaviour, it will not be impossible for him to find sureties. (Vol 1) 1914 Sind 13 (14): 8 Sind LR 173: 16 Cri L Jour 100 (DB). \* (99) 1 Bom LR 520 (521) (DB). (Order requiring sureties not to be of "Kunbi" caste is unreasonable and improper).

5. Amendment of order.—[1] An order under this section requiring security for good behaviour is in the nature of a charge in a warrant case. (Vol 29) 1942 Sind 122 (125): ILR (1942) Kar 252: 44 Cri L Jour 367 (DB). \* (Vol 3) 1916 Lah 295 (296): 1916 Pun

\* b113. If the person in respect of whom such order is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him.

[1882—S. 113; 1872—S. 492 Explanation].

[a] [b] See foot-remarks [a] [b] to Sec. 112.

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Re No 1 Cr : 17 Cri L Jour 84 \*(05) 2 Cri L Jour 462 (463); 1905 Upp Bur Rul Cr P C 29.

[2] It is permissible to amend an order under this section and serve it afresh on the person proceeded against. (Vol 29) 1942 Sind 122 (125) : ILR (1942) Kar 252 : 44 Cri L Jour 367 (DB). ((Vol 20) 1933 Sind 8 (9) distinguished) \*(33) 1933 Mad WN 551 (552). \*(95) 1895 All WN 241 (241) (Amount of security can be enhanced after giving opportunity to the accused to show cause) \*(Vol 29) 1942 Mad 242 (242) : 43 Cri L Jour 409 (Court can issue supplementary order after giving sufficient time to the party to consider the same).

6. Effect of non-compliance with the section.—[1] The provisions of this section are only directory and not mandatory. ('03) 7 Cri L Jour 94 (94) : 10 Oudh Cas 365 \*(92) 8 Cal 724 (726) (DB) \*(86) 12 Cal 520 (521) (DB).

[2] A failure to comply with the requirements of this section is a grave and substantial irregularity rendering it necessary for the Courts of appeal and revision to scrutinize the proceedings carefully. It does not *ipso facto* vitiate the proceedings without proof of prejudice. (Vol 13) 1926 Sind 69 (70) : 19 Sind L R 176 : 26 Cri L Jour 1398 (DB).

[But see (Vol 12) 1925 Rang 353 (354) : 27 Cri L Jour 318 \*(Vol 13) 1926 All 759 (760) : 28 Cri L Jour 9 : 49 All 5 \*(Vol 16) 1929 Lah 504 (505) : 10 Lah 155 : 30 Cri L Jour 839].

[3] The failure to pass an order at all under this section is an irregularity which will not vitiate the proceedings unless a failure of justice or prejudice to the accused has been occasioned thereby. ('91) 1891 All WN 40 (41) \*(08) 7 Cri L Jour 94 (95) : 10 Oudh Cas 365.

[But see ('07) 5 Cri L Jour 397 (398) : 30 Mad 282 (DB) \*(02) 2 Weir 55 (56) \*(07) 6 Cri L Jour 832 (332) (DB) (Mad).

[4] The omission to set forth in the order the particulars specified in the section is only an irregularity which will not vitiate proceedings in the absence of proof of prejudice. (Vol 13) 1926 Sind 69 (70) : 19 Sind LR 176 : 26 Cri L Jour 1398 (DB) (Omission to set forth particulars does not divest the Magistrate of his jurisdiction) \* (Vol 29) 1942 Sind 122 (126, 129) : ILR (1942) Kar 252 : 44 Cri L Jour 367 (DB) \*(Vol 23) 1941 Pat 241 (241) : 42 Cri L Jour 296 \*(Vol 16) 1929 Cal 739 (740) : 31 Cri L Jour 614 : 57 Cal 503 (SB) \*(Vol 13) 1926 Lah 366 (366, 367) : 27 Cri L Jour 575 : \*(Vol 17) 1930 Mad 331 (331) : 53 Mad 173 : 31 Cri L Jour 818 (FB) \*(02) 5 Oudh Cas 313 (315) \*(Vol 14) 1927 Oudh 306 (308, 309) : 2 Luck 157 : 28 Cri L Jour 744 (DB) \* (1922) 23 Cri L Jour 42 (44) (Pat) (DB) \* (Vol 7) 1920 Mad 534 (535, 536) : 43 Mad 450 : 21 Cri L Jour 554 \* ('82) 8 Cal 724 (727) (DB) \* (Vol 12) 1925 Rang 214 (215) : 3 Rang 74 : 26 Cri L Jour 1391 \* ('83) 1883 All WN 204 (204).

[5] If the party, proceeded against, is prejudiced, by the failure to comply with the section, the proceedings would be set aside ('10) 11 Cri L Jour 387 (388) (Lah)\*

('10) 11 Cri L Jour 388 (389) (Lah) \* ('09) 6 All L Jour 37n (37n).

[6] The question whether there is a failure of justice or prejudice is one of fact. (Vol 17) 1930 Mad 859 (861) : 32 Cri L Jour 27.

[7] Where a Magistrate wrote the order under this section on the back of a police report (which gave full details of the information) but did not embody such information in the order, and instead of sending a copy of the order with the summons as required by S. 115, he gave the substance of the information in the summons itself, it was held that the irregularity was one which was covered by S. 537. (Vol 13) 1926 All 767 (768) : 49 All 228 : 27 Cri L Jour 1132.

7. Joint order against two or more persons.—[1] Each person is entitled to a separate notice and not to have the charges which are going to be made against him confused with the charges that are to be made against somebody else. (Vol 16) 1929 All 273 (274) : 51 All 663 : 30 Cri L Jour 562 (DB) \* (Vol 12) 1925 Mad 189 (191) : 26 Cri L Jour 673 \* ('02) 5 Oudh Cas 243 (245).

[2] When, in proceedings under S. 110, two persons were alleged to be members of a gang of habitual thieves, always associated in the commission of thefts, the Magistrate was held right in issuing one order against both of them. (Vol 20) 1933 Oudh 251 (252) : 34 Cri L Jour 852 (Vol 16) 1929 All 273 : 51 All 663 : 30 Cri L Jour 562 distinguished) \* (Vol 20) 1933 Oudh 195 (196) : 34 Cri L Jour 793.

8. Security against person undergoing imprisonment.—[1] Where a person is undergoing only a short sentence it may be that in some cases there may be reason for calling upon him to give security for keeping the peace or for his good behaviour for a period subsequent to the expiration of the sentence. (Vol 3) 1916 Low Bur 1 (2) : 8 Low Bur Rul 353 : 17 Cri L Jour 88 (FB) (Overruling 4 Low Bur Rul 148).

9. Order, if a public document.—[1] An order under this section is a public document within the meaning of S. 74 of the Evidence Act, but it cannot be admitted in evidence without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced in evidence. (Vol 1) 1914 Cal 388 (388) (DB).

#### SECTION 113—Note 1.

[1] It is immaterial how the person, against whom an order has been passed under S. 112, has come to be present in Court ('69) 2 Beng LR App 28 (29) (DB) \* ('11) 12 Cri L Jour 533 (534) (Bom) \* ('04) 1 Cri L Jour 535 (537) : 31 Cal 557 (DB) \* (Vol 1) 1914 All 466 (467) : 36 All 262 : 15 Cri L Jour 288 (Do).

[2] It is not material whether the arrest under which he has been brought before the Court is legal or not. ('11) 12 Cri L Jour 533 (534) (DB) (Bom) \* (Vol 9) 1921 All 278 (280) : 43 All 186 : 22 Cri L Jour 115.

[3] A summons sent to a person under S. 114 but no order under S. 112 drawn up at that time and consequently not served on him along with the summons as required by it—The person appeared.—In pursuance of the summons proceedings under S. 112 were

a114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court.

Summons or warrant in case of person not so present.

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

[1882—S 114; 1872—S. 494, proviso, 515 para 1; 1861—Ss. 285 proviso 306].

[a] See foot-remark [b] to Sec. 112.

### Section 113 (contd.)

drawn up in his presence and the order read out to him—*Held* that, the fact that the person appeared in pursuance of a summons which was not served as required by S. 115 did not affect the validity of the order under S. 112 and its reading over to the person. (Vol 7) 1920 Mad 1014 (1014) : 20 Cri L Jour 763.

[4] Certain persons appeared before a Magistrate in pursuance of an order to show cause why they should not be required to furnish security in a sum of Rs. 2,000 when the Magistrate passed a fresh order under S. 112 demanding security of Rs. 5,000. This latter order was read out to them. It was held that the proceedings were not vitiated. (Vol 14) 1927 Lah 689 (690) : 28 Cri L Jour 815.

[5] If the person is present in Court, the order should be read over to him and if he so desires, the substance thereof should be explained to him. (Vol 1) 1914 All 466 (467) : 36 All 262 : 15 Cri L Jour 288.

[6] An omission to read over the order is likely to cause great prejudice to the person concerned. ('91) 14 All 45 (47, 48.)

[7] The error on the part of the Magistrate in failing to read out the order under S. 112 to the accused or to explain its substance to them, vitiates the order under S. 117 (3). (Vol 30) 1943 Sind 175 (176) : 45 Cri L Jour 164 (DB).

[8] Order read over after prosecution evidence—Defect is curable under S. 537. (Vol 33) 1946 Oudh 230 (231).

### SECTION 114—Synopsis.

1. "Shall issue a summons."
2. Form of summons.
3. Sufficient time to appear in Court to show cause.
4. "When such person is in custody."
5. Immediate arrest.
6. Record of information.
7. "May at any time."
8. Warrant of arrest against person outside jurisdiction.
9. Bail.

1. "Shall issue a summons."—[1] No order for security can be made against the person against whom an order under S. 112 is made and who is not present in Court, under S. 118, in the absence of summons or warrant requiring him to appear. ('68) 9 Suth WR Cr 16 (16) (DB).

[2] A summons or a warrant cannot be issued against such person unless an order had first been made against

him under Section 112. (Vol 13) 1926 Sind 288 (289) : 20 Sind LR 122 : 27 Cri L Jour 935.

2. Form of summons.—[1] Where the summons did not set forth the substance of the information and a copy of the order under section 112 was not served along with it, it was held that persons against whom proceedings were taken were prejudiced by the non-compliance with the section. ('09) 9 Cri L Jour 179 (180) (All).

[2] Order under section 112 with a view to take action under Section 110.—Summons issued—On appearance Magistrate thinking Section 110 inapplicable and proceeding to deal with case under Section 107—*Held*, that the person proceeded against should have been served with a fresh notice. ('07) 5 Cri L Jour 397 (398) : 30 Mad 282 (DB).

3. Sufficient time to appear in Court to show cause.—[1] Sufficient time should be allowed for appearance in court as so to enable the person summoned to get ready with his evidence for the purpose of the inquiry under S. 117 of the Code. ('73) 20 Suth WR Cr 18 (19) (DB) \* (Vol 1) 1914 Cal 357 (357) : 41 Cal 808 : 15 Cri L Jour 353 (DB) \* ('74) 22 Suth WR Cr 70 (71) (DB) (Parties required to show cause on 9th were summoned on 5th and 7th of the same month—*Held* that time allowed was insufficient).

4. "When such person is in custody."—[1] If an order is made under S. 112 against person arrested under S. 55 with a view to proceed under S. 110 and kept in custody a warrant should be issued. (Vol 13) 1926 Sind 190 (191) : 27 Cri L Jour 628 : 20 Sind LR 85 (DB).

[2] Section applies even if the arrest has been made outside jurisdiction or the Magistrate is acting under S. 114 and the person arrested is in custody within jurisdiction. (Vol 6) 1919 Cal 702 (706) : 46 Cal 215 : 19 Cri L Jour 696 (DB).

5. Immediate arrest.—[1] Before immediate arrest is ordered the Magistrate must have reason to fear the commission of the breach of the peace, and it must appear to him that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person. (Vol 13) 1926 Sind 288 (289) : 20 Sind LR 122 : 27 Cri L Jour 935. \*('83) 6 All 132 (138) \*(Vol 11) 1924 Pat 320 (320) : 24 Cri L Jour 829.

6. Record of information.—[1] The Magistrate is bound to record the substance of the report or information. (Vol 11) 1924 Pat 320 (320) : 24 Cri L Jour 829. \*(Vol 1) 1914 All 466 (467) : 36 All 262 : 15 Cr L J 288.

[2] Mere expression of Magistrate's belief that action under the section is necessary, is not sufficient. ('83) 6 All 132 (138).



a b115. Every summons or warrant issued under section 114 shall be accompanied by a Copy of order under section 112 to accompany summons or warrant. copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

[1882—S. 115].

[a] [b] See foot-remark [a] and [b] to S. 112.

a116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

[1882—S. 116 ; 1872—S. 495; 1861—S. 286].

[a] See foot-remark [b] to Sec. 112.

a b117. (1) When an order under section 112 has been read or explained under section 113 Inquiry as to truth to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

#### Section 114 (contd.)

[3] The provision is a safeguard to protect persons whose liberty is affected and who may have resort to a superior Court under S 498 or any other provision of the Code. (Vol 11) 1924 Pat 320 (320) : 24 Cri L Jour 829.

7. "May at any time."—[1] Where the person proceeded against has appeared in Court in pursuance of a summons or warrant and has executed a bond under S. 117 sub-s (3), the Magistrate has no power to issue a warrant of arrest against him on the ground that there is an imminent danger of the breach of the peace. (Vol 31) 1944 Mad 575 (576) : 46 Cri L Jour 172 \*(Vol 16) 1929 Pat 654 (656) : 30 Cri L Jour 809.

8. Warrant of arrest against person outside jurisdiction.—1. A Magistrate cannot issue a warrant against a person under this section unless such person is within the local limits of his jurisdiction. ('12) 13 Cri L Jour 796 (797) (Bom).

9. Bail.—[1] Section 496 should be read along with other provisions of the Code giving a special right of detention to a Court. ('12) 13 Cri L Jour 447 (448) : 36 Mad 474 (DB).

[2] Person detained under S 107 sub-s (4) has no absolute right to be released on bail. ('12) 13 Cri L Jour 447 (448) : 36 Mad 474 (DB).

[3] In the absence of any special provision the Court has no power to refuse to grant bail. (Vol 3) 1916 Sind 93 (94) : 9 Sind LR 158 : 17 Cri L Jour 77 \*(04) 1 Cri L Jour 775 (778) : 32 Cal 80 (DB) \*(93) 6 CPLR Cr 31 (32). \*(08) 7 Cri L Jour 360 (361) : 31 Mad 315 (FB).

[4] Refusal to grant bail is contrary to the very spirit of the provisions of chapter VIII of the Code. (Vol 13) 1926 Sind 283 (289) : 20 Sind LR 122 : 27 Cri L Jour 935.

#### SECTION 115—Note 1.

[1] The object of the provisions of this section is to provide the fullest information to the person whose liberty is in danger to enable him to rebut the truth of the information against him. ('91) 14 All 45 (47) \*(77) 1 Cal L Rep 130 (131) \*(Vol 11) 1924 Nag 166 (167, 168) : 25 Cri L Jour 132.

[2] The person should be given reasonable interval of time to meet the information ; and, an order requiring security, without allowing such time is illegal

('84) 6 All 214 (218) : ('74) 22 Suth WR (Cr) 70 (71) (DB).

[3] Appearance in response to summons specifying nature and amount of security required—Security of a different nature or amount cannot be demanded. ('72) 18 Suth WR Cr 61 (62) (DB) \*(76) 25 Suth WR Cr 50 (51), (DB).

[4] The Court can draw up fresh proceedings under S 113 of a different nature or period and read it over to a person who has appeared in response to a summons requiring security of a particular nature and amount. ('95) 1895 All WN 241 (241).

[5] Requiring security without serving summons at all, is illegal. ('88) 9 Suth WR Cr 16 (16) (DB).

[6] A failure to serve copy of the order under S 112 along with the summons will not vitiate the order in the absence of prejudice. (Vol 11) 1924 Nag 166 (167, 168) : 25 Cri L Jour 132 \*(Vol 7) 1920 Pat 25 (28) : 21 Cri L Jour 321 (DB) : (Vol 7) 1920 Mad 1014 (1014) \*(Vol 13) 1926 All 767 (763) : 49 All 228 : 27 Cri L Jour 1132 \*(09) 9 Cri L Jour 179 (180) (All) \*(Vol 12) 1925 Nag 33 (34) : 25 Cri L Jour 682 \*(02) 5 Oudh Cas 313 (315) \*(09) 10 Cri L Jour 375 (377) (DB) (Bom) (97-01) 1 Upp Bur Rul 16 (16).

[7] Where party is made aware of the information against him and also allowed opportunity to meet it, no prejudice can result by the mere non-service of a copy of the order. ('74) 22 Suth WR Cr. 70 (71) (DB).

#### SECTION 116—Note 1.

[1] Personal attendance of a person called upon to show cause against demanding security for good behaviour cannot be dispensed with under this section. ('03) 2 Weir 54 (55) (DB).

[2] The discretion to dispense with personal attendance should be judicially exercised. ('85) 12 Cal 133 (136) (DB). (Person residing at a far off place—No special circumstance making his personal appearance indispensable—Held that refusal to dispense with it was an unwise exercise of jurisdiction).

#### SECTION 117—Synopsis.

1. "Shall proceed to inquire."
2. Effect of consent to give security—Whether inquiry necessary.
3. Reference to arbitration.



(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed.

c[ (3) Pending the completion of the inquiry under subsection (1) the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded :

Provided that :—

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110, shall be directed to execute a bond for maintaining good behaviour, and

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112.]

a[ (4) For the purposes of this section the fact that a person is an habitual offender [or is so desperate and dangerous as to render his being at large without security hazardous to the community] may be proved by evidence of general repute or otherwise.

d[ (5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

[1882—S. 117 ; 1872—Ss. 491 Explanation, 515 para. 3 ; 1861—S. 307].

[a] [b] See foot-remark [a] [b] to Sec. 112.

[c] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 19.

[d] Original sub-sections (3) and (4) were *re-numbered* (4) and (5) respectively, *ibid*.

#### Section 117 (*contd.*)

4. Mode of enquiry.
5. Applicability of other provisions of the Code to inquiries under this section.
6. Interim security—Sub-section (3).
7. Evidence of general repute—Sub-section (4).
8. Evidence of repute against person charged under S 107, if admissible.
9. "Or otherwise."
10. Admissibility of evidence of previous convictions in S 110 proceedings.
11. Admissibility of evidence of the commission of a substantive offence in S 110 proceedings.
12. Sufficient evidence in proceedings under S 109.
13. Evidence in proceedings under S 108.
14. Joint inquiry—Sub-section (5).
15. Effect of joint inquiry where there is no association.
16. Admissibility of confession of a co-accused in a joint inquiry.
17. Suit for malicious prosecution.

1. "Shall proceed to inquire".—[1] The object of this chapter is to guard society from persons of evil reputation by placing them under substantial but not excessive security ('39) 1889 All WN 114 (114).

[2] The Magistrate is bound to hold a judicial inquiry and investigate the truth of the information upon

which proceedings have been instituted. ('99) 1889 Pun Re No 10 Cr p 50 (51)\* ('69) 12 South WR Cr 54 (55) (DB) \* ('68-69) 4 Mad HCR App xxii (xxiii) (DB) \* (Vol 1) 1914 All 546 (546) : 37 All 30 : 16 Cri L Jour 61. \* (Vol 19) 1932 All 670 (672) : 54 All 1036 : 34 Cri L Jour 42.

[3] Magistrate must give a legal finding before passing the final order for security. (Vol 7) 1920 Cal 412 (412) : 21 Cri L Jour 826 (DB) \* ('87) 9 All 452 (464) \* (Vol 16) 1929 Lah 504 (505) : 10 Lah 155 : 30 Cri L Jour 839 \* ('02) 5 Oudh Cas 203 (205).

[4] The Magistrate should exercise his powers with sound discretion after a very full and searching enquiry. (Vol 6) 1919 All 136 (136) : 20 Cri L Jour 689 \* ('93) 1893 Rat 639 (641) (DB) \* (72-92) 1872-92 Low Bar Rul 546 (547) \* (Vol 12) 1925 Sind 204 (206) : 19 Sind L R 96 : 25 Cri L Jour 1377.

[5] The Magistrate cannot keep proceedings under S. 107 pending and without enquiry on the ground that such pendency tends to preserve the peace. (Vol 8) 1921 Pat 440 (444) : 22 Cri L Jour 745.

[6] The Magistrate cannot proceed to hold the enquiry without giving sufficient opportunity to the person proceeded against to show cause why he should not be bound over. (Vol 1) 1914 Cal 357 (357, 358) : 41 Cal 806 : 15 Cri L Jour 353 (LB) \* (Vol 7) 1920 All 268 (269) : 42 All 646 : 22 Cri L Jour 228 \* ('12) 13 Cri L Jour 844 (845) (All) \* ('02) 1902 Pun Re No. 3 Cr p 9 (10) \* (Vol 13) 1926 Sind 288 (290) : 20 Sind L R 122 : 27 Cri L Jour 935.

[7] The Magistrate cannot order a person to furnish

## Objects and Reasons.

"We approve of the principle of new sub-section (3) of Section 117 which as an alternative to the immediate arrest allowed by the proviso to Section 114, enables Magistrate to make an interim order for security. But we see no reason why the interim order should not be, in certain cases, one for security for good behaviour, provided that an order of this nature is not made in proceedings under section 107. We have also re-drafted the proviso to new sub-section (3) in the hope of making its intention clearer.

We decided in favour of maintaining the amendment

of present sub-section (3) [now sub-section (4)] which will enable the fact that a person is "so desperate and dangerous as to render his being at large without security hazardous to the community" to be proved by evidence of general repute. Our colleague Saiyad Raza Ali dissents from this view. On the other hand, we think that the deletion of the words "or otherwise" would be a mistake, as the Courts might hold that some change in the law was intended by their omission, and that the sub-section was intended to be exhaustive of the methods of proof."—S.C.R. [XVIII of 1923].

Section 117 (*contd.*)

security in the absence of legal evidence. ('83) 6 All 132 (136, 137) \* ('91) 1891 Rat 585 (586) (DB) \* ('08) 3 Cri L Jour 128 (129) : 35 Cal 674 (DB) \* ('82) 1882 Pun Re No. 27 Cri p 34 (34) (DB) \* ('07) 6 Cri L Jour 278 (278) : 30 Mad 330 \* (Vol 7) 1920 Pat 550 (551) : 21 Cri L Jour 453.

[8] To permit a Magistrate to act, legal evidence must be duly recorded by him in the presence of the person proceeded against ('69) 6 Bom H C R (Cr) 1 (5) \* ('72) 18 Suth W R Cr 2 (3) (DB) \* (Vol 12) 1925 Rang 112 (112) : 2 Rang 641 : 26 Cri L Jour 395.

[9] The Magistrate cannot act on the basis of his own personal and extra-judicial knowledge obtained as a result of local enquiry. (Vol 10) 1923 All 596 (597) : 24 Cri L Jour 593 \* (Vol 11) 1924 All 451 (453) : 45 All 749 : 25 Cri L Jour 781 \* ('02) 29 Cal 392 (393) \* (Vol 12) 1925 Lah 166 (167) : 25 Cri L Jour 808 \* (Vol 12) 1925 Oudh 441 (442) : 26 Cri L Jour 1149 \* (Vol 12) 1925 Rang 112 (112) : 2 Rang 641 : 26 Cri L Jour 395.

[10] The Magistrate cannot act on the basis of his own knowledge obtained as a result of a previous case tried by him. (Vol 12) 1925 All 443 (444) : 26 Cri L Jour 981 \* (Vol 1) 1914 All 546 (546) : 16 Cri L Jour 61 : 37 All 30.

[11] The Magistrate cannot act on the evidence recorded in a previous case. ('75) 24 Suth W R Cr 4 (4) (DB) \* ('06) 4 Cri L Jour 464 (465) (DB) (Specially where such evidence has been rejected as unreliable in a charge for substantial offence) \* (Vol 7) 1920 Cal 301 (302, 303) : 21 Cri L Jour 170 (DB) (Do) \* (Vol 5) 1918 All 257 (257) : 19 Cri L Jour 351 : 40 All 372 (Do) \* (Vol 6) 1919 All 393 (394) : 20 Cri L Jour 727 (Do) \* (Vol 3) 1916 Oudh 122 (123) : 17 Cri L Jour 184 (185) (Do).

[12] The Magistrate cannot base his findings:

(a) On evidence recorded by Magistrate who had no jurisdiction to try the case. ('85) 1885 All W N 30 (30) \* ('75) 24 Suth W R Cr 52 (53) (DB).

(b) Upon a police report. (Vol 16) 1929 Lah 504 (505) : 10 Lah 155 : 30 Cri L Jour 839 \* ('69) 1869 Rat 23 (23) (DB) \* ('71) 6 Beng L R App 148 (148) (DB) \* ('74) 21 Suth W R Cr 28 (28) (DB).

(c) On the report of another Magistrate which is not legal evidence. ('71) 8 Bom H C R Cr 162 (163) (DB).

[13] Where the order under section 112 read that A was by general repute a thief and a burglar, but in the enquiry evidence was directed to show that he was by habit a thief and a burglar and the cross-examination was also directed to refute the same it was held that the enquiry was not vitiated. ('12) 13 Cri L Jour 784 (784) (DB) (Cal).

[14] Where the Magistrate after issuing summons under S. 107 started proceedings under S. 110 followed

the procedure as in the trial of warrant cases and there was no prejudice to the opposite party, it was held that the irregularity, if any, was cured by the provisions of S. 537 of the Code. ('13) 14 Cri L Jour 65 (66) (Mad).

[15] Where in proceedings under S. 107 the preliminary order did not contain sufficient particulars of the information upon which the Magistrate acted and objection was taken on that ground, the Magistrate had power to order an amendment of the same by giving full particulars. ('02) 29 Cal 399 (399, 391).

[16] Evidence as to occurrences after the receipt of information by the Magistrate under S. 110 is inadmissible under this section. (Vol 1) 1914 All 382 (383) : 15 Cri L Jour 212 : 36 All 239.

[17] Evidence not admissible under the Evidence Act cannot be admitted in proceedings under this section. (Vol 1) 1914 All 280 (282) : 15 Cri L Jour 705.

[18] Magistrates should be careful to see that unnecessary witnesses are not examined. (Vol 1) 1914 All 430 (431) : 15 Cri L Jour 363.

2. Effect of consent to give security.—Whether inquiry necessary.—[1] Mere consent or readiness to furnish security does not amount to a plea of guilty to the charges contained in the preliminary order and the Court is not justified in binding the person over on the strength of such consent alone without any inquiry and evidence. ('08) 8 Cri L Jour 128 (129) : 35 Cal 674 (DB) \* (Vol 23) 1936 Cal 292 (293) : 37 Cri L Jour 818 \* (Vol 12) 1925 Lah 135 (136) : 25 Cri L Jour 710 \* (Vol 16) 1929 Lah 504 (505) : 10 Lah 155 : 30 Cri L Jour 839 \* ('10) 11 Cri L Jour 393 (393) (Mad) \* (1900-02) 1 Low Bur Rul 79 (80) \* ('02-03) 1-Upp Bur Rul Cr P C 1 (1) \* (Vol 5) 1918 Nag 140 (141) : 20 Cri L Jour 105 \* (Vol 7) 1920 Nag 145 (146) : 21 Cri L Jour 656 \* (Vol 12) 1925 Sind 321 (321) : 26 Cri L Jour 1041 : 19 Sind L R 101.

[But see (Vol 15) 1928 All 270 (272) : 50 All 599 : 30 Cri L Jour 6 (DB) \* (Vol 14) 1927 All 579 (580) : 28 Cri L Jour 609 : 50 All 120 \* (Vol 22) 1935 Pesh 116 (118, 119) : 36 Cr L Jour 1212 (DB).]

[2] It depends upon the facts and circumstances of each case as to whether the consent to give security amounts to a plea of guilty. (Vol 15) 1928 All 357 (359) : 30 Cri L Jour 122 (DB) \* (Vol 24) 1937 Oudh 289 (289, 290) : 38 Cri L Jour 302.

[3] A statement made by a person against whom security proceedings are taken, expressing willingness to give security should be recorded as nearly as possible in the words used by him, and where a Magistrate fails to do so and orders security on the basis of the alleged consent, the proceedings are liable to be quashed. ('07) 6 Cri L Jour 332 (333) (Mad).

3. Reference to arbitration.—[1] Proceedings for taking security for keeping the peace or for good behaviour cannot be referred to arbitration. (Vol. 18) 1931 Pat 92 (95) (DB).

## Objects and Reasons.

"We approve of the principle of new sub-section (3) of Section 117 which as an alternative to the immediate arrest allowed by the proviso to Section 114, enables a Magistrate to make an interim order for security. But we see no reason why the interim order should not be, in certain cases, one for security for good behaviour, provided that an order of this nature is not made in proceedings under section 107. We have also re-drafted the proviso to new sub-section (3) in the hope of making its intention clearer.

We decided in favour of maintaining the amendment

of present sub-section (3) [now sub-section (4)] which will enable the fact that a person is "so desperate and dangerous as to render his being at large without security hazardous to the community" to be proved by evidence of general repute. Our colleague Saiyad Raza Ali dissents from this view. On the other hand, we think that the deletion of the words "or otherwise" would be a mistake, as the Courts might hold that some change in the law was intended by their omission, and that the sub-section was intended to be exhaustive of the methods of proof."—S.C.R. [XVIII of 1923].

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security in the absence of legal evidence. ('83) 6 All 132 (136, 137) \* ('91) 1891 Rat 585 (586) (DB) \* ('08) 8 Cri L Jour 128 (129) : 35 Cal 674 (DB) \* ('82) 1882 Pun Re No. 27 Cri p 34 (34) (DB) \* ('07) 6 Cri L Jour 278 (278) : 30 Mad 330 \* (Vol 7) 1920 Pat 550 (551) : 21 Cri L Jour 453.

[8] To permit a Magistrate to act, legal evidence must be duly recorded by him in the presence of the person proceeded against ('69) 6 Bom H C R (Cr) 1 (5) \* ('72) 18 Suth W R Cr 2 (3) (DB) \* (Vol 12) 1925 Rang 112 (112) : 2 Rang 641 : 26 Cri L Jour 395.

[9] The Magistrate cannot act on the basis of his own personal and extra-judicial knowledge obtained as a result of local enquiry. (Vol 10) 1923 All 596 (597) : 24 Cri L Jour 593 \* (Vol 11) 1924 All 451 (453) : 45 All 749 : 25 Cri L Jour 781 \* ('02) 29 Cal 392 (393) \* (Vol 12) 1925 Lah 166 (167) : 25 Cri L Jour 808 \* (Vol 12) 1925 Oudh 441 (442) : 26 Cri L Jour 1149 \* (Vol 12) 1925 Rang 112 (112) : 2 Rang 641 : 26 Cri L Jour 395.

[10] The Magistrate cannot act on the basis of his own knowledge obtained as a result of a previous case tried by him. (Vol 12) 1925 All 443 (444) : 26 Cri L Jour 381 \* (Vol 1) 1914 All 546 (546) : 16 Cri L Jour 61 : 87 All 30.

[11] The Magistrate cannot act on the evidence recorded in a previous case. ('75) 24 Suth W R Cr 4 (4) (DB) \* ('06) 4 Cri L Jour 464 (465) (DB) (Specially where such evidence has been rejected as unreliable in a charge for substantial offence) \* (Vol 7) 1920 Cal 301 (302, 303) : 21 Cri L Jour 170 (DB) (Do) \* (Vol 5) 1918 All 257 (257) : 19 Cri L Jour 351 : 40 All 372 (Do) \* (Vol 6) 1919 All 393 (394) : 20 Cri L Jour 727 (Do) \* (Vol 3) 1916 Oudh 122 (123) : 17 Cri L Jour 184 (185) (Do).

[12] The Magistrate cannot base his findings:

(a) On evidence recorded by Magistrate who had no jurisdiction to try the case. ('85) 1885 All W N 30 (30) \* ('75) 24 Suth W R Cr. 52 (53) (DB).

(b) Upon a police report. (Vol 16) 1929 Lah 504 (505) : 10 Lah 155 : 30 Cri L Jour 839 \* ('69) 1869 Rat 23 (23) (DB) \* ('71) 6 Beng L R App 148 (148) (DB) \* ('74) 21 Suth W R Cr 28 (28) (DB).

(c) On the report of another Magistrate which is not legal evidence. ('71) 8 Bom H C R Cr 162 (163) (DB).

[13] Where the order under section 112 read that A was by general repute a thief and a burglar, but in the enquiry evidence was directed to show that he was by habit a thief and a burglar and the cross-examination was also directed to refute the same it was held that the enquiry was not vitiated. ('12) 13 Cri L Jour 784 (784) (DB) (Cal).

[14] Where the Magistrate after issuing summons under S. 107 started proceedings under S. 110 followed

the procedure as in the trial of warrant cases and there was no prejudice to the opposite party, it was held that the irregularity, if any, was cured by the provisions of S. 537 of the Code. ('13) 14 Cri L Jour 65 (66) (Mad).

[15] Where in proceedings under S. 107 the preliminary order did not contain sufficient particulars of the information upon which the Magistrate acted and objection was taken on that ground, the Magistrate had power to order an amendment of the same by giving full particulars. ('02) 29 Cal 389 (390, 391).

[16] Evidence as to occurrences after the receipt of information by the Magistrate under S. 110 is inadmissible under this section. (Vol 1) 1914 All 382 (383) : 15 Cri L Jour 212 : 36 All 239.

[17] Evidence not admissible under the Evidence Act cannot be admitted in proceedings under this section. (Vol 1) 1914 All 280 (282) : 15 Cri L Jour 705.

[18] Magistrates should be careful to see that unnecessary witnesses are not examined. (Vol 1) 1914 All 430 (431) : 15 Cri L Jour 363.

2. Effect of consent to give security—Whether inquiry necessary.—[1] Mere consent or readiness to furnish security does not amount to a plea of guilty to the charges contained in the preliminary order and the Court is not justified in binding the person over on the strength of such consent alone without any inquiry and evidence. ('08) 8 Cri L Jour 128 (129) : 35 Cal 674 (DB) \* (Vol 23) 1936 Cal 292 (293) : 37 Cri L Jour 818 \* (Vol 12) 1925 Lah 135 (136) : 25 Cri L Jour 710 \* (Vol 16) 1929 Lah 504 (505) : 10 Lah 155 : 30 Cri L Jour 839 \* ('10) 11 Cri L Jour 393 (393) (Mad) \* (1900-02) 1 Low Bur Vol 79 (80) \* ('02-03) 1 Upp Bur Rul Cr P C 1 (1) \* (Vol 5) 1918 Nag 140 (141) : 20 Cri L Jour 105 \* (Vol 7) 1920 Nag 145 (146) : 21 Cri L Jour 656 \* (Vol 12) 1925 Sind 321 (321) : 26 Cri L Jour 1041 : 19 Sind L R 101.

[But see (Vol 15) 1928 All 270 (272) : 50 All 599 : 30 Cri L Jour 6 (DB) \* (Vol 14) 1927 All 579 (580) : 28 Cri L Jour 609 : 50 All 120 \* (Vol 22) 1935 Pesh 116 (118, 119) : 36 Cr L Jour 1212 (DB).]

[2] It depends upon the facts and circumstances of each case as to whether the consent to give security amounts to a plea of guilty (Vol 15) 1928 All 357 (359) : 30 Cri L Jour 122 (DB) \* (Vol 24) 1937 Oudh 289 (289, 290) : 38 Cri L Jour 802.

[3] A statement made by a person against whom security proceedings are taken, expressing willingness to give security should be recorded as nearly as possible in the words used by him, and where a Magistrate fails to do so and orders security on the basis of the alleged consent, the proceedings are liable to be quashed. ('07) 6 Cri L Jour 332 (333) (Mad).

3. Reference to arbitration.—[1] Proceedings for taking security for keeping the peace or for good behaviour cannot be referred to arbitration. (Vol. 18) 1931 Pat 92 (95) (DB).

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4. Mode of enquiry.—[1] The sub-section (2) makes applicable the special procedure laid down for the trial of summons or warrant cases in chapters xx and xxi, as well as the general provisions as to inquiries and trials contained in chapter xxiv. (Vol 24) 1937 All 438 (439) : 38 Cri L Jour 804.

[2] Where a Magistrate tries a case as to security for keeping the peace as a warrant case and orders rigorous imprisonment in default of furnishing security, order is illegal. (Vol 11) 1924 All 695 (696) : 26 Cri L Jour 430.

[3] The evidence in proceedings for security for keeping peace should be recorded as required by S. 365 (Vol 5) 1918 Pat 448 (450) : 19 Cri L Jour 169 \* ('06) 4 Cri L Jour 368 (369) : 33 Cal 1036 (DB).

[4] In proceedings for security for good behaviour the procedure prescribed for the trial of warrant cases should be followed. ('72-92) 1 Low Bur Rul 79 (80) \* (Vol 10) 1923 Bom 255 (257) : 47 Bom 438 : 25 Cri L Jour 150.

[5] The evidence in proceedings for security for good behaviour should be recorded in the manner prescribed by S. 360 (Vol 12) 1925 Cal 816 (816) : 52 Cal 470 : 26 Cri L Jour 1233 (DB) \* (Vol 12) 1925 Cal 940 (940) : 52 Cal 668 : 26 Cri L Jour 1456.

[6] The non-compliance with S. 360 is only an irregularity curable under S. 537. (Vol 14) 1927 PC 44 (49) : 28 Cri L Jour 259 : 5 Rang 53 : 54 Ind App 96 (PC).

[7] Where in proceedings under S. 110, the Court recalls and examines prosecution witnesses after the defence is closed without recording any reasons, the procedure is erroneous and prejudicial to the person proceeded against. ('12) 13 Cri L Jour 772 (772) (All).

[8] Section 256 does not apply to proceedings for security for good behaviour. ('08) 7 Cri L Jour 146 (151, 152) : 35 Cal 243 (DB) \* (Vol 14) 1927 Lah 470 (470) : 8 Lah 265 : 28 Cri L Jour 239 \* (Vol 3) 1916 Lah 295 (296) : 17 Cri L Jour 84 : 1916 Pun Re No. 1 Cr \* (Vol 17) 1930 Mad 331 (335, 336) : 53 Mad 173 : 31 Cri L Jour 618 (FB) \* (Vol 20) 1933 Sind 8 (9) : 27 Sind LR 19 : 34 Cri L Jour 9 (DB).

[See however (Vol 30) 1943 All 28 (24) : ILR (1942) All 945 : 44 Cri L Jour 187. (It is very much doubtful whether person proceeded against under S. 110 is entitled to demand cross-examination of witnesses second time) \* ('11) 12 Cri L Jour 89 (89) (Low Bur) \* ('05) 2 Cri L Jour 462 (463) : 1905 Upp Bur Rul Cri PC 29.]

[But see (Vol 17) 1930 All 274 (275) : 52 All 448 : 31 Cri L Jour 627 (DB) \* (Vol 14) 1927 All 660 (661, 662) : 50 All 71 : 28 Cri L Jour 792 \* (Vol 20) 1933 Rang 29 (29, 30) : 34 Cri L Jour 468. (Following 35 Cal 243 and dissenting from 12 Cri L Jour 89—Decision of a single Judge.)]

[9] In proceedings for good behaviour the Magistrate under S. 257 recall the prosecution witnesses for a further examination at the instance of the defence provided the requirements of that section are fulfilled. (Vol 17) 1930 Mad 331 (335, 336) : 31 Cri L Jour 618 : 53 Mad 173 (FB).

[10] In proceedings for good behaviour the Court is also bound under S. 257 to issue processes for summoning the defence witnesses cited unless it considers that the application for such summons has been made maliciously to defeat and delay the ends of justice ('02)

26 Bom 418 (421) (DB) \* (Vol 6) Cri L Jour 201 (DB) \* (Vol 11) Cri L Jour 293 (DB) \* (Vol 19) 1 Cri L Jour 679 \* ('12) 13 Cri L.

[11] The irregularity, if any, the close of the prosecution, against, is cured by S. 537. (Vol 50 Cal 985 : 25 Cri L Jour 1085

[12] An order of discharge on security for good behaviour with comments of the prosecuting inspector illegal (Vol 31) 1944 Oudh 296 (2

5. Applicability of other provisions to inquiries under this section of S. 250.—[1] The provisions as to inquiries under this section as an order for compensation. (Vol 149 All 750 : 28 Cri L Jour 604 (321) : 23 Cri L Jour 474 \* ('01) \* ('02) 1902 Pun Re No. 33 Cr

(ii) Applicability of S. 202.—not in terms apply ; but Magistrate to direct an inquiry by a subordinate investigation by the police before inq ; such inquiry must, however commencement of the proceedings process and taking evidence. ('141).

(iii) Applicability of S. 350 and a *de novo* inquiry can be ordered change in the Magistrate. (Vol 24) 38 Cri L Jour 804 \* (Vol 12) 192 Oudh Cas 323 : 25 Cri L Jour 138 337 (342, 344) : 43 Mad 511 : 21

(iv) Applicability of S. 404 not apply to inquiries under this : Lah 1019 (1020) : 35 Cri L Jour

(v) Applicability of S. 51 empowered to pass an order with produced before the Court though an offence committed with reference (Vol 6) 1919 Mad 20 (21, 22) : Cri L Jour 135 (DB) (Order to pay cos

(vi) Applicability of S. 541 does not apply to proceedings unless fine can be imposed in those cases 694 (695) : 25 Cri L Jour 476.

(vii) Applicability of S. 19 (c).—(7) Although S. 190 (1) (c) is to offences, principle of that section applies under this section. (Vol 5) 19 Cri L Jour 7 : 19 Cri L Jour 899 (DB

(viii) Bail and detention in cases against whom security proceedings entitled to bail as of right except Court takes action under sub-s. under sub-s. (4) of S. 107 (Vol 27 ILR (1940) Nag 61 : 41 Cri L Jour 1933 Rang 164 (164) : 34 Cri L Jour 1933 Rang 165 (165) : 34 Cri L Jour 775 (778) : 32 Cal 80

[9] To send a person to jail on security proceedings is pending and prejudicial to his interests. (199) : 16 Cri L Jour 91 (DB).

6. Interim security.—Sub-section is incumbent upon the Court to

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the requirements of the section have been fulfilled\* (Vol 14) 1927 Sind 148 (150) : 21 Sind LR 93 : 28 Cri L Jour 173 (DB) \* (Vol 30) 1943 Sind 173 (174) : ILR (1943) Kar 275 : 45 Cri L Jour 147 (DB).

[2] Sub-section does not apply to an offence that has no relation to the object of proceedings under Cri PC or to proceedings under Chap VIII. (Vol 30) 1943 Sind-173 (173) : ILR (1943) Kar 275 : 45 Cri L Jour 147 (DB).

[See (Vol 29) 1942 Sind 77 (78) : ILR (1942) Kar 9 : 43 Cri L Jour 692 (DB).

[3] An order under this sub-section is not a mere routine order to be appended to an order under sec. 112, and is not meant merely to anticipate the final order that may be made under Sec 118. It is designed to meet an emergency. (Vol 29) 1942 Sind 86 (86) : ILR (1942) Kar 189 : 43 Cri L Jour 788 (DB) \* (Vol 29) 1942 Sind 77 (77) : 43 Cri L Jour 692 : ILR (1942) Kar 9 (DB).

[4] Question of emergency should be considered as a separate case. (Vol 29) 1942 Sind 77 (78) : ILR (1942) Kar 9 : 43 Cri L Jour 692 (DB).

[5] Consideration of emergency as a separate case does not mean that Magistrate should conduct an enquiry within an inquiry and take evidence of witnesses and their cross-examination. (Vol 30) 1943 Sind 122 (123) : ILR (1943) Kar 279 : 44 Cri L Jour 779 (DB).

[6] Magistrate can act upon the sworn testimony of a police prosecutor given in the form of affidavits. (Vol 29) 1942 Sind 86 (87) : ILR (1942) Kar 189 : 43 Cri L Jour 788 (DB).

[7] An order passed under this sub-section is not bad merely because the Magistrate has based it on the same information and the same evidence which were the basis of his order under S. 112. (Vol 30) 1943 Sind 122 (123) : ILR (1943) Kar 279 : 44 Cri L Jour 779 (DB).

[8] Where a Magistrate starts proceedings under S 110, cls (a), (b) and (c) on a police-report, which make general and vague allegations, passes an order, immediately, without even calling the police-officer in the witness-box or without making any further inquiry, the order cannot be justified on the ground of emergency. (Vol 29) 1942 Sind 77 (78) : ILR (1942) Kar 9 : 43 Cri L Jour 692 (DB).

[9] The existence of a state of martial law is a strong evidence justifying an order under this sub-section. (Vol 30) 1943 Sind 173 (174) : ILR (1943) Kar 275 : 45 Cri L Jour 147 (DB).

[10] An order passed without the order under S 112 being read and explained to the accused is premature and illegal. (Vol 30) 1943 Sind 163 (163, 164) : ILR (1943) Kar 513 : 44 Cri L Jour 815 (DB) \* (Vol 30) 1943 Sind 175 (176) : 45 Cri L Jour 164 (DB).

[11] Where the Court passes an interim order for security the terms of the security should not be more onerous than those specified in the order under S 112. (Vol 13) 1926 Sind 276 (277) : 20 Sind L R 358 : 27 Cri L Jour 1080 (DB).

[12] The High Court cannot under sec 498 reduce the amount of security ordered to be furnished by the Magistrate under this sub-section though it can reduce the same under its inherent powers where it is too high. (Vol 17) 1930 Lah 529 (529) : 31 Cri L Jour 812.

[13] The reduction by the High Court of the amount of the interim security does not fetter the discretion of the Magistrate as to the amount of the final security that he may order. (Vol 17) 1930 Lah 529 (530) : 31 Cri L Jour 812.

[14] The Court has jurisdiction to pass an order for interim security notwithstanding that an application is made under S 526, sub-s (8). (Vol 15) 1928 All 268 (268) : 29 Cri L Jour 448 (DB) \* (Vol 14) 1927 Sind 148 (150, 151) : 28 Cri L Jour 173 (DB).

## 7. Evidence of general repute—Sub-section (4).—

[1] The fact that a person is a habitual offender or is a desperate and dangerous character may be proved by evidence of general repute or otherwise, that is by particular acts by which such character is established. (Vol 7) 1920 Oudh 255 (256) : 21 Cri L Jour 810 : 23 Oudh Cas 229.

[See also (Vol 23) 1936 Oudh 238 (240) : 37 Cri L Jour 390 : 12 Luck 36 (DB). ]

[2] The general reputation of a person is the collective opinion of those in whose midst he lives. (Vol 25) 1938 Mad 591 (593) : ILR (1938) Mad 720 : 39 Cri L Jour 898 (DB) \* (Vol 7) 1920 Oudh 255 (257) : 21 Cri L Jour 810 : 23 Oudh Cas 229. \* (Vol 10) 1923 Lah 419 (419) : 25 Cri L Jour 314 \* (Vol 12) 1925 Lah 166 (167) : 25 Cri L Jour 808 \* (Vol. 14) 1927 All 394 (395) : 28 Cri L Jour 502 \* (Vol 1) 1914 All 280 (282) : 15 Cri L Jour 705 (It need not necessarily be the opinion of the entire community). \* (Vol 7) 1920 Mad 534 (539) : 21 Cri L Jour 354 : 43 Mad 450 (DB) (Do) \* (Vol 12) 1925 Oudh 473 (475) : 26 Cri L Jour 1283 : 29 Oudh Cas 44 (Do).

[3] Evidence which discloses the existence of collective opinion is evidence in proof of general reputation. (Vol 1) 1914 All 280 (282) : 15 Cri L Jour 705.

[4] General reputation must be distinguished from rumour which is inadmissible in evidence. (Vol 22) 1935 Pesh 158 (159) \* (Vol 11) 1924 Pat 500 (501) : 25 Cri L Jour 985 \* (04) 1 Cri L Jour 984 (986) (All) \* (Vol 11) 1924 Oudh 187 (188) : 24 Cri L Jour 791 \* (Vol 6) 1919 Mad 633 (635) : 19 Cri L Jour 905 \* (96) 23 Cal 621 (623, 623) (DB).

[5] The roots of a bad reputation are often planted in rumour; it cannot be laid down as any hard and fast rule as to how many instances build up a reputation and how long it takes for rumour to ripen into reputation. (Vol 20) 1933 Pat 189 (191) : 34 Cri L Jour 643.

[6] Rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain kind are not in themselves evidence under this section. (Vol 8) 1921 Cal 625 (627) : 22 Cri L Jour 377 (DB) \* (96) 23 Cal 621 (623, 629) (DB).

[7] A mere suspicion on the part of the witness as to the complicity of the person sought to be proceeded against in certain isolated offences is not *per se* admissible as evidence of general repute. (Vol 16) 1929 All 273 (275, 276) : 51 All 663 : 30 Cri L Jour 562 (DB) \* (Vol 16) 1929 All 813 (813) : 30 Cri L Jour 1086 \* (Vol 7) 1920 Cal 301 (308) : 21 Cri L Jour 170 (DB) \* (02) 29 Cal 779 (781) (DB) \* (Vol 16) 1929 Lah 41 (41) : 9 Lah 586 : 29 Cri L Jour 479 \* (Vol 17) 1930 Lah 345 (348) : 32 Cri L Jour 62 \* (Vol 6) 1919 Mad 633 (635) : 19 Cri L Jour 905 \* (Vol 7) 1920 Oudh 226 (227) : 22 Cri L Jour 273 : 23 Oudh Cas 371 \* (Vol 11) 1924 Pat 498 (499) : 25 Cri L Jour 35 \* (Vol 7) 1920 Low Bur 86 (86, 87) : 22 Cri L Jour 492.

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[See however (Vol 16) 1929 All 650 (651, 652) : 51 All 275 : 31 Cri L Jour 755].

[8] Mere fact that the witness is a police officer will not make his evidence any the weightier or admissible. (Vol 16) 1929 All 273 (275) : 51 All 663 : 30 Cri L Jour 562 (DB) \* (Vol 2) 1915 All 144 (145) : 16 Cri L Jour 281.

[9] The following are inadmissible as evidence of general repute :—

(a) Police records of suspected cases. ('18) 22 Cal WN cxlviii (cxlviii) (DB) \* ('12) 13 Cri L Jour 9 (13) (All) \* (Vol 5) 1918 Oudh 190 (190) : 19 Cri L Jour 825 : 21 Oudh Cas 132 \* (Vol 20) 1933 Oudh 251 (252, 253) : 34 Cri L Jour 852 \* (Vol 7) 1920 Pat 25 (28) : 21 Cri L Jour 321 (DB).

(b) History sheet maintained by police. (Vol 7) 1920 Cal 556 (556) : 21 Cri L Jour 700 (DB) \* (Vol 6) 1919 All 136 (137) : 20 Cri L Jour 689 \* (Vol 17) 1930 All 37 (38) : 31 Cri L Jour 301 (DB).

(c) Entries in "Thana village Crime Note book." ('21) 22 Cri L Jour 486 (487) (DB) (Cal).

(d) Police diaries. (Vol 11) 1924 All 142 (143) : 25 Cri L Jour 45 \* (Vol 2) 1915 All 144 (145) : 16 Cri L Jour 281.

[10] In a doubtful case, the fact that a person has never been suspected of any offence may weaken the evidence of bad repute given against him. (Vol 7) 1920 Oudh 226 (227) : 23 Oudh Cas 371 : 22 Cri L Jour 273 \* (Vol 10) 1923 All 595 (595) : 25 Cri L Jour 486.

[11] Evidence, whether of general repute or of particular facts which would not be admissible at an ordinary trial, is not admissible under this section. (Vol 1) 1914 All 280 (282) : 15 Cri L Jour 705 \* (Vol 16) 1929 All 273 (275, 276) : 51 All 663 : 30 Cri L Jour 562 (DB) \* (Vol 7) 1920 Oudh 255 (256) : 23 Oudh Cas 229 : 21 Cri L Jour 810.

[12] Evidence of general repute must be direct evidence in accordance with the rules of evidence. (Vol 21) 1934 All 735 (738) : 36 Cri L Jour 33 \* (Vol 15) 1928 All 1 (3) : 29 Cri L Jour 92 \* (Vol 7) 1920 Oudh 255 (258) : 23 Oudh Cas 229 : 21 Cri L Jour 810.

[But see (Vol 25) 1938 Mad 482 (483) : 39 Cri L Jour 588 \* (Vol 25) 1938 Mad 591 (591) : ILR (1938) Mad 720 : 39 Cri L Jour 898 (DB) \* (Vol 16) 1929 All 650 (652) : 51 All 275 : 31 Cri L Jour 755 (DB) \* ('09) 10 Cri L Jour 355 (358) : 5 Low Bur Rul 72 (FB).]

[13] It has been held by the High Court of Patna that if the deponent does not know the person whose reputation is in question, his evidence that he heard the reputation is hearsay and, therefore, inadmissible. (Vol 20) 1933 Pat 189 (192) : 34 Cri L Jour 643.

[14] The evidence of a witness who does not know the person about whose reputation he deposes, would necessarily be very weak and would not ordinarily justify an order for security. (Vol 10) 1923 All 35 (37) : 45 All 109 : 24 Cri L Jour 257 \* (Vol 16) 1929 All 273 (276) : 51 All 663 : 30 Cri L Jour 562 (DB) \* ('02) 29 Cal 779 (781) (DB).

[15] Evidence of general repute ought to be evidence given by respectable persons who are acquainted with the person sought to be bound over, who live in the same neighbourhood and are aware of his reputation. (Vol 7) 1920 Mad 534 (539) : 43 Mad 450 : 21 Cri L Jour 854 (DB) \* (Vol 2) 1915 Upp Bur 13 (13) : 16 Cal L Jour 555.

[See (Vol 21) 1934 All 735 33.]

[16] It would not be sufficient officials such as the police, *saildars* ('03-04) 2 Low Bur Rul 166 (166) Bur 13 (13) : 16 Cri L Jour 553 174 (176) : 2 Rang 686 : 26 Cri (Vol 15) 1928 All 1 (2) : 29 Cri 1930 Nag 148 (148, 149) : 31 Cri 1923 Lah 419 (419) : 25 Cri L Jour 738 (739) (Lah).

[17] The Court ought not to police, *saildars* etc. unless they have occasion to know the reputation official duties. (Vol 29) 1942 P L Jour 6 (DB) \* (Vol 20) 1933 L Jour 183 \* (Vol 22) 1935 Pesh

[18] It would not be safe to rely on witness merely because he is a police-officer. (Vol 25) 1938 Ma L Jour 898 : ILR (1938) Mad 1935 Pesh 80 (82) : 36 Cri L Jour 1935 All 850 (851) : 36 Cri L Jour

[19] The vague evidence of witness that the witness is a habitual thief or that the witness is of much value with his associates, means of subsistence increase of thefts synchronises with locality. (Vol 11) 1924 Oudh 187 791 \* (1900) 2 Bom LR 57 (58) (

[20] The witness need not be a neighbour. (Vol 29) 1942 Oudh L Jour 398 \* (Vol 25) 1938 Ma L Jour 898 : ILR (1938) Mad 72

[21] The Court must properly of persons living at a considerable distance. 1925 Rang 174 (175) : 2 Rang 68 (DB).

[22] Where in consequence of in certain villages proceedings are taken against a person for being a robber by the police, the general reputation given against the different villages in which the person would be proper and admissible. 146 (155) : 35 Cal 243 : 7 Cal

[23] The Court should exercise discretion in each case as to the evidence to be received. 1903 All WN 181 (181) \* (Vol 1) 16 Cri L Jour 91 (DB) \* (Vol 8) 23 Cri L Jour 507.

[See also (Vol 25) 1938 M L Jour 588].

[24] No hard and fast rule can be laid down as to the quantum of evidence necessary to establish a case against a person charged with an offence. (Vol 33)

[25] The burden of proof lies on the prosecution. ('98) 1898 J (11) (DB) \* (Vol 7) 1920 Cal 412 826 (DB).

[26] The Court should pay regard to the evidence of the defence with regard to the character of the witness and should not convict unless there are substantial reasons. 415 (418) : 18 Cri L Jour 810 \* (37) : 45 All 109 : 24 Cri L Jour 1051 (1052) : 32 Cri L

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1925 Oudh 277 (278) : 26 Cri L Jour 99\* (Vol 11)  
 1924 Pat 500 (502) : 25 Cri L Jour 985 \* (Vol 20)  
 1933 Pat 112 (113) : 34 Cri L Jour 476 \* (Vol 6) 1919  
 Oudh 310 (311) : 22 Oudh Cas 375 : 20 Cri L Jour 748  
 (Mere fact that witnesses are caste people of accused is  
 no ground for discrediting evidence.) \* (Vol 2) 1915  
 All 464 (465) : 16 Cri L Jour 805 (Accused an influen-  
 tial man in the locality—No ground for discrediting  
 evidence).

[27] Where the evidence of the prosecution and the  
 defence is equally balanced and equal, if not greater,  
 number of defence witnesses speak to good character,  
 no order demanding security should be passed. (Vol 10)  
 1923 All 35 (37) : 45 All 109 : 24 Cri L Jour 257 \*  
 (Vol 17) 1930 Lah 105\* (1054) : 32 Cri L Jour 271 \*  
 (Vol 17) 1930 Oudh 357 (360) : 6 Luck 36 : 31 Cri  
 L Jour 1020 (DB) \* (Vol 12) 1925 Oudh 277 (278) : 26  
 Cri L Jour 99 \* (Vol 26) 1939 Lah 269 (270) : ILR  
 (1939) Lah 53 : 40 Cri L Jour 753 (Especially when  
 prosecution evidence is meagre and unsatisfactory.) \*  
 (Vol 15) 1928 Lah 49 (50) : 9 Lah 133 : 28 Cri L Jour  
 813 (Do) \* (Vol 12) 1925 Pat 131 (137) : 26 Cri L Jour  
 738 (Do) \* (Vol 10) 1923 All 596 (596, 597) : 24 Cri  
 L Jour 593 (Do).

[28] Where a large body of persons have come for-  
 ward to swear as to the reputation of a person and  
 he is not able to show anything as to why the witnesses  
 have come forward to give him a bad character such  
 evidence should not be lightly brushed aside. (Vol 33)  
 1946 Oudh 50 (51).

[29] Court should not, however, be guided by any  
 numerical tests in weighing evidence without paying  
 due regard to the credibility of each witness. (Vol 29)  
 1942 Oudh 356 (357) : 43 Cri L Jour 398 \* (Vol 12)  
 1925 Oudh 501 (501) : 27 Oudh Cas 327 : 26 Cri L Jour  
 530.

**8. Evidence of repute against person under  
 Section 107, if admissible.**—[1] Where a person  
 is called upon to furnish security to keep the peace  
 under S. 107, no evidence of general repute can be let  
 in against him. ('03) 25 All 273 (274, 275) \* ('86)  
 1888 Pun Re No. 16 Cr p. 30 (30, 31) (DB).

[2] Reports made by the prosecution witnesses re-  
 garding the past conduct of the accused and his disposi-  
 tion to use violence are admissible under S. 157 of the  
 Evidence Act, to corroborate what the witnesses have  
 testified in Court. (Vol 27) 1940 Pat 252 (252, 253) :  
 41 Cri L Jour 746.

**9. "Or otherwise."**—[1] The words "or otherwise"  
 do not permit the transgression of the general rules of  
 evidence as enacted by the Evidence Act. (Vol 7) 1920  
 Oudh 255 (256) : 20 Oudh Cas 229 : 21 Cri L Jour 810.

[2] The words are intended to include evidence of  
 particular act and not merely of general repute. Thus,  
 the fact that the person proceeded against has com-  
 mitted a number of thefts or that he associates with  
 proved bad characters can be proved. (Vol 20) 1933 All  
 674 (674) : 35 Cri L Jour 284 \* (Vol 20) 1933 All 674  
 (675) : 35 Cri L Jour 183 \* (Vol 21) 1934 Oudh 49  
 (49) : 35 Cri L Jour 403.

[3] Where a witness deposes to the fact that a person  
 is a habitual offender, the fact that such person was sus-  
 pected in various cases may be admissible as being one  
 of the grounds of the opinion of the witness that the  
 person is a habitual offender. (Vol 16) 1929 All 650  
 (655) : 51 All 275 : 31 Cri L Jour 755 (DB).

[4] Statements given to the police are admissible in

evidence in proceedings under S. 110 and cannot be  
 shut out by the use of S. 162. (Vol 20) 1933 Mad 688  
 (689) : 56 Mad 987 : 34 Cri L Jour 951.

[5] The words "or otherwise" are intended to give  
 the Magistrate a very large discretion as to the nature  
 of the evidence which he may admit. ('04) 1 Cri L  
 Jour 534 (535).

**10. Admissibility of evidence of previous  
 convictions in S. 110 proceedings.**—[1] The  
 existence of a number of previous convictions is a  
 matter which may and should be taken into consid-  
 eration but is not by itself sufficient to justify an order  
 for security. Weight and due regard must be given  
 to the conduct of the accused during the period that  
 has elapsed subsequent to the last conviction. (Vol 16)  
 1929 All 273 (275) : 51 All 663 : 30 Cri L Jour 562  
 (DB) \* (Vol 12) 1925 Bom 195 (195) : 26 Cri L Jour  
 1391 (DB) \* ('09) 10 Cri L Jour 122 (124) (DB) (Cal)  
 \* (Vol 8) 1921 Lah 179 (179, 180) : 23 Cri L Jour 507.

[2] Evidence of the previous order under S. 110 is  
 admissible though the Court cannot order security to  
 be furnished on the strength of the previous order  
 alone unless there is evidence of bad character subse-  
 quent to the same. (Vol 16) 1929 All 650 (653) : 51  
 All 275 : 31 Cri L Jour 755 (DB) \* (Vol 20) 1933 All  
 369 (369, 370) : 55 All 404 : 35 Cri L Jour 417 \*  
 (Vol 11) 1924 Oudh 84 (84) : 26 Oudh Cas 242 : 24  
 Cri L Jour 565 \* (Vol 2) 1915 Cal 643 (643) : 16 Cri  
 L Jour 312 (DB) \* ('09) 10 Cri L Jour 591 (591) :  
 1910 Pun Re No. 4 (Cr) \* ('11) 32 Cri L Jour 359  
 (359) (Mad).

[3] Proof of previous conviction is not necessary to  
 pass an order under S. 110. (Vol 25) 1938 Mad 482  
 (483) : 39 Cri L Jour 588 \* (Vol 23) 1936 Oudh 238  
 (239) : 37 Cri L Jour 390 : 12 Luck 36 (DB).

**11. Admissibility of evidence of the com-  
 mission of a substantive offence in S. 110  
 proceedings.**—[1] Positive evidence as to the actual  
 commission of offence is not necessary in proceedings  
 under S. 110. (Vol 20) 1933 Oudh 58 (59) : 34 Cri L  
 Jour 160 (DB) \* ('07) 5 Cri L Jour 178 (179) (DB)  
 (Bom) \* ('81) 3 Mad 238 (239, 240) (DB).

[2] Instances of specific crimes are admissible in  
 evidence although they are not supported by evidence  
 of such amount and value as would secure a conviction  
 for a substantive offence. (Vol 17) 1930 Oudh 357  
 (358) : 31 Cri L Jour 1020 : 6 Luck 36 (DB) \* (Vol 17)  
 1930 All 274 (275, 276) : 52 All 448 : 31 Cri L Jour  
 627 (DB) \* (Vol 20) 1933 All 676 (678) : 35 Cri L  
 Jour 218.

[3] Even where a prosecution for a substantive  
 offence has ended in an acquittal, evidence relating  
 to the incident which formed the subject-matter of the  
 previous trial cannot be excluded. (Vol 12) 1925 All  
 694 (697) : 47 All 733 : 26 Cri L Jour 1130 (DB).

**12. Sufficient evidence in proceedings  
 under section 109.**—[1] The following were held  
 not sufficient grounds for ordering security to be  
 furnished:—

(a) Statement of a police constable that accused is  
 wandering without means of subsistence or "does not  
 work." (1900 01) 5 Cal W N 28 (29) (DB) ('Does not  
 work' does not necessarily mean that he has 'no  
 ostensible means of subsistence') \* ('94) 1894 Bat 723  
 (724) (DB).

(b) The accused was seen coming out of sugarcanes  
 field at 10 p.m. and tried to run away when challenged.  
 (Vol 15) 1928 All 476 (476) : 29 Cri L Jour 864 (FB)



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(c) Respectable persons who gave satisfactory account of themselves were met at night by the police and a burgler's jemmy was found at the place. (Vol 6) 1919 All 260 (261) : 20 Cri L Jour 401.

**13. Evidence in proceedings under Section 108.**—[1] Where proceedings under S. 108(b) are based on certain speeches delivered by the accused, speeches delivered by him on prior occasions are admissible in evidence to show the existence of a particular state of mind or intention. (Vol 27) 1940 Nag 134 (137) : ILR (1942) Nag 62 : 41 Cri L Jour 713.

**14. Joint inquiry—Sub-section (5).**—[1] Sub-section (5) permits a joint inquiry against two or more persons provided that they have associated together in the matter under inquiry. (Vol 12) 1925 Pat 131 (137) : 26 Cri L Jour 738 (Vol 6) 1919 All 376 (376) : 20 Cri L Jour 750 (Vol 4) 1 Cri L Jour 3 (4) (DB) (Bom) (Vol 6) 1919 Cal 359 (359) : 20 Cri L Jour 551 (DB) (Vol 1) 1914 Lah 575 (576) : 1914 Pun Re No. 21 Cr : 16 Cri L Jour 136 (Vol 7) 1920 Mad 1014 (1014) : 20 Cri L Jour 763.

[2] The expression "associated together" means that the persons have been acting in concert or that there is something in the nature of a conspiracy among them in respect of the various acts alleged against them. (Vol 5) 1918 Pat 98 (98) : 19 Cri L Jour 899 : 4 Pat L Jour 7 (DB) (Vol 10) 1923 Pat 104 (110) : 23 Cri L Jour 100 (DB) (Vol 11) 1924 Nag 166 (167) : 25 Cri L Jour 132 (Vol 10) 11 Cri L Jour 23 (24) : 37 Cal 91 (DB) (Vol 33) 1946 Oudh 50 (51) (Vol 20) 1938 Oudh 251 (252) : 34 Cri L Jour 852 (Vol 21) 1934 Rang 121 (122) : 12 Rang 169 : 35 Cri L Jour 1257 (DB) (Vol 14) 1927 Mad 542 (543) : 29 Cri L Jour 77 : 51 Mad 515.

[3] The following were held not sufficient proof of association:—

(a) Mere fact that accused belonged to the same tribe and village. ('95) 1895 Pun Re No. 1 Cr p 1 (2).

(b) Accused to be close neighbours and had been convicted together on previous occasions. (Vol 7) 1920 Cal 556 (556) : 21 Cri L Jour 700 (DB).

(c) Accused happen to be members of undivided family. (Vol 6) 1919 Mad 633 (635) : 19 Cri L Jour 905.

(d) Mere fact that accused stand in the position of master and servant. ('06) 3 Cri L Jour 290 (291) : 9 Oudh Cas 69.

[4] Evidence of association—Fact that accused belong to different villages will not affect legality of joint trial. ('22) 23 Cri L Jour 58 (53) (DB) (Cal) (Vol 4) 1 All L Jour 144n.

[5] It is enough if some members of the gang are shown to have committed the various acts alleged against them; it is not necessary to prove that on every occasion the whole gang acted together. (Vol 10) 1923 Nag 53 (54) : 23 Cri L Jour 741 (742).

[6] The concert or association may be due to mutual agreement between several persons or due to the obedience to the orders of a common master. ('95) 2 Cri L Jour 554 (587) (DB) (Cal).

[See however (1900) 27 Cal 781 (784).]

[7] In order to justify a joint inquiry there should not merely be association but it is essential that such association should be in the matter under inquiry. ('05) 2 Cri L Jour 224 (225) : 9 Oudh Cas 91 (Vol 10) 11 Cri L Jour 50 (51) (Mad).

[8] Two opposite or contending parties cannot be tried in joint inquiry because they are in conflict with one another. (Vol 30) 1943 Pat 417 (418) : 45 Cri L Jour 406 (Vol 30) 1943 Pat 376 (376) : 45 Cri L Jour 308 (Vol 8) 8 Cri L Jour 154 (154) : 31 Mad 276 (Vol 5) 2 Cal L Jour 65n (65n) (DB) (Vol 3) 1916 All 338 (338) : 17 Cri L Jour 165 (165) (Vol 10) 1923 All 476 (478) : 25 Cri L Jour 200 (Vol 9) 10 Cri L Jour 375 (378) (DB) (Bom) (Vol 9) 9 Cri L Jour 560 (561) : 5 Nag L R 65.

[9] Where proceedings are taken against a person as a dangerous character under S. 110, cl (f), there is no habitual connection between several persons in regard to the character so as to make them desperate and dangerous persons and in such a case there should be a separate trial against each person. (1900) 27 Cal 781 (783) (DB) (Vol 25) 1938 Mad 35 (36, 37) : 39 Cri L Jour 230 (Vol 12) 1925 Mad 189 (191, 192) : 26 Cri L Jour 673 (Vol 7) 6 Cri L Jour 284 (284, 285) : 4 Low Bur Rul 46.

[But see (Vol 17) 1930 Mad 873 (873) : 54 Mad 334 : 32 Cri L Jour 144 (Vol 8) 1921 Cal 635 (636) : 22 Cri L Jour 377 (DB) (Vol 20) 1933 All 676 (677) : 35 Cri L Jour 218].

[10] Where several persons, associated together in a certain matter, a joint inquiry is permissible, notwithstanding that, in regard to some of them additional charges are made in their individual capacity. (Vol 25) 1938 Mad 615 (616) : 39 Cri L Jour 816.

[11] An allegation on the part of the prosecution that there is association is enough to justify a joint inquiry although there is no proof of the same in the inquiry. (Vol 8) 1921 Cal 625 (626) : 22 Cri L Jour 377 (DB).

[See however (Vol 6) 1919 Cal 359 (359) : 20 Cri L Jour 551 (DB) ].

[But see (Vol 10) 1923 Pat 104 (110, 111) : 23 Cri L Jour 100].

[12] The preliminary order under S. 112 should itself contain a charge of association where a joint inquiry is contemplated. ('02) 5 Oudh Cas 243 (245) (Vol 5) 2 Cri L Jour 554 (562, 563) (SB) (Cal).

[13] In a joint inquiry the Court is not absolved from its duty of giving a separate and distinct finding against each one of the accused on the merits of the evidence against him. (Vol 12) 1925 Sind 204 (205) : 19 Sind L R 96 : 25 Cri L Jour 1377 (Vol 11) 1924 All 195 (196) : 25 Cri L Jour 952 (Vol 3) 1916 All 100 (100) : 17 Cri L Jour 400 : 38 All 468 (Vol 17) 1930 Cal 294 (295) : 31 Cri L Jour 944 (Vol 8) 8 Cri L Jour 207 (208) : 35 Cal 929 (DB) (Vol 11) 12 Cri L Jour 104 (105) (Mad) (Vol 12) 1925 Nag 381 (382) : 26 Cri L Jour 1114 (Vol 12) 13 Cri L Jour 760 (761) : 15 Oudh Cas 263.

[See however (Vol 33) 1946 Oudh 50 (51) (Evidence against all accused identical—Distinct finding against each not necessary)].

**15. Effect of joint inquiry where there is no association.**—[1] A joint inquiry held in the absence of any association is a mere irregularity curable under S. 537 of the Code, which, in the absence of any prejudice, does not vitiate the trial. (Vol 30) 1943 Pat 417 (418) : 45 Cri L Jour 406 (Vol 11) 1924 All 195 (196, 197) : 25 Cri L Jour 952 (Vol 5) 8 Cri L Jour 290 (292) : 9 Oudh Cas 89 (Vol 8) 1921 Cal 625 (626) : 22 Cri L Jour 377 (DB) (Vol 12) 1925 Mad 189 (191, 192) : 26 Cri L Jour 673 (Vol 12) 1925 Nag 381 (382) : 26 Cri L Jour 1114 (Vol 11) 1924 Pat 493 (493) : 25 Cri



a 118. (1) If, upon such inquiry, it is proved that it is necessary for keeping the peace or Order to give security. maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties the Magistrate shall make an order accordingly :

Provided—

*first*, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112 :

*secondly*, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive :

*thirdly*, that when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

[1882—S. 118; 1872—S. 493 para 1, 497; 1861—Ss. 284, 288].

[a] See foot-remark [b] to Sec. 112.

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L Jour 35 (Vol 13) 1926 Sind 69 (71) : 19 Sind L R 176 : 26 Cri L Jour 1398 (DB) (1909) 10 Cri L Jour 375 (378) (DB) (Bom).

[But see (Vol 4) 1917 Lab 207 (207) : 18 Cri L Jour 617 (1908) 8 Cri L Jour 154 (154) : 31 Mad 276 (1909) 9 Cri L Jour 560 (561) : 5 Nag L R 65 (1905) 5 Cri L Jour 197 (199) (Cal) (DB) (1902) 5 Oudh Cas 243 (245) ].

**16. Admissibility of confession of a co-accused in a joint inquiry.**—[1] A statement made by a co-accused which is in the nature of a confession and contains incriminating matters against the other is admissible in evidence against the other accused. (Vol 6) 1919 All 220 (221) : 41 All 231 : 20 Cri L Jour 206.

[See also (Vol 21) 1934 All 927 (929) : 57 All 312 : 36 Cri L Jour 198. (There is no reason to hold that S. 30 of the Evidence Act may not be applied to a case where there is a proceeding under S. 110, Cr P C) .]

[2] Confessions made by a co-accused in a prior criminal case cannot be used in proceedings under this section against the others. (Vol 8) 1921 Cal 557 (557, 558) : 22 Cri L Jour 441 (DB).

**17. Suit for malicious prosecution.**—[1] A person called upon to furnish security under this chapter is not charged with any offence. (184) 7 All 67 (72) (DB) (1904) 27 Cal 662 (663) (DB) (Vol 20) 1933 Mad 688 (689) : 56 Mad 987 : 34 Cri L Jour 951 (Vol 17) 1930 Pat 274 (275) : 9 Pat 131 : 31 Cri L Jour 958 (DB).

[2] No action for malicious prosecution lies in respect of action taken under this section on a petition presented by a private individual as there is no prosecution for any offence in such a case. (1903) 13 Mad L Jour 370 (370) (DB).

[But see (1906) 9 Oudh Cas 357 (361) (DB) (When a person sets the criminal law in motion he must be treated as a "prosecutor").]

### SECTION 118—Synopsis.

1. Final order for security.
2. Terms of security to correspond with the order under S. 112—Proviso 1.
3. Amount of security—Proviso 2.
4. Period of security.
5. Form and accounts of bond for security.

6. Power of Court to impose conditions on sureties.

7. Power of Court to review a final order for security under the section.

8. Revision.

9. Letters Patent Appeal.

10. Appeal to the Privy Council.

**1. Final order for security.**—[1] The necessity for an order requiring security should be judicially determined and the order should contain valid reasons supporting it. (194) 1894 Rat 723 (724) (DB) (1888) 10 Bom 174 (175) (DB) (1900-02) 1 Low Bur Rul 90 (92) (1903) 7 Cal W N 32 (32, 33) (DB) (1931) 1931 Mad W N 402 (403) (Breach of peace under certain contingencies may be committed is no valid reason) (1973) 19 Suth WR Cr 32 (33) (DB). (That one person may be prevented is no reason to demand security from another).

[2] The procedure prescribed by the preceding sections of this chapter should be duly followed before an order can be passed under this section. (Vol 3) 1916 All 237 (238) : 17 Cri L Jour 527 (1888) 1888 Rat 421 (421, 422) (DB) (197-01) 1 Upp Bur Rul 16 (16, 17, 18) (1908) 7 Cri L Jour 94 (94) : 10 Oudh Cas 365.

[3] Joint proceedings against several persons—Order must show that evidence was considered against each and the case proved against each of them individually. (Vol 27) 1940 Sind 113 (114) : 41 Cri L Jour 724 (DB) (Vol 24) 1937 Sind 26 (27) : 30 Sind L R 382 : 38 Cri L Jour 363 (DB).

[4] Only direction to execute a bond for keeping peace or maintaining good behaviour can be demanded under the section. Hence, an order prohibiting the entry of the person into the village, with the direction that this should be enforced on his contravening the order cannot be passed. (1968) 1868 Pun Re No 24 Cri p 72 (73) (DB).

[5] The person ordered to furnish security should be given sufficient time to furnish the same. (Vol 12) 1925 Rang 353 (353) : 27 Cri L Jour 318.

[6] The direction, in an order for security, for imprisonment for a certain period in default of furnishing the security is illegal. (Vol 23) 1936 Nag 265 (265) : 11 LR (1937) Nag 173 : 38 Cri L Jour 388.

[7] An order binding over a person under this section is not an order convicting him of any offence. (Vol 23) 1936 All 107 (108) : 58 All 589 : 36 Cri L Jour

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155 (DB) \* (Vol 17) 1936 Pat 271 (275) : 9 Pat 191 : 31 Cri L Jour 958 (DB) \* (Vol 8) 1921 Pat 71 (74) (DB) (His name cannot be entered in the surveillance Register.)

[See (Vol 21) 1934 Cal 808 (808) (DB).]

**2. Terms of security to correspond with the order under section 112—Proviso.—**[1] A Magistrate cannot in the final order vary the conditions from those of the preliminary order and notice under S. 112 in respect of the following :

(a) To increase amount of security. ('85) 1885 All WN 30 (30) \* ('07) 5 Cri L Jour 219 (219) (Lah) \* ('72) 9 Beng LR App 41 (41) (DB).

(b) To alter the nature. ('06) 1 Cri L Jour 405 (405) (All) \* ('76) 25 Suth WR Cr 50 (50) (DB).

(c) To impose fresh conditions. (Vol 12) 1925 Sind 57 (58) : 18 Sind LR 298 : 25 Cri L Jour 1226 (DB).

(d) To increase the term of subsistence of security. (Vol 23) 1936 Nag 265 (265) : ILR (1937) Nag 173 : 38 Cri L Jour 388 \* ('03) 26 Mad 471 (472) (DB) \* ('72) 18 Suth WR Cr 61 (61, 62) (DB).

**3. Amount of security—Proviso 2.—**[1] The amount of security should be fixed in such a manner as to afford a fair and reasonable chance of compliance so as not to make the alternative of imprisonment unavoidable. ('78) 2 Cal 384 (385) (DB) \* ('98) 20 All 206 (207) \* ('84) 7 All 67 (72) (DB) \* (Vol 19) 1932 Lah 559 (563) : 33 Cri L Jour 831.

[2] The character and reputation of the person and the degree of danger to be apprehended from him to the community, though elements to be considered in fixing the amount of security, are not the sole guiding factors. ('92) 16 Bom 372 (373, 374) (DB) \* (1900) 1900 Pun Re No 24 Cr p 53 (53) \* ('68-69) 4 Mad HCR App xlv (xlvii). \* ('72-92) 1 Low Bur Rul 422 (423) \* ('90) 1890 Pun Re No. 30 Cr p 97 (98) \* ('11) 12 Cri L Jour 110 (110) : 5 Sind LR 10 (DB).

[3] When once the amount of security has been determined it is not advisable to reduce that amount at the time of forfeiture of the bond. (Vol 23) 1936 Pesh 141 (143) : 37 Cri L Jour 849.

**4. Period of security.—**[1] The order for security should not be for the extreme period unless it is found to be absolutely essential. ('81) 6 All 214 (218, 219) \* (Vol 3) 1916 Mad 654 (654, 655) : 16 Cri L Jour 614.

**5. Form and contents of bond for security.**

—[1] Each of the sureties cannot be asked to execute a separate bond for the same amount demanded from the person bound over. ('90) 1890 Pun Re No. 30 Cr p 97 (99).

[2] The furnishing of a registered hypothecation bond offering as security any property is not contemplated either by the section or the forms prescribed for the bond. (Vol 19) 1932 All 122 (123) : 33 Cri L Jour 229 \* ('75) 7 N W P H C R 249 (250).

[3] The Magistrate is not authorised to direct the security to be deposited in cash. ('81) 6 Cal 14 (15, 16) (DB) \* ('93) 1893 Rat 671 (671) (DB).

[But see ('67) 7 Suth WR Cr 30 (30) (DB).]

[4] Except where the person required to give security is a minor, execution of bond by sureties alone in the absence of a personal recognizance by the person required to give security, is not authorised. ('04) 1 Cri L Jour 897 (898) : 27 All 262.

**6. Power of Court to impose conditions on sureties.** [1] Court should accept a surety only if he is likely to fulfil his obligation. (Vol 19) 1932 All 122 (123) : 33 Cri L Jour 229.

**7. Power of Court to review a final order for security under the section.—**[1] A final order for security under this section cannot be reviewed by a Magistrate. (Vol 6) 1919 All 329 (329, 330) : 20 Cri L Jour 486.

**8. Revision.—**[1] An order passed in appeal against an order made under this section can be revised by the High Court. (Vol 1) 1914 Lah 281 (283) : 1914 Pun Re No. 5 Cri : 15 Cri L Jour 565 (DB) \* ('68) 6 Suth WR Cr 18 (18) (DB).

[2] The High Court will not ordinarily interfere on the merits. (Vol 29) 1942 Oudh 356 (357) : 43 Cri L Jour 398 \* (Vol 6) 1919 All 136 (136) : 20 Cri L Jour 689 \* (Vol 11) 1924 All 451 (453) : 45 All 749 : 25 Cri L Jour 781 \* ('99) 1899 Pun Re No. 10 Cr p 29 (30) \* (Vol 19) 1932 Sind 100 (101) : 35 Cri L Jour 324 (DB).

[3] The following conditions are necessary before the High Court will refuse to interfere on merits.

(a) That evidence on record has been really considered should be apparent from the judgment. ('12) 13 Cri L Jour 9 (9) (All) \* ('21) 22 Cri L Jour 660 (660, 662) (All).

(b) That the interests of parties have not been allowed to suffer. (Vol 29) 1942 Oudh 356 (357) : 43 Cri L Jour 398 \* (Vol 2) 1915 All 161 (165) : 16 Cri L Jour 805 \* (Vol 14) 1927 All 473 (474) : 28 Cri L Jour 515 \* (Vol 12) 1925 Oudh 473 (474) : 29 Oudh Cas 44 : 26 Cri L Jour 1283.

[4] The High Court will interfere in the following circumstances.

(a) Where the power has been exceeded or summarily exercised. (Vol 3) 1916 All 48 (48, 49) : 17 Cri L Jour 161.

(b) Where the order is vitiated by an error of law or is illegal. ('08) 7 Cri L Jour 24 (25) (DB) (Bom) \* (Vol 16) 1929 All 273 (275) : 51 All 663 : 30 Cri L Jour 562 (DB) \* (Vol 17) 1930 All 23 (24) : 31 Cri L Jour 1 \* ('10) 11 Cri L Jour 388 (389) (Lah).

(c) Where there was no fair trial. (Vol 5) 1918 Bom 254 (255) : 19 Cri L Jour 329 (DB) \* (Vol 1) 1911 Bom 199 (199) : 16 Cri L Jour 91 (DB) \* (Vol 2) 1915 Cal 368 (368, 369) : 16 Cri L Jour 114 (DB).

(d) Where inadmissible evidence was acted upon. (Vol 14) 1927 All 394 (395) : 28 Cri L Jour 502 \* (Vol 14) 1927 All 146 (147) : 28 Cri L Jour 8.

(e) Where the finding is perverse. (Vol 9) 1922 All 86 (87) : 23 Cri L Jour 86 \* ('12) 13 Cri L Jour 720 (720) (Lah). (Finding based on no evidence) \* (Vol 16) 1929 Nag 328 (330, 331) : 31 Cri L Jour 20 (Finding based on a misconception of evidence) \* (Vol 11) 1924 All 569 (569) : 25 Cri L Jour 1172 (Do) \* ('10) 11 Cri L Jour 387 (388) (Lah) (Do) \* (Vol 10) 1923 All 35 (37, 38) : 45 All 109 : 24 Cri L Jour 257 (Finding in disregard of credible evidence) \* (Vol 2) 1915 All 464 (465) (Do).

(f) Where there is miscarriage of justice. (Vol 10) 1923 Nag 53 (54) : 23 Cri L Jour 741 \* ('89) 1889 Pun Re No. 23 Cr p 77 (79) \* ('11) 12 Cri L Jour 542 (544, 545) (Lah).

(g) Where the amount of security is excessive. ('87) 2 Cal 110 (112, 113) (DB) \* ('77) 2 Cal 384 (385) (DB) \* ('04) 1 Cri L Jour 344 (349) : 31 Cal 350 (DB).

a119. If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made, should execute a bond the Magistrate shall make an entry on the record to that effect, and if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

[1882—S. 119: 1872—S. 496 ; 1861—S. 287].

[a] See foot-remark [b] to S. 112, *supra*.

*C.—Proceedings in all Cases subsequent to Order to furnish Security.*

a[120. (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to imprisonment or undergoing a sentence of, imprisonment the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

[1882—S. 120 ; 1872—Ss. 489, paras 2, 3, 4, 504 para 2.]

[a] See foot-remark [b] to Sec. 112.

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(b) Where the enquiry was not held in accordance with law or where wrong conclusions were arrived at. (Vol 27) 1940 Mad 23 (26): ILR (1940) Mad 335: 41 Cri L Jour 238 (FB).

[5] Revision will not be allowed in the following circumstances.

(a) Where another remedy is available or such remedy has been neglected. (Vol 1) 1914 Sind 139 (140): 8 Sind LR 229 : 16 Cri L Jour 252 (DB) \* ('05) 2 Cri L Jour 335 (335) (All)\* (Vol 5) 1918 All 343 (343, 344): 40 All 140 : 19 Cri L Jour 188\* (Vol 14) 1927 Lah 689 (690) : 28 Cri L Jour 815 \* (Vol 5) 1918 Pat 588 (590) : 19 Cri L Jour 589 : 3 Pat L Jour 302 (DB).

(b) Against mere procedural irregularity not resulting in prejudice by causing failure of justice. (Vol 7) 1920 Nag 138 (138, 139) : 21 Cri L Jour 591 \* (Vol 7) 1920 Mad 1014 (1014) : 20 Cri L Jour 763.

(c) Against a finding based on the demeanour of witness. (Vol 3) 1916 All 48 (49) : 17 Cri L Jour 461 (461).

**9. Letters Patent Appeal.**—[1] No letters Patent Appeal lies against the order of single Judge in revision arising out of security proceedings. (Vol 2) 1915 Mad 881 (882) : 39 Mad 539 : 16 Cri L Jour 303 (304) (DB) \* ('04) 1 Cri L Jour 1087 (1088) : 27 Mad 510 (DB).

**10. Appeal to Privy Council.**—[1] No Letters Patent Appeal lies against the order of High Court confirming the lower Court's order demanding security. ('13) 14 Cri L Jour 598 (599) (DB) (Cal).

**SECTION 119—Note 1.**

[1] Where the information against a person is found to be false or there is no evidence to prove it the person should be discharged. (Vol 14) 1927 Cal 343 (343, 344) : 28 Cri L Jour 479 (DB) \* ('84) 1884 Pun No. 37 Cri p 72 (72) (DB) \* ('05) 2 Cri L Jour 8 (88, 89) (All).

[2] The following were held not sufficient to require security :—

(a) Mere lending of money to one side of a factions where no breach of the peace can be envisaged to result from the act. ('75) 7 N W P H C R 233 (234, 235).

(b) Mohamedan starting Sanskrit School with the help of a Pandit. ('87) 9 All 452 (463).

(c) That the person was charged for false imprisonment. ('66) 6 Suth WR Cr 1 (1) (DB).

(d) That the servant of person was fined for assault and a breach of peace was apprehended by the police. ('69) 12 Suth WR Cr 16 (16, 17) (DB).

(e) Extra Judicial information obtained in respect of persons bad character. ('83) 6 All 132 (136, 137).

[3] "Discharge" in the section means "permission to depart" and not the acquittal of an offence. ('10) 11 Cri L Jour 162 (163) : 33 Mad 85 \* ('13) 14 Cri L Jour 559 (560, 561) : 36 Mad 315 (DB).

[4] No compensation can be awarded on a discharge under this section. ('10) 11 Cri L Jour 446 (446, 447) (All) \* ('01) 25 Bom 48 (49) (DB) \* ('02) 1902 Pun Re No. 83 Cr p 86 (87).

[5] An order for discharge and not one for acquittal should be passed under this section. (Vol 25) 1938 All 49 (50) : ILR (1938) All 89 (DB).

[6] Security proceedings cannot be brought to an end by the withdrawal by the Crown from enquiry ; it can be terminated only by an order for discharge. (Vol 27) 1940 Rang 189 (190) : 41 Cri L Jour 853 : 1940 Rang LR 226.

[7] Further enquiry against a person discharged under this section cannot be ordered. (Vol 31) 1944 Pesh 48 (48) : 46 Cri L Jour 156 (DB) \* (Vol 15) 1928 All 755 (756) : 51 All 408 : 30 Cri L Jour 63 \* (Vol 11) 1924 Rang 207 (208) : 2 Rang 30 : 25 Cri L Jour 1146.

[8] A discharge under this section is no bar to a second case being instituted on fresh material. (Vol 10) 1923 All 332 (333) : 24 Cri L Jour 232 \* ('13) 14 Cri L Jour 189 (189) (DB) (Cal).

[9] An order of discharge under this section passed by a responsible Magistrate after careful consideration of evidence will not be interfered with by the High Court. (Vol 23) 1936 Sind 243 (243) : 33 Cri L Jour 117 : 30 Sind L R 368 (DB).

**SECTION 120—Note 1.**

[1] The fact that an order under S. 123 (2) is passed on the same day on which the order under S 118 is passed will not affect the commencement of the period. (Vol 24) 1937 Sind 203 (204) : 31 Sind L R 409 : 38 Cri L Jour 961 (DB).

a[121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.]

[1882—S. 121; 1872—S. 502 para 6; 1861—S. 293].

[a] See foot-remark [b] to S. 112.

### Section 120 (contd.)

[2] Magistrate sentencing under S. 106 Cr P C cannot fix a time for furnishing security before the expiry of the sentence. ('09) 10 Cri L Jour 69 (71, 72, 76); 5 Low Bur Rul 34 (FB).

[3] If a person is convicted of another offence and sentenced to a fresh term of imprisonment, the period will not commence until the expiry of both imprisonments. ('95) 1895 Rat 7 74 (775) (DB).

[4] Person sentenced to imprisonment but on bail pending appeal—In proceedings instituted in the meanwhile against him under S. 110 security was ordered to be furnished—*Held* that, the security did not commence till after the disposal of the appeal, and after the expiry of any sentence that might be passed by the appellate Court. (Vol 7) 1920 All 286 (286, 287): 22 Cri L Jour 95.

[5] If the suspect is not sentenced to or is not undergoing any sentence of imprisonment, the Magistrate may grant time for furnishing the security. (Vol 13) 1926 All 297 (297): 27 Cri L Jour 377.

[6] When time is granted to the suspect to furnish security, but before the expiry of such time he is convicted of a substantive offence and sentenced to imprisonment, the Court has no power under this section to extend the time for security till the expiry of the sentence. (Vol 14) 1927 Sind 166 (167): 28 Cri L Jour 431: 22 Sind L R 20 (DB).

[7] A second order to give further security during the continuance of the first one is not contemplated by law. ('99) 4 Cal WN 121 (122) (DB) \*(Vol 16) 1929 All 608 (608): 30 Cri L Jour 756 \*(11) 15 Cal WN cclv (DB).

[8] If, upon expiry of the first order the dispute still exists, a further security may be demanded on fresh proceedings. ('99) 4 Cal WN 121 (122) (DB).

[9] The period of security is to be calculated under sub-s (2) from the date of the final order under S. 118. (Vol 24) 1937 Sind 26 (28): 30 Sind LR 332: 38 Cri L Jour 363 (DB) \*(Vol 14) 1927 Mad 542 (543): 29 Cri L Jour 77: 51 Mad 515.

[10] The period of security is not suspended during the time the suspect is in jail or on bail. (Vol 24) 1937 Sind 26 (28): 30 Sind LR 332: 38 Cri L Jour 363 (DB).

[11] A subsequent sentence of imprisonment passed on the suspect will not affect the running of the period for which security is to be furnished. (1900-02) 1 Low Bur Rul 14 (15).

[12] If a suspect is sentenced for an offence committed prior to the date of order for security under S. 118, the Magistrate cannot fix the date of the expiry of such sentence as the date for computing the period. (Vol 13) 1926 Sind 273 (274, 275): 20 Sind LR 163: 27 Cri L Jour 365 (FB).

[13] When the operation of an order to furnish security is stayed pending decision of an appeal therefrom, and the appeal is ultimately dismissed, the date of commencement of the period for which security is

required is the date of the decision in appeal. (Vol 25) 1938 Oudh 195 (197): 39 Cri L Jour 831. (Possibly the period between the order of the Magistrate and the stay order of the appellate Court is to be deducted from the period for which security is to be furnished).

### SECTION 121—Synopsis.

1. What constitutes breach of the bond to keep the peace.
2. What constitutes a breach of the bond for good behaviour.
3. "Wherever it may be committed."
4. Bond executed by sureties.
5. Construction of bond.

1. What constitutes breach of the bond to keep the peace.—[1] Person ordered to give security to keep the peace should bind himself not to commit a breach of the peace or do any act that may probably occasion such breach. ('81) 2 Mad 189 (173) (DB) \*(Vol 25) 1938 Oudh 195 (196): 39 Cri L Jour 831. (Offence under S. 323 Penal Code entails forfeiture).

[2] The bond will be forfeited if the person bound does an act which will probably occasion breach of peace though he may not have committed any breach of peace himself. The word "probably" limits the forfeiture of the bond to cases where breach of peace is the probable and not only a possible result of the act of the person bound. (Vol 1) 1914 Lah 393 (393, 394): 1914 Pun Re No. 22 Cr: 15 Cri L Jour 605 (DB).

[3] In each case it is for the Court to judge of the character of the act which is alleged to be likely to cause a breach of the peace. ('69) 4 Mad HCR App xxxviii (xxxix).

[4] Conviction for theft or wrongful confinement and extortion unattended with any breach of peace, or a secret attempt to poison a person, or the abduction of a woman will not be a breach of the bond to keep the peace. ('72) 18 Suth WR Cr 63 (63) (DB) (Theft) \*(78) 19 Suth WR Cr 48 (49) (DB) (Wrongful confinement and extortion) \*(Vol 1) 1914 Lah 393 (393, 394): 1914 Pun Re No. 22 Cr: 15 Cri L Jour 605 (Attempt to poison) \*(06) 4 Cri L Jour 278 (278): 1906 Pun Re No. 7 Cr (Abduction).

[5] It is not necessary that any offence should have been committed at all in order to entail a breach of the bond. ('81) 2 Mad 189 (173) (DB).

[6] Where some Hindus bound over to keep the peace under S. 107 owing to a dispute with certain Mahomedans regarding the location of a slaughter-house, brought a civil suit for an injunction, it was held that the institution of the suit, though provocative, would not justify a forfeiture of the bond. (Vol 7) 1920 Lah 440 (448): 1 Lah 310: 21 Cri L Jour 702.

[7] It is immaterial whether the person bound over did the act, involving the breach himself, or instigated others to do it or whether he committed the breach in respect of the person at whose instance the bond was

<sup>a</sup>[122. (1) A Magistrate may refuse to accept any surety offered, or may reject any surety Power to reject sure- previously accepted by him or his predecessor under this Chapter on the ties. ground that such surety is an unfit person for the purposes of the bond :

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall, before holding inquiry, give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.

#### Section 121 (contd.)

taken, or in respect of any other person. ('81) 2 Mad 189 (173) (DB) \*('71) 15 Suth WR Cr 14 (14) (DB).

[8] The mere fact that the person bound over acted as a "muktear" of one of two parties for whose benefit the breach of peace took place, will not constitute a breach of the bond. ('69) 11 Suth WR Cr 52 (52) (DB) \*('10) 11 Cri L Jour 252 (252) : 1910 Pun Re No 5 Cr.

[9] Sacrifice of cow by Mahomedans in open space was, in the circumstances of the case held, to be a wrongful act within S. 298 of the Penal Code and that bond for keeping the peace could be forfeited. (Vol 24) 1937 Lah 717 (718) : 39 Cri L Jour 23.

**2. What constitutes a breach of the bond for good behaviour.**—[1] The commission of an offence of hurt or grievous hurt, or of assault, or of criminal trespass or of an offence under the Gambling Act, or of an offence under the Excise and Opium Acts would amount to a breach of the bond for good behaviour. (Vol 11) 1924 Lah 262 (263) : 4 Lah 462 : 25 Cri L Jour 1131 (Hurt) \* (Vol 1) 1914 Lah 563 (564) : 1915 Pun Re No. 10 Cr : 16 Cri L Jour 449 (DB) (Hurt) \* ('89) 1889 Pun Re No. 11 Cr p 55 (56) (DB) (Assault) \* ('06) 3 Cri L Jour 456 (457) : 28 All 629 (Criminal trespass) \* (Vol 17) 1930 Lah 227 (227) : 31 Cri L Jour 130 (Criminal trespass) \* ('06) 3 Cri L Jour 91 (92) : 28 All 307 (Gambling in public place) \* (Vol 23) 1936 Pesh 16 (17) : 37 Cri L Jour 342 (Offence under the Excise Act).

[2] The offence need not be *ejusdem generis* with that for which the person was bound over. (Vol 15) 1928 All 232 (233) : 50 All 666 : 30 Cri L Jour 203 \* (Vol 23) 1936 Pesh 16 (17) : 37 Cri L Jour 342.

[But see (Vol 1) 1914 Lah 563 (564) : 1915 Pun Re No. 10 Cr : 16 Cri L Jour 449 (DB) \* ('13) 14 Cri L Jour 575 (576) : 1913 Pun Re No. 15 Cr].

[3] If evidence is produced to show the commission of the offence, there will be a breach of the bond. No conviction is necessary for that purpose. (1923) 24 Cri L Jour 588 (589) (Pesh) \* (Vol 15) 1928 All 232 (233) : 50 All 666 : 30 Cri L Jour 203.

[4] A bond cannot be forfeited where the person bound over, was found in possession of costly clothes, for which he could not satisfactorily account, but there was no proof that he had actually stolen them. ('02) 2 Weir 57 (57) (DB).

[5] Person found in joint possession of counterfeit jewellery with his companions—No offence. ('10) 11 Cri L Jour 252 (252) : 1910 Pun Re No. 5 Cr.

[6] Person found concealing himself under suspicious circumstances in abandoned watermill and unable to give a satisfactory explanation—No offence. (Vol 19) 1932 All 58 (58) : 54 All 335 : 33 Cri L Jour 281 (DB).

[7] Suspicion of person having committed some offence for which he was ordered to furnish security a second time—Bond cannot be forfeited. ('92-96) 1 Upp Bur Rul 20 (20).

[8] There can be no breach of the bond where the offence complained of was committed prior to the date on which the bond was executed. (Vol 1) 1914 Lah 393 (393, 394) : 15 Cri L Jour 605 : 1914 Pun Re No. 22 Cr (DB) \* (1923) 24 Cri L Jour 588 (590) (Pesh).

**3. Wherever it may be committed.**—[1] Bond for keeping the peace is forfeited only if the breach is committed within the jurisdiction of the Magistrate who ordered the execution of the bond. (Vol 30) 1943 Pesh 41 (42) : 44 Cri L Jour 478.

[But see ('69) 2 Beng L R App Cr 11 (12) (DB).]

[2] A conviction in the State of Kapurthala under S. 457 Penal Code, in respect of a subject of that Native State does not amount to a breach of the bond for good behaviour. (Vol 5) 1918 Lah 13 (13) : 1918 Pun Re No. 26 Cr : 19 Cri L Jour 924 (DB).

[3] If the offence is committed in a Native State against a British subject it would amount to a breach of the bond for good behaviour. ('10) 11 Cri L Jour 635 (636) : 1910 Pun Re No. 28 Cr (DB).

**4. Bond executed by sureties.**—[1] A breach of surety bond for good behaviour is committed when the person bound commits or attempts to commit or abets the commission of any offence punishable with imprisonment. (Vol 23) 1936 Pesh 16 (17) : 37 Cri L Jour 342 \* (Vol 19) 1932 All 53 (58) : 54 All 335 : 33 Cri L Jour 281 (DB).

[2] A surety cannot be required to execute a bond for an amount greater than that for which the principal is required to execute a bond. ('93-1900) 1893-1900 Low Bur Rul 187 (187).

**5. Construction of bond.**—[1] The terms of a bond to keep the peace or for good behaviour must be construed literally and strictly. (Vol 5) 1918 Lah 13 (13) : 1918 Pun Re No. 26 Cr : 19 Cri L Jour 924 (DB).

[2] If by mistake a bond for good behaviour is taken, instead of one for keeping the peace, from a person who is ordered to furnish security to keep peace, the bond is invalid and cannot be forfeited and *vice versa*. ('75) 23 Suth W R Cr 1 (1) (DB) \* (1904) 1 Cri L Jour 90 (93) : 1903 Pun Re No. 32 Cr p. 78 (81)

#### SECTION 122—Synopsis.

1. "Magistrate."
2. Discretion of Court in refusing or rejecting sureties as unfit.
3. Grounds of rejection of surety.
4. Enquiry on oath.
5. "After considering the evidence so adduced."

1.)

undertakes to live with the accused and keep them within his observation. (Vol 3) Oudh 165 (166) : 24 Cri L Jour

are solvent and respectable and no fitness is shown. ('28) 29 Cri L Jour \* ('10) 11 Cri L Jour 392 (392) :

are not valid grounds to reject a

once challenged for theft. (Vol 7) : 21 Cri L Jour 365.

once convicted for an offence under 3) 1921 Cal 356 (356) : 22 Cri L Jour Cri L Jour 359 (360) : 26 All 189 190 (191) : 26 All 371 (DB).

breach of bond, amount cannot be 14, from his moveable property sufficient immoveable property) (908, 909) : 17 Cri L Jour 97 (97) : All 182 (182) : 19 Cri L Jour 711 468 (468) (DB) (Cal).

at a distance. (Vol 11) 1924 Oudh Cas 284 : 25 Cri L Jour 296 \* 8 (108) : 19 Cri L Jour 441\* (1921) 96) (All) \* (Vol 8) 1921 Oudh 229 292 : 23 Cri L Jour 425 \* ('06) 3 (DB) (Cal).

Cal 360 (361) : 17 Cri L Jour 95

elation of the suspect. ('02) 25 All 1914 Lah 492 (493) : 1914 Pun L Jour 337 \* ('09) 9 Cri L Jour R 3 (DB) \* ('06) 4 Cri L Jour 169 ('12) 16 Cal WN ecliv (ecliv) : All 309 (309) : 22 Cri L Jour 22.

1916 Cal 908 (909) : 17 Cri L Jour

to the caste of the suspect (Vol 1) 6 Cri L Jour 100 : 8 Sind LR 173 Jour 23 (25) : 37 Cal 91 (DB).

end of the suspect and rendered nce. (Vol 5) 1918 All 108 (108, 141 \* (Vol 7) 1920 All 309 (309) :

s to the particular political party 353 (353) : 27 Cri L Jour 318. ready a surety for another person. 32 (133) : 24 Cri L Jour 517. ung. (Vol 8) 1921 Oudh 229 (229) :

ld man. ('08) 8 Cri L Jour 166 (DB).

ath.—Magistrate can accept per- art any inquiry on oath. (Vol 24) 38 Cri L Jour 635 (DB).

ering the evidence so ad- port by the police is not legal evi- art could come to a conclusion, surety. (Vol 22) 1935 Pat 421 1473 \* ('10) 11 Cri L Jour 497 (DB) \* ('1909) 10 Cri L Jour 225 (DB) \* (Vol 2) 1915 All 177 (177) : Vol 1) 1914 All 489 (489, 490) : ('04) 1 Cri L Jour 459 (461) : 7

pal to cross-examine him as to the contents of the report. ('08) 8 Cri L Jour 344 (346) : 11 Oudh Cas 267. \* ('07) 5 Cri L Jour 148\* (152) : 1906 Pun Re No. 18 Cr.

[3] Evidence of general repute should not be allowed as against the sureties in an inquiry as to their fitness. (Vol 9) 1922 Oudh 227 (227) : 23 Cri L Jour 639.

[4] The onus of showing that a surety is a fit person to be accepted is on the person called upon to give security and it is discharged by the evidence of the surety himself. ('11) 12 Cri L Jour 410 (410) : 5 Sind LR 87 (DB).

[5] If the Magistrate is not satisfied with the evidence of the surety, he must not reject the surety but call for further evidence. (Vol 1) 1914 Sind 15 (16) : 8 Sind LR 322 : 16 Cri L Jour 479 (DB).

[6] Magistrate cannot decide without taking evidence on the ground that no evidence but that of a particular class of witnesses will satisfy him. ('11) 12 Cri L Jour 410 (410) : 5 Sind LR 87 (DB).

[7] Magistrate cannot import his personal knowledge into the proceeding and reject the sureties on his personal knowledge. (Vol 1) 1914 Sind 108 (108) : 7 Sind LR 94 : 15 Cri L Jour 378 (DB).

[8] Criminal Courts should not act on the certificate of a pleader as to the fitness of a surety. (Vol 21) 1934 Sind 142 (143) : 28 Sind LR 293 : 35 Cri L Jour 1455 (DB).

**6. Recording reasons.**—[1] The intention of the Legislature in insisting that a Magistrate should record his reasons in refusing to accept a surety is that the Magistrate should exercise his independent judgment in refusing to accept a surety. ('06) 4 Cri L Jour 169 (169) (DB) (Cal).

**7. Opportunity to furnish fresh security on rejection of surety offered.**—[1] Magistrate refusing to accept or rejecting already accepted sureties, should afford to the person called on to furnish security an opportunity to furnish other sureties. Vol 4) 1917 All 215 (216) : 18 Cri L Jour 1039 (1039) \* (Vol 12) 1925 Rang 353 (353) : 27 Cri L Jour 318.

**8. Power of the District Magistrate to reject sureties accepted by subordinate Magistrate.**—[1] When a Subordinate Magistrate accepts the sureties, the District Magistrate cannot reject them but if he wants to pass orders himself he should regularly transfer the case to his own Court and then proceed under this section. ('95) 1896 All WN 143 (143) (DB) \* ('11) 12 Cri L Jour 430 (431) (All).

**9. Revision.**—[1] High Court will not interfere with the reasonable exercise of discretion given to a Magistrate under this section. (Vol 1) 1914 All 487 (488) : 15 Cri L Jour 727.

[2] High Court can set aside the order of a Magistrate on the following grounds :—

(a) That the discretion is based on police-report and not exercised judicially. (Vol 1) 1914 All 489 (489, 490) : 16 Cri L Jour 54 \* (Vol 2) 1915 All 177 (177) : 16 Cri L Jour 445 \* ('09) 10 Cri L Jour 230 (231) : 2 Sind LR 15 (DB) \* ('09) 10 Cri L Jour 225 (227) : 2 Sind LR 11 (DB) \* ('07) 5 Cri L Jour 179 (180) (Lah) \* ('12) 13 Cri L Jour 760 (762) : 15 Oudh Cas 263 \* (Vol 8) 1921 Oudh 193 (193) : 24 Oudh Cas 303 : 23 Cri L Jour 142. [See ('07) 5 Cri L Jour 181 (181) (Lah).]

(b) That sureties are refused to be accepted on invalid and unreasonable grounds. (Vol 11) 1924 Oudh 132 (133) : 24 Cri L Jour 517 \* ('28) 29 Cri L Jour 842 (842) (DB) (Cal) \* ('16) 14 All L Jour 25n (25n) \* (Vol 8) 1921 Cal 356 (356) : 22 Cri L Jour 433.

[See ('10) 11 Cri L Jour 497 (497, 498) : 4 Sind LR

a[123. (1) If any person ordered to give security under section 106 or section 107, and he fails to give such security on or before the date on which the period of imprisonment in default of security is to be given commences, he shall, except in the cases after mentioned, be committed to prison, or, if he is already in prison be detained during such period expires or until within such period he gives the security to the Court who made the order requiring it.

(2) When such person has been ordered by a Magistrate to give security exceeding one year, such Magistrate shall, if such person fails to give such security as aforesaid, issue a warrant directing him to be committed to prison pending the orders of the Sessions Judge or, if such person is already in prison pending the orders of the High Court; and the proceedings may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the person such further information or evidence which it thinks necessary, may pass such order as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for security shall not exceed three years.

b[ (3A) If security has been required in the course of the same proceedings from persons in respect of any of whom the proceedings are referred to the Sessions Judge or Court under sub-section (2), such reference shall also include the case of any other person who has been ordered to give security, and the provisions of sub-section (2) and (3) shall apply to the case of such other person also, except that the period (if any) for which he is imprisoned shall not exceed the period for which he was ordered to give security.

#### SECTION 123—Synopsis.

1. Scope of the section.
2. "Does not give such security."
3. "Shall be . . . committed to prison."
4. "Or if he is already in prison."
5. Term of imprisonment.
6. Sub-section (2)—Detention pending orders of Sessions Court, etc.
7. Nature of the proceedings on reference.
8. Notice to person proceeded against.
9. Discretion of Court on reference.
10. Power to order retrial and remand.
11. Order, contents of.
12. Jurisdiction of Magistrate after reference to accept security.
13. Order for imprisonment on reference—Commencement of.
14. Appeal and revision.
15. Kind of imprisonment.
16. Tender of security to jail officer—Sub-section (4).
17. Detention in Borstal School.

1. **Scope of the section.**—[1] Object of the section is not to punish persons from whom security is demanded with imprisonment but the safeguard which the law provides for should be provided by his detention in custody. (Vol 15) 1928 Lah 64 (85) : 29 Cri L Jour 236 & ('93) 6 CPLR Cr 13 (14).

[2] The section should not be invoked for punishment of past offences. ('84) 7 All 67 (72) (DB).

[3] A person imprisoned under the Code for any offence. (Vol 8) 1943 All 185 : 21 Cri L Jour 831.

[4] Person ordered to give security in default—imprisonment not a part of sentence and therefore no appeal lies. 1905 All 1054 (1055) : 7 Oudh Cas 338.

[5] The section does not apply to a person who gives security under S. 562. (Vol 12) 1902 Rang 360 : 26 Cri L Jour 285.

2. **"Does not give such security."**—Imprisonment cannot be awarded in default in furnishing security. (Vol 265, 266) : 38 Cri L Jour 388 : ILR 1906 Pun Re No. 18 Cr.

[2] Pending receipt of the report regarding the adequacy of the security furnished, the person cannot be sent to jail. ('06) 5 Cri L Jour 1906 Pun Re No. 18 Cr.

[3] Order requiring security should be made at the time of imprisonment in default. The imprisonment should be separately ordered if there is failure to give security by the date fixed for it. (Vol 14) 1902 51 Mad 178 : 26 Cri L Jour 1034 (Order requiring security for one year) & ('93-Low Bur Rul 245 (246).

[4] The accused should be afforded an opportunity of complying with the requirement of security before ordering imprisonment. 1974 (775) (DB) & ('72) 16 Bom 372 (373) : 4 Mad HOB App xlii (xlvii).

[5] Person bound committing offence requiring security—Magistrate can order imprisonment for the remainder of the term. ('97-01) 1 Upp Bur Rul 26 (26).

3. **"Shall be . . . committed to prison."**—[1] Imprisonment commences from

ons Judge may in his discretion transfer any proceedings laid before him under sub-section (3-A) to an Additional Sessions Judge or Assistant Sessions Judge and r, such Additional Sessions Judge or Assistant Sessions Judge may exercise the ons Judge under this section in respect of such proceedings.]

urity is tendered to the officer in charge of the jail, he shall forthwith refer the rt or Magistrate who made the order, and shall await the orders of such Court

ent. (5) Imprisonment for failure to give security for keeping the peace shall be simple.

ment for failure to give security for good behaviour o[shall, where the proceed- ten under section 108 [\* \* \*]d be simple and, where the proceedings have been ion 109 or section 110], be rigorous or simple as the Court or Magistrate in each

1872—Ss. 489 para 3, 490, 497, 498, 499 para 3, 507, 508, 510; 1861—Ss. 281, 288, 290,

ark [b] to Sec 112.

(3-A and 3-B) were inserted by the Code of Criminal Procedure (Amendment) Act, 1923, S. 21.

*ibid.*, for "may".

nd figures "or section 109" were repealed, *ibid.* (Second Amendment) Act, 1926 (10 [X]

*id.*

#### Objects and Reasons.

endments made in section 123 by ise 22). We have added another de that sub-section (6) of Section apply only to cases for security We think that in cases under Sec- risonment in default of furnish- simple. out that, though the object of the is to avoid differences of opinion in the Magistrate and the Sessions

Judge, yet the amendment proposed in Section 406 may have this very result inasmuch as in a single case one accused person may appeal to the District Magistrate, while the case of another accused person will be referred to the Sessions Judge. The Bombay Government have suggested that, where the case of one accused has to be referred to the Ssssions Judge under Section 123, the case of all should be referred whether they have given security or not. We have adopted the sugges- tion."—S.C.R. [XVIII of 1923].

) 5 Bom LR 26 (27) (DB) \*(09) 1) (DB) (Ma1). (Committal order the date on which the period of as held illegal) \*(Vol 10) 1923 idh Cas 286 : 22 Cri L Jour 766

he detention can be issued only not furnished, on the commence- such security. ('89) 1889 Rat

Borstal School under Madras 326, of person committing default 21) 1934 Mad 457 (457, 458) : 57 ur 1153.

is already in prison".—[1] ntemporaneous with conviction risonment—Person should be eing bound after serving sentence . ('75) 24 Suth WR Or 13 (14)

WPHCR 127 (128). ]

or default in furnishing security to run concurrently with a sen- ready undergoing. (Vol 3) 1916 ri L Jour 272 \*(Vol 28) 1941 ILR (1941) Kar 63 : 43 Cri L

Jour 105 (DB) \*(02) 4 Bom LR 934 (935) (DB) \*(Vol 13) 1926 Bom 545 (545) : 27 Cri L Jour 1163 (DB) \*(Vol 3) 1916 Low Bur 1 (2) : 8 Low Bur Rul 353 : 17 Cri L Jour 88 (FB).

[But see ('08) 7 Cri L Jour 472 (476) : 4 Low Bur Rul 205 (FB) \*(09) 10 Cri L Jour 69 (72, 76) : 5 Low Bur Rul 34 (FB). ]

[3] An accused in prison should be given all facili- ties for furnishing security, but need not be produced before the Magistrate if he informs the Jail authorities that he is unable to furnish the required security. (Vol 13) 1926 Bom 545 (546) : 27 Cri L Jour 1163 (DB) \*(Vol 14) 1927 Sind 166 (167) : 22 Sind L R 20 : 28 Cri L Jour 431 (DB).

[4] The section does not contemplate the release of the suspect from prison on the expiration of his sen- tence, in order to enable him to find his sureties. (Vol 24) 1937 Sind 204 (205) : 38 Cri L Jour 1014 : 31 Sind LR 412 (DB).

5. Term of imprisonment.—[1] Term of im- prisonment should be the same as that for which security is demanded. ('01) 23 All 422 (423) (DB) \*(08) 7 Cri L Jour 412 (414) : 4 Low Bur Rul 135 \*(Vol 17) 1930 Lah 49 (49) : 31 Cri L Jour 583 \*(92-96) 1892-1896 Upp Bur Rul 21 (22).

[2] A Magistrate who thinks that the term should be shortened should report to the District Magistrate



**Section 123 (contd.)**

for action under S. 124 ('93) 1893 Rat 668 (668) (DB).

[3] Imprisonment for default lasts until such period expires or until, within such period, the required security is given. ('08) 5 Bom LR 26 (27) (DB).

[4] Detention cannot be made after the expiry of the term of security. ('12) 13 Cri L Jour 62 (62) (Upp Bur).

[5] Bond executed after the date on which the period for security commences, should plainly state the date of expiry of the period. ('12) 13 Cri L Jour 62 (62) (Upp Bur).

[6] An order directing a person to be imprisoned "Until he gives security", or "for one year", is bad. It ought to be "for one year, or within that period till the security is given." ('82) 8 Cal 644 (645) (DB) \* (Vol 14) 1927 Mad 976 (976) : 51 Mad 178 : 28 Cri L Jour 1034 (Order saying merely one year) \* ('33) 1933 Mad WN 548 (549) (DB).

[See also (Vol 23) 1936 Nag 265 (266) : 38 Cri L Jour 388 : ILR (1937) Nag 173.

[7] A Magistrate ordering imprisonment for default can even exceed the limit of his ordinary powers to impose sentence of imprisonment in regard to the period. ('86) 1886 All W N 181 (181) \* (Vol 2) 1915 All 15 (15, 16) : 87 All 230 : 16 Cri Jour 350. (Second class Magistrate can award imprisonment for a period in excess of six months) \* (Vol 14) 1927 Mad 976 (976) : 51 Mad 178 : 28 Cri L Jour 1034. (Summary Court can award imprisonment for a period over three months).

[8] In computing the period of imprisonment under this section, the period during which the person is released on bail should be deducted. (Vol 21) 1934 All 845 (845) : 57 All 264 : 36 Cri L Jour 177.

[But see (Vol 23) 1936 Sind 125 (126) : 37 Cri L Jour 1003 : 29 Sind L R 353 (DB) \* (Vol 11) 1924 Sind 120 (121) : 17 Sind L R 160 : 26 Cri L Jour 179 (DB).]

**6. Sub-section (2)—Detention pending orders of Sessions Court, etc.**—[1] Magistrate demanding security for a period of more one year can only issue a warrant directing detention of the person pending orders of the Sessions Judge or High Court to whom he should submit the proceedings immediately for orders. He cannot himself order the imprisonment for any term. (Vol 32) 1945 Sind 55 (55) : 1 L R (1944) Kar 440 : 46 Cr L Jour 553 (DB) \* (Vol 22) 1935 Pesh 55 (55) : 36 Cri L Jour 936 \* ('08) 7 Cri L Jour 427 (432) : 30 All 334 (FB) \* ('99) 1899 All W N 151 (151) \* (Vol 15) 1928 Lah 189 (190) : 28 Cri L Jour 657 \* ('08) 7 Cri L Jour 412 (413) : 4 Low Bur Rul 135 \* ('97-01) 1 Upp Bur Rul 28 (28) \* (Vol 1) 1914 Lah 492 (493) : 1914 Pun Re No. 6 : 16 Cri L Jour 337 (The defect cannot be cured by the Magistrate reducing the term to one year).

[See however ('03) 1903 All W N 28 (28) (Order for imprisonment by Magistrate for more than one year confirmed by Sessions Judge—*Held* the order is to be deemed as that the latter) \* ('92) 6 Cal C P L R Cr 27 (28) (Do).]

[2] Order for a term of imprisonment for a period of two years set aside in appeal and Magistrate directed to lay the proceedings before the Sessions Judge—*Held* Sessions Judge could fix the term. ('72-92) 1872-1892 Low Bur Rul 279 (279).

[3] Person ordered to give security for more than one year suffering imprisonment at the time—Reference to Sessions Judge before expiry of imprisonment is premature. ('95) 1895 Rat 765 (766) (DB).

[But see ('09) 10 Cri L Jour 69 (75, 76) : 5 Low Bur Rul 34 (FB) (Reference must be made at once).]

[4] Person sent to prison pending orders from Sessions Judge on the reference—*Held*, he was undergoing sentence and not merely in detention. ('08) 7 Cri L Jour 427 (431) : 30 All 334 (FB).

[5] Sureties are liable for the attendance of the accused until reference for final orders is made. (Vol 13) 1926 All 297 (297, 298) : 27 Cri L Jour 377.

[6] If a person ordered to find a security for a period over one year does furnish such security, the section does not apply and no reference to the Court of Session could be made. ('96) 23 Cal 621 (626, 627) (DB) \* ('91) 1891 All W N 219 (219) \* (Vol 5) 1918 All 215 (216) : 40 All 39 : 19 Cri L Jour 2 \* ('72-92) 1872-1892 Low Bur Rul 279 (279).

**7. Nature of the proceedings on reference.**

[1] Sessions Judge acting on a reference made to him by a Magistrate does so in his administrative capacity only. (Vol 11) 1924 Sind 120 (120, 121) : 26 Cri L Jour 179 : 17 Sind LR 160 (DB). (The proceedings are not in the nature of appeal and need not be so dealt with).

[2] The case should be dealt with by the Sessions Judge as a Court of first instance. (Vol 19) 1932 Sind 88 (89) : 26 Sind L R 200 : 33 Cri L Jour 898 (DB).

[3] The order passed by Sessions Judge is the separate and substantive order of the Court of Session and not a mere confirmation of the Magistrate's order. (Vol 24) 1937 Sind 203 (203, 204) : 31 Sind L R 409 : 38 Cri L Jour 961 (DB) \* ('93) 1893 All W N 183 (184) \* ('08) 7 Cri L Jour 412 (413) : 4 Low Bur Rul 135 \* ('03-04) 2 Low Bur Rul 16 (17) \* ('99) 1899 All W N 151 (151) \* (Vol 12) 1925 Oudh 517 (518) : 26 Cri L Jour 656 \* ('92) 6 C P L R Cr 27 (27).

[4] The warrant following the order of the Sessions Judge should proceed from the Sessions Court itself and the Sessions Judge cannot ask the Magistrate to issue the warrant. ('93-1900) 1893-1900 Low Bur Rul 245 (246).

[5] The power to accept or reject sureties is vested in the Magistrate and the Sessions Judge exercising jurisdiction under this section has no power to do so. (Vol 21) 1934 Cal 482 (487) : 61 Cal 588 : 35 Cri L Jour 952 (DB).

**8. Notice to person proceeded against.**—[1] Notice to a person from whom security is demanded should be given before passing a prejudicial order though the section itself does not direct it. ('03) 25 All 375 (377) \* (Vol 20) 1933 Pat 276 (276) : 34 Cri L Jour 813 : 12 Pat 770 (DB) \* (Vol 15) 1928 Lah 189 (190) : 28 Cri L Jour 657 \* (1900) 4 Cal W N 797 (798) (DB) \* ('09) 10 Cri L Jour 69 (72) : 5 Low Bur Rul 34 (FB) \* ('05) 2 Cri L Jour 736 (738) : 3 Low Bur Rul 43.

[See ('11) 12 Cri L Jour 257 (258) : 35 Bom 271 (DB).]

**9. Discretion of Court on reference.**—[1] The Sessions Judge cannot decline to entertain a reference made to him on the ground that it is belated, but should deal with the case on merits. (Vol 7) 1920 Lah 283 (284) : 21 Cri L Jour 623 \* ('11) 12 Cri L Jour 257 (258) : 35 Bom 271 (DB).

a[124. (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion  
 • Power to release persons imprisoned for failing to give security. b[\* \*] may be released without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

c[(3) An order under subsection (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts :

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.]

d[(4) The e[Provincial Government] may prescribe the conditions upon which a conditional discharge may be made.]

d[(5) If any condition upon which any such person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.]

d[(6) When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate.

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion.

#### Section 123 (contd.)

[4] Rigorous imprisonment for failure to give security for good behaviour under S. 108 is illegal. (Vol 28) 1941 Oudh 98 (98) : 16 Luck 260 : 42 Cri L Jour 35 (DB).

[5] Imprisonment for failure to give security for keeping the peace shall be simple. (Vol 11) 1924 All 695 (696) : 26 Cri L Jour 490 \* (93-1900) 1893-1900 Low Bur Rul 630 (630) \* (03-04) 2 Low Bur Rul 53 (54).

**16. Tender of security to jail officer—Sub-Section (4).—**[1] Where security is offered to the jail officer subsequent to a warrant for imprisonment by the Sessions Court has reached him he should refer the matter to the Sessions Court. (Vol 17) 1930 Pat 217 (219) : 9 Pat 741 : 31 Cri L Jour 802 (DB).

[2] Security offered when the person is in jail should be taken by the Magistrate (or Court); it cannot be given at the jail. ('08) 7 Cri L Jour 472 (478) : 4 Low Bur Rul 205 (FB).

**17. Detention in Borstal School.—**[1] It is legal to pass an order of detention in a Borstal School under that Act instead of ordering the imprisonment of the defaulter under this section. (Vol 21) 1934 Mad 457 (457, 458) : 57 Mad 928 : 35 Cri L Jour 1153.

[2] The period of detention in accordance with the Borstal School Act 1926 may exceed the period for which imprisonment may be ordered under this section. (Vol 21) 1934 Mad 457 (457, 458) : 57 Mad 928 : 35 Cri L Jour 1153.

#### SECTION 124—Note 17.

[1] The District Magistrate or the Chief Presidency Magistrate, as the case may be, has absolute discretion to act under this section without interference from any other authority. ('93) 1893 All WN 183 (184).

[2] Subordinate Magistrate who thinks that the term of imprisonment should be shortened should report to the District Magistrate to take action. ('93) 1893 Rat 668 (668) (DB).

[3] District Magistrate cannot refuse to act under this section on the ground that order for security can be appealed against. ('93) 1893 All WN 183 (184).

[4] District Magistrate can use the evidence recorded by the Subordinate Magistrate to arrive at a conclusion. (Vol 1) 1914 Mad 618 (620) : 14 Cri L Jour 546 : 37 Mad 125 (FB).

[5] High Court cannot, in revision, direct the District Magistrate or Presidency Magistrate to act upon an application made to him under this section. ('93) 1893 All WN 183 (184).

A person remanded to prison under this sub-section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.]

[1882—S. 124; 1872—Ss. 500, 511, 512; 1861—Ss. 291, 302, 303.]

[a] See foot-remark [b] to Sec. 112.

[b] Certain words were *repealed* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923) S. 22.

[c] *Substituted, ibid.*, for the original sub-section (3).

[d] Sub-sections (4), (5) and (6) were *inserted, ibid.*

[e] *Substituted* by A. O. for "Local Government".

Power of District Magistrate to cancel any bond for keeping the peace or good behaviour.

a125. The Chief Presidency or District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court.

[1882—S. 125; 1872—S. 500; 1861—S. 291.]

[a] See foot-remark [b] to Sec. 112.

a126. (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction.

#### SECTION 125—Synopsis.

1. Scope of the section.
2. Sufficient reasons, what are.
3. "Cancel any bond".
4. "By order of any Court in his district not superior to his Court".
5. Parties, if entitled to be heard in proceeding under this section.
6. Power to remand.
7. Power to demand fresh security.
8. Power to alter terms of bond.

1. **Scope of the section.**—[1] This section gives a special and rather an exceptional power to the District Magistrate or the Chief Presidency Magistrate to cancel, for sufficient reasons, a bond executed under this chapter. (Vol 1) 1914 Mad 613 (619): 14 Cri L Jour 546 (554): 37 Mad 125 (FB).

2. **Sufficient reasons, what are.**—[1] A bond can be cancelled even on the ground that the bond should not have been taken at all under the circumstances of the case, as it existed on the date of the order for security. ('06) 4 Cri L Jour 399 (401): 34 Cal 1 (FB) \*('10) 11 Cri L Jour 147 (147): 37 Cal 72 (DB) \*(Vol 1) 1914 Mad 613 (619): 14 Cri L Jour 546: 37 Mad 125 (FB) \*(03) 7 Cri L Jour 348 (349) (Lah) \*(Vol 5) 1918 All 343 (343): 40 All 140: 19 Cri L Jour 183 \*(Vol 2) 1915 Nag 113 (113): 11 Nag LR 98: 16 Cri L Jour 555 \*(Vol 5) 1918 Nag 173 (173): 19 Cri L Jour 900.

[But see (Vol 10) 1923 All 484 (484): 24 Cri L Jour 204 \* (Vol 7) 1920 Nag 138 (138): 21 Cri L Jour 591 \* (Vol 9) 1922 Pat 334 (336): 23 Cri L Jour 281 \* (Vol 11) 1924 Oudh 241 (241): 24 Cri L Jour 616 \* (Vol 9) 1922 Pat 420 (422): 24 Cri L Jour 627 \* (Vol 1) 1914 Oudh 305 (306): 15 Cri L Jour 721 \* (Vol 4) 1917 All 428 (428): 39 All 466: 18 Cri L Jour 630 (DB).]

3. **"Cancel any bond."**—[1] The bond contemplated is which has been given by the person, against whom the order has been passed under S. 1, 8, and not the

bond executed by the surety. ('11) 12 Cri L Jour 480 (481): 33 All 624.

[4] "By order of any Court in his district not superior to his Court."—[1] Proceedings under S. 107 in District transferred to District T—First Class Magistrate of T ordered the petitioner to be bound over to keep the peace—District Magistrate of T cancelled it under this section—*Held* that, he had jurisdiction to pass that order. (Vol 6) 1919 Cal 81 (81): 20 Cri L Jour 387 (DB).

5. **Parties, if entitled to be heard in proceeding under this section.**—[1] It is not incumbent upon the District Magistrate to hear the petitioner or his pleader before disposing of the application. (Vol 5) 1918 Pat 183 (184): 19 Cri L Jour 246.

[But see (Vol 4) 1917 All 423 (423): 18 Cri L Jour 630: 39 All 466 (DB) \* (Vol 1) 1914 Lah 73 (74): 15 Cri L Jour 143].

6. **Power to remand.**—[1] The District Magistrate cannot in a proceeding under this section remand the case to the Magistrate for further inquiry. (Vol 6) 1919 Pat 171 (172): 20 Cri L Jour 221.

7. **Power to demand fresh security.**—[1] This section does not enable the District Magistrate to order fresh security to be given where security has been given and accepted by the subordinate Magistrate. ('05) 2 Cri L Jour 278 (279): 1905 Pun Re No. 16 Gr \* (1902) 29 Cal 455 (456) (DB) \* ('05) 2 Cri L Jour 507 (510): 8 Oudh Cas 245.

8. **Power to alter terms of bond.**—[1] In an appeal against an order for security under S. 406 the bond may be altered or modified by the Appellate Court. Except in this case the Magistrate cannot alter the bond. He can either cancel it or leave it alone (Vol 9) 1922 Nag 180 (180): 23 Cri L Jour 394.

#### SECTION 126—Note 1.

[1] The object of this section is to protect the surety who finds that he is unable to control the principal for whom he has given surety. ('13) 14 Cri L Jour 430 (432): 1 Upp Bur Bul 159.

(2) On such application being made, the Magistrate shall issue his summons or warrant, he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

[1882—S. 121, paras 1, 2; 1872—Ss. 501 paras 1, 2, 513 paras 1, 2. 1861—S. 292, 304.]

[a] See foot-remark [b] to Sec. 112.

a[126A.] b[When a person for whose appearance a warrant or summons has been issued Security for unexpired under the proviso to sub-section (3) of section 122 or under section 1 period of bond. sub-section (2), appears or is brought before him, the Magistrate shall cancel the bond executed by such person] and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118, as the case may be.

[1882—S. 126 para 3; 1872—Ss. 501 para 3, 513 para 3; 1861—Ss. 292, 394.]

[a] Sec. 126 (3) was renumbered 126 A by the Code of Criminal Procedure (Amendment) Act, 1923 [XVIII] of 1923), S. 23.

[b] Substituted, *ibid*, for "when such person appears or is brought before the Magistrate, such Magistrate shall cancel the bond".

## CHAPTER IX. a

### UNLAWFUL ASSEMBLIES.

127. (1) Any Magistrate or officer in charge of a police station may command any unlawful Assembly to disperse assembly, or any assembly of five or more persons likely to cause disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(3) This section applies also to the police in the town b of Calcutta b[\* \*].

[1882—S. 127; 1872—S. 480; 1861—S. 111.]

[a] This Chapter, so far as it applied to the City of Bombay, was repealed by the City of Bombay Police Act, 1902 (Bom Act 4 [IV] of 1902) S. 2 (1) and Sch. A.

[b] The letter 'S' and the words "and Bombay" were repealed, *ibid*.

#### SECTION 126 A—Note 1.

[1] When the effect of an order discharging a surety is to remit the suspect to prison for a term exceeding one year, the Magistrate is bound to refer the case to the Sessions Court as required under S. 123 ('11) 12 Cri L Jour 410 (411); 5 Sind LR 87 (DB).

#### SECTION 127—Note 1.

[1] Any Magistrate can exercise the power conferred under this section anywhere in the District. (See ('12) 18 Cri L Jour 716 (716, 717); 34 All 597).

[2] A Sub-Inspector of Police or a Deputy Commissioner of Police can command an assembly to disperse under this section. (Vol 20) 1933 Nag 277 (278, 279); 34 Cri L Jour 705 (A Sub-Inspector of Police can order) \* ('83) 7 Bom 42 (50) (DB) (Deputy Commissioner of Police can order).

[3] A police-officer in charge of a patrol boat has no power to disperse an unlawful assembly under this section. (Vol 10) 1923 Cal 517 (518); 50 Cal 818; 25 Cri L Jour 467 (DB).

[4] The legality of the command to disperse depends on the conduct of the assembly preceding the command and not on what followed it. (Vol 20) 1933 Nag 277 (282); 34 Cri L Jour 705 (DB).

[5] Any assembly of five or more persons likely to cause breach of peace can be ordered, to disperse, even if it has assembled for a lawful purpose. ('87) 1887 Pūn Be No. 22 Cr p 45 (DB) \* ('83) 7 Bom 42 (50) (DB).

[6] Three persons carrying flag with the object of attracting crowd.—The whole text of this section was repealed by the Code of Criminal Procedure (Amendment) Act, 1923 [XVIII] of 1923), S. 23.

crowd attracted constitute an assembly of five or more persons. ('83) 7 Bom 42 (49) (DB).

[7] The section enables a Magistrate or police officer to order the dispersal of an assembly of persons even though not unlawful. When he is of opinion that it is likely to cause breach of peace. (Vol 12) 1925 All 11 (170); 47 All 205; 26 Cri L Jour 599 (DB) \* (Vol 1922 Lah 135 (137); 13 Cri L Jour 5).

[8] It is the fact that such an assembly is likely to cause a disturbance of the public peace that gives jurisdiction to the Magistrate or police officer to act under this section and before an assembly can be said to be likely to affect public peace it must clearly appear from the behaviour of such assembly that it would actively disturb the peace or incite others to do so. (Vol 20) 1933 Nag 277 (279); 34 Cri L Jour 705.

[9] The likelihood of a breach of public peace being caused is a question of fact which must be proved by independent evidence. (Vol 20) 1933 Nag 277 (278, 281); 34 Cri L Jour 705 \* (Vol 9) 1922 Lah 135 (137) 23 Cri L Jour 5.

[See also (Vol 10) 1923 Pat 1 (4); 2 Pat 134; 2 Cri L Jour 625 (SB).]

[10] The conduct and behaviour of the assembly should be considered to determine the existence of the possibility of breach of peace. (Vol 15) 1928 Pat 9 (99); 28 Cri L Jour 906.

[11] Disobedience of an order under this section is chargeable under S. 145 of IPC in the case of unlawful assemblies and S. 151 of IPC in the case of other assemblies. (Vol 12) 1925 All 185 (171); 47 All 205.

128. If, upon being commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station, whether within or without the presidency towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer <sup>a</sup>[, soldier, sailor or airman in His Majesty's Army, <sup>b</sup> Navy or Air Force] or a volunteer enrolled under the Indian Volunteers Act, 1869,<sup>c</sup> and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

[1882—S. 128 : 1872—S. 481.]

[a] *Substituted* by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Sch., for “or soldier in Her Majesty's Army.”

[b] As to which members of the Assam Rifles are to be deemed part of His Majesty's Army for the purpose of this section, *See* the Assam Rifles Act, 1941 (V of 1941), S. 11.

[c] *Repealed* by the Auxiliary Force Act, 1920 (49 [XLIX] of 1920).

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

[1882—S. 129 ; 1872—S. 482.]

130. (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, <sup>b</sup> to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

[1882—S. 130 ; 1872—S. 484.]

[a] As to which members of the Assam Rifles are to be deemed part of His Majesty's Army for the purpose of this section, *See* the Assam Rifles Act, 1941 (V of 1941), S. 11.

[b] *Repealed* by the Auxiliary Force Act, 1920 (49 [XLIX] of 1920).

#### SECTION 128—Note 1.

[1] The degree of force which may lawfully be used in the suppression of an assembly depends on the nature of such assembly. ('98) 21 Mad 249 (252) (DB).

[2] Every male person is bound to assist the Magistrate or police-officer. (Vol 18) 1931 Bom 57 (65) : 58 Bom 263 : 32 Cri L Jour 403 (SB).

[3] The unlawful assembly which refuses to disperse may be dealt with as follows:—

(a) the assembly may be dispersed by force. ('04) 1 Ori L Jour 920 (928) (Kathiawar).

(b) ring-leaders or as many of the persons forming part of it as may be necessary may be arrested and confined. (Vol 18) 1931 Bom 520 (521, 524) : 55 Bom 725 : 33 Cri L Jour 64 (DB).

(c) The persons disobeying may be prosecuted under S. 145 of the Penal Code. (Vol 18) 1931 Mad 484 (485) : 54 Mad 1025 : 32 Ori L Jour 806 (DB).

[4] If the assembly persists in not dispersing, a warning should be given that if they refuse to disperse, force will be used. ('98) 21 Mad 249 (251) (DB).

[5] If the officer is competent to act under this section and acts in good faith, he is entitled under S. 132 to be protected from prosecution for doing such acts. (Vol 8) 1921 Cal 697 (697, 698) : 22 Ori L Jour 606 (DB).

[6] This section does not confer a general power of arrest on the Magistrate but only authorises him to arrest when the assembly on being commanded to disperse does not disperse or without being so commanded shows a determination not to disperse. (Vol 26) 1939 Oudh 81 (83) : 40 Ori L Jour 221 : 14 Luck 409.

#### SECTION 130—Note 1.

1. “Every such officer shall obey such requisition”—Sub-section (2).—[1] It is the duty of the military officers in the service of the Crown to aid the Civil authorities in quelling disorder. (Vol 18) 1931 Bom 57 (59) : 55 Bom 263 : 32 Ori L Jour 403 (SB).

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of His Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such Assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so, and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

[1882—S. 131; 1872—S. 487.]

[a] As to which members of the Assam Rifles are to be deemed part of His Majesty's Army for the purposes of this section, *See* the Assam Rifles Act, 1941 (V of 1941), S. 11.

Protection against prosecution for act done under this Chapter:—

132. No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the <sup>a</sup>[Provincial Government]; and—

- (a) no Magistrate or police-officer acting under this Chapter in good faith,
- (b) no officer acting under section 131 in good faith,
- (c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and
- (d) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence :

b[Provided that no such prosecution shall be instituted in any Criminal Court against any officer or soldier in His Majesty's Army except with the sanction of the <sup>c</sup>[Central Government].]

[1882—S. 132; 1872—Ss. 483, 485, 486, 488.]

[a] Substituted by A. O. for "Local Government": which had been substituted by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch I, for "Governor General in Council."

[b] Proviso Inserted, *ibid.*

[c] Substituted by A. O. for "Governor-General in Council".

#### SECTION 132—Note 1.

[1] The section should be construed broadly. (Vol 20) 1933 Mad 268 (269) : 34 Cri L Jour 528.

[See ('37) 1937 Mad WN 1243 (1245).]

[2] The protection given by this section is one against the trial itself while S. 79 gives protection against conviction. (Vol 20) 1933 Mad 268 (269) : 34 Cri L Jour 528.

[3] An inquiry which merely results in the dismissal of a complaint does not amount to a 'prosecution' within the meaning of this section. (Vol 16) 1929 Cal 229 (231) : 30 Cri L Jour 942 (DB) (Per Graham J).

[4] It is not necessary for a person empowered to act under this chapter, before the question of sanction is raised, to prove that there was in fact such an assembly as is contemplated by this chapter. ('37) 1937 Mad WN 1243 (1244) \*(Vol 20) 1933 Mad 268 (269) : 34 Cri L Jour 528 \*(Vol 8) 1921 Cal 697 (698) : 22 Cri L Jour 606 (DB).

[5] In deciding whether a person purported to act or not under this section the Court is not confined to the complaint and the sworn statement. (Vol 20) 1933 Mad 268 (269) : 34 Cri L Jour 528.

[6] The sanction of the Provincial Government is a condition precedent to the prosecution of any person. ('37) 1937 Mad WN 1243 (1245) \*(Vol 20) 1933 Mad 268 (269) : 34 Cri L Jour 528.

[7] The power to disperse an unlawful assembly is not given by the Code to any police-officer below the rank of an officer in charge of a police-station. Any officer below that rank, e.g., an officer in charge of a patrol boat is not protected by the provisions of this

section. (Vol 10) 1923 Cal 517 (518) : 50 Cal 318 : 28 Cri L Jour 467 (DB).

[8] The definition of "good faith" given in S. 52 of the Penal Code applies to this Code. ('98) 21 Mad 248 (251) (DB).

[9] The term is to be interpreted relatively to the position of the person doing an act or omission with due regard to the surrounding circumstances. ('68) 10 Suth WR Cr 20 (20) (DB).

[10] Police officer not believing necessary for the public security to disperse an assembly by firing but still ordering to shoot—A man shot dead—*Held* that the officer did not act in good faith. ('98) 21 Mad 249 (251) (DB).

[11] A police officer is not protected simply because he obeyed the orders of his superior officer unless the order is one which he is bound to obey. ('98) 21 Mad 249 (252) (DB).

[12] Order of superior officer manifestly illegal—Subordinate has same opportunities of observing and judging the circumstances as the superior—Obedience to the orders of superior is no defence. ('98) 21 Mad 249 (252) (DB) \*(Vol 11) 1924 Sind 33 (35) : 17 Sind LR 182 : 26 Cri L Jour 142 (DB).

[13] A subordinate obeying the orders of his superior will even if the order is illegal, be entitled to protection under S. 76 of the Penal Code, if, by reason of a mistake of fact he believed, in good faith, to be bound by law to obey it. ('83) 1883 Pun Re No. 17 Cr p 29 (36, 37) (DB).

[14] The sanction is a condition precedent to the institution of a prosecution against any person for an act done under this Chapter and consequently the absence of a sanction is an illegality curable by S. 537. ('07) 6 Cri L Jour 382 (383) : 31 Mad 380 (DB).

## CHAPTER X.

## PUBLIC NUISANCES.

<sup>a</sup>[133. (1) Whenever a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of Conditional order for the first class considers, on receiving a police-report or other information removal of nuisance. and on taking such evidence (if any) as he thinks fit,

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance ; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation ; or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed ; or

to prevent or stop the erection of, or to remove, repair or support such building, tent or structure ; or

## SECTION 133—Synopsis.

1. Remedies for a public nuisance.
2. Scope and applicability of the section.
3. Preventive action in respect of anticipated nuisance.
4. Long-standing nuisances and obstructions.
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1. Remedies for a public nuisance —[1] A proceeding under this chapter is not a condition precedent to a prosecution under the Penal Code, or to the maintenance of a civil suit. ('69) 1869 Rat 23 (23) (DB) (Prosecution under the Penal Code) \*('70) 14 Suth WR Cr 63 (65) (DB) (Do) \*(1862) 1 Bom H C R Cr 1 (2) (Civil Suit).

to remove or support such tree : or



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[10] Proceeding under this section is not proper when there is a dispute between the Government and a private individual. (1900) 2 Bom LR 818 (819, 820) (DB).

[11] The section is confined to the matters mentioned therein and cannot be applied to other matters, such as the apprehension of an imminent breach of the peace. (Vol 24) 1937 Lah 101 (102) : ILR (1937) Lah 308 : 39 Cri L Jour 18.

[12] Two proceedings under the section, side by side with regard practically to the same subject-matter, are not contemplated by the Code. (Vol 23) 1936 Pat 577 (579) : 37 Cri L Jour 1159.

[13] Whether order under the section should be passed is a matter of discretion for the Magistrate. (Vol 24) 1937 All 785 (786) : 39 Cri L Jour 148.

[14] The order under this section is a conditional order and does not amount to an injunction. (Vol 25) 1938 Nag 84 (85) : ILR (1938) Nag 348 (DB).

**3. Preventive action in respect of anticipated nuisance.**—[1] This section does not justify action being taken in regard to an anticipated but non-existent obstruction or nuisance. (Vol 26) 1939 Bom 92 (95) : 40 Cri L Jour 444 (DB) \* (Vol 23) 1936 Pat 577 (579) : 37 Cri L Jour 1159 \* (Vol 22) 1935 All 926 (927) : 37 Cri L Jour 347 \* (Vol 21) 1934 Nag 230 (231) : 35 Cri L Jour 1414.

**4. Long-standing nuisances and obstructions.**—[1] This section is not intended to be employed to avoid the necessity of filing civil suits in regard to long-standing obstructions, but only for unlawful obstructions lately caused in public places and rendering their immediate summary removal necessary. (Vol 13) 1926 All 157 (157) : 27 Cri L Jour 27 \* (Vol 26) 1939 Lah 276 (277) : 40 Cri L Jour 758 \* (Vol 26) 1939 Lah 452 (453) : 40 Cri L Jour 933 \* (Vol 27) 1940 Oudh 75 (77) : 15 Luck 140 : 41 Cri L Jour 99.

[But see ('83) 2 Weir 59 (59) (DB) \* (Vol 30) 1943 Pat 32 (32, 33) : 43 Cri L Jour 908 \* (Vol 26) 1939 Pat 183 (186) : 17 Pat 669 : 40 Cr L Jour 516 (DB).]

**5. Sections 133 and 144.**—[1] Where a case falls both under this section and S. 144 the order should, under this section, be a conditional one giving the party an opportunity to show cause against the order. ('68) 10 Suth W R Cr 53 (53, 54) (DB) \* ('69) 1 N W P H C R 197 (197, 198) (DB) \* ('74) 21 Suth W R Cr 24 (25) (DB).

[2] Where an order has to be passed prohibiting burial in certain places on sanitary grounds, it should be made under the more general provision, S. 144. ('81) 2 Weir 64 (64).

**6. Sections 133 and 147.**—[1] This section is not a bar to proceeding under S. 147, where a case falls under both the sections. (Vol 1) 1914 Mad 712 (713) : 15 Cri L Jour 362 (DB).

[2] When proceedings are taken under this section, no order can be passed under S. 147. (Vol 9) 1922 Cal 59 (65) : 49 Cal 682 : 23 Cri L Jour 353 (FB).

**7. Who may act under the section.**—[1] A *karnam* cannot issue an order for the removal of an obstruction from a public way. ('85) 1 Weir 132 (133).

[2] A third class Magistrate cannot make any enquiry under this section. (Vol 16) 1929 Cal 813 (813) : 31 Cri L Jour 673 : 57 Cal 666 (DB).

[3] Magistrate of the second class cannot make a conditional order under this section, though he may

pass the final order under S. 137 if the case is transferred to him by the Magistrate making the conditional order. (Vol 32) 1945 Pat 334 (336) : 24 Pat 1147 Cr L Jour 29 (DB).

**8. "Considers."**—[1] It is enough if the Magistrate has before him sufficient materials upon which *prima facie* he can act. ('10) 144 Cal W N ex (excix) (DB).

[2] Where the acts complained of amount to nuisance, it *prima facie* gives the Magistrate jurisdiction to pass an order under this section. ('04) 1 Cr L Jour 70 (72) (Cal).

**9. "On receiving police-report or other information"**—[1] A proceeding under this section is, in the first instance, *ex parte* and the report or other information on which it is based is no evidence against the opposite party. (Vol 4) 1917 Cal 207 (207, 208, 17 Cri L Jour 409 : 44 Cal 61 (DB).

**10. "And on taking such evidence"**—[1] The expression "on taking such evidence (if any) as I think fit" does not make it incumbent on the Magistrate to hold an inquiry before he makes an order under this section. (Vol 18) 1934 All 257 (257) : 32 Cr L Jour 565.

[But see (Vol 26) 1939 Lah 276 (277) : 40 Cr L Jour 758].

**11. "Unlawful obstruction or nuisance."**—[The words "public nuisance" have the same meaning as in S. 268 of the Penal Code. ('70) 5 Mad HCR 3 (357) (DB) \* ('12) 13 Cri L Jour 183 (184) : 34 All 34

[2] Any act or illegal omission which must necessarily cause obstruction to persons, who may have occasion to use any public right, is a public nuisance ('70) 5 Mad HCR 345 (357) (DB).

[3] This section deals with unlawful obstructions, a particular kind, namely those relating to any way, river or channel which may be lawfully used by the public, or any public place. ('07) 5 Cri L Jour 97 (9) (DB) (Bom) \* (Vol 9) 1922 Cal 59 (70) : 49 Cal 682 : 23 Cri L Jour 353 (FB) \* (Vol 13) 1926 All 193 (193) : 27 Cri L Jour 276.

[4] The section does not apply to obstruction of private rights. ('98) 22 Bom 988 (994) (DB) \* (Vol 1) 1928 All 627 (628) : 50 All 871 : 29 Cri L Jour 661.

[5] The obstruction must be on the public way, etc. (Vol 32) 1945 Nag 226 (228) : ILR (1945) Nag 461 : 4 Cr L Jour 217.

[6] Where the obstruction is on a public road, the section will apply though it is caused by something done on a private property. (Vol 32) 1945 Nag 22 (228) : ILR (1945) Nag 461 : 47 Cr L Jour 217.

[7] The question whether there has been an obstruction is a question of fact which must be decided having regard to the facts and circumstances of each case. ('01) 20 Cal 665 (670) (DB) \* (Vol 21) 1934 Nag 290 (231) : 35 Cri L Jour 1414 \* (Vol 11) 1924 All 667 (667) : 2 Cri L Jour 104 (Spreading of a branch of tree over country road—No obstruction) \* ('12) 13 Cri L Jour 86 (830) (All) (Placing charpoy on public road—No obstruction) \* ('67) 7 Suth W R Cr 59 (59) (DB). (Unlawful cutting up of public road is obstruction) \* ('72) 1 Suth W R Cr 38 (38) (Filling drain forming part of public road is obstruction) \* (Vol 17) 1930 All 75 (751) : 32 Cri L Jour 160 (*Chabutra* unlawfully erected over a public way constitutes obstruction) \* ('97) 5 Mad 433 (434) (Building over the road punishable under S. 290 IPC is obstruction) \* (Vol 14) 1927 Pat 21

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(266) : 6 Pat 428 : 28 Cri L Jour 910. No length of user can justify an encroachment upon a public way) \* ('97) 7 Mad L Jour 95 (96) (DB). (It is no answer to say that the street is wide enough for all) \* (1921) 22 Cri L Jour 582 (583) (DB) (Cal) (Holding cattle market on public road is obstruction) \* ('87) 14 Cal 656 (658) (DB) (Placing a bamboo stockade across a tidal navigable river for the purpose of fishing and leaving narrow opening for the passage of boats is obstruction) \* (Vol 14) 1927 Oudh 122 (124) : 28 Cri L Jour 203 (Case under S. 268 IPC) \* ('05) 2 Cri L Jour 762 (763, 764) : 32 Cal 930 (DB) (Erecting dam obstructing crossing of river is obstruction).

[8] Any encroachment, however small, on a public road must inevitably result in obstruction to persons who may have occasion to use such road, and is a public nuisance. (Vol 14) 1927 Pat 265 (266) : 6 Pat 428 : 28 Cri L Jour 910 \* (Vol 12) 1925 Lah 454 (455) : 6 Lah 203 : 26 Cri L Jour 942 (DB) \* ('97) 20 Mad 433 (434).

[9] The obstruction should be *in presentis* and not merely *in future* (Vol 21) 1934 Nag 230 (231) : 35 Cri L Jour 1414.

[See (Vol 23) 1936 Pat 577 (579) : 37 Cri L Jour 1159].

[10] It is immaterial as to how the person, proceeded against, caused the obstruction, or how genuine his belief in his rights may be. (Vol 32) 1945 Nag 226 (228, 229) : ILR (1945) Nag 461 : 47 Cr L Jour 217. (But this is a matter which the Magistrate may take into consideration in passing orders.—He has always discretion and he may desist from taking action if he thinks fit to do so.)

[11] The section is not inapplicable merely because the motive for causing the obstruction is good, or it does not cause practical inconvenience to persons using such way or affords some convenience to the person causing it. ('01) 23 All 159 (162) (Motive good) \* (Vol 30) 1945 Pat 32 (32) : 43 Cri L Jour 903. (No practical inconvenience) \* (Vol 17) 1930 All 751 (751) : 32 Cri L Jour 160 (Do) \* (Vol 3) 1916 Mad 847 (847) : 38 Mad 305 : 16 Cri L Jour 560 (Do).

[See however (Vol 32) 1945 Nag 226 (229) : ILR (1945) Nag 461 : 47 Cr L Jour 217 \* ('12) 13 Cri L Jour 183 (184) : 34 All 345 (DB) (Convenience to person causing obstruction).

[12] A public road comprises all the ground forming part of the road over which the public have a right of way. (Vol 1) 1914 All 341 (342) : 37 All 9 \* ('81) 7 Cal L Rep 272 (273) (Includes a fair margin on either side).

12. Nuisance.—[1] The section does not apply to a nuisance in a private place. (Vol 22) 1935 All 926 (927) : 37 Cri L Jour 347.

[2] A nuisance in a public place may originate in a private place and the act or omission which constitutes it may be an exercise of a right in respect of one's own property. ('05) 2 Cri L Jour 762 (763) : 32 Cal 930 (DB).

[3] The following are cases where acts of private user may amount to a public nuisance. (Vol 22) 1935 All 926 (927) : 37 Cri L Jour 347. (Use of private latrine a nuisance to neighbours) \* (Vol 23) 1936 Pat 409 (409, 410) (Latrine near a public well) \* ('98) 25 Cal 425 (430) (Cremation carried on in an offensive manner) \* ('98) 19 Mad 464 (468, 469) (DB) (Do) \* ('10) 11 Cri

L Jour 665 (667) (DB) (Cal) (High wall leaving no space for drainage between it and neighbour's house) \* ('63) 1868 Pun Re No. 15 Cr p 86 (38) (DB) (Beef cooked under annoying circumstances) \* (Vol 15) 1928 Mad 1235 (1235, 1236) : 52 Mad 79 : 30 Cri L Jour 432. (Pricklypear spreading over public road) \* ('11) 12 Cri L Jour 258 (258, 259) : 35 Bom 368 (DB) (Crowd collecting in toy-shop) \* (Vol 11) 1924 All 568 (568) : 26 Cri L Jour 135. (Sale of *satta* tickets causing rush) \* ('06) 4 Cri L Jour 492 (493) (All) (Temporary obstruction of public thoroughfare is public nuisance).

[4] It is not enough to show that the sentiments of certain persons or of a class of persons are offended by the act. ('08) 7 Cri L Jour 381 (385, 386, 387) : 30 All 181 (Slaughter of cows in private compound—No nuisance) \* ('76) 25 Suth WR Cr 72 (73) (DB) (Do) \* (Vol 16) 1929 Lah 252 (253) : 30 Cri L Jour 660 (Do).

[But see ('87) 10 All 44 (46) \* ('87) 12 Bom 437 (439) (DB) (Meat exposed in verandah—Jains offended—No nuisance) \* ('96) 19 Mad 464 (468, 469) (DB) (Cremation on particular spot—No nuisance) \* (Vol 18) 1931 All 674 (686, 687) : 53 All 836 (DB) (Music before mosque—No nuisance) \* (Vol 13) 1926 Oudh 414 (414, 415) : 27 Cri L Jour 1020 : 29 Oudh Cas 302. (Noise by chowkidar to keep thieves away—No nuisance)]

[5] The question whether an act or omission causes or must necessarily cause injury, danger or annoyance is one of fact which depends upon the circumstances of each case. ('32) 1932 Mad WN-111 (118) \* (1862) 31 LJ QB 236 (292).

[6] The following are cases where acts complained of have been held to be no nuisance. ('95) 1895 Rat 765 (765) (DB) (Bare solicitation of chastity) \* (1900) 22 All 113 (115) (DB) (Do) \* ('70) 2 N W P H C R 349 (352) (Prostitute's visit to dak bungalow) \* ('32) 1932 Mad WN 111 (113). (Letting water on public road) \* ('70) 7 Bom HCR Cr 74 (76). (Admitting gamblers to a house) \* ('81) 1 Weir 231 (231). (Angling in a tank) \* (Vol 1) 1914 All 363 (363) : 15 Cri L Jour 600 (Skinning a dead animal) \* (Vol 22) 1935 All 926 (927) : 37 Cri L Jour 347 (Latrine on one's own land) \* (Vol 15) 1928 All 128 (128) : 29 Cri L Jour 233 (Do) \* ('96) 19 Mad 464 (468, 469) (DB). (Disposing corpse on cremation ground) \* ('02) 25 Mad 118 (130, 131) (DB) (Do) \* (Vol 3) 1916 Bom 122 (128) : 18 Cri L Jour 137 (DB) (Do) \* ('81) 2 Weir 64 (64) (Do) \* ('98) 25 Cal 425 (430) (DB) (Do) \* ('68) 9 Suth WR Cr 70 (71) (Allowing cattle to stray on other's land) \* ('94) 1 Weir 244 (244) (Straying and committing nuisance in a public place) \* ('10) 11 Cri L Jour 665 (667) (DB) (Cal). (Building wall on one's own land) \* ('68) 1868 Pun Re No. 15 Cr p 86 (38) (Cooking beef on one's own premises) \* ('86) 8 All 99 (101) (Using night-soil as manure) \* (Vol 16) 1929 Lah 801 (801) : 11 Lah 236 : 31 Cr L Jour 442. Selling *satta* tickets).

[7] In the following cases, acts complained of have been held to be nuisances. (1900) 1900 Pun Re No. 2 Cr p 3 (8, 9) (DB) (Solicitation by prostitutes in public) \* ('81) 1 Weir 242 (242) (DB) (Gambling in market place) \* (Vol 3) 1916 Mad 617 (618) : 16 Cri L Jour 254 (Gambling in public) \* ('81) 1 Weir 229 (229) (DB) (Cultivating paddy in tank used for drinking) \* ('81) 1 Weir 231 (231) (Angling with foul bait).

13. "Channel".—[1] The word "channel" includes a catchment area in the centre of which there is a water course. (Vol 13) 1926 Mad 165 (166) : 27 Cri L Jour 105.

[2] It is doubtful if a field across which surplus water of the neighbouring lands used to flow into the

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tank is a "channel". (Vol 1) 1914 All 213 (213) : 36 All 209 : 15 Cri L Jour 229 (DB).

14. "Which is or may be lawfully used by the public."—[1] It is essential that the way, river, or channel from which a nuisance is sought to be removed is one which is or may be lawfully used by the public. (Vol 10) 1923 Pat 540 (541) : 24 Cri L Jour 855 \*('76) 25 Suth WR Cr 4 (5) (DB) \*('76) 25 Suth WR Cr 72 (73) (DB) \*('02) 6 Cal WN 886 (886) (DB).

[2] An obstruction, etc., in respect of a private place is not within the section. (Vol 12) 1925 Oudh 130 (130) : 25 Cri L Jour 1118 \*('66) 5 Suth WR Cr 58 (59) \*('71) 15 Suth WR Cr 67 (68) \*('Vol 15) 1928 All 627 (628) : 50 All 871 : 29 Cri L Jour 661 \*('03) 1903 Pun Re No. 2 Cr p 4 (7) \*('67) 8 Suth WR Cr 239 (240) (DB) (Interior of private house).

[3] The fact that the Magistrate has taken action under S. 133 is sufficient to show that he considered that the *locus in quo* is a public place. ('81) 8 Cal L Rep 399 (400) (DB).

[4] In order to give jurisdiction under the section all that is required is that the way, etc., should be one which is or may be lawfully used by the public. ('09) 10 Cri L Jour 210 (211) (DB) (Cal).

[5] Private property cannot be treated as public, merely because a section of the public have enjoyed permissible user over it. (Vol 11) 1924 All 1 (7) : 45 All 656 : 24 Cri L Jour 817 (DB).

[6] The fact that the residents of a particular village have a right to take their cattle across a field does not constitute the field a public way. (Vol 7) 1920 PC 43 (45) : 1 Lah 117 : 47 Ind App 25 (PC).

[7] Road may be established to be a public one where acts of user by the public are shown to have been acquiesced in by the owner of the land. ('80) 6 Cal L Rep 282 (284) (DB).

15. "Public place" meaning of.—[1] A public place "is a place where the public go, no matter whether they have a right to go or not". (1884) 14 QBD 63 (66) : 51 LT 604 : 33 WR (Eng) 156 \*('Vol 32) 1945 Pat 809 (810) : 24 Pat 104 (DB) \*('Vol 4) 1917 Mad 124 (124) : 40 Mad 556 : 18 Cri L Jour 7 (DB) \*('Vol 3) 1916 Nag 15 (15) : 13 Nag LR 68 : 18 Cri L Jour 650 ('04) 1 Cri L Jour 349 (352) : 31 Cal 542 (DB).

[2] A place in order to be public must be a place to which the public have access by right, permission, usage or otherwise. (Vol 12) 1925 Nag 123 (123) : 25 Cri L Jour 1073 \*('95) 17 All 166 (166, 167) (DB).

[3] A place may be a "public place" though it is the private property of an individual, it will depend upon the character of the place itself and the use actually made of it at a particular time. (1904) 1 Cri L Jour 349 (353) : 31 Cal 542 (DB) \*('Vol 11) 1924 All 768 (769) : 46 All 787 : 25 Cri L Jour 1308.

[4] Whether a piece of private property is a public place is a question of fact which depends on the evidence in each particular case. (Vol 12) 1925 Nag 123 (124) : 25 Cri L Jour 1073 \*('Vol 3) 1916 Nag 15 (15) : 13 Nag LR 68 : 18 Cri L Jour 650 (Public using private well—Well is a public place) \*('1857) 26 L J Exch 393 (Railway platform) \*('02) 26 Bom 609 (613) (DB) (Railway goods yard) \*('Vol 10) 1923 Pat 540 (541) : 24 Cri L Jour 855 (Railway land other than yard or platform is not a public place) \*('Vol 18) 1931 Lah 576 (576) : 33 Cri L Jour 845 (Verandah of private house accessible from public street is not a public place) \*('81) 1881 All WN 17 (17) (Do) \*('Vol 23) 1936 Pat 409 (410) (Public well is a public place) \*('Vol 8) 1921 Oudh 204

(204) : 24 Oudh Cas 327 : 23 Cri L Jour 57 (Vacant space between two houses is not public place).

[5] Encroachment upon the land owned by a State railway comes within S. 133. (Vol 32) 1945 Pat 93 (810) : 24 Pat 104 (DB).

16. Conduct of trade or occupation injurious to the health or physical comfort of the community.—

[1] The Section applies not only where the trade or occupation is in itself, injurious but also where the conduct of the trade is injurious to the community (Vol 17) 1930 Cal 757 (758) : 32 Cri L Jour 235 : 5 Cal 854 (DB) (Per S K Ghose, J, *contra*).

[2] Stock of bones remaining uncovered in the open became rotten and emitted noxious smell. It was held to be a nuisance. ('07) 5 Cri L Jour 45 (48) : 34 C 73 (DB).

[3] Noise of an engine in a factory or a mill is serious nuisance if it prevents the neighbours from sleeping and from concentrating on work (Vol 18) 1931 All 433 (433) : 53 All 706 : 33 Cri L Jour 331 \*('01) 1 Cri L Jour 513 (513) : 1904 Pun Re No. 9 Cr \*('Vol 7) 1920 Cal 550 (550) : 21 Cri L Jour 669 (DB) \*('Vol 2) 1934 Nag 193 (193) : 36 Cri L Jour 591.

[But see (Vol 26) 1939 Bom 92 (94) : 40 Cri L Jour 444 (DB).]

[4] The following have been held to be injurious occupations :—

(a) Solicitation by prostitutes on public road with *charpoy*s with them. (1900) Pun Re No. 2 Cr 3 (8, 9) (DB).

(b) Driving of cattle to and fro a congested lane ('21) 62 Ind Cas 822 (822, 823) (DB) (Cal).

(c) Discharging noxious effluent in a river from a factory. (Vol 13) 1926 Pat 506 (507) : 28 Cri L Jour 317 (DB).

[See also ('75) 24 Suth WR Cr 68 (69) \*('01) 5 Cal WN 566 (567) \*('93-1900) 1893-1900 Low Bur Bul 54 (546) \*('Vol 1) 1914 Upp Bur 3 (3) : 1 Upp Bur Re 180 : 15 Cri L Jour 253].

[5] The following are not trades or occupation injurious to the health or physical comfort of the community :—

(a) The opening of a new market close to an old one even if sometimes people are dragged from one market to the other. ('04) 14 Mad L Jour 207 (208) (DB).

(b) Flying of rival steam launches even though their rivalry people are taken on board from places other than jetties and from boats much to the annoyance and danger to the public travelling in the launches (Vol 17) 1930 Cal 757 (758) : 32 Cri L Jour 285 : 5 Cal 854.

(c) Keeping a house of public entertainment. ('81) 1888 Pun Re No. 47 Cr p 118 (119) (DB).

(d) Cultivation of maize, jowar or bajra within a short distance from the town. ('89) 1889 Pun Re No. 8 Cr p 142 (143).

(e) Where there is no effect on public health, the conduct of an occupation like a tannery, or a lime-kiln or a brick kiln cannot be stopped. ('11) 12 Cri L Jour 146 (147, 148) (Lah) \*('88) 1888 Pun Re No. 17 Cr 31 (32) \*('Vol 19) 1932 All 159 (161) : 54 All 359 : 1 Cri L Jour 524 \*('Vol 7) 1920 Lah 258 (260) : Lah 163 : 21 Cri L Jour 462.

(f) The working of flour mills as regulated by the order of the Magistrate in previous proceedings and this section cannot be described as a nuisance. (Vol 2) 1940 Oudh 75 (76) : 15 Luck 140 : 41 Cri L Jour 9

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[6] The Magistrate has jurisdiction to regulate the manner in which a trade is to be conducted in such a way as not to be a nuisance to the community. (Vol 30) 1943 Mad 357 (359) : ILR (1944) Mad 64 : 44 Cri L Jour 533 \* (Vol 19) 1932 All 159 (161) : 54 All 359 : 33 Cri L Jour 524 \* (Vol 7) 1920 Cal 550 (550) : 21 Cri L Jour 669 (DB).

[7] It is generally inexpedient for a Magistrate to take action in such cases and he will act wisely if he refers the party to set in motion the machinery provided in those local Acts. (Vol 19) 1932 All 159 (161) : 54 All 359 : 33 Cri L Jour 524 \* (Vol 7) 1920 Cal 550 (550) : 21 Cri L Jour 669 (DB).

[8] No order can be passed on the possibility that the digging of pits for brick making may, in future, be injurious to the health of the community. (Vol 7) 1920 Lah 258 (261) : 1 Lah 163 : 21 Cri L Jour 462.

**17. Community—Meaning of.**—[1] An act found to be injurious to the physical comfort of the neighbours must be deemed to be so to the physical comfort to the community though a part of the community is not affected by it. (Vol 18) 1931 All 433 (433) : 58 All 706 : 33 Cri L Jour 331 \* ('04) 1 Cri L Jour 513 (513) : 1904 Pun Re No. 9 Cr.

[2] Interference must be considerable and caused to a considerable section of the public. ('11) 12 Cri L Jour 146 (147) (Lah) \* (Vol 13) 1926 Oudh 414 (414, 415) : 29 Oudh Cas 302 : 27 Cri L Jour 1020.

**18. Building, tent or structure or tree.**—[1] An order can be passed under this section in respect of a dilapidated house. ('68) 4 Mad HCR App xxxiv (xxxv).

[2] "Building", indicates structure intended to afford protection to the persons dwelling inside it or the property placed therein for custody. (Vol 14) 1927 Mad 343 (344) : 28 Cri L Jour 248 \* (Vol 16) 1929 Sind 17 (18, 19) : 22 Sind L R Jour 466 : 29 Cri L Jour 875 (DB) \* (Vol 17) 1930 Lah 414 (415) : 31 Cri L Jour 268 \* (Vol 3) 1916 Oudh 109 (110) : 17 Cri L Jour 536.

[3] It does not include any other enclosure or structure. (Vol 14) 1928 All 607 (607) : 29 Cri L Jour 766 \* ('87) 1887 Pun Re No. 57 Cr p 151 (152) (DB) \* (1905) 2 Cri L Jour 420 (420) : 1905 Pun Re No. 28 Cr (DB) \* (Vol 6) 1919 Lah 333 (333) : 20 Cri L Jour 240 \* (Vol 11) 1924 Lah 623 (623) : 25 Cri L Jour 457 \* (Vol 12) 1925 Lah 279 (279) : 26 Cri L Jour 383 \* (Vol 14) 1927 Mad 343 (344) : 28 Cri L Jour 248. It may or may not be roofed. (Vol 13) 1926 Lah 28 (29) : 6 Lah 463 : 27 Cri L Jour 88.

[4] A "railway carriage" or "a brake van" is not a "building". ('80) 1 Weir 436 (1) (436).

[5] The likelihood of a tree enabling thieves to get into a house is no ground for ordering the tree to be removed. ('83) 1883 All W N 222 (223).

[6] The section does not apply unless the danger or injury is an existing one. ('90) 1890 Pun Re No. 5 Cr p 11 (11).

[7] Section is not meant to apply to what may happen at some indefinite time in the future or under quite abnormal circumstances. (Vol 11) 1924. All 687 (688) : 26 Cri L Jour 104.

**19. Persons living or carrying on business in the neighbourhood or passing by.**—[1] A Magistrate cannot issue an order to repair a house away from a

public road in its own compound. ('98) 20 All 501 (505).

**20. Form of order.**—[1] An order under this section is only conditional and not absolute. ('83) 9 Cal 637 (639).

[2] The order should be in writing. ('70) 2 Agra Cr 1 (2) \* (Vol 2) 1915 Cal 741 (742) : 16 Cri L Jour 24 (25) (DB) \* ('92-96) 1 Upp Bur Rul 178 (178).

[3] The order should state the time within which, the Magistrate before whom and the place at which the person proceeded against may appear and move to have the order set aside. ('83) 9 Cal 637 (639) \* ('87) 1867 Pun Re No. 26 Cr p 46 (46) (DB) \* ('72-92) 1872-1892 Low Bur Rul 363 (364).

[4] It should not be general but should be directed to particular individuals. ('83) 12 Cal L R 231 (232) (DB) \* ('87) 1887 Rat 342 (342, 343) (DB) \* (Vol 3) 1916 Bom 122 (123) : 18 Cri L Jour 137 (DB) \* ('70) 14 Suth W R 177 (177) \* ('72-92) 1872-92 Low Bur Rul 363 (364) \* (Vol 15) 1928 All 300 (301) : 29 Cri L Jour 445.

[5] The order must be definite. (Vol 4) 1917 Cal 207 (208) : 44 Cal 61 : 17 Cri L Jour 409 (DB) (Vague order set aside) \* (Vol 12) 1925 All 310 (310) : 26 Cri L Jour 731 (Demolition ordered—Portion must be marked) \* (Vol 2) 1915 Cal 402 (402) : 16 Cri L Jour 160 (160) (DB) (Do) \* (Vol 4) 1917 Cal 207 (208) : 44 Cal 61 : 17 Cri L Jour 409 (DB) (Proceedings against a number of persons—Order must state specific obstruction by each) \* (Vol 15) 1928 Lah 187 (188) : 28 Cri L Jour 1036 (Do).

[6] The time specified in the order runs from the date of the order and not of the service on the person, and if it is served after the expiry of such time, the order is a nullity and all the consequent proceedings thereon are void. ('72) 1 Bom PJ 282 (283).

[7] The form in which the order is expressed is such as not to amount to an injunction. (Vol 25) 1938 Nag 84 (85) : ILR (1938) Nag 348 (DB).

**21. Directions in the order.**—[1] The list of the matters in respect of which the Magistrate is empowered to pass orders is exhaustive. ('93) 1893 All W N 145 (145).

[2] The section does not confer general powers to pass orders on any matter he may consider necessary. ('74) 22 Suth W R Cr 19 (19) (DB).

[3] It was held in the following cases that the Magistrate could not pass orders under this section under the particular circumstances of each case. ('93) 1893 All W N 145 (145). (Drinking water) \* (1904) 1 Cri L Jour 916 (917) All (Limiting cultivation) (1900) 1900 All W N 138 (138) (Constructing new drain) \* (Vol 12) 1925 Cal 399 (400) : 26 Cri L Jour 517 (DB) (New bund) \* ('83) Oudh SC No. 60 p 63 (69) (Building pig sties) \* ('07) 6 Cri L Jour 370 (371) (DB) (Cal) (Cremation prohibited) \* ('75) 24 Suth W R Cr 6 (7) (Do) \* ('80) 2 Weir 66 (67) (Delivering custody of children).

[4] Where the obstruction to road was by the fence, order should be for removal of the fence and not of the house itself. ('04) 1 Cri L Jour 669 (671) (DB) (Rang).

[5] Latrine in such a condition as to be a nuisance—Order should be to abate nuisance and not to remove latrine. (Vol 22) 1935 All 926 (927) : 37 Cri L Jour 347 \* ('02) 4 Bom L R 882 (882) (DB) \* ('10) 7 All L Jour 53n (54n).

[See (Vol 23) 1936 Pat 409 (410).]

Service or notification  
of order.  
summons.

134. (1) The order shall, if practicable, be served on the person against whom it is made, in manner herein provided for service of a

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the [Provincial Government] may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

[1882—S. 134; 1872—S. 522; 1861—S. 309].

[a] Substituted by A. O. for "Local Government".

### Section 133 (contd)

[6] Nuisance caused by accumulation of filth and want of space to clear drainage—Order should be to abate nuisance and not to pull down the wall. (10) 11 Cri L Jour 665 (667) (Cal).

[7] Cooking beef in a burning ghat—Order should be to remove nuisance and not to remove the ghat. (98) 25 Cal 425 (431) (DB).

[8] Cooking beef in a cooking shop—Nuisance—Order should be to abate nuisance and not to close the shop. (68) 1868 Pun Re No. 15 Cr p 36 (88) (DB).

[9] While stopping a brick kiln, the order cannot direct the filling up the pits made for the purpose. (Vol 16) 1929 All 114 (115): 51 All 489: 30 Cri L Jour 561.

[10] Sparks from a forge likely to set fire to cotton in a factory—Order should be to so construct the forge anew as not to be a nuisance, and not be to have the forge removed. (96) 1896 Rat 872 (872) (DB).

[11] Branch of tree likely to endanger human life—Order should not be to cut it down but to secure the safety to the public, by directing a proper support to be given. (Vol 11) 1924 All 667 (668): 26 Cri L Jour 104.

[12] In the case of a tank, well, or excavation, the order should be to fence the same and not to fill or repair them. (68) 10 Suth WR Cr 27 (27) \* (Vol 16) 1929 All 114 (115): 51 All 489: 30 Cri L Jour 561 (DB) (Excavations) \* (98) 22 Bom 714 (715) (DB) \* (74) 22 Suth WR Cr 19 (19) (DB).

[But see (71) 1871 Rat 50 (50). (Repairs) \* (68) 10 Suth WR Cr 27 (27) (DB) \* (68) 10 Suth WR Cr 51 (52) (DB) (Order directing filling up a particular way is improper).]

[13] Flour mills causing vibrations to neighbouring buildings—It was held to be a case for regulating the working, and not for closing it. (Vol 26) 1939 Bom 92 (95): 40 Cri L Jour 444 (DB).

[14] In this case, certain butchers were ordered to desist from carrying on their business. (Vol 26) 1939 Pat 182 (185): 40 Cri L Jour 518: 17 Pat 669 (DB).

22. "To appear before himself or some other Magistrate of the first or second class".—[1] Party demanding jury under S. 135—Matter can be disposed of only by the Magistrate who issued order and not by any other Magistrate. (Vol 30) 1943 Pat 115 (116): 21 Pat 759: 44 Cri L Jour 364 (DB) \* (Vol 14) 1927 Pat 265 (266): 6 Pat 428: 28 Cri L Jour 910.

[2] Where the person appears before the Magistrate in obedience to his order, the Magistrate has no power at that stage to send the case for disposal to another Magistrate. (Vol 25) 1938 Lah 323 (324): 39 Cri L Jour 608: 47 Cr L Jour 29 (DB) \* (47) 49 Pun LR 8 (9).

[3] Case transferred at appearance stage—Order of transfer is only irregular and not one affecting the jurisdiction of the Magistrate to whom the case is transferred. (Vol 32) 1945 Pat 334 (335): 24 Pat 16: 47 Cr L Jour 29 (DB) \* (Vol 32) 1945 Pat 316 (317): 24 Pat 23: 47 Cr L Jour 179 (DB).

[But see (47) 49 Pun LR 8 (9).]

23. "And move to have the order set aside or modified."—[1] In suitable cases the order initially made may not only be set aside, but may be modified and the modified order be allowed to stand. (Vol 12) 1925 All 310 (311): 26 Cri L Jour 731.

24. Parties to order.—[1] The order binds only the person against whom it is passed. (Vol 22) 1935 All 79 (80): 36 Cri L Jour 144.

25. Effect of death of party.—[1] Person proceeded against dying—Separate proceedings against successor-in-interest must be taken, if deemed necessary. (Vol 15) 1928 All 300 (301): 29 Cri L Jour 445.

26. Jurisdiction of Civil Courts.—Sub-section (2) —[1] The object of the provision is to enable Magistrate to make speedy orders. (Vol 8) 1921 Bom 29 (30): 22 Cri L Jour 605 (DB) \* (Vol 16) 1929 All 833 (833): 51 All 1025: 31 Cri L Jour 302.

[2] Order under the section should be passed sparingly and with great caution. (Vol 2) 1915 Cal 168 (169): 42 Cal 158: 15 Cri L Jour 698 (DB) \* (03) 1908 Pun Re No. 3 Cr p 4 (8).

27. Costs.—[1] In proceedings under the section an order for costs is improper. (Vol 12) 1925 Cal 399 (401): 26 Cri L Jour 517.

28. Further enquiry.—[1] Any order for further enquiry into a matter coming under this section is *ultra vires*. (Vol 12) 1925 Oudh 736 (736): 26 Cri L Jour 1251 \* (10) 14 Cal WN 1v (iv) (DB).

[See (98) 25 Cal 425 (428) (DB).]

[2] Magistrate may himself revive a proceeding or draw up fresh proceedings under this section with respect to matter previously dropped by himself. (1900-01) 5 Cal WN 173 (174) \* (Vol 18) 1931 Cal 2 (3): 32 Cri L Jour 189 (DB) (Fresh proceedings).

29. Revision.—[1] The High Court will not, in revision, interfere with an order under S. 133 Cr P C merely because the procedure of the Magistrate was irregular. The High Court will only interfere if substantial injustice has been done. (Vol 29) 1942 All 443 (444): 44 Cri L Jour 76.

[2] A person invoking the revisional jurisdiction of the High Court is bound to apply first to the Sessions Judge or the District Magistrate. (Vol 11) 1924 All 1 (4): 45 All 656: 24 Cr L Jour 817 (DB) \* (Vol 8) 1921 Cal 76 (76): 48 Cal 534: 22 Cr L Jour 650 (DB).

### SECTION 134—Note 1.

[1] The word "person" includes any company or association or body of persons whether incorporated or not. (Vol 10) 1923 Lah 525 (527): 4 Lah 224: 24 Cri L Jour 457 (DB) (Includes all male adults in a mohalla).

[2] The order cannot be affixed as provided by S. 71 unless it is found that it cannot be served as provided by S. 69 and 70. (Vol 13) 1926 Cal 1208 (1209): 27 Cri L Jour 715 (DB).

[3] Proclamation must be issued only when the order cannot be served either personally or on some

Person to whom order is addressed to obey or show cause or claim jury.

### 135. The person against whom such order is made shall—

- (a) perform, within the time <sup>a</sup>[and in the manner] specified in the order, the act directed thereby; or
- (d) appear in accordance with such order and either show cause against the same, or apply to the Magistrate by whom <sup>a</sup> was made to appoint a jury to try whether the same is reasonable and proper.

[1882—S. 135; 1872—S. 523, para 1; 1861—S. 310.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 25.

**136.** If such person does not perform such act or appear and show cause or apply for consequence of his the appointment of a jury as required by section 135, he shall be liable to failing to do so, the penalty prescribed in that behalf in section 138 of the Indian Penal Code, and the order shall be made absolute.

[1882—S. 136; 1872—S. 525; 1861—S. 311.]

#### Section 134 (contd.)

adult male members of the family. (Vol 22) 1935 Cal 251 (252): 36 Cri L Jour 736.

[4] Where there is knowledge of the order issued, the irregularity in the procedure adopted in bringing it to the notice of party is immaterial. ('66) 5 Suth WR Cr 4 (4) (DB) \* (Vol 16) 1929 Bom 433 (436): 54 Bom 35: 31 Cri L Jour 495 (DB)\* ('89) 12 Mad 475 (477) (DB)\* (Vol 10) 1923 Lah 525 (527): 4 Lah 224: 24 Cri L Jour 457 (DB)\* (1900) 1900 Pun Re No. 2 Cr p 3 (6, 7) (DB)\* ('89) 16 Cal 9 (12) (DB) (Irregularity is one curable under S. 537).

#### SECTION 135—Note 1. ♦

[1] This section enables a party, against whom an order under S. 133 is made, to do any of the things mentioned in this section. ('10) 11 Cri L Jour 1 (2) (DB) (Cal) \* ('07) 5 Cri L Jour 97 (99) (DB) (Bom) \* ('89) 12 Mad 475 (477) (DB) \* (Vol 7) 1920 Mad 378 (378): 43 Mad 316: 20 Cri L Jour 761.

[2] An opportunity is given under this section to the party, against whom the conditional order is made, to contest the validity of the order in view of the fact that the proceedings under S. 133 are *ex parte* in the first instance. (Vol 4) 1917 Cal 207 (207, 208): 44 Cal 61: 17 Cri L Jour 409 (DB).]

[3] Conditional order based on report that a flour mill causes vibration to two neighbouring houses—Subsequently evidence given that the flour mill causes nuisance to general public—Person against whom order is passed is not bound to disprove the latter allegation. (Vol 26) 1939 Bom 92 (95): 40 Cri L Jour 444 (DB).

[4] Order of Magistrate against a party under S. 133—Accused appearing to show cause—Magistrate must proceed under S. 137. ('99) 1 Bom LB 783 (784) (DB).

[5] Under the S. 139-A, a party can set up a private claim, and if the Magistrate finds that there is no reliable evidence to support that claim, he can still apply for a jury under this section. (Vol 28) 1941 Pat 370 (370): 42 Cri L Jour 784: (Vol 20) 1933 Cal 318: 34 Cri L Jour 532 (DB) relied on \* (Vol 20) 1933 Cal 318 (319): 34 Cri L Jour 532 (DB).

[6] Where the person against whom the conditional order has been passed does not deny the public right under S. 139-A, it is not open to him to apply to show cause against the order and at the same time apply for the appointment of a jury. (Vol 27) 1940 Sind 24 (25): LJR (1939) Kar 179: 41 Cri L Jour 364 (DB).

[7] The Magistrate to whom the case is sent under S. 133 has no jurisdiction to entertain an application under this section. (Vol 30) 1943 Pat 115 (116): 21 Pat 759: 44 Cri L Jour 364 (DB) \* (Vol 14) 1927 Pat 265 (266): 6 Pat 428: 28 Cri L Jour 910 \* ('86) 9 Mad 201 (202) (DB).

[8] The only purpose for which a jury is appointed is to try the question whether the order of the Magistrate is reasonable and proper. ('99) 26 Cal 869 (870) (DB) \* (Vol 2) 1915 Cal 113 (114): 15 Cri L Jour 515 (DB)\* ('10) 11 Cri L Jour 305 (305) (DB) (Cal) (Jury not to decide on questions of *bona fide* claim of right)\* (1904) 31 Cal 979 (982) (DB).

[9] Party served with conditional order applied for appointment of jury—Jury submitted its finding, setting up a *bona fide* claim of private right not open to the party—That right held deemed to be abandoned and waived by him. (Vol 18) 1931 All 257 (258): 32 Cri L Jour 565 \* (Vol 1) 1914 Low Bur 31 (32): 15 Cri L Jour 259 \* (1908) 8 Cri L Jour 1 (36): 30 All 364.

[10] An order under this section can be revised by the High Court. ('85) 1885 Pun Re No. 42 Cr p 89 (89) (DB) \* ('04) 1 Cri L Jour 514 (517): 1904 Pun Re No. 8 Cr \* (Vol 15) 1928 All 627 (628, 639): 50 All 871: 29 Cri L Jour 661.

[11] Sessions Judge has no jurisdiction to order further enquiry where a Magistrate abstains from further proceedings on the ground that the order under S. 133 is not reasonable and proper. ('97) 24 Cal 395 (398) (DB).

#### SECTION 136—Note 1.

[1] The object of Chapter X is to enable the Magistrate to make speedy orders and deal speedily with cases where a public nuisance has been committed. (Vol 8) 1921 Bom 29 (30): 22 Cri L Jour 605 (DB).

[2] The provisions of this section are stringent, the intention of the law being to create facilities for conditional orders becoming final without needless delay and thereby promptly to ensure public safety. ('89) 12 Mad 475 (478) (DB).

[3] Order under S. 133 passed—Accused appearing and protesting under S. 135—Order cannot be made absolute—Magistrate must proceed under S. 137. (Vol 9) 1922 All 335 (336): 25 Cri L Jour 266 \* ('76) 24 Suth WR Cri 7 (7).

Procedure where he appears to show cause.

137. (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

[1882—S. 137; 1872—S. 527; 1861—S. 313].

#### Section 136 (contd.)

[4] Preliminary order under S. 133 passed against a lady observing purdah—Her servant appearing requesting for time—Time refused and order made absolute. *Held*, sufficient time having not been given to show cause order cannot be made absolute. (1946) 2 MLJ 271 (272).

[5] No notice is necessary to the person not complying with S. 135, before he is prosecuted therefor. ('08) 8 Cri L Jour 151 (152) : 31 Mad 280.

[6] Where the order under S. 133 is made absolute, it is necessary that under S. 140, a notice should be given to the person that in case of disobedience of the order within a time fixed by the Court, he will be liable to the penalty under S. 188 of the Penal Code. ('08) 8 Cri L Jour 151 (151) : 31 Mad 280.

[7] Disobedience of the Magistrate's order cannot be held to take place till after the expiry of the term fixed in the order for carrying it out. ('82) 1882 All WN 232 (233).

[8] A conditional order made against a person fixing the 14th of August 1916 for his appearance but he failed to appear—Nothing further was done till 11th September 1920—*Held* that it was improper to revive the proceeding in 1920, and if there was a nuisance in 1920, the proceeding should have been recommenced under S. 133. (Vol 8) 1921 Bom 29 (30) : 22 Cri L Jour 605 (DB).

[9] Magistrate being lawfully empowered makes an order under S. 133 against a person—That person fails to act in one of the ways specified in S. 135—Order presumed to be correctly made—Such person cannot, in subsequent proceedings question the order. ('89) 12 Mad 475 (477, 478) (DB) \* ('91) 13 All 577 (579) (12 Mad 475 followed).

[10] Magistrate having no jurisdiction and not being empowered passes order against a person under S. 133—That person fails to act in one of the ways mentioned in S. 135—Failure does not disentitle him to question validity of order in subsequent proceedings against him. ('88) 20 All 501 (506) (DB) (('89) 12 Mad 475 and ('91) 13 All 577 Distinguished on point of jurisdiction.)

[11] There is no express provision in the Code for setting aside orders absolute *ex parte* but that on general principles Courts are entitled to set aside such orders, if they are satisfied with the reasons given for the absence of the party. (Vol 4) 1917 Pat 124 (125) : 19 Cri L Jour 214.

#### SECTION 137—Synopsis.

1. Scope of the section.
2. "The Magistrate".
3. "Shall take evidence in the matter."
4. "As in a summons-case".
5. Burden of proof.
6. Summons to witnesses.
7. Sub-section (2).

8. "If the Magistrate is not so satisfied."

9. "The order shall be made absolute."

10. Abatement of nuisance pending proceeding.

11. Effect of the order being made absolute.

12. High Court's powers of revision.

1. Scope of the section.—[1] In cases of public right the Magistrate should question the person proceeded against whether he denies the existence of such right in respect of such way, etc., and if he denies it the matter should first be enquired into. (Vol 30) 1943 Pat 3 (3) : 43 Cri L Jour 923 \* (Vol 28) 1941 Oudh 271 (272) : 42 Cri L Jour 241.

[2] Where there is no reliable evidence in inquiry about public right in support of denial of that right the procedure in this section is to be adopted. (Vol 25) 1938 All 653 (654) : 40 Cri L Jour 143 \* (Vol 24) 1937 Lah 676 (677) : 38 Cri L Jour 1056 \* (Vol 23) 1936 All 150 (151) : 37 Cri L Jour 422 \* (Vol 23) 1936 Pat 639 (640) : 38 Cri L Jour 29 \* (Vol 23) 1936 Pat 360 (361) : 37 Cri L Jour 846 (DB).

[3] Where the way alleged to have been encroached upon was a P.W.D. Road and this fact was not in controversy between the parties it was held that had the question been put to the person the answer must necessarily have been in the negative and therefore the procedure of the Magistrate in taking up forthwith the enquiry under this section was only an irregularity not affecting the merits. (Vol 30) 1943 Pat 3 (4) : 43 Cri L Jour 923.

[4] Where there is reliable evidence in support of the denial of public right the proceedings under this chapter should be stayed until the matter of the existence of such right is decided by a competent Civil Court. (Vol 26) 1939 Mad 465 (466) : ILR (1939) Mad 1030 : 40 Cri L Jour 813.

[5] The provisions of this chapter are not intended to apply to cases where the party has a *bona fide* claim of title. (Vol 10) 1923 Oudh 152 (153) : 24 Cri L Jour 635 \* (Vol 10) 1923 Oudh 22 (23) : 24 Cri L Jour 494 \* (Vol 18) 1931 Lah 62 (63) : 32 Cri L Jour 621 \* ('03) 1903 Pun Re No. 2 Cr p 4 (7) \* (Vol 20) 1933 Cal 790 (791) : 35 Cri L Jour 89 (DB) \* (Vol 17) 1930 Cal 486 (486) : 57 Cal 368 : 32 Cri L Jour 33 (DB).

2. "The Magistrate".—[1] The word "Magistrate" in the section will include both the Magistrate who made the order and the Magistrate before whom the party is required to appear under S. 133. ('99) 2 Wei 61 (61) (DB) \* ('04) 1 Cri L Jour 669 (671) : 10 Bu LR 130 \* (Vol 30) 1943 Pat 115 (116) : 44 Cri L Jour 364 : 21 Pat 759 (DB).

[2] Where a party is required to appear before Magistrate other than the one who made the order, the former can take evidence in the matter. ('86) 9 Ma 201 (202) (DB) \* ('98) 25 Cal 278 (280) (DB) (9 Ma 201 followed).

[3] The Magistrate who made the order can, on the evidence so taken, make the conditional order absolute. (Vol 11) 1924 Pat 418 (419) : 24 Cri L Jour 690.



## Section 137 (contd.)

[4] A Magistrate of the second class not competent to make a conditional order can pass the final order under this section if the case is transferred to him by the Magistrate making the conditional order. (Vol 32) 1945 Pat 334 (336) : 24 Pat 16 : 47 Cri L Jour 29 (DB).

3. "Shall take evidence in the matter".—[1] Conditional order under S. 133 served on a party—Party appearing to show cause—Magistrate must record evidence in the matter before making the order absolute. (Vol 4) 1917 Cal 800 (800) : 18 Cri L Jour 738 (DB) \* (Vol 23) 1936 Pat 577 (578) : 37 Cri L Jour 1159 \* (27) 28 Cri L Jour 60 (61) (Lah) \* (Vol 4) 1917 Pat 124 (125) : 19 Cri L Jour 214 \* (Vol 18) 1931 Oudh 397 (397) : 32 Cri L Jour 1165 \* (Vol 14) 1927 Oudh 26 (27) : 27 Cri L Jour 1254 \* (Vol 11) 1924 Lah 392 (392) : 24 Cri L Jour 615 \* (Vol 16) 1929 Cal 21 (21) : 30 Cri L Jour 973 (DB) \* (87) 11 Bom 375 (375, 376) (DB) \* (99) 1 Bom LR 733 (734) (DB) \* (Vol 14) 1927 All 384 (384) : 49 All 453 : 28 Cri L Jour 294 \* (Vol 14) 1927 All 267 (268) : 49 All 270 : 28 Cri L Jour 159 \* (Vol 3) 1916 Cal 151 (152) : 42 Cal 702 : 18 Cri L Jour 415 (DB).

[2] The Magistrate must give judicial decision on the evidence recorded. (Vol 26) 1939 Bom 92 (93) : 40 Cri L Jour 444 (DB) \* (01) 1901 Pun LR No. 147, P. 371 (372).

[3] The Magistrate cannot make a conditional order absolute merely :

(a) On the result of his local inspection. (Vol 26) 1939 Bom 92 (93) : 40 Cri L Jour 444 (DB) \* (Vol 8) 1921 Oudh 147 (147) : 24 Oudh Cas 267 : 22 Cri L Jour 765 \* (Vol 6) 1919 Cal 153 (153) : 20 Cri L Jour 322 (DB) \* (Vol 14) 1927 All 350 (351) : 49 All 475 : 28 Cri L Jour 291 \* (Vol 21) 1934 All 325 (326) : 35 Cri L Jour 708 \* (Vol 22) 1935 Lah 28 (29) : 37 Cri L Jour 70 \* (Vol 21) 1934 Pat 316 (316) : 35 Cri L Jour 1020.

(b) On his personal opinion. (Vol 3) 1916 Mad 304 (304) : 18 Cri L Jour 207 \* (Vol 14) 1927 All 825 (826) : 28 Cri L Jour 510 \* (Vol 22) 1935 Lah 28 (29) : 27 Cri L Jour 70.

(c) On the report of a *tahsildar* or *panchayatdar*. (Vol 13) 1926 All 193 (193) : 27 Cri L Jour 276 \* (Vol 14) 1927 Oudh 26 (27) : 27 Cri L Jour 1254.

(d) On arbitration, even if the parties consent thereto. (Vol 14) 1927 All 267 (268) : 49 All 270 : 28 Cri L Jour 159 \* (Vol 4) 1917 Cal 800 (800) : 18 Cri L Jour 733 (DB) \* (21) 22 Cri L Jour 327 (328) (Pat).

(e) On the evidence recorded or information or report received at the time of the conditional order. (Vol 26) 1939 Bom 92 (93) : 40 Cri L Jour 444 (DB) \* (Vol 4) 1917 Cal 207 (208) : 44 Cal 61 : 17 Cri L Jour 409 (DB) ((97) 24 Cal 395 (DB) followed).

[4] The Magistrate cannot refuse to take evidence on the ground that the objections were filed beyond the time allowed, provided they are filed before the case is taken up. (68) 10 Suth WR Cr 27 (27) (DB) \* (77) 26 Suth WR Cr 7 (7).

[5] The fixing of an arbitrary time limit for the cross-examination of witnesses is improper. (Vol 8) 1921 Cal 118 (118) : 22 Cri L Jour 524 (DB).

[6] Evidence recorded by Magistrate under S. 139A is treated same as evidence under S. 137 on request of parties—Order not illegal. (Vol 32) 1945 Oudh 108 (108) : 47 Cri L Jour 305.

[7] Conditional order against a person for obstruction of public way passed—Person denying the public right of way in the inquiry under S. 139—Order made absolute by Magistrate without recording evidence under S. 137—Order illegal and defect not curable. (Vol 34) 1947 Oudh 65 (66) : 47 Cr L J 398.

4. "As in a summons case".—[1] The opposite party may cross-examine the complainant's witnesses and then produce his evidence if so advised. (09) 10 Cri L Jour 297 (298) : 31 All 453 (DB) \* (Vol 5) 1918 Mad 934 (934) : 18 Cri L Jour 848 \* (Vol 4) 1917 Lah 243 (244) : 1917 Pun Re No. 32 Cr : 18 Cri L Jour 888 \* (97) 24 Cal 395 (398) (DB) \* (Vol 12) 1925 All 614 (614) : 47 All 341 : 26 Cri L Jour 905 \* (Vol 17) 1930 Lah 662 (664) : 11 Lah 247 : 31 Cri L Jour 880.

5. Burden of proof.—[1] The burden of proof in an inquiry under this section is on the prosecution. (Vol 26) 1939 Bom 92 (95) : 40 Cri L Jour 444 (DB) \* (Vol 23) 1936 Pat 639 (640) : 38 Cri L Jour 29.

6. Summons to witnesses.—[1] The person proceeded against is entitled to apply to the Court to compel the attendance of his witnesses by issuing summons and the Court should do so, if necessary. (02) 6 Cal WN 548 (550) \* (03) 13 Cal WN cclxxxiii.

7. Sub-section (2).—[1] The dropping of proceedings initiated by an order under S. 133 can be done only after the evidence is recorded under sub-s. (1) and the Court is satisfied on such evidence that the preliminary order was not reasonable and proper. (Vol 7) 1920 Cal 834 (834, 835) : 22 Cri L Jour 239 (DB).

[2] The existence of a genuine dispute as to title suitable for decision by a Civil Court may be sufficient to show that the order was not reasonable and proper. (Vol 10) 1923 Oudh 152 (153) : 24 Cri L Jour 635 \* (Vol 10) 1923 Oudh 22 (23) : 24 Cri L Jour 494 \* (98) 25 Cal 278 (282) (DB) \* (Vol 8) 1921 Cal 118 (118) : 22 Cri L Jour 524 (DB).

8. "If the Magistrate is not so satisfied".—[1] Party appears to show cause against preliminary order—Inquiry started—Party fails to appear at subsequent hearing—Magistrate cannot make the order absolute without any evidence. (1900) 2 Bom LR 818 (819) (DB).

[2] Magistrate passing conditional Order—Party required to appear before him—He must take the evidence and act upon it—Proceedings cannot be forwarded to another Magistrate for recording evidence. (Vol 9) 1922 Bom 384 (384) : 47 Bom 89 : 23 Cri L Jour 587 (DB).

9. "The order shall be made absolute".—[1] Provisional order cannot be made absolute :

(a) If no preliminary order exists. (Vol 8) 1921 Bom 29 (30) : 22 Cri L Jour 605 (DB).

(b) If the preliminary order was illegal as being made without jurisdiction. (90) 1890 Rat 516 (518) (DB).

(c) If the preliminary order was too vague and indefinite. (10) 11 Cri L Jour 213 (214) (DB) (Cal).

[2] The modification of the provisional order can only be made on the recommendation of a jury under S. 139 and not by Magistrate himself under this section. (Vol 30) 1943 Mad 335 (336) : 44 Cri L Jour 545.

[3] An order cannot be made absolute except on clear proof that the act complained of is a nuisance and a removal thereof is quite necessary. (88) 1888 Pun Re No. 17 Cr p 51 (82) (DB).



## Section 137 (contd.)

[4] Where the Magistrate confirms an order under this section, he should lay down fully the grounds on which he acted, and in deciding on the objections of the parties, he ought to record in each case the grounds of his rejection of such objection. ('11) 7 Beng L R 482n (483n) \* (Vol 8) 1921 Cal 118 (118) : 22 Cri L Jour 524 (DB).

[5] A verbal order issued under S. 133 cannot amount to or have the force of an order made absolute under this section. (Vol 2) 1915 Cal 741 (742) : 16 Cri L Jour 24 (DB).

[6] The Magistrate cannot make an order absolute under this section on grounds different from those on which the preliminary order under S. 133 was issued. (Vol 7) 1920 Lah 258 (259) : 1 Lah 163 : 21 Cri L Jour 462.

[7] A substantive order for the removal of the obstruction must be made. (Vol 23) 1936 Pat 360 (361) : 37 Cri L Jour 846.

[8] The fact that a Magistrate has made an order under S. 142 which has been complied with does not preclude him from proceeding with the case and making a final order under this section. (Vol 23) 1936 Cal 692 (693) : 38 Cri L Jour 173 (DB).

[9] Magistrate transferring case for disposal to another Magistrate, not by conditional order but after the person appears and shows cause—Final order by another Magistrate is not without jurisdiction. (Vol 32) 1945 Pat 334 (335) : 24 Pat 16 : 47 Cri L Jour 29 (DB).

10. Abatement of nuisance pending proceeding.—[1] Conditional order under S. 133 passed—Nuisance ceased to exist—Order should not be made absolute. (Vol 23) 1936 Pat 577 (578) : 37 Cri L Jour 1159.

11. Effect of the order being made absolute.—[1] Once a Magistrate confirms a conditional order under this section, his successor in office cannot go behind it and question its legality. (Vol 27) 1940 Oudh 75 (77) : 15 Luck 140 : 41 Cri L Jour 99 \* (Vol 10) 1923 Cal 589 (589) : 24 Cri L Jour 317 (DB).

12. High Court's powers of revision.—[1] An order absolute under this section can be varied or confirmed by the High Court in revision. (Vol 16) 1929 All 220 (222) : 30 Cri L Jour 670.

[2] The provisions of this section being mandatory, an order passed in contravention thereof is not merely an irregularity but is an illegal order made without jurisdiction. (Vol 14) 1927 All 850 (851) : 49 All 475 : 23 Cri L Jour 291 \* (Vol 14) 1927 All 267 (268) : 28 Cri L Jour 159 : 49 All 270.

[3] The High Court will interfere in revision :

(a) Where the Magistrate fails to take evidence but confirms an order on information which is not legal evidence. (Vol 17) 1930 Lah 662 (664) : 11 Lah 247 : 31 Cri L Jour 880 \* (Vol 11) 1924 Lah 392 (392) : 24 Cri L Jour 615 \* (Vol 3) 1916 Mad 304 (304) : 16 Cri L Jour 207 \* (Vol 18) 1931 Oudh 397 (397) : 32 Cri L Jour 1165 \* ('07-08) 12 Cal W N cccxlii (cccxlili) \* ('87) 11 Bom 375 (376), (DB) \* ('99) 1 Bom L R 783 (784) (DB) \* (Vol 14) 1927 All 350 (351) : 49 All 475 : 28 Cri L Jour 291 \* ('10) 11 Cri L Jour 1 (2) (Cal) (Order absolute solely on local inspection with consent of parties)

\* (Vol 4) 1917 Pat 509 (510) : 18 Cri L Jour 448 (Order absolute on local inspection). \* (Vol 6) 1919 Pat 172 (173) : 20 Cri L Jour 217 (Order absolute on local inspection with consent) \* (Vol 14) 1927 All 384 (384) : 49 All 453 : 28 Cri L Jour 294 \* (Vol 14) 1927 Oudh 26 (27) : 27 Cri L Jour 1254.

(b) Where the Magistrate calls upon the person served with notice to produce his evidence as if the onus is on him and then considering that the evidence is of no weight makes the order absolute. ('09) 10 Cri L Jour 297 (299) : 31 All 453 (DB) \* (Vol 4) 1917 Lah 243 (244) : 1917 Pua Re No. 32 Cr : 18 Cri L Jour 888 \* (Vol 15) 1928 Cal 96 (97) : 28 Cri L Jour 559 (DB) \* ('13) 15 Cri L Jour 23 (23) (All).

(c) Where he confirms the preliminary order on the evidence recorded by another Magistrate. (Vol 9) 1922 Bom 384 (384, 385) : 23 Cri L Jour 587 : 47 Bom 89 (DB).

(d) Where he drops the proceedings under this section without recording evidence as required by sub-S. (1). (Vol 7) 1920 Cal 834 (834, 835) : 22 Cri L Jour 239 (DB) \* (Vol 16) 1929 Cal 21 (21) : 30 Cri L Jour 973 (DB).

(e) Where he declines to take evidence because the objections were filed beyond the time allowed by the Court though filed before the case is actually taken up. ('68) 10 Suth W R Cr. 27 (27) (DB).

(f) Where he refuses to issue summons to the witnesses of the party showing cause in order to compel their attendance. ('01-02) 6 Cal W N 548 (550).

(g) Where he does not allow sufficient opportunity to the party to show cause by arbitrarily fixing the time limit for the examination of his witnesses or otherwise. ('07) 5 Cri L Jour 1 (2) \* (Vol 8) 1921 Cal 118 (118) : 22 Cri L Jour 524 (DB) \* (Vol 15) 1928 Cal 879 (879) : 30 Cri L Jour 622 (DB).

(h) Where an order absolute is made without reasonable and sufficient grounds. (Vol 10) 1923 Oudh 22 (23) : 24 Cri L Jour 494 \* ('71) 7 Beng L R 516 (535) (DB) \* (Vol 10) 1923 Oudh 152 (153) : 24 Cri L Jour 635 \* ('11) 12 Cri L Jour 146 (148) (Lah).

(i) Where the order contains no finding on the question of *bona fides* of the objection of the party showing cause. (Vol 10) 1923 Pat 540 (541) : 24 Cri L Jour 855 \* ('98) 2 Cal W N 554 (556) (DB).

(j) Where he decides on the merits the question of title without leaving the same to the decision of a Civil Court. (Vol 17) 1930 Cal 486 (486) : 57 Cal 368 : 32 Cri L Jour 33 (DB) \* ('05) 2 Cri L Jour 517 (518) : 28 All 99 \* ('03) 7 Cal W N 117 (118) (DB).

(k) Where, when the opposite party denies the existence of a public right in respect of the place in question, the Magistrate instead of proceeding under S. 139A, passes an order under this section after taking evidence on both sides. (Vol 26) 1939 Mad 465 (466) : 1 L R (1939) Mad 1030 : 40 Cri L Jour 813 \* (Vol 23) 1936 Pat 360 (361) : 37 Cri L Jour 846.

[4] Where the Magistrate has dropped proceeding under sub-S. (2), the High Court will not interfere and consider the value of evidence on which the Magistrate decided so to act. ('82) 8 Cal 883 (884) (DB).

Procedure where he 138. (1) On receiving an application under section 135 to appoint a claims jury. jury, the Magistrate shall—

- (a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;
- (b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and
- (c) fix a time within which they are to return their verdict.

(2) The time so fixed may, for good cause shown, be extended by the Magistrate.

[1882—S. 138; 1872—Ss. 523 paras 2, 5, 524; 1861—S. 310.]

#### SECTION 138—Synopsis.

1. Object of the section.
  2. "Forthwith appoint".
  3. "The Magistrate".
  4. "Uneven number of persons not less than five".
  5. Nomination of members of jury, how made.
  6. Duty of jurors.
  7. Summons to jurors.
  8. Fresh jury.
  9. Pendency of Civil suits.
  10. Appeal and revision.
1. Object of the section.—[1] The object in providing for a jury is to check the summary and arbitrary dealing with the rights of property. (1864-1866) 2 Bom HCR Cr 384 (386) (DB).
2. "Forthwith appoint".—[1] When a person demands the appointment of a jury, the Magistrate has no discretion to refuse to do so. ('09) 10 Cri L Jour 494 (495) (DB) (Cal) \* ('67) 8 Suth W R Cr 37 (37) (DB) \* ('83) 2 Weir 63 (63) \* ('85) 1885 Pun Re No. 42 Cr p 89 (89) (DB) \* ('87) 1887 Pun Re No. 19 Cr P 39 (39) (DB) \* (Vol 28) 1941 Pat 370 (370): 42 Cri L Jour 784 (Even where there is no reliable evidence to support the denial, appointment is compulsory)\* (Vol 20) 1933 Cal 318 (319): 34 Cri L Jour 532 (DB) (Do).
- [2] He cannot decide the matter by making a local inquiry himself. ('78) 2 Cal L Rep. 509 (509, 510).
- [3] "Forthwith" merely means as soon as it is reasonable. (Vol 10) 1923 Lah; 525 (527): 4 Lah 224: 24 Cri L Jour 457 (DB).]
3. "The Magistrate".—[1] The Magistrate who passed the conditional order under S. 133 cannot refer the matter for disposal to another Magistrate, if a jury is demanded. ('98) 25 Cal 278 (280) (DB) \* (Vol 14) 1927 Pat 265 (266): 6 Pat 428: 28 Cri L Jour 910 \* (Vol 7) 1920 Mad 378 (378, 379): 43 Mad 316: 20 Cri L Jour 761.
4. "Uneven number of persons not less than five".—[1] A jury of only three persons will not be a properly constituted one and an order based on the verdict of such a jury will be invalid. ('21) 22 Cri L Jour 511 (512) (DB) (Cal).
- [2] Where one out of the five jurors dies, or is ill or refuses to act or for some other cause remains absent, the decision of the jury will be wholly void and the Magistrate cannot act upon that finding. ('10) 11 Cri L Jour 402 (402) (DB) (Cal) \* ('01) 23 All 159 (162) (DB) \* ('85) 11 Cal 84 (85) (DB) \* ('86) 13 Cal 375 (379) (DB).

5. Nomination of members of jury, how made.—[1] In making nominations of the jurors and of the foreman, the following should be noted by the Magistrate:

- (a) The Magistrate cannot delegate the function to anyone else. ('89) 1889 Rat 460 (460) (DB).
  - (b) He cannot nominate less than half the number of Jurors. ('81) 10 Cal L Rep 193 (196).
  - (c) He cannot nominate entire jury himself. (Vol 15) 1928 Lah 187 (188): 28 Cri L Jour 1036.
  - (d) He should not merely accept the persons put forward by the complainant. (Vol 16) 1929 Bom 79 (80, 81): 30 Cri L Jour 785 (DB) \* ('96) 23 Cal 499 (501) (DB).
  - (e) He should not select persons who will be interested in upholding his conditional order. ('99) 26 Cal 869 (870) (DB) \* (Vol 18) 1931 All 257 (258): 32 Cri L Jour 595 \* ('74) 21 Suth W R Cr 43 (43) (DB).
  - (f) He should not select friends and supporters of the complainant. (Vol 1) 1914 All 491 (492): 37 All 26: 16 Cri L Jour 40.
  - (g) The complainant and his witnesses must not be appointed. ('74) 22 Suth W R Cr 47 (47, 48) (DB).
- [2] Any irregularity with regard to a nomination of the jury invalidates the proceedings and cannot be cured under S. 537. (Vol 17) 1930 Pat 199 (200): 31 Cri L Jour 53 \* (Vol 16) 1929 Bom 79 (80): 30 Cri L Jour 785.
- [But see (Vol 20) 1933 Pat 676 (677): 35 Cri L Jour 54].
- [3] The Magistrate has no jurisdiction to veto the nomination by the applicant of any person as a juror. ('97) 1897 Pun Re No. 4 Cr p 7 (8)\* ('74) 21 Suth W R Cr 43 (43, 44) (DB).

[4] The appointment of the jury cannot be made by ballot from the ordinary list of jurors. ('71) 7 Beng LR 516 (533) (DB).

[5] Every appointment or cancellation of the jury should be made in the presence of parties. ('80) 5 Cal 875 (876) (DB).

6. Duty of jurors.—[1] The jurors should act together and not as partisans and should give their verdict of deliberation. ('96) 18 All 158 (159) \* ('75) 25 Suth W R Cr 4 (5).

7. Summons to jurors.—[1] The time when and the place where the juror is to attend should be specifically mentioned in the summons. ('82) 5 All 7 (8).

8. Fresh jury.—[1] Magistrate may appoint fresh jury for the following reasons:

- (a) Perverse refusal by jury to return verdict. (Vol 9) 1922 All 297 (297): 44 All 575: 23 Cri L Jour 276 (DE) \* ('85) 11 Cal 84 (85) (DB).

139. (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order to be reasonable. absolute, subject to such modification (if any).

(2) In other cases no further proceedings shall be taken under this Chapter.

[1882—S. 139, 1872—Ss. 523 paras 3, 5, 526; 1861—S. 312.]

a[139A. (1) Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and if he does so, the Magistrate shall, before proceeding under section 137 or section 138, inquire into the matter.

#### Section 138 (contd.)

(b) Failure of jury to send verdict within the time fixed. ('08) 8 Cri L Jour 233 (234, 235) (DB).

(c) Where the report is illegal or defective because of the non-participation of some of the jurors. (Vol 7) 1920 Cal 161 (161) : 21 Cri L Jour 448 (DB).

9. Pendency of civil suits.—[1] Pending of civil suit in respect of the right will not preclude the Magistrate from acting under this section. (Vol 20) 1933 Cal 318 (319) : 34 Cri L J 532.

[2] In the absence of urgency or imminent danger to public interests the Magistrate should refrain from acting under this section pending a Civil Suit in respect of the right. ('97) 1897 Pun Re No. 4 Cr p 7 (9).

10. Appeal and revision.—[1] The High Court can call for the records and revise the orders passed under this section. ('74) 21 Suth WR Cr 43 (43) (DB).

#### SECTION 139—Note 1.

[1] Only a Magistrate, sitting with a jury, that has power to modify an order under S. 133 before making it absolute and not when he acts singly under S. 137. (Vol 30) 1943 Mad 335 (336) : 44 Cri L Jour 545.

[2] Where out of the jurors nominated one or more of them do not take part in the inquiry and report, the verdict of those who take part is not a finding of a "majority". (Vol 29) 1942 Pat 468 (469) : 43 Cri L Jour 423 \* ('10) 11 Cri L Jour 402 (402) (DB) (Cal) (One ill and did not act: \* (Vol 7) 1920 Cal 161 (161) : 21 Cri L Jour 448 (DB) (One juror absent) \* (Vol 9) 1922 All 297 (297) : 44 All 575 : 23 Cri L Jour 276.

[3] Where a person who has already expressed his opinion in the matter is included in the jury, the verdict of the jury or of a majority of the jurors is illegal and cannot be acted upon. (Vol 27) 1940 Pat 717 (717) : 42 Cri L Jour 202 ((Vol 7) 1920 Cal 161: 21 Cri L Jour 448 relied on).

[4] Disobedience of an order made absolute on the defective verdict of the jury cannot be punished under S. 188 IPC. ('81) 10 Cal L Rep 193 (196).

[5] Three of seven jurors appointed holding the order reasonable and three others holding it unreasonable—Remaining juror holding it not necessary—Held that majority verdict was against the order. ('76) 25 Suth WR Cr 31 (32) (DB).

[6] The Jury is not bound to take evidence in arriving at a finding. ('08) 8 Cri L Jour 1 (3) : 30 All 864.

[But see ('99) 26 Cal 869 (870) (DB) \* ('02) 6 Cal WN 886 (887) (DB)].

[7] The finding of the Jury becomes illegal in the following circumstances :

(a) Where separate and independent judgment is given without material consultation. ('96) 18 All 158 (159).

(b) Where some juror blindly endorse the opinion of the others. ('78) 25 Suth WR Cr 4 (5) (DB).

[8] Recommendations of the Jury do not constitute a contract between the parties and can only be enforced under S. 140 sub-section (2). (Vol 3) 1916 Pat 264 (266): 18 Cri L Jour 305.

[9] Objections to the verdict of the Jury should be specific and such as to lead to the conclusion that the Jury did not exercise their discretion at all or that the discretion was not properly exercised. ('75) 23 Suth WR Cr 15 (15) (DB).

[10] A Magistrate cannot transfer the case to any other Magistrate after appointing the Jury. (Vol 7) 1920 Mad 378 (379): 43 Mad 316: 20 Cri L Jour 761.

[11] On a verdict by the Jury that the order is reasonable and proper the order should be made absolute. ('74) 22 Suth WR Cr 86 (86) (DB) \* ('77) 1 Shome LR 11 (12) \* ('82) 2 Weir 59 (59) (DB) \* ('09) 10 Cri L Jour 210 (211) (DB) (Cal). (He cannot refuse to do so on the ground that the verdict is inconsistent) \* (1864-66) 2 Bom HCR 384 (388) (DB) (Do).

[12] The order cannot be made absolute against the verdict that it is unreasonable. ('06) 10 Cal WN lxxxvii (DB) \* ('01) 5 Cal WN 566 (567).

[13] Modifications suggested in the order—Magistrate can confirm the order only with those modifications. (Vol 12) 1925 Cal 399 (400) : 26 Cri L Jour 517 (DB).

[14] Magistrate cannot take further proceedings where the Jury finds the order unreasonable or suggests some modifications which he is not prepared to accept. (Vol 29) 1942 Mad 113 (114) : 43 Cri L Jour 314 \* ('69) 12 Suth WR Cr 28 (29) (DB) \* ('74) 21 Suth WR Cr 10 (10) (DB) \* ('87) 1887 Rat 336 (336) (DB).

[15] Where the Jury is defectively constituted or where they have exceeded their powers in material respects the verdict should be rejected and fresh Jury should be constituted. (Vol 27) 1940 Pat 717 (718) : 42 Cri L Jour 202.

[16] No appeal lies from the decision of a jury appointed to consider whether the order of the Magistrate is reasonable and proper. ('71) 16 Suth WR Cr 56 (57) (DB).

[17] The District Magistrate has no jurisdiction to call for the records of the jury and examine the same under S. 435. ('87) 1887 Rat 336 (336) (DB).

#### SECTION 139 A—Synopsis.

1. Scope and object.
2. The Magistrate shall question as to existence of public right.
3. "Shall enquire into the matter."
4. Delegation of enquiry.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138, as the case may require.

(3) A person who has, on being questioned by the Magistrate under sub-section (1) failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under section 138.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 26.

#### Section 139A (contd.)

5. Reliable evidence—Sub-section (2).
6. "Shall stay proceedings".
7. Until decided by a competent Civil Court.
8. Procedure where there is no reliable evidence.
9. Consequences of failure to deny the public right.
10. Revision.

1. **Scope and Object.**—[1] Where the public right is denied the Magistrate must stay proceedings and refer the matter to Civil Suit irrespective of whether the claim is *bona fide* or not, provided there is reliable evidence in support of the denial. (Vol 26) 1939 All 187 (187) : 40 Cri L Jour 375 \* (Vol 26) 1939 Lah 452 (453) : 40 Cri L Jour 933 \* (Vol 25) 1938 Nag 512 (512) : 39 Cri L Jour 791 : ILR (1939) Nag 600 \* (Vol 13) 1926 Pat 170 (171) : 4 Pat 783 : 27 Cri L Jour 9 (DB) \* (Vol 17) 1930 Cal 486 (486) : 57 Cal 368 : 32 Cri L Jour 33 (DB) \* (Vol 20) 1933 Cal 790 (790, 791) : 35 Cri L Jour 89 (DB).

[But see (Vol 32) 1945 Nag 226 (229) : ILR (1945) Nag 461 : 47 Cri L Jour 217 (The denial of public right must be made in good faith. If it is only made as a pretext to oust the jurisdiction of the Magistrate, S. 139A will not apply (Vol 20) 1933 Nag 267 : 29 Nag LR 361 : 35 Cri L Jour 145 referred)].

[2] If the Magistrate were to try and weigh the evidence in order to determine the truth of the denial his subsequent proceedings would be a nullity. (Vol 28) 1941 Pat 38 (39) : 42 Cri L Jour 34 \* (Vol 32) 1945 Nag 226 (227) : ILR (1945) Nag 461 : 47 Cri L Jour 217 \* ('41) 42 Cri L Jour 413 (413) (Pat) \* (Vol 18) 1931 Cal 2 (3) : 32 Cri L Jour 189 (DB).

[3] The section does not apply to cases where such party admits the public right but denies only the fact of obstruction. (Vol 32) 1945 Nag 226 (227) : ILR (1945) Nag 461 : 47 Cri L Jour 217 \* (Vol 23) 1936 Pat 409 (409) (S. 139 in the judgment in this case is an obvious mistake for S. 139A) \* (Vol 13) 1926 All 157 (157) : 27 Cri L Jour 27 \* (Vol 16) 1929 Cal 507 (508) : 57 Cal 252 : 31 Cri L Jour 973 (DB).

[4] The right denied must clearly be the right which is said to have been obstructed. (Vol 32) 1945 Nag 226 (227) : ILR (1945) Nag 461 : 47 Cri L Jour 217.

[5] Order under S. 133 passed and appearance by party—Procedure under this section should be followed before proceeding under S. 137 and 138. (Vol 26) 1939 Mad 465 (466) : 40 Cri L Jour 813 : ILR (1939) Mad 1030 \* (Vol 25) 1938 All 653 (654) : 40 Cri L Jour 143 \* (Vol 24) 1937 Lah 676 (677) : 38 Cri L Jour 1056 \* (Vol 23) 1936 Pat 629 (640) : 38 Cri L Jour 29 \* (Vol 23) 1936 Pat 360 (361) : 37 Cri L Jour 846 \* (Vol 19) 1932 All 366 (366) : 33 Cri L Jour 613.

[6] Party can claim enquiry under S. 137 or S. 1 even though Magistrate under this section finds that there is no reliable evidence in support of the denial. (Vol 28) 1941 Pat 370 (370) : 42 Cri L Jour 784 \* (Vol 20) 1933 Cal 318 (319) : 34 Cri L Jour 532 (DB).

[7] The section does not give the right to a complainant to compel the Magistrate to hold an enquiry into the rights of the parties concerned. (Vol 24) 19 All 785 (786) : 39 Cri L Jour 148.

2. **The Magistrate shall question as to existence of public right.**—[1] It is obligatory on the Magistrate to question the party on his appearance as to whether he denies the existence of the public right whether the party himself raises the objection or not. (Vol 28) 19 Pat 38 (39) : 42 Cri L Jour 34 \* (Vol 25) 1938 All 6 (654) : 40 Cri L Jour 143 \* (Vol 24) 1937 All 653 (653) (Vol 18) 1931 Cal 2 (2) : 32 Cri L Jour 189 (DB) \* (Vol 17) 1930 Pat 199 (200) : 31 Cri L Jour 53 \* (Vol 1) 1928 Lah 856 (857) : 10 Lah 151 : 29 Cri L Jour 6 \* (Vol 18) 1931 Lah 62 (63) : 32 Cri L Jour 621 \* (Vol 18) 1931 Oudh 397 (397) : 32 Cri L Jour 1165.

[2] Party admitting the right but denying construction—Omission to question him about the right only an irregularity curable under S. 537. (Vol 30) 19 Pat 3 (4) : 43 Cri L Jour 923 \* (Vol 16) 1929 Cal 5 (507, 508) : 57 Cal 262 : 31 Cri L Jour 973 (DB).

[3] When a party, on appearance, puts in a statement denying the existence of any public right, it is not necessary for the Magistrate to put any question that respect. (Vol 32) 1945 Pat 306 (311) : 24 Pat 1 (DB).

[4] Written statement ambiguous on the question of denial of public right—Magistrate questioning him the subsequent hearing—*Held* irregularity was cured under S. 537. (Vol 32) 1945 Nag 226 (228) : ILR (1945) Nag 461 : 47 Cri L Jour 217.

[5] Whether a right is a public right or not is a question of fact. (Vol 26) 1939 Pat 460 (461) : 18 Lah 76 : 40 Cri L Jour 837 (DB).

3. **"Shall enquire into the matter".**—[1] The Magistrate has to enquire only with a view to find out if there is reliable evidence supporting the claim or not whether the claim is *bona fide*. (Vol 20) 1933 All 790 (790, 791) : 35 Cri L Jour 89 (DB) \* (Vol 18) 1931 Lah 62 (63) : 32 Cri L Jour 621 \* (Vol 15) 1928 Lah 856 (857) : 10 Lah 151 : 29 Cri L Jour 698 \* (Vol 1) 1933 All 615 (616) : 55 All 866 : 35 Cri L Jour 20 \* (Vol 12) 1925 All 811 (811) : 26 Cri L Jour 873 \* (Vol 20) 1933 Pat 676 (676, 677) : 35 Cri L Jour 54.

[2] This enquiry should be kept quite distinct from the enquiry which may be held later under S. 137 in the absence of *prima facie* reliable evidence in support of the denial of the public right. (Vol 15) 1928 Cal 5 (579) : 30 Cri L Jour 622 (DB).

## Section 139A (contd.)

[3] In deciding whether the party has a supportable case for his denial the Magistrate has an absolute discretion as to how far he will go and upon what materials he will act. (Vol 16) 1929 All 220 (221) : 30 Cri L Jour 670.

[4] It is not the duty of the Magistrate to be satisfied whether the opposite party has succeeded in proving the non-existence of public right but he should only see if there is reliable evidence in support of the denial. (Vol 23) 1936 All 856 (857) : 37 Cri L Jour 343 : 58 All 739 (Vol 25) 1938 All 653 (654) : 40 Cri L Jour 143 (Vol 15) 1928 Lah 856 (857) : 10 Lah 151 : 29 Cri L Jour 698 (Vol 18) 1931 Cal 2 (3) : 32 Cri L Jour 189 (DB) (Vol 20) 1933 Nag 267 (268) : 29 Nag LR 361 : 35 Cri L Jour 145.

[5] The party denying the public right must be called upon to produce evidence in support of such denial and such evidence must be legal evidence. (Vol 18) 1931 Cal 527 (527) : 58 Cal 461 : 32 Cri L Jour 1187 (DB).

[6] The Magistrate may allow the cross-examination of witnesses adduced in support of the denial. (Vol 25) 1938 All 653 (654) : 40 Cri L Jour 143 (Vol 18) 1931 Cal 527 (527) : 58 Cal 461 : 32 Cri L Jour 1187 (DB).

[7] The enquiry is of a summary nature the party complaining of obstruction should not be required to adduce evidence to counteract the evidence in support of denial. (Vol 25) 1938 All 653 (654) : 40 Cri L Jour 143 (Vol 23) 1936 All 856 (857) : 37 Cri L Jour 343 : 58 All 739 (Vol 18) 1931 Cal 527 (527) : 58 Cal 461 : 32 Cri L Jour 1187 (DB).

[8] The provisions of this section are mandatory and cannot be waived by the party. (Vol 17) 1930 Lah 1046 (1047) : 32 Cri L Jour 250.

[9] Where the Magistrate proceeds to make the order absolute on the waiver of enquiry by the party, he acts without jurisdiction. (Vol 29) 1942 Pat 468 (469) : 43 Cri L Jour 423 (41) 42 Cri L Jour 413 (413) (Pat) (Vol 28) 1941 Pat 38 (39) : 42 Cri L Jour 34 (Vol 28) 1941 Oudh 271 (272) : 42 Cri L Jour 241.

[10] "Shall enquire into the matter" means that the Magistrate has to hear evidence produced by the petitioner before proceeding. (Vol 29) 1942 Pat 468 (469) : 43 Cri L Jour 423.

[But see (Vol 28) 1941 Oudh 271 (272) : 42 Cri L Jour 241].

[11] Though the Magistrate does not record a definite finding in terms of S. 139A sub-s. (2) if the record shows that he did in fact find that the denial was well founded the requirements of this section would be satisfied. (Vol 23) 1936 All 150 (151) : 37 Cri L Jour 422.

4. Delegation of enquiry.—[1] The enquiry cannot be delegated to another by the Magistrate before whom the party appears under an order under S. 133. (Vol 16) 1929 Cal 813 (813) : 57 Cal 666 : 31 Cri L Jour 673 (DB).

[See however (Vol 32) 1945 Pat 316 (316, 317) : 24 Pat 28 : 47 Cri L Jour 179 (DB)].

[2] The enquiry need not be necessarily held by the Magistrate who passed the conditional order by which the party may be asked to appear before some other Magistrate. (Vol 24) 1937 Lah 676 (677) : 38 Cri L Jour 1056.

5. Reliable evidence—Sub-section (2).—[1] The Magistrate should only take the evidence in support of the denial and see whether as it stands he could come to the conclusion that the evidence was reliable. (Vol 25) 1938 All 653 (654) : 40 Cri L Jour 143 (Vol 24) 1937 All 12 (13) : 38 Cri L Jour 200 (Vol 15) 1928 Lah 664 (665) : 29 Cri L Jour 254 (Vol 13) 1926 Pat 170 (171) : 4 Pat 783 : 27 Cri L Jour 9 (DB) (Vol 21) 1934 Cal 545 (546) : 61 Cal 390 : 35 Cri L Jour 1374 (DB) (Vol 21) 1934 Pat 438 (439) : 36 Cri L Jour 867.

[2] "Reliable evidence" as used in the section does not mean evidence which definitely establishes the title to the land but only that on which the Court can place reliance. (Vol 24) 1937 All 12 (13) : 38 Cri L Jour 200.

[3] The test of reliability is to see whether the evidence is such that if un rebutted it will prove the non-existence of the public right. (Vol 26) 1939 Pat 460 (462) : 18 Pat 76 : 40 Cri L Jour 837 (DB).

[4] The following have been held to be reliable evidence :

(a) Public records. (Vol 12) 1925 Cal 268 (268) : 25 Cri L Jour 1080 (DB) (Vol 14) 1927 Lah 745 (746) : 28 Cri L Jour 247 (Vol 18) 1931 Cal 2 (2) : 32 Cri L Jour 189 (DB) (Vol 19) 1932 Oudh 118 (120) : 7 Luck 583 : 33 Cri L Jour 809 (Vol 22) 1935 Pat 218 (219) : 36 Cri L Jour 1051.

(b) Long user of the property by the person claiming it. (Vol 32) 1945 Pat 309 (310, 311) : 24 Pat 104 (DB) (41) 42 Cri L Jour 401 (401) (Pat).

[5] The evidence has to be considered as a whole and if it contains anything which suggested a refutation of the claim the Magistrate is not ousted of his jurisdiction. The evidence as to denial of the public right must be taken as a whole and if it contains also a refutation of the claim made, then the suggested inference does not follow and the jurisdiction is not ousted. (Vol 32) 1945 Pat 309 (310, 311) : 24 Pat 104 (DB).

6. "Shall stay proceedings".—[1] The Magistrate has no discretion in the matter of staying proceedings when there is reliable evidence. (Vol 26) 1939 Mad 465 (466) : 40 Cri L Jour 813 : 11LR (1939) Mad 1030 (Vol 26) 1939 Pat 460 (462) : 40 Cri L Jour 837 : 18 Pat (76) (DB) (Vol 26) 1939 All 187 (188) : 40 Cri L Jour 375 (Vol 25) 1938 Nag 512 (512) : 39 Cri L Jour 791 : 1 L R (1939) Nag 600 (Vol 20) 1933 All 615 (616) : 55 All 866 : 35 Cri L Jour 4 (Vol 12) 1925 Cal 268 (268) : 25 Cri L Jour 1080 (DB) (Vol 15) 1928 Lah 856 (857) : 10 Lah 151 : 29 Cri L Jour 698 (Vol 18) 1931 Lah 62 (63) : 32 Cri L Jour 621 (Vol 19) 1932 Oudh 118 (119, 120) : 7 Luck 588 : 33 Cri L Jour 809 (Vol 19) 1932 Oudh 120 (120, 121) : 33 Cri L Jour 384 (Vol 20) 1933 Cal 790 (791) : 35 Cri L Jour 89 (DB) (Vol 22) 1935 Pat 138 (139) : 36 Cri L Jour 588.

[2] The Court is not, however, directed to quash the proceedings altogether but only to stay the same until the adjudication by a Civil Court. (Vol 16) 1929 All 220 (222) : 30 Cri L Jour 670 (Vol 22) 1935 All 79 (80) : 36 Cri L Jour 144.

[3] The proceedings can be stayed for a definite time to establish the right in Civil Court. (Vol 16) 1929 All 709 (709) : 51 All 890 : 31 Cri L Jour 1004 (Vol 9) 1922 Cal 59 (64, 67) : 49 Cal 632 : 23 Cri L Jour 353 (FB) (Vol 16) 1929 Oudh 85 (86) : 30 Cri L Jour 360.

140. (1) When an order has been made absolute under section 136, section 137 or section 139, Procedure on order the Magistrate shall give notice of the same to the person against whom being made absolute. the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code.

#### Section 139A (contd.)

[4] Where the party fails to move the Civil Court within a reasonable time the order may be made absolute. (Vol 2) 1915 Cal 168 (169): 15 Cri L Jour 698 : 42 Cal 158 (DB).

7. Until decided by a competent Civil Court.—[1] There is nothing in the section which entitles the Magistrate to say which party should file the suit. (Vol 25) 1938 Nag 512 (512) : 39 Cri L Jour 791 : ILR (1939) Nag 600 \* (Vol 17) 1930 All 653 (658) : 52 All 592 : 31 Cri L Jour 839 \* (Vol 14) 1927 Lah 227 (228) : 28 Cri L Jour 363 \* (Vol 16) 1929 All 200 (222) : 30 Cri L Jour 670 \* (Vol 22) 1935 All 79 (79, 80) : 36 Cri L Jour 144.

[But see (Vol 16) 1929 All 709 (709) : 51 All 890 : 31 Cri L Jour 1004 (In the circumstances of this case complainant was directed to file the suit).]

[2] Under the law, as it is, it is the party moving for proceedings under S. 133 or somebody interested in asserting such right who has got to go to the Civil Court to establish its existence and not for the opposite party to go to the Civil Court to disprove its existence. (Vol 21) 1934 Cal 545 (546) : 61 Cal 390 : 35 Cri L Jour 1374 (DB).

[3] By the stay the Magistrate ousts his own jurisdiction to decide anything about title including the question of onus of proof. (Vol 14) 1927 Lah 227 (228): 28 Cri L Jour 363.

8. Procedure where there is no reliable evidence.—[1] Magistrate finding that there is no reliable evidence must record his reasons for the finding and decide the case under S. 137 or 138 without any reference to the claim. (Vol 26) 1939 All 116 (117): 40 Cri L Jour 286 \* (Vol 20) 1933 All 615 (616) : 55 All 866 : 35 Cri L Jour 4 \* (Vol 20) 1933 Cal 790 (791) : 35 Cri L Jour 89 (DB) \* (Vol 15) 1928 Lah 856 (857) : 10 Lah 151 : 29 Cri L Jour 698 \* (Vol 17) 1930 Lah 1046 (1047, 1048) : 32 Cri L Jour 250 \* (Vol 21) 1934 Pat 145 (145) : 35 Cri L Jour 488.

[2] In a case where the Magistrate proceeds under S. 137 or 138 the mere fact that the party has filed a civil suit to establish his right is no ground for stay of proceedings. (Vol 21) 1934 All 131 (132) : 35 Cri L Jour 1445.

[3] The case after the inquiry under S. 139A may be transferred to another Magistrate for disposal under S. 137 or 138. (Vol 30) 1943 Pat 115 (116) : 21 Pat 759 : 44 Cri L Jour 364 (DB) (Vol 14) 1927 Pat 265 : 6 Pat 428 : 28 Cri L Jour 910, followed).

9. Consequences of failure to deny the public right.—[1] Failure to deny the public right—Question cannot be raised in revision. (Vol 30) 1943 Pat 32 (33) : 43 Cri L Jour 908.

[2] Where the Jury enquires into the question of public right after the failure of party to deny, their report will be illegal. (Vol 27) 1940 Pat 717 (718) : 42 Cri L Jour 202.

10. Revision.—[1] High Court will revise the order of the lower Court in the following cases:

(a) Where order is passed on merits without staying when there is reliable evidence (Vol 13) 1926 Pat 170

(171) : 4 Pat 783 : 27 Cri L Jour 9 (DB) \* (Vol 14) 1927 Lah 745 (746) : 28 Cri L Jour 247 \* (Vol 19) 1932 Oudh 118 (120) : 7 Luck 583 : 33 Cri L Jour 809.

[b] Proceeding under S. 137 or 138 without the enquiry under this section or passing final orders under these sections. (Vol 26) 1939 Lah 452 (453) : 40 Cri L Jour 933 \* (Vol 15) 1928 All 627 (629) : 50 All 871 : 29 Cri L Jour 661 \* (Vol 17) 1930 Lah 1046 (1047, 1048) : 32 Cri L Jour 250 \* (Vol 17) 1930 Pat 199 (200) : 31 Cri L Jour 53 \* (Vol 20) 1933 All 615 (616) : 55 All 866 : 35 Cri L Jour 4 \* (Vol 13) 1926 All 390 (392) : 27 Cri L Jour 473 (Passing final order under S. 137 or 138 without enquiry under this section) \* (Vol 17) 1930 Cal 486 (486) : 57 Cal 368 : 32 Cr. L Jour 33 (DB) (Do) \* (Vol 20) 1933 Cal 790 (791) : 35 Cri L Jour 89 (DB) (Do) \* (Vol 20) 1933 Cal 790 (791) : 35 Cri L Jour 89 (Do).

(c) Where order is passed on the test of *bona fides* of claim and not on the test of existence or otherwise of reliable evidence (Vol 19) 1932 All 366 (367) : 33 Cri L Jour 618 \* (Vol 17) 1930 Cal 144 (144) : 31 Cri L Jour 767 (DB).

(d) Delegation of enquiry to a subordinate Magistrate is wrong. (Vol 16) 1929 Cal 313 (313) : 57 Cal 666 : 31 Cri L Jour 673 (DB).

(e) Where the order negatives the rights given under S. 138. (Vol 20) 1933 Cal 318 (319) : 34 Cri L Jour 532 (DB).

(f) Where the Magistrate fails to ask the party whether he denies the public right or to ask him to produce evidence in support of denial. (Vol 18) 1931 Oudh 397 (397) : 32 Cri L Jour 1165 \* (Vol 18) 1931 Lah 62 (63) : 32 Cri L Jour 621.

[See however (Vol 30) 1943 Pat 3 (4) : 43 Cri L Jour 923].

[2] No revision will lie where the finding of the Magistrate is not perverse. (Vol 33) 1946 Oudh 108 (110) : 47 Cri L Jour 306 \* (Vol 33) 1946 Cal 302 (304) : 47 Cri L Jour 320 (DB).

#### SECTION 140—Synopsis

1. Scope of the section.
2. Notice.
3. Notice under S. 137, by whom to be given.
4. Non-compliance with notice, effect of.
5. "Is not performed within the time fixed."
6. Death of person against whom conditional order is made.
7. Costs.
8. "Movable property", meaning of.
9. Suit in respect of acts done under the section.

1. Scope of the section.—[1] Order under S. 133 not made absolute under S. 139 (1)—Further proceedings dropped under sub-S. (2) of that section—This section does not apply—Magistrate cannot pass any further orders for the removal of the obstruction. (Vol 29) 1942 Mad 113 (114) : 43 Cri L Jour 314.

2. Notice.—[1] The provisions of the section as to the issue of notice are mandatory. (Vol 18) 1931 Cal 787 (787) : 53 Cal 1088 : 32 Cri L Jour 1240 (DB).

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other movable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

[1882—S. 140 ; 1872—Ss. 525, 526; 1861—S. 311.]

141. If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if from any cause the jury appointed do not return their verdict within the time fixed or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by section 140.

[1882—S. 141; 1872—S. 523 para 4; 1861—S. 310.]

### Section 140 (contd.)

[2] Magistrate cannot direct the manner in which the nuisance is to be removed ('97) 25 Cal 425 (431) (DB).

3. Notice under Section 137, by whom to be given.—[1] Where a conditional order directs a person to appear before a Magistrate other than the Magistrate issuing the order and the former after enquiry under S. 137 makes the order absolute, it is he who is entitled to issue the notice under this section and not the Magistrate who originally issued the conditional order. ('86) 9 Mad 201 (202) (DB) \* ('99) 2 Weir 61 (61) (DB).

4. Non-compliance with notice, effect of.—[1] After a notice issued under this section to a party, temporary injunction was issued in a civil suit restraining him from performing the acts ordered to be done by the notice—Court can desist from taking any further proceedings against him under this section until the conclusion of the civil suit. (Vol 18) 1931 Cal 787 (787) : 58 Cal 1088 : 32 Cri L Jour 1240 (DB).

[2] Magistrate cannot refuse to enforce the orders of his predecessor on the ground that they were not legal or valid. (Vol 10) 1923 Cal 589 (589) : 24 Cri L Jour 317 (DB).

[3] A refusal to enforce an order on the ground that such enforcement has become unnecessary is not *ultra vires*. (Vol 3) 1916 Pat 264 (266) : 18 Cri L Jour 305.

[4] The question as to the validity of an order passed under S. 138 cannot be raised in a trial for an offence under S. 138, Penal Code, for disobedience of the order. (Vol 21) 1934 Cal 242 (242) : 60 Cal 1336 : 35 Cri L Jour 778 (DB).

[But see ('81) 10 Cal L Rep 193 (196) \* ('83) 12 Cal L Rep 231 (232) (DB).]

5. "Is not performed within the time fixed".—[1] The time to be allowed for removing the nuisance is within the discretion of the Magistrate who should consider the danger and inconvenience to the public. ('82) 2 Weir 59 (59) (DB).

[2] Where the Court fixes a time for the removal of the nuisance, no action can be taken by the Magistrate for non-compliance with the notice before the expiry of the period fixed. ('82) 1882 All WN 282 (283).

6. Death of person against whom conditional order is made.—[1] Where the person against whom

an order for removal of nuisance is made dies, the order ceases to have any force, and no further steps as provided by this section can be taken against his legal representatives. (Vol 15) 1928 All 300 (301) : 29 Cri L Jour 445.

7. Costs.—[1] Recovery of the costs from a party who was not actually served with notice of the proceedings is unjust. (Vol 14) 1927 Cal 70 (71) : 28 Cri L Jour 30 (DB).

8. "Movable property." meaning of.—[1] The words "movable property" in this section mean tangible movable property. (Vol 4) 1917 Mad 748 (749) : 18 Cri L Jour 1 (DB).

9. Suit in respect of acts done under the section.—[1] A suit for damages will not lie in respect of anything done in good faith. ('88) 15 Cal 460 (469) (FB).

[2] A suit to set aside the order of the Magistrate or to prevent him from carrying his order into effect, is barred. ('70) 12 Suth WRFB 18 (19, 20) (FB) (7 Suth WR 95 overruled) \* (Vol 3) 1916 Pat 264 (266) : 18 Cri L Jour 305 \* (Vol 27) 1940 Oudh 75 (76) : 15 Luck 140 : 41 Cri L Jour 99.

[But see (Vol 16) 1929 All 833 (833) : 31 Cri L Jour 302 : 51 All 1025.]

[3] A suit for a declaration that the property, treated as a public thoroughfare, is the private property of the plaintiff is not barred. ('10) 6 Ind Cas 46 (46) (Cal) \* ('93) 17 Bom 293 (299) (DB) \* ('88) 15 Cal 460 (467, 468, 470) (FB) (Overruling ('87) 14 Cal 60) \* ('82) 6 Bom 672 (673) (DB).

[4] A failure to resort to the remedies provided for in this chapter does not debar a person from instituting a civil suit to abate public nuisance where he suffers special damage thereby. ('77) 3 Cal 20 (23) (FB) \* ('95) 22 Cal 551 (556) (DB).

[5] A person not a party to the proceedings under this chapter and dispossessed under colour of an order passed in such proceedings can bring an ejectment suit in a Civil Court. ('74) 22 Suth WR Civ 461 (462).

[6] [See also S. 1 of the Judicial Officers' Protection Act (18 (XVIII) of 1850).]

### SECTION 141—Note 1.

[1] The verdict of four out of five jurors is not the verdict of the jury and the Magistrate can pass order under S. 141. (Vol 29) 1942 Pat 468 (469) : 43 Cri L Jour 423.



142. (1) If a Magistrate making an order under section 133 considers that an injunction pending measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or he is not appointed or not, issue such an injunction to the person against whom the order was made required to obviate or prevent such danger or injury pending the determination of the matter.

(2) In default of such person forthwith obeying such injunction, the Magistrate may use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

[1882—S. 142; 1872—S. 528; 1861—S. 314.]

143. A District Magistrate or Sub-Divisional Magistrate, or any other Magistrate empowered by the [Provincial Government] or the District Magistrate in this behalf may prohibit repetition or continuance of public nuisance. may order any person not to repeat or continue a public nuisance defined in the Indian Penal Code or any special or local law.

[1882—S. 143; 1872—S. 519; 1861—S. 63.]

[a] Substituted by A. O. for "Local Government".

#### Section 141 (contd.)

[2] One of the jurors expressed his opinion before the appointment of jury became complete—*Held* that, the constitution of jury being defective, this section did not apply but a fresh jury could be appointed. (Vol 27) 1940 Pat 717 (717, 718) : 42 Cri L Jour 202.

[3] Proceedings, taken before an application for extension of time for return of the verdict is disposed of will be invalid. ('01) 23 All 159 (161) (DB).

[4] Court has judicial discretion which should be exercised on considerations of justice and equity. (Vol 27) 1940 Sind 24 (27) : ILR (1939) Kar 179 : 41 Cri L Jour 364 (DB).

[5] Where the jury perversely refuses to act or fails to return its verdict within the time fixed the Court may, on application by the party appoint a fresh jury. (Vol 29) 1942 Pat 468 (469) : 43 Cri L Jour 423 \* (Vol 9) 1922 All 297 (297) : 44 All 575 : 23 Cri L Jour 276 \* (1864-66) 2 Bom HCR 384 (388) (DB) \* ('08) 8 Cri L Jour 238 (234, 235) (DB).

[6] The Court may allow the person, proceeded against to show cause by evidence against the conditional order. (Vol 29) 1942 Pat 468 (469) : 43 Cri L Jour 423 \* (Vol 10) 1923 Pat 229 (230) : 24 Cri L Jour 492 \* ('09) 10 Cri L Jour 494 (495) (DB) (Cal).

[7] If the jury does not return its verdict, the Magistrate must inquire into the matter before he passes an order. (Vol 10) 1923 Pat 131 (132, 133) : 24 Cri L Jour 583.

[See however (Vol 27) 1940 Sind 24 (26, 27) : ILR (1939) Kar 179 : 41 Cri L Jour 364 (DB).]

[8] Where the failure of the jury to return a verdict is due to the negligence or obstructive tactics of the person proceeded against, the Magistrate can make the order absolute without giving any opportunity to such person to show cause against it. (Vol 23) 1936 All 65 (66) : 36 Cri L Jour 1472.

[9] Jury failed to return verdict within time—Parties allowed to adduce evidence but failed—Locality inspected by Court and order made absolute—Procedure held proper. (Vol 13) 1926 All 658 (660) : 27 Cri L Jour 981.

[10] Jury sent verdict after the time allowed but

before order—Magistrate should consider the and not appoint a fresh jury. (1864—66) 2 B 384 (386, 387, 388) (DB) \* ('74) 21 Suth W (54) (DB).

#### SECTION 142—Note 1.

[1] The order under S. 133 is a condition and that under this section is an injunction, form in which the conditional order is expressed be such as not to amount to an injunction. 1938 Nag 84 (85) : ILR (1938) Nag 348 (DB).

[2] Immediate measures may be taken only when imminent danger or injury of a serious kind to the public. (1864) 1 Suth W R Cr 8 (9) (DB) (A taken after danger has passed is irregular) \* Suth W R Cr 86 (88) (Magistrate who after passing order for injunction does nothing for a long time be deemed to have abandoned the proceedings).

[3] An order under this section can be passed against an injury or danger specified in S. 133 is appropriate and not otherwise. (Vol 24) 1937 Lah 101 (102) : ILR (1937) Lah 303 : 39 Cri L Jour 13.

[4] The Magistrate in spite of making an order under S. 142 should proceed with the case and make an order under S. 137. (Vol 23) 1936 Cal 692 (693) : 36 Cri L Jour 173 (DB).

#### SECTION 143—Note 1.

[1] Where a nuisance has been ascertained to be a public nuisance after a trial, the Magistrate empowered in that behalf may prohibit its repetition. (Vol 29) 1942 Pat 468 (469) : 43 Cri L Jour 423 \* (Vol 10) 1923 Pat 229 (230) : 24 Cri L Jour 492 \* ('09) 10 Cri L Jour 494 (495) (DB) (Cal).

[2] A summary order should not be passed giving the party affected an opportunity to defend himself. (Vol 21) 1934 Pat 305 (306) : 36 Cri L Jour 137 (138) : 36 Cri L Jour 144.

[3] The Magistrate cannot prohibit what was done before his order. ('96) 19 Mad 464 (469) (DB).

[4] Unless an order is served on an individual, he would not render himself liable under S. 293 of the Penal Code. ('86) 8 All 99 (100, 101).



## CHAPTER XI.

## TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER.

144. (1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other Magistrate <sup>a</sup>[ (not being a Magistrate of the third class) ] specially empowered by the <sup>b</sup>[Provincial Government] or the Chief Presidency Magistrate or the District Magistrate to act under this section, <sup>a</sup>[there is sufficient ground for proceeding under this section and] immediate prevention or speedy remedy is desirable,

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed, *ex parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may, <sup>a</sup>[either on his own motion or on the application of any person aggrieved], rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

## SECTION 144—Synopsis.

1. Scope of the section.
2. Power of Magistrate under the section to override private rights.
3. "Written order stating the material facts."
4. Who can pass order under the section.
5. Nature of orders that can be passed under this section.
6. Order to abstain from certain acts.
7. "Direction to take certain order with certain property."
8. Effect of order under the section.
9. *Ex parte* order—Sub-section (2).
10. Order against the general public—Sub-section (3).
11. Rescission or alteration of order—Sub-section (4).
12. Enquiry into application to rescind or alter the order—Sub-section (5).
13. Duration of the order—Sub-section (6).
14. Revision.
15. Disobedience of order under the section.
16. Suit to establish civil rights infringed by an order under this section.

1. Scope of the section.—[1] The following conditions are necessary to promulgate an order under this section :—

(a) Existence of necessity for immediate prevention or speedy remedy. (Vol 18) 1931 Bom 513 (513) : 33 Cri L Jour 75 (DB) \* (Vol 29) 1942 Lah 171 (172) : 43 Cri L Jour 747 : ILR (1942) Lah 510 (FB) The urgency of the case vests jurisdiction with the Magis-

722 (Do) \* (Vol 15) 1928 All 14 (15) : 50 All 414 : 29 Cri L Jour 991 (Do) \* (Vol 6) 1919 Cal 584 (584, 585) : 19 Cri L Jour 951 (DB). (If facts show otherwise mere opinion of Magistrate that there is urgency is not sufficient) \* (Vol 18) 1931 Mad 242 (246) : 32 Cri L Jour 763.

(b) That the direction is likely to prevent obstruction etc. (Vol 16) 1929 Pat 714 (716) : 31 Cri L Jour 466 \* ('74) 6 N W P H C R 104 (108, 109) (DB) \* ('75) 23 Suth W R Cr 34 (34) (DB) \* ('09) 13 Cal W N exix (exix) \* ('76) 1876 Bom P J 181 (181).

[See (Vol 24) 1937 Mad 494 (494) : 38 Cri L Jour 892 (Order without deciding that there is a dispute likely to lead to a disturbance of the public peace etc., is void).]

[2] (Urgency vests jurisdiction in the Magistrate). (Vol 12) 1925 All 678 (679) : 26 Cri L Jour 560 (Do) \* (Vol 7) 1920 Bom 367 (368) : 22 Cri L Jour 521 (DB) \* (Vol 20) 1933 Cal 348 (350) : 34 Cri L Jour 334 (DB) (Do) \* (Vol 1) 1914 Mad 697 (697) : 14 Cri L Jour 658 (DB) (Do) \* (Vol 11) 1924 Oudh 338 (340) : 25 Cri L Jour 433 (Do) \* (Vol 9) 1922 Pat 435 (438) : 23 Cri L Jour 549 : 2 Pat 94 (FB) (Do).

[3] No distinction can be made out between injury to person and property for the purpose of passing an order under this section. (Vol 21) 1934 Cal 513 (514) : 35 Cri L Jour 1252 (DB).

[4] The section can be invoked to prevent not only offences but also civil wrongs. (Vol 30) 1943 Cal 35 (38) : ILR (1942) 1 Cal 488 : 44 Cri L Jour 288 (DB).

[5] The discretion vested under this section should be used sparingly and only where all the conditions prescribed are strictly fulfilled. (Vol 29) 1942 Lah 171 (172) : 43 Cri L Jour 747 : ILR (1942) Lah 510 (FB) \* (Vol 15) 1928 All 14 (15) : 50 All 414 : 28 Cri L Jour 991 \* (Vol 20) 1933 Cal 348 (351) : 34 Cri L Jour

a[(5) Where such an application is received, the Magistrate shall afford to the applicant early opportunity of appearing before him either in person or by pleader and showing against the order : and, if the Magistrate rejects the application wholly or in part, he shall in writing his reasons for so doing.]

c[(6) No order under this section shall remain in force for more than two months from making thereof ; unless, in cases of danger to human life, health or safety, or a likelihood of riot or an affray, the b[Provincial Government], by notification in the Official Gazette, otherwise directs.

[1882—S. 144 ; 1872—S. 518 ; 1861—S. 62.]

[a] *Inserted* by the Code of the Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 2

[b] *Substituted* by A. O. for "Local Government".

[c] The original sub.sec. (5) was *renumbered* (6), by Act 18 of 1923, S. 27.

#### Objects and Reasons.

"We accept the amendment made in Section 144 by this Clause (i.e. clause 26). It was suggested to us that Section 144 should be elaborated so as to enable a person aggrieved by an order made under the Section to require the Magistrate to make a judicial inquiry regarding the truth of the information on which he had acted, and thereby to bring in the revisional powers of the High Court, with the exception of Saiyad Raza Ali we think this proposal goes too far, and that it is necessary to maintain the executive character of pro-

ceedings under Section 144. We are, however, prepared and we have proposed an amendment to this effect lay down that a person aggrieved shall be entitled to apply to the Magistrate and show cause against the order, and that the Magistrate shall give the person an opportunity to be heard in person or by pleader and shall record an order in writing on the application giving his reasons where he rejects it."—S.C.R. [of 1923].

#### Section 144 (contd.)

[6] This section does not empower a Magistrate to decide disputes of a civil nature between private individuals. (Vol 29) 1942 Pat 414 (416) : 43 Cri L Jour 722 \* (Vol 15) 1928 All 14 (15) : 50 All 414 : 28 Cri L Jour 991 \* (Vol 19) 1932 Mad 294 (296) : 33 Cri L Jour 605 \* ('73) 19 Suth WR Cr 6 (7) (DB) \* ('01) 11 Mad L Jour 122 (123) (DB) \* (Vol 12) 1925 Pat 33 (34) : 3 Pat 809 : 26 Cri L Jour 268 (DB) \* ('04) 1 Cri L Jour 251 (253) (DB) (Cal).

[7] For the purposes of passing a proper and reasonable order, he can take into consideration the nature of the claims set up by the parties. (Vol 19) 1932 Mad 294 (296) : 33 Cri L Jour 605.

[8] The Magistrate cannot question the legality or propriety of a Civil Court's decree nor interfere with the execution of a Civil Court's decree. ('95) 17 All 485 (489) (FB) \* ('02) 6 Cal WN 466 (467, 468) (DB) \* ('05) 2 Cri L Jour 168 (169) : 32 Cal 154 \* (Vol 10) 1923 Mad 15 (16) : 23 Cri L Jour 689.

[9] Where the party applying has a proper and appropriate remedy in a Civil Court, the Criminal Court should not assume jurisdiction under this section. (Vol 12) 1925 All 678 (679) : 26 Cri L Jour 560 \* (Vol 16) 1929 Mad 845 (846) : 30 Cri L Jour 1010.

[10] A Magistrate under cover of an order under the section cannot dispossess or direct delivery of property where it is not for the object specified in the section. (Vol 15) 1928 All 14 (15, 16) : 50 All 414 : 28 Cri L Jour 991 \* ('72) 17 Suth WR Cr 37 (37, 38) (DB) \* ('98) 2 Cal WN 572 (572, 573) (DB).

[11] Matter pending before Civil Court likely to be decided soon—No apprehension of imminent breach of peace existing, the Magistrate need not act. (Vol 1) 1914 Mad 239 (240) : 15 Cri L Jour 291 (DB).

**2. Power of Magistrate under the section to override private rights.**—[1]. The authority of a Magistrate under this section should ordinarily be exercised in defence of such rights rather than in

their suppression. (Vol 26) 1939 All 182 (183, 40 Cri L Jour 383 \* (Vol 26) 1939 Sind 167 40 Cri L Jour 703 : ILR (1939) Kar 662 (DB) 24) 1937 Mad 311 (312) : 38 Cri L Jour 582 20) 1933 Cal 348 (351) : 34 Cri L Jour 334 ('83) 6 Mad 203 (220) (FB) \* (Vol 8) 1921 P (420) : 22 Cri L Jour 442 \* (Vol 22) 1935 P (577) : 36 Cri L Jour 955 \* (Vol 21) 1934 P (105) : 35 Cri L Jour 1057.

[2] Powers under this section are intended to be exercised also for the protection of the public by restraining private individuals and for the preservation of the public tranquillity. ('95) 17 All 485 (489) (FB).

[3] Where there is a conflict between public interest and private interest, a Magistrate can under this section override, temporarily, private rights. ('94) 2 Pat 414 (416) : 43 Cri L Jour 722 \* (Vol 19) 1932 Sind 158 (159) : 41 Cri L Jour 952 : ILR (1932) Kar 508 (DB) \* (Vol 27) 1940 Pat 185 (186) : 37 Cri L Jour 468 \* (Vol 26) 1939 Rang 181 (182) : 39 Cri L Jour 645 : 1939 Rang LR 294 \* (Vol 26) 1939 Pat 230 (232) : 40 Cri L Jour 823 : ILR (1939) Kar 508 (DB) \* (Vol 15) 1928 Mad 1049 (1050) : 51 Mad 80 Cri L Jour 31 (FB) \* ('83) 6 Mad 203 (220) ('08) (30) Cal 155 (184) (FB) \* (Vol 15) 1928 Pat 446 (447) : 55 Cal 1077 : 29 Cri L Jour 422 (Enjoyment of property however innocent and lawful may be temporarily restrained if likely to be a source of public peace).

[See however (Vol 14) 1927 Mad 611 (612) 61 Cri L Jour 509 \* (Vol 15) 1928 Mad 1049 : 51 Pat 1006 : 30 Cri L Jour 31 (FB)].

[4] Legal rights should be suppressed only as a resort when in the opinion of the Magistrate the exercise of such rights by others is likely to be a source of breach of peace. (Vol 27) 1940 Bom 42 (43) : 39 Cri L Jour 819 (DB) \* (Vol 25) 1938 Mad 714 (715) 71 Cri L Jour 886 \* (Vol 20) 1933 Cal 348 (351) : 34 Cri L Jour 334 (DB).

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[5] Care should be taken to see that use of this section is not invoked by one party to a dispute in order to obtain material advantage over the other. (Vol 27) 1940 Sind 158 (159): ILR (1940) Kar 508: 41 Cri L Jour 952 (DB).

[6] The Magistrate should try as far as possible to uphold the rights declared by civil courts. (Vol 21) 1934 Pat 565 (569): 36 Cri L Jour 146 (DB) \* (Vol 14) 1927 Mad 368 (368): 28 Cri L Jour 325 (Resort to the section should be had only when there is no time or opportunity for any other course.) \* (Vol 21) 1934 Cal 513 (515): 35 Cri L Jour 1252 (DB) (Do).

[7] An order under this section should always be commensurate to the emergencies of any particular situation. (Vol 29) 1942 Pat 414 (416): 43 Cri L Jour 722 \* (Vol 27) 1940 Bom 42 (43): 41 Cri L Jour 319 (DB) \* (Vol 20) 1933 Cal 348 (351): 34 Cri L Jour 334 (DB).

[8] The Magistrate must hold a full and sufficient enquiry as to the circumstances which make it likely that a breach of the peace will occur. ('80) 5 Cal 132 (134) (DB) \* (Vol 11) 1924 Pat 767 (768, 769): 25 Cri L Jour 1178.

[9] So soon as the emergency is over the Magistrate must restore the enjoyment of the legal rights superseded by him and protect the peaceful enjoyment of the same. ('81) 2 Weir 74 (76) (DB).

[10] In the absence of apprehension of a breach of the public peace, a Magistrate should not restrain the liberty of a private individual. (Vol 26) 1939 Rang 181 (182): 40 Cri L Jour 645: 1939 Rang LR 294.

[11] Where a person interferes with the legal exercise of right by another person the Magistrate should restrain the former and not deprive the latter of his rights. (Vol 11) 1924 Pat 767 (769): 25 Cri L Jour 1178 \* ('80) 5 Cal 132 (134, 135) (DB) \* ('84) Oudh SC No. 77 p 87 (89) \* ('73) 1873 Bom PJ 385 (386) (Right to conduct religious procession) \* ('82) Weir 3rd Edn 762 (762) (Right to conduct marriage procession) \* (Vol 24) 1937 Mad 311 (312): 38 Cri L Jour 582.

[12] A the mutawalli of mosque appointing one H to read prayers thereby causing dissatisfaction to many—Magistrate should inquire as to who was in the wrong and restrain him and not pass an order restraining both the parties. (Vol 9) 1922 Cal 483 (484): 24 Cri L Jour 154 (DB).

[13] Where breach of peace is anticipated it is the potential law breakers that should be restrained and not the peaceful citizens. (Vol 14) 1927 Lah 430 (430): 28 Cri L Jour 345 (DB) \* (Vol 10) 1923 Mad 15 (16): 23 Cri L Jour 689.

**3. "Written order stating the material facts".**—[1] Where the Magistrate is satisfied about the existence of sufficient ground he should pass a written order stating the material facts therein. (Vol 29) 1942 Lah 171 (172): 43 Cri L Jour 747: ILR (1942) Lah 510 (FB) \* (Vol 26) 1939 Rang 181 (182): 40 Cri L Jour 645: 1939 Rang LR 294 \* (Vol 11) 1924 Pat 767 (768): 25 Cri L Jour 1178 \* (Vol 11) 1924 Pat 703 (704): 26 Cri L Jour 260 \* ('05) 9 Cal WN cccxlii (cccxlili) (DB) \* (Vol 27) 1940 Bom 42 (43): 41 Cri L Jour 319 (DB) \* (Vol 15) 1928 All 14 (15): 50 All 414: 28 Or L Jour 991 \* (Vol 18) 1931 Bom 513 (513): 33 Cri L Jour 75 \* (1905) 2 Cri L Jour 215 (218): 32 Cal 935 (DB) (Cal).

[2] There ought to be evidence or information before the Magistrate that the act prohibited is likely

to cause a riot or affray or danger to human life, etc., constituting sufficient grounds to the satisfaction of the Magistrate. (Vol 26) 1939 Rang 181 (182): 40 Cri L Jour 645: 1939 Rang LR 294 \* (Vol 29) 1942 Lah 171 (172): 43 Cri L Jour 747: ILR (1942) Lah 510 (FB) \* ('75) 24 Suth WR Cr 30 (31) (DB) \* ('06) 10 Cal WN cliv (cliv) (DB).

[3] The information may, however, be oral. ('81) 8 Mad 354 (357) (DB).

[4] The information may be in a police report. (Vol 26) 1939 Mad 733 (735): 41 Cri L Jour 677 \* (Vol 11) 1924 Oudh 338 (340): 25 Cri L Jour 433.

[5] A Magistrate cannot act solely on the report of an interested person. (Vol 2) 1915 Cal 733 (734): 16 Cri L Jour 320 (320) (DB).

[6] The order should be served upon the persons proceeded against in the manner provided for by S. 134 of the Code. (Vol 10) 1923 Rang 146 (147): 1 Rang 49: 24 Cri L Jour 737 \* (Vol 22) 1935 Cal 251 (252): 36 Cri L Jour 736.

[7] Failure to stick on a copy of the order as required by S. 134 is a mere irregularity which will be immaterial if the person concerned has knowledge of its contents. (Vol 27) 1940 Cal 358 (362): ILR (1940) 2 Cal 110: 41 Cri L Jour 864 (16 Cal 9, relied on) \* ('89) 16 Cal 9 (12) (DB) \* (Vol 27) 1940 Pat 446 (447): 41 Cri L Jour 414.

[8] The notice issued to the party must follow the terms of the order in pursuance of which it is issued. (Vol 21) 1934 Cal 393 (396): 35 Cri L Jour 881 (DB).

[9] The authority under which the Magistrate takes action under this section should be clearly shown in the order. (Vol 10) 1923 Rang 146 (146): 1 Rang 49: 24 Cri L Jour 737.

[10] An order under this section should be clear and definite. (Vol 27) 1940 All 465 (466): 42 Cri L Jour 120: ILR (1940) All 662 \* (Vol 26) 1939 Rang 181 (183): 40 Cri L Jour 645: 1939 Rang LR 294 \* (Vol 23) 1936 Cal 259 (259): 37 Cri L Jour 696 \* (Vol 22) 1935 Bom 33 (33, 34): 36 Cri L Jour 547 (DB) \* (Vol 21) 1934 Oudh 162 (163): 35 Cri L Jour 699: 9 Luck 543 \* (Vol 28) 1941 All 70 (73): 42 Cri L Jour 298: ILR (1941) All 186 (FB) (An act prohibited within the area administered by certain Municipality—Held, word administered should not have been used—Magistrate should have regard to exact terms of the statutory provision).

**4. Who can pass order under the section.**—[1] Magistrate fixing day for enquiry not attending Court that day—Another Magistrate in charge of the current file and otherwise qualified to pass an order under this section can pass order on the application. (Vol 21) 1934 Cal 393 (394): 35 Cri L Jour 881 (DB).

[2] A sub-divisional Magistrate can pass an order under this section on the materials gathered by the subordinate Magistrate even though the latter has refused to pass the order on the ground that he did not find sufficient ground. (Vol 29) 1942 Mad 20 (21): 43 Cri L Jour 372.

**5. Nature of orders that can be passed under the section.**—[1] Only absolute and definite orders can be passed under the section and not conditional orders to be made absolute later. (Vol 23) 1936 Cal 259 (259): 37 Cri L Jour 696.

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[2] The orders under the section vary very widely in their scope and effect so as to drastically curtail liberties in some cases and only to a very minimum extent in other cases. (Vol 26) 1939 Mad 783 (78f) : 41 Cri L Jour 677.

6. Order to abstain from certain acts.—[1] An order of this description in order to be valid should fulfil the following requirements :—

(a) The order should be a definite order to abstain from a certain act. (Vol 23) 1936 Cal 259 (259) : 37 Cri L Jour 696 (DB) (Order to abstain from an act or show cause against the order is not one under this section).

(b) The order should be addressed to a definite person. ('98) 25 Cal 852 (853, 856) (DB) \*('98) 2 Cal WN 422 (423) (DB) \*(Vol 18) 1931 Bom 135 (138) : 55 Bom 322 : 32 Cri L Jour 507 (DB).

(c) The order should be addressed to a party to the proceedings and not to a third person. (Vol 4) 1917 Mad 629 (629) : 17 Cri L Jour 190 \*(Vol 8) 1921 Pat 415 (420) : 22 Cri L Jour 442.

(d) The order must state in clear and precise terms what it is that the person ordered is prohibited from doing. (Vol 27) 1940 Bom 42 (44) : 41 Cri L Jour 319 (DB) \*(Vol 26) 1939 Rang 181 (183) : 40 Cri L Jour 645 : 1939 Rang LR 294 \*('06) 10 Cal WN clxxvi (clxxvi) (Order prohibiting illegal acts generally) \*(Vol 26) 1939 Rang 181 (182, 183) : 40 Cri L Jour 645 : 1939 Rang LR 294 (Order prohibiting the public from discussing any matter which may excite public feelings) \*(Vol 27) 1940 Bom 42 (44) : 41 Cri L Jour 319 (DB) (Order prohibiting an editor from publishing any news in respect of a particular matter except with the previous approval of a certain officer).

(e) The order must be an order prohibiting the performance of an act and not one directing the performance of the act. (Vol 29) 1942 Pat 414 (416) : 43 Cri L Jour 722 \*(1936) 37 Cri L Jour 936 (937) (Cal) \*(Vol 25) 1938 Pat 610 (611) : 40 Cri L Jour 144 \*(('69) 6 Bom HCR Cr 36 (41, 42) (DB) \*('95) 17 All 485 (487, 489) (FB) \*(Vol 20) 1933 Cal 724 (725) : 34 Cri L Jour 1192 (DB) \*(Vol 1) 1914 Mad 239 (240) : 15 Cri L Jour 291 (DB) \*('69-'70) 5 Mad HCR App xix (xix) \*(Vol 21) 1934 Rang 124 (125) : 12 Rang 283 : 35 Cri L Jour 1300.

[See however (Vol 24) 1937 Cal 406 (407) : ILR (1937) 2 Cal 475 : 38 Cri L Jour 915 (DB) (Where the order may be covered by the words "or to take certain order with certain property in his possession or under his management" such order can be passed) \*(Vol 27) 1940 Pat 57 (58) : 47 Cri L Jour 98 (Do).]

(f) The object of the order should be one of those specified in sub-section (1). ('09) 11 Cri L Jour 11 (11) (DB) (Cal) \*('04) 1 Cri L Jour 248 (250) (DB) \*(Vol 18) 1931 Mad 236 (239, 240) : 32 Cri L Jour 744 \*(Vol 18) 1931 Bom 135 (138) : 55 Bom 322 : 32 Cri L Jour 507 (DB) ('Annoyance' includes mental and physical annoyance.)

(g) The discretion is to be exercised by the Magistrate himself and cannot be delegated to another. (Vol 27) 1940 Bom 42 (44) : 41 Cri L Jour 319 (DB).

[2] Where one part, separable from the other, is bad because of vagueness the whole order does not become bad. (Vol 18) 1931 Bom 135 (138) : 55 Bom 322 : 32 Cri L Jour 507 (DB).

[See also (Vol 31) 1944 Pat 213 (214) : 46 Cri L Jour 18].

7. "Direction to take certain order certain property".—[1] 'Property' refers to immovable property and an order with custody of movable property cannot be passed under this section. ('69) 12 Suth WR Cr 38 (38).

[2] An order of this description should not be an interference of some kind with the property itself. 19 Cal 127 (130) (DB).

[3] The property, in respect of which the order is made, should be in the possession or management of the person against whom the order is passed. Shome LR 30 \*(Vol 31) 1944 Pat 213 (214) : 46 Cri L Jour 18 (Magistrate cannot put the Sub-Inspector in possession and direct him to do so).

[4] The section does not authorize the attachment of properties. ('08) 13 Cal WN cxix (cxix).

[5] The Magistrate under this section cannot order disputed articles to be placed in the custody of a third person for a fixed period or pending disposal of suit in respect of it. ('08) 8 Cri L Jour 230 (231, 232) (DB) (

[6] A Magistrate has jurisdiction under this section to prohibit the holding of a *hat* on particular days of the week if he considers that such an order is necessary to prevent a breach of the peace in the case is an emergent one. (Vol 27) 1940 Bom 42 (44) : 41 Cri L Jour 319 (DB) \*(Vol 22) 1935 (462) : 36 Cri L Jour 1268 \*(Vol 20) 1933 (351) : 34 Cri L Jour 334 (DB) \*('72) 18 Suth WR Cr 47 (53) (FB).

[See however (Vol 9) 1922 Cal 569 (570) : 33 Cri L Jour 164 (DB). (The Magistrate cannot prohibit the holding of *hat* though he can regulate the holding of it by prohibiting its holding on certain days) \*('12) 13 Cri L Jour 511 (512) (DB) (Cal) (

8. Effect of order under the section. An order under this section has not the effect of depriving either title or possession, though it may prevent the exercise of the rights. (Vol 27) 1940 Pat 512 (514) : 40 Cri L Jour 895 \*(Vol 25) 1936 (371) : 39 Cri L Jour 778 (DB) \*(Vol 21) 1934 (572) (573) (Cal).

[2] The order cannot be treated as a substantive order of possession in subsequent proceedings. 1945 Pat 453 (457) : 24 Pat 379 (DB) \*(Vol 27) 1940 Pat 331 (334) : 43 Cri L Jour 697.

[3] An incidental observation as to possession of an order under this section will not have the effect of an order under S. 145. (Vol 27) 1940 Pat 331 (334) : 43 Cri L Jour 697.

[4] The nature of the proceeding and its effect may be referred to when the history of the case is in question in a subsequent proceeding. 1938 Pat 455 (455) : 39 Cri L Jour 721.

[5] The fact of the order under this section being admitted in evidence under S. 13 of the Act. ('38) 1938 Pat W N 390 (391) \*(Vol 27) 1940 Pat 331 (333) : 39 Cri L Jour 361 (Previous order under S. 144, Cr P C is relevant to test the evidence of person prosecuted for offence under S. 44).

[6] An order under this section does not deprive a person who was not a party to the proceedings of his right to be heard. (Vol 8) 1921 Pat 415 (420) : 22 Cri L Jour 44.

9. Ex parte order.—Sub-section (2).—An order should not be passed without giving the party opportunity to show cause against the order being passed. (Vol 23) 1936 Cal 25

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37 Cri L Jour 696 \* ('96) 19 Mad 18 (20) (DB) \* (Vol 11) 1924 Pat 703 (704) : 26 Cri L Jour 260 \* ('83) 6 Mad 203 (223) (FB) \* ('98) 2 Cal W N 747 (748, 749) (DB).

[2] An *ex parte* order, under this section, can be passed in the following circumstances:

(a) Where there is emergency. (Vol 23) 1936 Cal 259 (259) : 37 Cri L Jour 696 \* (1900) 27 Cal 785 (787) (DB) \* ('16) 14 All L Jour 39n (39n).

(b) Where there is no time to serve notice on the party. ('98) 2 Cal W N 747 (748, 749) (DB) \* ('10) 11 Cri L Jour 449 (449) (DB) (Mad) \* (Vol 11) 1924 Oudh 338 (340) : 25 Cri L Jour 433.

[3] The *ex parte* order must set out the reasons for the necessity of such an order. (Vol 6) 1919 Mad 1004 (1007) : 20 Cri L Jour 309 : 42 Mad 422 (FB) (Per Sadasiva Iyer J.)

(4) Person aggrieved by an *ex parte* order, under this sub-section, can apply under sub-S. (4) to rescind or alter the order. (Vol 21) 1934 Cal 139 (140) : 35 Cri L Jour 541 (DB) \* (Vol 21) 1934 Cal 393 (395) : 35 Cri L Jour 881 (DB).

[5] Where the legality of an *ex parte* order is challenged it must be disposed of quickly. (Vol 9) 1922 Cal 569 (571) : 24 Cri L Jour 164 (DB).

**10. Order against the general public-Sub-section (3).—**[1] The order can only be directed to the general public when frequenting or visiting a particular place. (Vol 27) 1940 Cal 358 (361) : ILR (1940) 2 Cal 110 : 41 Cri L Jour 864 \* (Vol 26) 1939 All 746 (747) : 41 Cri L Jour 121 : ILR (1939) All 934 \* (Vol 18) 1931 Bom 513 (513) : 33 Cri L Jour 75 (DB) \* (Vol 18) 1931 Bom 325 (326) : 32 Cri L Jour 1144 (DB) \* (Vol 7) 1920 Mad 847 (848) : 20 Cri L Jour 755 (DB).

[2] The expression "particular place" implies a well-defined area regarding the boundaries of which the public can be in no doubt. (Vol 27) 1940 All 465 (467) : 42 Cri L Jour 120 : ILR (1940) All 662 \* (Vol 21) 1934 Bom 375 (378) : 36 Cri L Jour 130 : 59 Bom 27 (DB) (May also apply to a municipal town or ward the boundaries of which may reasonably be expected of the public to be clearly known) \* (Vol 27) 1940 Cal 358 (361) : ILR (1940) 2 Cal 110 : 41 Cri L Jour 864 \* (Vol 22) 1935 Lah 679 (680) : 36 Cri L Jour 951 \* (Vol 1) 1914 Bom 198 (198) : 16 Cri L Jour 98 (98) (DB) \* (Vol 27) 1940 Oudh 241 (243) : 40 Cri L Jour 228 : 15 Luck 344 (Overruled on another point in (Vol 29) 1942 Oudh 39 (44) : 42 Cri L Jour 884 : 17 Luck 52 (DB) \* (Vol 28) 1941 All 70 (72) : 42 Cri L Jour 298 : ILR (1941) All 186 (FB) \* (Vol 2) 1915 Oudh 189 (189) : 16 Cri L Jour 190 (191, 192) : 18 Oudh Cas 70 (Prohibiting sacrifice within a specified boundary) \* (Vol 7) 1920 Mad 847 (847, 848) : 30 Cri L Jour 755 (Prohibiting attendance at a temple during a particular festival).

[3] The expression "particular place" should not be interpreted too narrowly but should be held to include the whole district over which the Magistrate may have jurisdiction or a particular sub-division of a district or the limits of a particular union committee or the public and private streets in a particular city (Vol 24) 1937 Lah 80 (81) : 38 Cri L Jour 354 : 17 Lah 515 (District of Lahore is a particular place within the meaning of sub-s. (3) \* (Vol 27) 1940 Cal 358 (361) : ILR (1940) 2 Cal 110 : 41 Cri L Jour 864 (Expression "particular place" is sufficiently wide to include the whole district

over which the Magistrate may have jurisdiction) \* (Vol 26) 1939 Cal 703 (704) : ILR (1939) 2 Cal 507 : 41 Cri L Jour 105 (DB) (Order prohibiting public meeting in any area within the sub-division of Barrackpore held to be legal) \* (Vol 22) 1935 Bom 33 (34) : 36 Cri L Jour 547 (DB) \* (Vol 27) 1940 Pat 446 (448) : 41 Cri L Jour 414 (An order forbidding the assembly of five or more persons in any public place, street or thoroughfare within the limits of the N. Union Committee and forbidding the carrying of any lathi or weapon by any person within those limits describes "a particular place."

[But see (Vol 18) 1931 Bom 325 (325, 326) : 32 Cri L Jour 1144 (DB) \* (Vol 18) 1931 Bom 513 (513, 514) : 33 Cri L Jour 75 (DB)].

[4] An order prohibiting meetings to be held in any "place of public resort" in a city is much too vague to come within the terms of the section. (Vol 22) 1935 Bom 33 (33) : 36 Cri L Jour 547 (DB).

[5] The "particular place" should be one which is frequented or visited by the Public ; in other words it must be open to the public as such. (Vol 18) 1931 Mad 242 (245) : 32 Cri L Jour 763 (Private house not frequented by the public is not a public resort.) \* (Vol 27) 1940 Oudh 241 (243) : 41 Cri L Jour 228 : 15 Luck 344 (Do) \* ('90) 14 Bom 165 (167) (DB).

[6] The expression "public generally when frequenting or visiting a particular place" includes also the residents of the place. (Vol 28) 1941 All 70 (71) : 42 Cri L Jour 298 : ILR (1941) All 186 (FB) \* (Vol 29) 1942 Oudh 39 (44) : 42 Cri L Jour 884 : 17 Luck 52 (DB) ((Vol 27) 1940 Oudh 241 : 15 Luck 344 : 41 Cri L Jour 228 overruled) \* (Vol 27) 1940 All 465 (466) : 42 Cri L Jour 120 : ILR (1940) All 662 \* (Vol 24) 1937 Lah 80 (81) : 17 Lah 515 : 38 Cri L Jour 354 \* (Vol 27) 1940 Cal 358 (361).

[7] An order to the general public can be issued prohibiting the visit to a particular place where it is impracticable to serve it individually. (Vol 28) 1941 All 70 (73) : 42 Cri L Jour 298 : ILR (1941) All 186 (FB) \* (Vol 24) 1937 Lah 80 (81) : 17 Lah 515 : 38 Cri L Jour 354 \* (Vol 2) 1915 Oudh 188 (189) : 18 Oudh Cas 70 : 16 Cri L Jour 190 (DB).

[8] Order under this section cannot be made until it is shown that the public whom it is sought to restrain from doing certain acts are actually frequenting or visiting a particular place. (Vol 12) 1925 Cal 625 (626) : 26 Cri L Jour 874 (DB) \* (Vol 21) 1934 Cal 393 (396) : 35 Cri L Jour 881 (DB).

[But see (Vol 27) 1940 Cal 358 (362) : ILR (1940) 2 Cal 110 : 41 Cri L Jour 864 (DB).]

[9] The law contemplates only the prohibition of some act on an occasion on which a place is frequented or visited and not the frequenting or visiting. (Vol 28) 1941 All 70 (72) : 42 Cri L Jour 298 : ILR (1941) All 186 (FB) \* (Vol 27) 1940 Cal 358 (361) : ILR (1940) 2 Cal 110 : 41 Cri L Jour 864.

[10] The order must be sufficiently clear to enable the public or persons affected by it, to know exactly what it is which they are prohibited from doing. (Vol 22) 1935 Bom 33 (33) : 36 Cri L Jour 547 (DB) \* (Vol 26) 1939 Rang 181 (183) : 1939 Rang LR 294 : 40 Cri L Jour 645 \* (Vol 27) 1940 Cal 358 (361) : ILR (1940) 2 Cal 110 : 41 Cri L Jour 864.

[11] An order addressed to a particular portion of the community and not to a general public in the absence of any indication that the Magistrate contemplated immediate action is not competent. ('86) 8 All 99 (100, 101).

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[12] An order directed neither to a particular individual nor to the public generally when frequenting or visiting a particular place is one made without jurisdiction. (Vol 1) 1914 Bom 198 (198) : 16 Cri L Jour 98.

**11. Rescission or alteration of order—Sub-section (4).**—[1] The jurisdiction conferred by this sub-section is not appellate or revisional, but is a special one. (Vol 24) 1937 Mad 487 (488) : 38 Cri L Jour 864 \* (Vol 8) 1921 Pat 468 (468) \* (Vol 19) 1932 Mad 720 (721, 722) : 56 Mad 149 : 33 Cri L Jour 826.

[2] Magistrate acting under this sub-section cannot substitute an entirely new order of his own. (1938) 1938-2 Mad L Jour 509 (511) \* (Vol 24) 1937 Mad 487 (488) : 38 Cri L Jour 864.

[3] The sub-section contemplates only a change in the nature of the order and not a change in the party against whom it has been made. (1938) 19 Pat L Tim 796 (797) \* (Vol 5) 1918 Pat 672 (673) : 19 Cri L Jour 880 (DB) \* (Vol 24) 1937 Mad 487 (489) : 30 Cri L Jour 864 (Counter-petitioners ought not to be prohibited by the District Magistrate of what he was permitted to do by the Deputy Magistrate.) \* (Vol 9) 1922 Mad 76 (77, 78) : 23 Cri L Jour 404 (Do).]

[4] An order directing proceedings to be taken under S. 145 passed by the District Magistrate while setting aside the order of the Subordinate Magistrate is bad although such a suggestion may be given for his guidance. (Vol 16) 1929 Cal 751 (752) : 31 Cri L Jour 544 \* (Vol 9) 1921 Pat 445 (446) : 23 Cri L Jour 27 \* (Vol 8) 1921 Pat 468 (469) \* (Vol 8) 1921 Pat 410 (411) : 23 Cri L Jour 498 (May suggest for the guidance of the subordinate Magistrate).

[5] A superior Magistrate can still act even though the subordinate Magistrate himself has disposed of an application for rescinding or altering the order. (Vol 24) 1937 Mad 167 (168) : ILR (1937) Mad 171 : 38 Cri L Jour 125 \* (Vol 24) 1937 Mad 311 (312) : 38 Cri L Jour 582.

[6] Reasons for passing an order no longer existing or having changed or the order being one that ought not to have been passed—Rescission or alteration held justified. (Vol 9) 1922 Pat 435 (436, 437) : 2 Pat 94 : 23 Cri L Jour 549 (FB).

[7] The mere fact that a Magistrate is interested in the matter, does not disqualify him from exercising his powers under this sub-section. (Vol 21) 1934 Pat 313 (315) (DB).

[8] Intermediate or interlocutory orders pending final orders, cannot be passed under the section. ('06) 4 Cri L Jour 433 (435, 436) (DB) (Cal).

[9] A superior Magistrate who has ceased to have territorial jurisdiction over the subordinate Magistrate cannot rescind or alter an order made by him. (Vol 24) 1937 Mad 487 (489) : 38 Cri L Jour 864.

[10] Order passed by acting District Magistrate subsequently reverted—Permanent District Magistrate should rescind or alter it—He cannot transfer the same to the former. (Vol 8) 1916 Mad 533 (533) : 16 Cri L Jour 74.

**12. Enquiry into application to rescind or alter the order—Sub-section (5).**—[1] Magistrate passing order under this section should give an early opportunity to the aggrieved party to show cause against it for altering or rescinding it. (Vol 26) 1939 Rang 181 (183) : 40 Cri L Jour 645 : 1939 Rang LR 294 \* (Vol 24) 1937 Mad 167 (169) : ILR (1937) Mad 171 : 38 Cri L Jour 125.

[2] The Magistrate is bound to hold an enquire the circumstances of the case on an application if that order has to be rescinded or altered. 1932 Mad 294 (296, 297) : 33 Cri L Jour 605 1934 Cal 393 (395) : 35 Cri L Jour 881 (DB).

[3] The provisions of this sub-section are not an application under sub-s. (4) should be dismissed summarily without giving an opportunity to the applicant to support his application. 1939 Rang 181 (183) : 40 Cri L Jour 645 : 1 LR 294.

[4] An enquiry under this section is an enquiry. (Vol 18) 1931 Bom 325 (326) : 32 C 1144 (DB) \* (Vol 18) 1931 Mad 242 (244) : Jour 763 \* (Vol 17) 1930 Mad 242 (244) : 31 C 324 : 53 Mad 320 (DB) \* (Vol 16) 1929 Pat 46 Cri L Jour 302 : 7 Pat 269.

[See also (Vol 29) 1942 Lah 171 (172) : Jour 747 : ILR (1942) Lah 510 (FB) \* (Vol Oudh 416 (416) : 41 Cri L Jour 781].

[But see (Vol 15) 1928 Mad 1108 (1109) : Jour 119 : 52 Mad 69 \* (Vol 10) 1923 Mad 4 24 Cri L Jour 424 : 47 Mad 56 (DB).

[5] The Magistrate is bound to take evidence in the usual way by examination and cross-examination of witnesses in an enquiry under this section. 1931 Mad 236 (238) : 32 Cri L Jour 744 \* (Vol Bom 325 (326) : 38 Cri L Jour 1144 (DB) Suth WR Cr 17 (17, 18) (DB) \* ('70) 13 Su 19 (20) (DB) (Police report is not evidence).

[6] Magistrate cannot record evidence ex parte act solely on that without hearing the parties 1929 Pat 46 (47) : 7 Pat 269 : 30 Cri L Jour 11) 1924 Pat 717 (718) : 25 Cri L Jour 455 (1 Mad WN 1263 (1263). (DB) (Persons under this section against another, institute proceedings against that person).

[7] The accused is entitled to a copy of the order, upon which the Magistrate has acted. 1931 Mad 242 (244) : 32 Cri L Jour 763.

[8] Though the enquiry can be delegated to a subordinate Magistrate the superior Magistrate must come to an independent opinion. (Vol 20) 348 (351, 352) : 34 Cri L Jour 334 (DB).

[See however (Vol 24) 1937 Mad 167 (168) (1937) Mad 171 : 38 Cri L Jour 125 (Enquiry delegated to a Magistrate who has already made an application under sub-s. (4).]

[9] Enquiry delegated to subordinate Magistrate District Magistrate cannot suspend order of enquiry. (Vol 24) 1937 Mad 167 (169) : 1 Mad 171 : 38 Cri L Jour 125.

**13. Duration of the order—Sub-section (6).**—[1] The order under this section should be revocable but must be one that can be rescinded within two months. (Vol 29) 1942 Pat 43 Cri L Jour 722 \* (Vol 29) 1942 Pat 331 Cri L Jour 637 \* (Vol 15) 1928 All 14 (16) : 5 2 \* Cri L Jour 991 \* ('88) 10 All 115 (117, 118) having the effect of perpetual injunction passed) \* (Vol 19) 1932 Cal 288 (288) : 33 Cri (DB) (Do) \* ('80) 5 Cal 7 (19, 20) (FB) (Do) 1932 Mad 294 (296) : 33 Cri L Jour 605 (D Cri L Jour 166 (167, 168). (DB) (Cal) (1 rival claimants from collecting rents till established in Court) \* ('01) 24 Mad 45 (46)

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a person to abstain from exercising rights in a temple till another person was removed).

[See also (Vol 28) 1941 Mad 498 (499) : 43 Cri L Jour 433 : ILR (1941) Mad 544 (DB).]

[2] An order under this section cannot be extended by passing successive orders or by renewing it at the end of every two months. (Vol 29) 1942 Pat 414 (417) : 43 Cri L Jour 722 (Vol 27) 1940 Pat 559 (560) : 41 Cri L Jour 578 (Vol 3) 1916 Cal 472 (473) : 17 Cri L Jour 200 (200, 201) (DB) (Vol 12) 1925 Cal 625 (625) : 26 Cri L Jour 874 (DB) (Vol 1) 1914 Mad 697 (697) : 14 Cri L Jour 658 (DB) (Vol 10) 1923 Mad 15 (16) : 23 Cri L Jour 689.

[3] Order under S. 144 cancelled as being defective—Magistrate can initiate a valid proceeding and pass an affective order—Such order cannot be attacked as a excessive order extending the duration for more than two months. ('46) 1946 Pat WN 169 (171).

[4] Where an order does not prove sufficient for the purpose, the proper course is to take action under S. 107. (Vol 3) 1916 Cal 472 (473) : 17 Cri L Jour 200 (DB) (Vol 4) 1917 Pat 154 (155) : 19 Cri L Jour 365 : 3 Pat L Jour 130 (DB).

[5] Where the duration of the order is found insufficient to meet the emergency the Magistrate should move the Provincial Government to extend the duration of the order. (Vol 3) 1916 Mad 1106 (1106) : 16 Cri L Jour 592.

[6] The Provincial Government need not state the reasons for extending the duration of the order. (Vol 10) 1923 All 606 (607) : 45 All 526 : 24 Cri L Jour 689.

[7] The section does not permit the Provincial Government to resuscitate an order which is no longer in force. (Vol 27) 1940 Lah 459 (460) : 42 Cri L Jour 90.

[8] The two months count from the date of the order and not from the date of confirmation of the order on a subsequent date. (Vol 29) 1942 Pat 414 (415) : 43 Cri L Jour 722 (Vol 27) 1940 Pat 492 (494) : 41 Cri L Jour 417 (Vol 27) 1940 Pat 364 (364) : 41 Cri L Jour 384 (Vol 10) 11 Cri L Jour 12 (13) (DB) (Cal) (Vol 24) 1937 Mad 311 (312) : 38 Cri L Jour 582.

[9] An order under this section need not state expressly that its operation is confined to two months or some shorter period. ('07) 6 Cri L Jour 194 (195, 197) : 34 Cal 897 (DB) (Vol 7) 1920 Mad 847 (848) : 20 Cri L Jour 755 (DB).

**14. Revision.**—[1] Ordinarily, a person aggrieved by an order, should exhaust his remedy under Sub-s. (4) before he can apply for a revision to the High Court. (Vol 27) 1940 Bom 42 (42) : 41 Cri L Jour 319 (DB) (Vol 21) 1934 Cal 139 (140) : 35 Cri L Jour 541 (DB) (Vol 19) 1932 Mad 720 (722) : 56 Mad 149 : 33 Cri L Jour 826 (Vol 11) 1924 Pat 145 (147) : 24 Cri L Jour 947 (Vol 6) 1919 Mad 1004 (1008, 1009) : 19 Cri L Jour 56 (DB).

[2] Application directly for revision will lie where the Magistrate has acted without jurisdiction or there are other circumstances justifying it. (Vol 11) 1924 Pat 145 (147) : 24 Cri L Jour 947 (Vol 8) 1921 Pat 392 (394) : 22 Cri L Jour 685 (Vol 27) 1940 Bom 42 (42) : 41 Cri L Jour 319 (DB) (Vol 21) 1934 Cal 139 (140) : 35 Cri L Jour 541 (DB) (Vol 19) 1932 Mad 720 (722) : 56 Mad 149 : 33 Cri L Jour 826.

[3] Unless there is clear evidence that no reasonable man could have held that there was an emergency the High Court will not interfere with the findings of the Magistrate. (Vol 26) 1939 Sind 230 (231) : ILR (1939) Kar 751 : 40 Cri L Jour 823 (DB) (Vol 24) 1937 Mad 311 (312) : 38 Cri L Jour 582 (Vol 18) 1931 Bom 135 (137) : 55 Bom 322 : 32 Cri L Jour 507 (DB) (Vol 21) 1934 Pat 313 (315) (DB).

[4] The opinion of local authorities on record about the gravity of danger and the necessity for the step taken will be given great weight by the High Court. (Vol 29) 1942 Lah 171 (172) : 43 Cri L Jour 747 : ILR (1942) Lah 510 (FB) (Vol 18) 1931 Mad 242 (244) : 32 Cri L Jour 763 (Vol 10) 11 Cri L Jour 194 (194) (Mad) (Vol 21) 1934 Pat 463 (465) : 36 Cri L Jour 257.

[5] The High Court may in view of the facts placed before it, call for the record to satisfy itself that the order is legal and that the Magistrate has not acted in an arbitrary manner. (Vol 30) 1943 Cal 35 (38) : 44 Cri L Jour 286 : ILR (1942) 1 Cal 488 (DB) (Vol 29) 1942 Lah 171 (172) : 43 Cri L Jour 747 : ILR (1942) Lah 510 (FB) (Vol 26) 1939 Sind 230 (231) : ILR (1939) Kar 751 : 40 Cri L Jour 823 (DB).

[6] The High Court will interfere in revision in the following cases:—

(a) Where there are no materials justifying the issue of the order. (Vol 16) 1929 Pat 714 (716) : 31 Cri L Jour 466 (Vol 9) 1922 Pat 239 (240) (Vol 6) 1919 Mad 1004 (1007) : 19 Cri L Jour 56 (DB).

[See however (Vol 24) 1937 Mad 494 (494) : 38 Cri L Jour 892 (Vol 20) 1938 Cal 343 (353) : 34 Cri L Jour 334 (Vol 3) 1916 Cal 69 (69) : 17 Cri L Jour 464 (DB).]

(b) Where the grounds stated in the order are either unfounded in fact or insufficient in law. (Vol 18) 1931 Mad 242 (245) : 32 Cri L Jour 763.

(c) Where the order violates the conditions in the section. ('93) 2 Cal WN 747 (748, 749) (DB) (Vol 18) 1931 Mad 242 (245) : 32 Cri L Jour 763 (Vol 1) 1914 Mad 697 (697) : 14 Cri L Jour 658 (DB) (Vol 11) 1924 Pat 145 (146, 147) : 24 Cri L Jour 947 (Vol 4) 1917 Cal 6 (7) : 18 Cri L Jour 892 (893) (DB).

[But see (Vol 26) 1939 Rang 181 (182) : 40 Cri L Jour 645].

(d) Where the order is beyond the scope of the section. ('98) 25 Cal 852 (856) (DB) (Vol 78) 1 Cal L Rep 58 (61) (DB) (Vol 7) 1920 Pat 155 (155) : 21 Cri L Jour 657 (Vol 1) 1914 Cal 22 : 41 Cal 400 : 14 Cri L Jour 673 (DB) followed (Vol 20) 1933 Pat 185 (186, 187) : 34 Cri L Jour 717.

(e) Where final order is passed without notice and hearing the party. (Vol 11) 1924 Pat 703 (704) : 26 Cri L Jour 260 (Vol 7) 1920 Pat 496 (499) : 20 Cri L Jour 829.

(f) Where the order is based upon no legal evidence. (Vol 16) 1929 Pat 46 (47) : 7 Pat 269 : 30 Cri L Jour 302.

(g) Where the order amounts to an abuse of the process of Court or has resulted in the denial of a right of fair trial. (Vol 27) 1940 Pat 382 (383) : 41 Cri L Jour 907 (Vol 9) 1922 Pat 435 (438) : 2 Pat 94 : 23 Cri L Jour 549 (FB).

[7] Where the order has spent itself out by lapse of time, High Court will not generally interfere in revision. (Vol 29) 1942 Pat 331 (332) : 43 Cri L Jour 697 (Vol 27) 1940 Pat 185 (187) : 41 Cri L Jour 463 (Vol 27)



## CHAPTER XII.

## DISPUTES AS TO IMMOVABLE PROPERTY.

145. (1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute concerning land, first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land etc., is likely to cause or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or

## Section 144 (contd.)

1940 Pat 364 (364) : 41 Cri L Jour 384 \* (Vol 11) 1924 Mad 896 (896) : 25 Cri L Jour 304 \* (Vol 21) 1934 Oudh 87 (87) : 35 Cri L Jour 472 \* (Vol 17) 1930 Mad 242 (242) : 53 Mad 320 : 31 Cri L Jour 324.

[See also (Vol 30) 1943 Cal 35 (39) : 44 Cri L Jour 288 : ILR (1942) 1 Cal 488 (DB).]

[8] High Court will interfere in revision even where the order has lapsed in the following cases:—

(a) Exceptional cases. (Vol 27) 1940 Pat 559 (560) : 41 Cri L Jour 578.

[See (Vol 27) 1940 Bom 42 (42) : 41 Cri L Jour 319 (DB) \* (Vol 22) 1935 Lah 676 (679, 680) : 36 Cri L Jour 951.]

(b) Where question of jurisdiction is involved. (Vol 6) 1919 Cal 584 (584, 585) : 19 Cri L Jour 951 (DB) \* (Vol 17) 1930 Cal 131. (132) : 31 Cri L Jour 804 (DB) \* (Vol 9) 1922 Mad 76 (77) : 23 Cri L Jour 404 \* (Vol 16) 1929 Pat 46 (48) : 7 Pat 269 : 30 Cri L Jour 302 \* (Vol 14) 1927 Pat 432 (432) : 28 Cri L Jour 1039 \* (Vol 14) 1927 Lah 430 (430) : 28 Cri L Jour 345.

(c) Where the party has been seriously prejudiced. ('38) 19 Pat L Tim 796 (798) \* (Vol 22) 1935 Pat 224 (225) : 36 Cri L Jour 655

[9] High Court can interfere in revision even after cancellation of the order by Magistrate. (Vol 27) 1940 Bom 42 (42) : 41 Cri L Jour 319 (DB).

[10] An order dropping proceedings on untenable grounds can be interfered with in revision. (Vol 28) 1941 Pat 281 (282) : 42 Cri L Jour 620.

15. Disobedience of order under the section.—[1] Disobedience of order under this section is punishable under S. 188, IPC the prosecution for which has to be launched under S. 195 or 476 of this Code. (Vol 26) 1939 Mad 496 (496) : 40 Cri L Jour 752 \* ('36) 37 Cri L Jour 936 (937) (DB) (Cal) \* (Vol 9) 1922 Pat 84 (86) : 23 Cri L Jour 381 \* (Vol 6) 1919 Cal 108 (109) : 20 Cri L Jour 113 (DB).

[2] The following conditions should be fulfilled to punish a person for disobedience of an order under this section:—

(a) Order should be one warranted by the section and the requirements of the section should have been fully complied with. (Vol 31) 1944 Pat 213 (214) : 46 Cri L Jour 18 \* (Vol 27) 1940 Pat 446 (447) : 41 Cri L Jour 414 (Mere irregularity in promulgation of the order will not invalidate the order where the parties have knowledge of its contents) \* (Vol 27) 1940 Cal 358 (362) : ILR (1940) 2 Cal 110 : 41 Cri L Jour 864 \* (Vol 24) 1937 Cal 406 (407) : ILR (1937) 2 Cal 475 : 38 Cri L Jour 915 (DB) \* ('92—96) 1 Upp Bur Rul 174 (175) \* ('92—96) 1 Upp Bur Rul 183 (186) \* ('89) 16 Cal 9 (12) (DB). (Mere irregularity in the promulgation will not vitiate the order where parties have knowledge of its contents).

(b) Accused must be shown to have had actual knowledge of the order which cannot be presumed. (Vol 27) 1940 Pat 446 (447) : 41 Cri L Jour 414 \* (Vol 26) 1939 Cal 703 (704) : ILR (1939) 2 Cal 507 : 41 Cri L Jour 105 (DB) \* (Vol 14) 1927 Cal 28 (28) : 34 Cal 152 : 23 Cri

L Jour 4 \* ('99) 1 Bom LR 524 (524) (DB) \* ('05) 2 Cri L Jour 719 (720) : 1905 Pun Re No. 36 (Cr) \* (Vol 22) 1935 All 552 (553) : 36 Cri L Jour 639.

[See however (Vol 28) 1941 All 70 (73) : 42 Cri L Jour 298 : ILR (1941) All 186 (FB) \* (Vol 29) 1942 Oudh 89 (41) : 42 Cri L Jour 884 : 17 Luck 52 (DB).]

(c) The accused should be proved to have disobeyed the order. (Vol 31) 1944 Pat 213 (214) : 46 Cri L Jour 18 \* ('32) 1932 Mad W N 1073 (1073) \* ('89) 16 Cal 9 (13) (DB) \* (Vol 7) 1920 All 223 (224) : 22 Cri L Jour 2 (Should be during continuance of the order) \* ('88) 10 All 115 (118) (Do).

(d) Disobedience should have caused or tended to cause obstruction or annoyance or injury to a person lawfully employed or danger to life, health or safety or riot or an affray. (Vol 17) 1930 Cal 131 (132) : 31 Cri L Jour 804 (DB) \* (Vol 19) 1932 Cal 868 (869) : 33 Cri L Jour 829 \* (Vol 9) 1922 Pat 84 (86, 87) : 23 Cri L Jour 381 \* ('68) 4 Mad HCR App v (vi) (DB) \* ('88) 1886 All WN 251 (251) \* ('08) 8 Cri L Jour 431 (434) (Bom).

[3] For the purpose of deciding as to what part of the penal provision in S. 188 applies, the Court can only look to the order under S. 144. (Vol 9) 1942 Oudh 39 (41) : 42 Cri L Jour 884 : 17 Luck 52 (DB).

[4] The legality of an order under this section can be questioned in proceedings under S. 188 IPC. (Vol 6) 1921 Cal 258 (259) : 23 Cri L Jour 376 (DB).

[5] Resistance, within the limits of private defence, to an order which is *ultra vires*, is not an offence. (Vol 8) 1921 Pat 415 (420) : 22 Cri L Jour 442.

16. Suit to establish civil rights infringed by an order under this section.—[1] Civil suit will lie for establishing a right infringed by an order under this rule and it will not be barred by the existence of the order itself. (Vol 6) 1919 Mad 674 (675) : 42 Mad 271 (FB) (Vol 5) 1918 Mad 448 (DB) overruled \* ('73) 5 NWP HCR 8 (9) (DB) \* ('77) 3 Cal 20 (23) (FB) \* ('80) 2 Mad 140 (142) (Suit to establish right to play music before mosque) \* ('80) 5 Cal 7 (9, 20) (FB).

[2] No proof of special damage is necessary to succeed in an action to establish a right infringed by an order under this section. (Vol 6) 1919 Mad 674 (675, 676) : 42 Mad 271 (FB) \* ('78) 2 Bom 457 (468, 469) (DB).

[3] Where the Civil Court declared the rights, the parties should approach the Provincial Government to modify or cancel the order in the light of the Civil Court's declaration. The Civil Court itself cannot cancel the order. (Vol 9) 1922 Mad 123 (124) (DB) \* ('74) 6 NW HCR 104 (109) (DB).

## SECTION 145—Synopsis.

1. Scope and applicability of the section.
2. Applicability to cases arising under the Bengal Alluvial Lands Act.
3. Sections 144, 145 and 107 compared.
4. Nature of proceedings under this section.



by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section the expression "land or water" includes buildings markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, a[receive all such evidence as may be] produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject :

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date :

Provided also, that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed ; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

#### Section 145 (contd.)

5. Who can take action under this section.
6. "Is satisfied"
7. Police-report.
8. "Or other information".
9. "Dispute", meaning of.
10. Likely to cause a breach of the peace.
11. The subject of dispute.
12. "Within the local limits of his jurisdiction".
13. Effect of non-compliance with the provisions of the section.
14. Preliminary order.
15. Statement of grounds in the preliminary order.
16. "Parties concerned in such dispute".
17. Addition of parties.
18. Continuation of proceedings by or against legal representatives—Sub-section (7).
19. "Attend his Court".
20. Written statements.
21. "Fact of actual possession".
22. "Land or water or the boundaries thereof".
23. Service and publication of the preliminary order—Sub-section (3).
24. Omission to serve or publish the order.
25. Attachment in case of emergency.
26. "Crops or other produce subject to speedy and natural decay"—Sub-section (3).
27. Procedure at the inquiry.
28. Issue of summons to witnesses—Sub-section (9).
29. Power to adjourn enquiry.

30. Perusal of statements.
31. "Hear the parties".
32. "Receive all such evidence as may be produced".
33. "Consider the effect of such evidence and take such further evidence as he thinks necessary."
34. Procedure in recording evidence.
35. Local inquiry and local inspection.
36. Possession at the date of the preliminary order.
37. Reference to arbitration and compromise.
38. Question of title.
39. Effect of prior proceedings on the inquiry in possession.
40. Joint possession.
41. Forcible and wrongful dispossession "within two months next before date of order".
42. "Forcibly and wrongfully"—Meaning of.
43. Cancellation of the preliminary order—Sub-section (5).
44. Finality of the preliminary order.
45. "Any other person interested".
46. Order under this section.
47. "Declare that such person is entitled to possession".
48. Evicted in due course of law.
49. Restoration of possession.
50. Effect of order under this section.
51. Effect of an order under this section on limitation.
52. Persons bound by the order.
53. Conversion of proceedings.
54. Revision.

(6) If the Magistrate decides that one of the parties was b[or should under the first proviso to  
Party in possession to subsection (4) be treated as being] in such possession of the said subject,  
retain possession until he shall issue an order declaring such party to be entitled to possession  
legally entitled

## Objects and Reasons.

"*Clause 145.*—As the law stands at present, the date of the order under sub-section (1) of this clause is taken as the critical date for the purpose of determining actual possession. This appears to give an unfair advantage to a person who has forcibly dispossessed another. But difficulties arise when the test of actual possession at the time of the institution of the proceedings is departed from. We think that the proviso we have added to sub-section (4) goes as far as is possible to meet the evil in question without involving the Magistrate in an enquiry into title or right to possession, which is the function of a Civil Court."—S.C.R., 1898.

*Amendment made in 1923.*—"In view of the objections of the Bengal Government, we do not think Sections 145, 147 and 148 should apply to the Presidency towns. We have, therefore, omitted the first amendment made by Clause 27, and references to "Presidency Magistrate" and "Chief Presidency Magistrate," respectively, in Clauses 29 and 30.

In order to meet certain difficulties, which have arisen in connection with the words "receive the evidence produced by them" in Section 145 (4), we have made an amendment adopting the phraseology of Section 244 (1), and have also added a new sub-section (8-A) [now sub-S. (9)] on the lines of Section 244 (2). We have made an addition to the first amendment made in sub-section (6), Section 145 to make the intention clearer. We have introduced a new clause which, by an amendment of Section 146, will enable a District Magistrate to withdraw the attachment of property at any time when he is satisfied that there is no longer any likelihood of a breach of the peace.

Doubts have been expressed as to the procedure to be followed in cases under Section 147 and we have introduced amendments here to make it clear that the procedure is to be that laid down by Section 145."—S. C. R. [XVIII of 1923].

Section 145 (*contd.*)

under S. 145 either in supersession or in continuation of the orders, if any, passed under S. 107 or S. 144. (Vol 16) 1929 Pat 46 (48) : 7 Pat 269 : 30 Cri L Jour 302 \* (Vol 9) 1922 Pat 435 (440) : 2 Pat 94 : 23 Cri L Jour 549 (FB).

[But see (Vol 21) 1934 Pat 463 (465) : 36 Cri L Jour 257 \* (Vol 7) 1920 Cal 841 (841) : 22 Cri L Jour 224 (DB).]

[3] Dispute relating to immovable property likely to cause breach of peace—Action should be taken under this section and not S. 107. (1946) 27 Pat L Tim 231 (234).

[4] Ordinarily, when a dispute relating to the possession is likely to cause a breach of the peace and there is no emergency, the provisions of S. 144 will not apply and action should be taken under S. 145. (Vol 27) 1940 Pat 382 (383) : 41 Cri L Jour 907 \* (Vol 29) 1942 Cal 66 (66) : 43 Cri L Jour 396 \* (Vol 27) 1940 Pat 492 (494) : 41 Cri L Jour 417 \* (Vol 4) 1917 Upp Bur 5 (6) : 3 Upp Bur Rul 17 : 18 Cri L Jour 967 \* (Vol 27) 1940 Pat 471 (472) : 41 Cri L Jour 451.

[5] Where there is, in reality, no dispute as to possession, and a party whose claim to possession is a mere pretence, is threatening to interfere with possession, the Magistrate is clearly entitled to resort to the summary procedure under S. 144 provided the conditions of the section are fulfilled. (Vol 9) 1922 Pat 435 (438) : 2 Pat 94 : 23 Cri L Jour 549 (FB) \* (Vol 27) 1940 Pat 492 (494) : 41 Cri L Jour 417.

[6] Where there is a *bona fide* dispute relating to the possession of land or water, the Magistrate should take action under S. 145 and not under S. 144, and even where he takes action under S. 144, he should convert the proceeding into one under S. 145. This, however, is only a rule of propriety and convenience and does not affect the question of jurisdiction of a Magistrate to act under S. 144. (Vol 16) 1929 Pat 714 (715) : 31 Cri L Jour 466 \* (Vol 9) 1922 Pat 435 (438) : 2 Pat 94 : 23 Cri L Jour 549 (FB) \* (Vol 29) 1942 Pat 331 (333) : 43 Cri L Jour 637 \* (Vol 4) 1917 Upp Bur 5 (6) : 3 Upp Bur Rul 17 : 18 Cri L Jour 967 (Though dispute might exist, order under S. 144 is justified if the crops would be ruined if not harvested by the party in actual possession).

[7] Where the Magistrate finds one of the rival parties in actual possession of the land and there is a likelihood of the breach of the peace, he has a discretion to proceed either under S. 144 or S. 145 or S. 107. ('41) 1941 Mad W N 960 (960) \* ('08) 8 Cri L Jour 170 (175, 176) : 1 Sind LR 80 (SB) \* ('05) 2 Cri L Jour 769 (770) : 32 Cal 966 (DB) \* ('03) 26 Mad 471 (472) (DB).

[8] Where the question of possession is disputed and the case is one of emergency, the proper course is to pass a temporary order under S. 144 and then to institute an enquiry into possession, or straightway take the proceedings under S. 145 by attaching the property in dispute. (Vol 29) 1942 Pat 331 (334) : 43 Cri L Jour 637 \* (Vol 31) 1944 Pat 213 (214) : 46 Cri L Jour 18 \* (Vol 27) 1940 Sind 158 (159) : 41 Cri L Jour 952 : ILR (1940) Kar 508 (DB).

[9] Magistrate cannot by passing repeated orders under S. 144, avoid the decision of a dispute which may be appropriately dealt with under S. 145 or S. 107. (Vol 27) 1940 Pat 559 (560) : 41 Cri L Jour 578 \* (Vol 27) 1940 Pat 382 (383) : 41 Cri L Jour 907 \* (Vol 27) 1940 Sind 158 (159) : ILR (1940) Kar 508 : 41 Cri L Jour 952 (DB) \* (Vol 9) 1922 Pat 435 (440) : 2 Pat 94 : 23 Cri L Jour 549 (FB) (If he does so it is an abuse of the process of law).

[10] Owing to ill-feelings prevailing between certain persons likely to attend a meeting, a breach of the peace was expected—It was held that the Magistrate should proceed under S. 144 and not institute proceedings under S. 107 and arrest the persons. (Vol 5) 1918 Upp Bur 53 (54, 55) : 2 Upp Bur Rul 157 : 18 Cri L Jour 512.

[11] In cases of disputes likely to cause a breach of the peace but not coming strictly within S. 145, the Magistrate should take security from both the parties to the dispute under S. 107. (Vol 9) 1922 All 430 (430) : 23 Cri L Jour 612 (Dispute about claim to weigh grain in market not covered by S. 145).

[12] Where it is difficult to say which of the parties to a dispute is creating a disturbance, and speedy remedy is necessary, an order under S. 144 may be passed. It is, however, desirable that the order under S. 144 is followed up by proceedings under S. 107 binding over the party in fault. (Vol 22) 1935 Pat 461 (463) : 36 Cri L Jour 1268.

Section 145 (*contd.*)

[13] Where the conditions necessary for the applicability of S. 107, S. 144 as well as S. 145 are satisfied the Magistrate's exercise of the power is not limited to those under S. 145 only, but may act under S. 107 or S. 144. (Vol 21) 1934 Pat 308 (308, 309) : 13 Pat 76 : 35 Cri L Jour 1009 \* (Vol 16) 1929 Cal 468 (469, 470) : 30 Cri L Jour 1027 (DB) \* (Vol 15) 1928 Cal 610 (613, 614) : 56 Cal 290 : 30 Cri L Jour 69 (FB) \* (Vol 9) 1922 Pat 435 (438) : 2 Pat 94 : 23 Cri L Jour 549 (FB) \* ('13) 14 Cri L Jour 559 (562) : 36 Mad 315 (DB) \* ('09) 10 Cri L Jour 231 (232, 233) : 2 Sind LR 18 (DB) \* ('09) 10 Cri L Jour 221 (223) : 5 Nag LR 94 \* (1906) 3 Cri L Jour 323 (324) : 28 All 406 \* ('03) 26 Mad 471 (473) (DB).

[But see (1921) 22 Cri L Jour 574 (575) (Pat) \* (Vol 5) 1918 Pat 300 (301) : 19 Cri L Jour 1002 (1002).

[14] The proper course in the above case is to proceed under S. 145. As mentioned already, the question is really one of propriety and not of jurisdiction. (Vol 20) 1933 Pat 584 (585) : 35 Cri L Jour 88 \* (Vol 9) 1922 Pat 435 (438) : 23 Cri L Jour 549 : 2 Pat 94 (FB) \* (Vol 5) 1918 Lah 344 (344) : 19 Cri L Jour 446 \* (Vol 6) 1919 Cal 465 (465) : 19 Cri L Jour 367 \* ('08) 25 All 537 (540, 541) \* ('98) 25 Cal 798 (800).

[See (Vol 26) 1939 Sind 261 (262) : 40 Cri L Jour 887 (DB).]

[15] The Magistrate may find that after an order under S. 107 or S. 144 has been passed, the likelihood of a breach of the peace no longer exists. In such a case action under S. 145 becomes unnecessary. On the other hand, pending proceedings under S. 145 the emergency referred to in S. 144 may arise, in which case an order under S. 144 will not be without jurisdiction. (Vol 15) 1928 Cal 610 (613, 614) : 30 Cri L Jour 69 : 56 Cal 290 (FB).

[16] Pending proceedings under chapter VIII, it is open to the Magistrate to institute proceedings under chapter XII, if he considers them more appropriate. (Vol 23) 1936 Sind 147 (148) : 37 Cri L Jour 1036 : 29 Sind LR 443 (DB).

[17] When a Magistrate adopts one of the several courses open to him to meet the emergency, the propriety of his action is not to be judged in the light of the fact that at a later stage, when the emergency can be viewed on a different basis, it may be considered that another course might have been followed more properly. (Vol 21) 1934 Pat 308 (309) : 35 Cri L Jour 1009 : 13 Pat 76 (DB).

[18] It is inadvisable that proceedings under S. 107, S. 144 and 145 should be allowed to go on at the same time. (Vol 6) 1919 Cal 465 (465) : 19 Cri L Jour 367 (DB).

[19] A Magistrate should state distinctly in his order under what section he is proceeding. (Vol 24) 1937 Mad 494 (494) : 38 Cri L Jour 892 (It is not desirable that the Magistrate should pass orders which do not purport to be orders passed under any specific provision of law) \* (Vol 5) 1918 Mad 508 (503) : 18 Cri L Jour 295.

**4. Nature of proceedings under this section.**—[1] A proceeding under this section constitutes an "inquiry" within the meaning S. 4 (1) (k) ('01) 25 Bom 179 (184) (DB) \* ('09) 9 Cri L Jour 278 (279) (DB) (Cal) \* ('08) 7 Cri L Jour 423 (425) : 11 Oudh Cas 61 \* ('95) 22 Cal 898 (901) (DB).

[2] The proceeding under this section is of a quasi executive character. ('01) 23 Bom 179 (184) \* (Vol 21) 1934 Nag 194 (195) : 35 Cri L Jour 1460 \* (Vol 12) 1925 All 316 (317) : 26 Cri L Jour 683 \* (Vol 1) 1914 Sind 11 (12) : 16 Cri L Jour 249 : 8 Sind LR 215 (DB) (Quasi civil).

[3] The action is of a purely preventive and provisional nature in a civil dispute pending formal adjudication of the rights of the parties. (Vol 1) 1914 Sind 11 (12) : 16 Cri L Jour 249 : 8 Sind LR 215 (DB) \* (Vol 5) 1918 Upp Bur 8 (9) : 3 Upp Bur Rul 33 : 19 Cri L Jour 889.

[See (Vol 25) 1938 Sind 132 (136) : ILR (1939) Kar 18 (DB) (Order under S. 145 partakes something of the nature of interim proceedings in a Civil Court).

[4] The proceeding is not of a punitive nature nor a matter relating to an offence to attract the application of Ss. 182 and 185. (Vol 1) 1914 All 473 (473, 474) : 15 Cri L Jour 520 \* ('99) 3 Cal WN 148 (150) (DB).

[5] A proceeding under this section is a case within the meaning of Ss. 192, 526 and 528. (Vol 32) 1945 Nag 56 (56) : ILR (1944) Nag 836 : 46 Cri L Jour 654 \* (Vol 9) 1922 All 99 (100) : 23 Cri L Jour 205 (Section 192 applied) \* (Vol 10) 1923 Pat 366 (367) : 24 Cri L Jour 487 \* (1906) 3 Cri L Jour 83 (84) (DB) (Cal) \* ('95) 22 Cal 898 (901, 902) (DB) \* ('03) 26 Mad 188 (188) (DB).

[But see ('01) 4 Cal WN 821 (822) (DB) (A Magistrate of first class duly empowered has power only to transfer an inquiry or trial relating to an offence under S. 192) \* (Vol 6) 1919 All 311 (313) : 20 Cri L Jour 410]].

[6] The District Magistrate has power under S. 192 to transfer a proceeding of which he has taken cognizance. (Vol 20) 1933 All 264 (266) : 55 All 301 : 54 Cri L Jour 414 (FB) \* (Vol 15) 1928 Mad 1230 (1231) : 52 Mad 241 : 30 Cri L Jour 340 (The subordinate Magistrate need not have territorial jurisdiction).

[7] An application to a Magistrate under this section is not a complaint. (Vol 13) 1926 Sind 85 (85) : 18 Sind LR 278 : 26 Cri L Jour 1333.

[8] The initiation of a proceeding under this section on the application of a person may constitute malicious prosecution of the opposite party so as to entitle him to claim damages in a civil action. ('11) 18 Ind Cas 737 (738, 742) (DB) (Cal) \* (Vol 14) 1927 All 412 (412).

**5. Who can take action under this section.**

—[1] Any Magistrate mentioned can take action under this section and hence the District Magistrate can act in spite of the fact that the Sub-Divisional Magistrate has refused to act. ('02) 29 Cal 242 (244) (DB) \* (Vol 18) 1926 Cal 1049 (1050, 1051) : 27 Cri L Jour 1038 (DB). (Even though no application is made to him).

**6. "Is satisfied".**—[1] A clear and unambiguous finding that a dispute likely to cause a breach of the peace exists is necessary before the Magistrate can assume jurisdiction. (Vol 32) 1945 Oudh 62 (63) \* (Vol 32) 1945 All 60 (63) : 46 Cri L Jour 504 : ILR (1944) All 727 \* (Vol 27) 1940 Nag 265 (268) : 41 Cri L Jour 799 \* (Vol 26) 1939 Lah 108 (108) : ILR (1938) Lah 611 : 40 Cri L Jour 519 \* (Vol 24) 1937 Mad 494 (494) : 38 Cri L Jour 892 \* (1905) 2 Cri L Jour 670 (675) : 33 Cal 33 (DB) \* (Vol 10) 1923 Rang 211 (211) : 1 Rang 53 : 24 Cri L Jour 740 \* (Vol 22) 1935 Nag 78 (80) \* (Vol 12) 1925 Oudh 484 (484) : 26 Cri L Jour 680 \* (Vol 14) 1927 Lah 822 (823) : 28 Cri L Jour 328 \* (Vol 9) 1922 All 31 (31) : 23 Cri L Jour 303.

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[2] No hard and fast rule specifying the sufficiency of the materials upon which a Magistrate ought to be satisfied before he assumes jurisdiction in any particular case can be laid down. (1905) 2 Cri L Jour 670 (673) : 33 Cal 33 (DB) \* (Vol 22) 1935 Oudh 316 (324) : 36 Cri L Jour 656 : 11 Luck 157 (DB) \* ('07) 6 Cr L Jour 86 (37) (DE) (Cal).

[3] The Magistrate is not bound to take action on a police-report or upon an expression of opinion by the police. (Vol 11) 1924 Pat 787 (739) : 26 Cri L Jour 133 \* (Vol 15) 1928 Nag 81 (83) : 28 Cri L Jour 929 \* (1905) 2 Cri L Jour 670 (673) : 33 Cal 33 (DB).

[4] A statement of facts is always necessary to enable the Magistrate to determine the question of necessity for an order. (1905) 2 Cri L Jour 670 (372) : 33 Cal 33 (DB) \* (Vol 23) 1936 Sind 143 (144) : 37 Cri L Jour 1030 (DB) \* (Vol 11) 1924 Pat 787 (789) : 26 Cri L Jour 133 \* (Vol 15) 1928 Nag 81 (83) : 28 Cri L Jour 929 \* (Vol 16) 1929 Cal 463 (469, 470) : 30 Cri L Jour 1027 (DB) \* (Vol 11) 1924 Lah 678 (679) : 25 Cri L Jour 78.

[5] In the absence of a police report the Magistrate should act very cautiously upon the statements of interested persons. (Vol 11) 1924 Cal 444 (445) : 24 Cri L Jour 304 (DB) \* (Vol 12) 1925 Nag 142 (143) : 25 Cri L Jour 1109.

[6] Police reporting that there is no apprehension of breach of peace—Magistrate not justified in starting proceedings merely on affidavit of applicant and ignoring police report. (Vol 32) 1945 Oudh 62 (63).

[7] Mere statement that he is satisfied by the Magistrate is not sufficient in the absence of materials. (Vol 8) 1921 Pat 176 (177) : 22 Cri L Jour 431 \* ('79) 4 Cal L Rep 433 (490) (DB) \* (Vol 7) 1920 Pat 499 (499) : 21 Cri L Jour 748 \* ('02) 6 Cal WN 340 (342) (DB) \* (Vol 11) 1924 Rang 178 (178) : 25 Cri L Jour 1161.

[8] A preliminary order cannot be justified by evidence recorded subsequent to the notice under sub-s (1) (Vol 32) 1945 Oudh 62 (63).

[9] The question whether, upon the materials placed before him, proceedings should be instituted under this section is one entirely within the Magistrate's discretion. (Vol 30) 1943 Pat 44 (47) : 44 Cri L Jour 25 (DB) \* (Vol 16) 1929 Cal 805 (806, 807) : 32 Cri L Jour 923 (DB).

[10] The High Court or the District Magistrate has no authority to direct a subordinate Magistrate to institute proceedings under this section. (Vol 8) 1921 Pat 445 (446) : 23 Cri L Jour 27 \* (Vol 8) 1921 Pat 410 (411) : 23 Cri L Jour 498 \* (Vol 16) 1929 Cal 751 (752) : 31 Cri L Jour 544 (DB) \* (Vol 16) 1929 Cal 805 (806) : 31 Cri L Jour 923 (DB).

[11] The High Court in revision will not question the sufficiency of information on which the Magistrate acted. (Vol 30) 1943 Pat 44 (47) : 44 Cri L Jour 25 (DB) \* (Vol 4) 1917 Mad 610 (611, 612) : 18 Cri L Jour 23 \* (Vol 12) 1925 Oudh 46 (46) : 25 Cri L Jour 48.

[12] The Magistrate need not summon or examine any witness before passing the preliminary order but can do so on any information received. (Vol 27) 1940 Sind 33 (37) : ILR (1940) Kar 162 : 41 Cri L Jour 486 (DB) \* (Vol 10) 1923 Oudh 161 (162) : 25 Cri L Jour 194 \* ('69) 11 Suth WR Cri 36 (36) (DB) \* (Vol 22) 1935 Oudh 316 (324) : 36 Cri L Jour 656 : 11 Luck 157 (DB).

[But see (Vol 4) 1917 Lah 179 (179, 180) : 18 Cri L Jour 565].

[13] Ample grounds present for apprehending breach of peace—Mere omission to state that breach of peace was likely is immaterial. (Vol 22) 1935 Oudh 316 : (325) : 36 Cri L Jour 656 : 11 Luck 157 (DB).

7. "Police-report"—[1] The Magistrate is entitled to peruse a police-report for satisfying himself as to the likelihood of a breach of the peace and as to the identity of the subject-matter and of the contending parties. (Vol 14) 1927 Cal 327 (329) : 28 Cri L Jour 329 (DB).

[See ('36) 37 Cri L Jour 95 (97) (Pat)]

[2] The police report is inadmissible as evidence in the inquiry relating to the possession of the parties. (Vol 14) 1927 Cal 327 (329) : 28 Cri L Jour 329 (DB) \* (Vol 7) 1920 Pat 433 (435) : 21 Cri L Jour 735.

[3] The police should communicate to the Magistrate the result of their inquiry and not merely a copy of the reports which they may have received. (Vol 22) 1935 Nag 78 (79).

8. "Or other information".—[1] The Magistrate has the widest possible latitude in interpreting the words "other information". (Vol 21) 1934 Nag 194 (195) : 35 Cri L Jour 1460 \* (Vol 12) 1925 Pat 553 (556) : 26 Cri L Jour 965 (It is not necessary that any person should have actually informed). \* (Vol 7) 1920 Pat 219 (220) : 21 Cri L Jour 625 (Do).

[2] The Magistrate can base his action on complaint filed by one of the parties. (Vol 21) 1934 Nag 194 (195) : 35 Cri L Jour 1460 \* ('06) 3 Cri L Jour 48 (49) (All).

[3] Where application does not contain information that a dispute likely to cause a breach of the peace existed, Magistrate cannot take action. (Vol 25) 1938 Rang 229 (229, 230) : 39 Cri L Jour 708.

[4] The Magistrate can act on the statement on oath of the person who presented the complaint. (Vol 18) 1931 Rang 51 (52) : 32 Cri L Jour 637.

[5] The action can be based on a perusal of the petitions filed by the parties in another proceeding. (Vol 7) 1920 Pat 219 (220) : 21 Cri L Jour 625.

[6] In a dispute between a tenant and his sub-tenants, the superior landlord, can present a petition under this section. (Vol 29) 1942 Mad 534 (534) : 43 Cri L Jour 741.

9. "Dispute", meaning of.—[1] (a) The word "dispute" has only its ordinary meaning of disagreement, scramble, struggle, or quarrel and when there is dispute in respect of land the Magistrate could act (Vol 15) 1928 Cal 610 (620) : 56 Cal 290 : 30 Cri L Jour 69 (FB) \* (Vol 21) 1934 Pat 471 (472) : 36 Cri L Jour 624.

(b) The Magistrate need not consider whether the dispute is *bona fide* or whether there is decree in favour of the party or whether possession was obtained in executions. (Vol 28) 1941 Nag 171 (173) : 42 Cri L Jour 675 \* (Vol 24) 1937 Rang 202 (202) : 38 Cri L Jour 805 \* (Vol 15) 1928 Cal 610 (614, 619) : 56 Cal 290 : 30 Cri L Jour 69 (FB) (Followed in (Vol 29) 1942 Pat 331 (333) : 43 Cri L Jour 637).

[See also (Vol 26) 1938 Pat 151 (152, 153) : 41 Cri L Jour 339].

[But see (Vol 27) 1940 Pat 492 (494) : 41 Cri L Jour 417 \* (1906) 3 Cri L Jour 323 (324) : 28 All 40 \* (Vol 9) 1922 Pat 435 (439, 440) : 2 Pat 94 : 23 Cri L Jour 549 (FB) \* (Vol 30) 1943 Oudh 410 (412) : 44 Cri L Jour 789 : 19 Luck 300 \* (Vol 6) 1919 All 311 (314) 20 Cri L Jour 410.]

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(c) "Dispute" means a legal dispute as to possession and when a person has been put in possession of property in execution the Magistrate cannot take action under this section but has to maintain Civil Court's decree or possession by acting under S. 101 or S. 144. (Vol 10) 1923 Pat 76 (78) : 24 Cri L Jour 279 & (99) 26 Cal 625 (629, 630) (DB) & (04) 1 Cri L Jour 256 (257, 258) (DB) (Bom).

[See however (Vol 26) 1939 Pat 151 (152, 153) : 40 Cri L Jour 339 & (43) ILR (1943) All 150 (153, 154) & (Vol 26) 1939 Rang 388 (389) : 41 Cri L Jour 123 : 1940 Rang LR 157 & (Vol 24) 1937 Pat 557 (557, 558) : 38 Cri L Jour 1096 & (1926) 27 Cri L Jour 43 (43) (Oudh) & (Vol 10) 1923 Cal 176 (176) : 24 Cri L Jour 517 & (Vol 15) 1928 Lah 818 (820) : 29 Cri L Jour 775.]

[2] A decree-holder or auction-purchaser placed in possession by the process of Court has to maintain his own possession and the law gives him the same assistance as it gives to other persons in possession. (Vol 21) 1934 Nag 217 (219) : 36 Cri L Jour 52 : 31 Nag LR 97.

[3] A decree-holder or auction-purchaser who has been forcibly dispossessed can be reinstated to possession provided he makes an application within two months of such dispossession. (Vol 15) 1928 Cal 610 (623) : 56 Cal 290 : 30 Cri L Jour 69 (FB) & (Vol 26) 1939 Pat 151 (154) : 40 Cri L Jour 339.

10. Likely to cause a breach of the peace.—[1] The jurisdiction to act under the section can be exercised only when the dispute is such that it is likely to cause a breach of the peace. (Vol 32) 1945 All 60 (62) : ILR (1944) All 727 : 45 Cri L Jour 504 & (Vol 29) 1942 Pat 489 (489) : 44 Cri L Jour 95 & (Vol 34) 1947 Pesh 8 (10) & (01) 25 Bom 179 (184, 185) (DB) & (Vol 12) 1925 Nag 448 (449) : 26 Cri L Jour 1085 & (Vol 15) 1928 Mad 859 (859) : 29 Cri L Jour 456 & (Vol 14) 1927 Cal 944 (944) : 28 Cri L Jour 245 (DB) & (Vol 7) 1920 Cal 344 (345) : 21 Cri L Jour 593 (DB) & (93) 15 All 394 (394, 395) & (Vol 4) 1917 Pat 28 (29) : 19 Cri L Jour 105 & (Vol 15) 1928 Nag 81 (83) : 28 Cri L Jour 929.

[2] The apprehension should be of a breach of the peace and not any infringement of private rights. (Vol 1) 1914 All 62 (63) : 36 All 143 : 15 Cri L Jour 27.

[3] Apprehension is not determined by the dispossession of any of the parties. (Vol 25) 1938 Rang 229 (229, 230) : 39 Cri L Jour 708 & (13) 14 Cri L Jour 223 (224) (All) & (1900) 4 Cal WN 57, (58) (DB).

[4] The Magistrate should very carefully decide whether the suggested apprehension is merely a device to induce him to deal with a matter cognisable by the Civil Court. (84) 10 Cal 78 (80) (DB) & (Vol 15) 1928 Mad 1230 (1231) : 52 Mad 241 : 30 Cri L Jour 340 & (Vol 13) 1926 Nag 371 (372) : 27 Cri L Jour 68 & (Vol 13) 1926 Sind 85 (86) : 18 Sind LR 278 : 26 Cri L Jour 1333 (DB).

[5] There should be material on record to show that as on the date the Magistrate acts, there was fear of breach of peace. (Vol 30) 1943 Pat 44 (47) : 44 Cri L Jour 25 (DB) & (Vol 30) 1943 Cal 559 (560) : 45 Cri L Jour 107 (DB) & (Vol 19) 1932 Cal 60 (60) : 3 Cri L Jour 305 (DB) & (Vol 8) 1921 Pat 445 (447) : 23 Cri L Jour 27 & (01) 25 Bom 179 (185) (DB) & (Vol 12) 1925 Oudh 418 (418) : 29 Oudh Cas 23 : 26 Cri L Jour 944 & (Vol 11) 1924 Lah 678 (679) : 25 Cri L Jour 78.

[See (Vol 13) 1926 Sind 85 (85) : 18 Sind LR 278 : 26 Cri L Jour 1333 (DB).]

[6] It is not necessary that there should be a danger of an immediate or imminent breach of the peace. (05) 2 Cri L Jour 670 (674, 675) : 33 Cal 33 (DB) & (08) 8 Cri L Jour 170 (180) : 1 Sind LR 50 (DB) & (Vol 7) 1920 Pat 745 (746) : 22 Cri L Jour 205 & (Vol 19) 1932 Nag 134 (135) : 28 Nag LR 154 : 33 Cri L Jour 937.

[But see (Vol 4) 1917 Pat 368 (369) : 18 Cri L Jour 763].

[7] It is not necessary that there should have been any overt act of violence. (03) 30 Cal 155 (200) (FB).

[But see (Vol 4) 1917 Pat 368 (369) : 18 Cri L Jour 763].

[8] If the nature of the dispute is such that it will lead to a breach of the peace the Magistrate gets jurisdiction even though the parties are of peaceful nature. (1903) 30 Cal 155 (200) (FB) & (Vol 11) 1924 Lah 678 (679) : 25 Cri L Jour 78.

[9] Where breach of the peace is unlikely there is no jurisdiction to give any directions regarding the subject of the dispute. (Vol 10) 1923 Mad 472 (472) : 24 Cri L Jour 783.

11. The subject of dispute.—[1] The subject-matter of dispute should be ascertained definitely and described clearly in the preliminary order. (07) 5 Cri L Jour 32 (35) (DB) (Cal) & (03) 7 Cal WN 558 (561) & (31) 1931 Mad WN 1317 (1318) & (04) 1 Cri L Jour 917 (918, 919) : 27 All 296.

[2] Absence of clear specification of the subject of dispute is a serious defect. (Vol 7) 1920 Cal 344 (345) : 21 Cri L Jour 593 (DB).

[3] Absence of specification in the preliminary order will not vitiate the proceedings when the parties were under no misapprehension regarding it. (Vol 12) 1925 Oudh 152 (153) : 25 Cri L Jour 1139 & (Vol 7) 1920 Pat 219 (220) : 21 Cri L Jour 625 & (10) 11 Cri L Jour 69 (70) : 12 Oudh Cas 400 : (01) 5 Cal WN 563 (565) (DB).

[4] Independent disputes in respect of each plot of a land consisting of several plots cannot be clubbed together in one inquiry. (Vol 24) 1937 Pat 413 (414) : 38 Cri L Jour 842 & (07) 5 Cri L Jour 91 (93) : 29 Mad 561.

[See however (Vol 26) 1939 Pat 353 (354, 355) : 40 Cri L Jour 749 (No prejudice caused by clubbing—Proceedings not invalidated) & (Vol 25) 1938 Pat 511 (512, 513) : 40 Cri L Jour 17 & (01) 5 Cal WN 544 (545) (DB) (Do) & (03) 30 Cal 155 (200) (FB) (Only single dispute in respect of all items—Clubbing does not invalidate proceeding) & (Vol 7) 1920 Mad 233 (235) : 22 Cri L Jour 90 (DB) (Do).]

[5] Smallness of the area of the land in dispute will not vitiate the proceedings. (Vol 26) 1939 Lah 108 (110) : ILR (1938) Lah 611 : 40 Cri L Jour 519.

[6] Inclusion in the proceedings of only a portion of the land which is the subject of the police-report will not vitiate the proceedings under this section. (Vol 4) 1917 Pat 435 (436) : 18 Cri L Jour 692 (693).

[7] Where the dispute relates to possession of an undivided share in a property, the Magistrate has no power to institute proceedings under this section. (Vol 29) 1942 Sind 117 (119) : ILR (1942) Kar 120 : 43 Cri L Jour 876 (DB) & (Vol 23) 1936 Sind 143 (143) : 37 Cri L Jour 1030 (DB) & (96) 23 Cal 80 (82, 85) (DB)

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\*('10) 11 Cri L Jour 370 (370) (DB) (Cal) ✕ (Vol 2) 1915 Mad 1105 (1107) : 16 Cri L Jour 284.

**12. "Within the local limits of his jurisdiction".**—[1] Proceedings can be instituted by a Magistrate only in respect of disputes in respect of property within his jurisdiction. (Vol 32) 1945 Nag 56 (57) : ILR (1944) Nag 836 : 46 Cri L Jour 654 ✕ (Vol 15) 1928 Mad 1280 (1281) : 52 Mad 241 : 30 Cri L Jour 340 ✕ (Vol 9) 1922 Pat 219 (220) ✕ ('02) 29 Cal 885 (886) (DB).

[See (Vol 2) 1915 All 137 (138) : 16 Cri L Jour 527 (Deep stream of river Ghagra dividing Fyzabad and Basti Districts—Dispute about land between two channels of the Ghagra—Channel towards the Fyzabad side found to be deep stream of the river—Held, Basti Magistrate was competent to take cognizance of dispute)].

[See however (1910) 11 Cri L Jour 69 (71) : 12 Oudh Cas 400 (Where it is doubtful as to in which of two local areas the property is situate either of the Magistrate can take proceedings).]

[2] Portion only of the property within jurisdiction—An order in respect of the whole is *ultra vires*. ('05) 2 Cri L Jour 406 (407) : 32 Cal 444 (DB) ✕ ('72) 17 Suth WR Cr 33 (34).

[3] The Magistrate has jurisdiction to decide if the subject of the dispute is within the local limits of his jurisdiction. (Vol 7) 1920 Cal 912 (912) : 22 Cri L Jour 392 (DB).

[4] An objection as to jurisdiction should be raised at the earliest opportunity and when not done so cannot be taken up in revision. (Vol 15) 1928 Cal 610 (612) : 56 Cal 290 : 30 Cri L Jour 69 (FB) ✕ (1905) 2 Cri L Jour 670 (676, 677) : 33 Cal 33 (FB).

**13. Effect of non-compliance with the provision of the section.**—[1] Non-compliance in the undermentioned instances were held to have rendered subsequent proceedings void :

(a) Failure to draw up a preliminary order. (Vol 23) 1936 Mad 824 (825) : 37 Cri L Jour 953 ✕ (Vol 1) 1914 Mad 78 (81) : 15 Cri L Jour 559 ✕ ('03) 30 Cal 443 (444) (DB) ✕ (Vol 11) 1924 Lah 91 (93) : 4 Lah 66 : 24 Cri L Jour 751 ✕ (Vol 6) 1919 Nag 160 (160) : 20 Cri L Jour 124 ✕ (Vol 17) 1930 Lah 895 (895, 896) : 32 Cri L Jour 139 ✕ (Vol 1) 1914 All 107 (107) : 15 Cri L Jour 424 ✕ (Vol 14) 1927 All 286 (286, 287) : 49 All 325 : 28 Cri L Jour 231 ✕ ('05) 2 Cri L Jour 347 (348, 349) : 32 Cal 552 (DB).

[See (Vol 25) 1938 Rang 229 (232) : 39 Cri L Jour 708.]

[See however (Vol 19) 1933 All 446 (448) : 34 Cri L Jour 156 (No invalidation unless prejudice caused) ✕ (Vol 26) 1933 Pat 88 (90) : 34 Cri L Jour 1130 (DB) (Do) ✕ (Vol 4) 1917 Lah 35 (35) : 18 Cri L Jour 633 (Do) ✕ (Vol 4) 1917 Lah 35 (35, 36) : 18 Cri L Jour 461 (Do) ✕ (Vol 12) 1925 Rang 111 (111) : 26 Cri L Jour 324 (Do) ✕ (1912) 13 Cri L Jour 296 (297) (DB) (All) (Do).]

(b) Failure to set out the grounds in the preliminary order. (Vol 32) 1945 Oudh 62 (63) ✕ (Vol 29) 1942 Sind 117 (118) : 43 Cri L Jour 876 : ILR (1942) Kar 120 (DB) ✕ ('08) 8 Cri L Jour 399 (400) (DB) (Mad) ✕ (Vol 6) 1919 All 311 (313) : 20 Cri L Jour 410 (DB) ✕ (1905) 2 Cri L Jour 342 (343) : 32 Cal 771 (DB) ✕ (1900) 24 Bom 527 (532, 533) (DB).

[See however (Vol 20) 1933 All 264 (266, 267, 268) : 55 All 30 : 34 Cri L Jour 414 (FB) (Does not invalidate unless prejudice is caused) ✕ (1905) 2 Cri L Jour 637 (645, 646, 648, 649) : 33 Cal 352 (FB) (Do) ✕ (Vol 6) 1919 Mad 166 (167) : 20 Cri L Jour 773 (Do) ✕ (Vol 7) 1920 Mad 233 (235) : 22 Cri L Jour 90 (DB) (Do) ✕ (Vol 1) 1914 Sind 8 (10) : 8 Sind L R 207 : 16 Cri L Jour 235 (DB) (Do) ✕ (Vol 4) 1917 Oudh 400 (403) : 19 Oudh Cas 136 : 18 Cri L Jour 100 (DB) (Do) ✕ (Vol 14) 1927 Rang 177 (178) : 5 Rang 129 : 23 Cri L Jour 623 (Do) ✕ (Vol 22) 1935 Oudh 316 (325) : 11 Luck 157 : 36 Cri L Jour 656 (DB) (Do).

(c) Failure to specify the property in dispute in the preliminary order. ('04) 1 Cri L Jour 917 (918, 919) : 27 All 296 ✕ (Vol 7) 1920 Cal 344 (345) : 21 Cri L Jour 593 (DB).

(d) Refusal to receive the evidence adduced by the parties ('04) 1 Cri L Jour 774 (774, 775) : 31 Cal 685 ✕ ('07) 6 Cri L Jour 452 (454) : 34 Cal 840 (DB).

[2] The jurisdiction of the Magistrate does not depend upon how he proceeds. (Vol 20) 1933 All 264 (267, 268) : 55 All 301 : 34 Cri L Jour 414 (FB) ✕ ('12) 13 Cri L Jour 753 (757-759) ✕ 36 Mad 275 ✕ (Vol 9) 1922 Lah 454 (455) ✕ (Vol 1) 1914 Sind 8 (9) : 16 Cri L Jour 235 (236) : 8 Sind L R 207 (DB) ✕ ('05) 2 Cri L Jour 618 (633) : 33 Cal 68 (FB) ✕ ('05) 2 Cri L Jour 637 (642, 643, 648) (FB) (Cal).

(3) The bare fact of an omission or irregularity in a matter of procedure unaccompanied by any suggestion of probable failure of justice having been occasioned thereby, is not sufficient to invalidate the proceedings. (Vol 14) 1927 PC 44 (49) : 5 Rang 53 : 28 Cri L Jour 259 : 54 Ind App 96 (PC).

[4] Where, in spite of a failure to conform to the provisions, substantial justice has been done, the final order will not be interfered with in revision (Vol 30) 1943 Pat 124 (125) : 44 Cri L Jour 414 : 21 Pat 743 (DB) ✕ (Vol 26) 1939 Lah 233 (234) : 40 Cri L Jour 784 ✕ (Vol 27) 1940 Nag 265 (266) : 41 Cri L Jour 799 ✕ (Vol 13) 1926 Sind 53 (55) : 26 Cri L Jour 1299 (DB) ✕ ('32) 1932 Mad W N 320 (320, 321) ✕ (Vol 34) 1947 Pesh 8 (9) (Absence of preliminary order under S. 145 (1) does not take away jurisdiction of Magistrate to proceed with the matter further).

**14. Preliminary order.**—[1] The object of the preliminary order is to give notice to the parties to prove their claim to enable the Magistrate to decide as to who was in possession at the date of commencement of proceedings. (Vol 14) 1927 Lah 805 (806) : 28 Cri L Jour 973.

[2] The order need not be in any particular form. ('68) 10 Suth WR Cr 16 (16) (DB).

[3] The fact that the preliminary order is not complete would not be sufficient to vitiate the proceedings. ('37) 39 Pun L R 503 (504) (Vol 4) 1917 Lah 35 (1) : 18 Cri L Jour 633 followed).

[4] It is the preliminary order that gives the Magistrate jurisdiction to proceed under this section and an omission to draw up a preliminary order, renders all proceedings without jurisdiction. (Vol 23) 1936 Mad 824 (825) : 37 Cri L Jour 953 ✕ ('03) 30 Cal 443 (444) ✕ (Vol 14) 1927 Lah 805 (807) : 28 Cri L Jour 973 ✕ (Vol 6) 1919 Nag 160 (160) : 20 Cri L Jour 124.

[See (Vol 25) 1938 Rang 229 (232) : 39 Cri L Jour 708.]

[But see (Vol 26) 1939 Lah 108 (109) : 40 Cri L Jour 519 : ILR (1938) Lah 611 ✕ (Vol 19) 1932 All 446 (447, 448) : 34 Cri L Jour 156.]

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**15. Statement of grounds in the preliminary order.**—[1] The grounds on which he is satisfied about the likelihood of breach of peace should be stated by the Magistrate in the order. (Vol 29) 1942 Sind 117 (118) : 43 Cri L Jour 876 : ILR (1942) Kar 120 (DB) \* (Vol 25) 1938 Rang 229 (232) : 39 Cri L Jour 708 \* (Vol 19) 1932 Mad 368 (369) : 33 Cri L Jour 536 \* ('93) 6 CPLR Cr 21 (23) \* (Vol 20) 1933 All 96 (97) : 34 Cri L Jour 449 \* ('01) 28 Cal 416 (418) (DB) \* ('05) 2 Cri L Jour 342 (343) : 32 Cal 771 (DB).

[2] The following are the objects in stating the grounds:

(a) To inform parties of the reasons for the order. ('05) 2 Cri L Jour 637 (644, 645) : 33 Cal 352 (FB) \* ('03) 7 Cal WN 599 (601).

(b) To enable the High Court to decide the propriety of the order if there is revision. (Vol 19) 1932 Sind 145 (148) : 34 Cri L Jour 216 : 26 Sind L R 353 (DB) \* (Vol 12) 1925 Nag 448 (449) : 26 Cri L Jour 1035 \* ('99) 12 CPLR Cr 2 (3) \* ('93) 20 Cal 520 (525) (DB).

[3] The term "grounds" includes the particulars of the information and does not merely mean the source of the Magistrate's information. ('05) 9 Cal WN cclxiii (cclxiii) (DB) \* ('73) 19 Suth W R Cr 10 (10) (DB).

[4] The grounds need not be furnished in any particular form, but may exist and appear in the records of the proceedings. ('67) 8 Suth W R Cr 83 (84) (DB) \* ('05) 2 Cri L Jour 102 (103) : 27 All 294 \* (1900) 27 Cal 981 (982, 983) (DB).

[5] Where the police report or complaint of the party sets out the grounds expressly and such a report or complaint is referred to in the order there is sufficient compliance with sub-s. (1). ('05) 2 Cri L Jour 637 (648) : 33 Cal 352 (FB) (Police-report referred to in order) \* (Vol 7) 1920 All 227 (229) : 22 Cri L Jour 97 (Do) \* (Vol 4) 1917 Mad 610 (611) : 18 Cri L Jour 23 (24) (Do) \* (Vol 7) 1920 Pat 745 (746) : 22 Cri L Jour 205 (Do) \* ('06) 3 Cri L Jour 487 (488) (Mad) (Complaint expressly referred to) \* (Vol 19) 1932 Sind 145 (147) : 26 Sind L R 353 : 34 Cri L Jour 216 (DB) (Do) \* (1906) 3 Cri L Jour 48 (49) (All) (Do) \* (Vol 5) 1918 Mad 1203 (1204) : 18 Cri L Jour 156 (Do).

[6] Dismissal order on an application under this section is not bad for not giving reasons. (Vol 32) 1945 All 60 (63) : ILR (1944) All 727 : 46 Cri L Jour 504.

**16. "Parties concerned in such dispute".**—

[1] The Magistrate must ascertain, as to who are the parties concerned before initiating the proceedings. ('03) 30 Cal 155 (201) (FB) \* ('97) 24 Cal 55 (61) (FB) (Magistrate's jurisdiction to require a person to attend proceedings depends upon his satisfaction that the person is a party to the dispute) \* (Vol 12) 1925 Nag 457 (458) : 26 Cri L Jour 1289 \* (1900) 24 Bom 527 (533) (DB).

[2] Parties concerned means not only persons actually disputing but includes persons concerned in claiming to be in possession. (Vol 38) 1946 Pat 889 (891).

[3] The preliminary order should make specific mention of the names of parties and require them to put forward their claims to possession. (1900) 24 Bom 527 (532) \* (1900) 27 Cal 892 (917) \* ('01) 5 Cal WN 900 (903) (DB).

[4] The words "parties concerned in the dispute" refer to persons claiming to be in possession at the time of the proceedings, though not themselves likely

to cause a breach of the peace and not merely to persons who actually dispute or persons who are present at or near land and concerned in the breach. (1903) 30 Cal 155 (195, 196) (FB) \* (Vol 12) 1925 Oudh 190 (192) (DB) \* (Vol 12) 1925 Oudh 484 (484) : 26 Cri L Jour 630.

[5] All parties interested in or claiming a right to the property in dispute or entitled to it need not be made parties to the proceeding. (Vol 32) 1945 Oudh 12 (14) : 46 Cri L Jour 680 \* (Vol 23) 1936 All 531 (531, 532) : 37 Cri L Jour 886 \* ('03) 30 Cal 155 (196) (FB).

[But see ('94) 21 Cal 29 (32, 33) (DB) (The force of this decision is considerably weakened by 30 Cal 155 (FB) \* (1900) 4 Cal WN 753 (754, 755) (DB) (21 Cal 29 followed) \* (Vol 4) 1917 Mad 742 (742) : 18 Cri L Jour 44.

[6] The owner or proprietor of the property who is in possession through his servant or manager is a necessary party to the proceedings. (Vol 4) 1917 Mad 742 (743) : 18 Cri L Jour 44 \* (04) 1 Cri L Jour 49 (53) : 31 Cal 48 (FB) (Overruling 7 Cal WN 208).

[7] A receiver appointed by a Court who is in possession on behalf of the Court cannot be made a party to the proceedings without the leave of the Court appointing him. ('03) 30 Cal 593 (598) : ('11) 12 Cri L Jour 185 (185) (DB) (Mad).

[8] In a dispute between rival landlords, the tenants who are actually in possession in their own right are necessary parties to the proceedings. (Vol 24) 1937 Nag 93 (94) : ILR (1937) Nag 288 : 38 Cri L Jour 395 \* (1900) 27 Cal 892 (917) (DB) \* (Vol 3) 1916 Cal 727 (727) : 16 Cri L Jour 590 (DB).

[9] In a dispute between a tenant and his subtenant the landlord is not a party to the dispute. (Vol 29) 1942 Mad 534 (534) : 43 Cri L Jour 741.

[10] Dispute between two communities.—The Magistrate may choose the right persons to represent each community and pass an order binding on the communities. (Vol 12) 1925 All 316 (317) : 26 Cri L Jour 683.

[11] The fact that one of the parties to the dispute is a trustee will not render this section inapplicable. (Vol 23) 1936 Mad 188 (189) (DB).

[12] In case of cosharer landlords, possession of one is the possession of all, and hence, one set is capable of representing the entire body in a proceeding under S 145. (Vol 26) 1939 Pat 853 (854) : 40 Cri L Jour 749.

[13] Parties to proceedings under chapter XII are not persons referred to as "The accused" in S. 360 (1) (Vol 12) 1925 Cal 1040 (1042) : 26 Cri L Jour 915 (SB).

**17. "Addition of parties."**—[1] The Magistrate has power to add parties even after the initiation of the proceedings provided that such parties were originally concerned in the dispute but before the commencement of the inquiry under sub-s. (4). ('03) 30 Cal 155 (201) (FB) \* (Vol 4) 1917 Cal 173 (174) : 17 Cri L Jour 449 (DB).

[2] If after commencement of inquiry more parties are added though no fresh proceedings is necessary the inquiry should commence *de novo* in their presence. ('03) 30 Cal 155 (201) (FB).

[3] Non-joinder or mis-joinder of parties to a proceeding under this section does not affect the jurisdiction of the Magistrate. (Vol 32) 1945 Oudh 12 (14) : 46 Cri L Jour 680 \* ('03) 30 Cal 155 (200) (FB) \* (Vol 4) 1917



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Pat 264 (265) : 18 Cri L Jour 322\* (Vol 32) 1945 Oudh 62 (63) (Omission to implead persons who are interested in the property in dispute is not "a serious matter" when they were not concerned in the dispute).

[4] Non-joinder or mis-joinder may be sufficient to vitiate proceedings only if the parties are prejudiced. (Vol 13) 1926 Pat 67 (67,68) : 26 Cri L Jour 1287\* (Vol 21) 1934 All 853 (854) : 36 Cri L Jour 114 \* (Vol 33) 1946 Pat 330 (333) : 25 Pat 19 : 47 Cri L Jour 328 (DB) (Mis-joinder does not affect jurisdiction of the Magistrate).

**18. Continuation of proceedings by or against legal representatives—Sub.s. (7).—**[1] The Court has no power to drop the proceedings on the death of any of the parties. (Vol 21) 1934 Cal 787 (788) : 36 Cri L Jour 303 (DB).

[2] Where after the filing of a revision petition against an order under this section, the petitioner dies, the High Court has power to bring on record his legal representatives if the ends of justice require it. (Vol 29) 1942 Mad 249 (250) : 43 Cri L Jour 487.

**19. "Attend his Court".—**[1] The preliminary order should direct that the parties should attend the Court of the Magistrate issuing the order. ('43) 24 Pat L Tim 326 (327).

[2] The jurisdiction to make the final order, is not personal to the Magistrate making the preliminary order. ('95) 22 Cal 898 (902) (DB) \* ('06) 4 Cri L Jour 223 (226) (DB) (Cal).

[3] The proceedings cannot be dismissed because one of the parties failed to attend the Court on the date fixed. (Vol 27) 1940 Oudh 22 (23) : 41 Cri L Jour 96,

[4] Permission accorded to the party to appear by pleader—Personal appearance cannot be insisted upon subsequently. (Vol 33) 1946 Mad 447 (448).

**20. Written statements.—**[1] The inquiry into the question of possession is, not limited to the allegation made in the written statements. (Vol 3) 1916 Mad 967 (969) : 16 Cri L Jour 525 (DB).

[2] Non-filing of statements will not deprive the Magistrate of his jurisdiction to make the inquiry. (Vol 10) 1923 Pat 369 (370) : 24 Cri L Jour 557.

[3] The Magistrate should not ordinarily refuse to provide opportunities to the parties to file statements of their respective claims. (1939) 40 Cri L Jour 32 (33) (Mad) \* (Vol 11) 1924 Pat 783 (783) : 25 Cri L Jour 906 \* ('08) 8 Cr L Jour 202 (203) (DB) (Cal).

**21. "Fact of actual possession".—**[1] "Actual possession" means actual physical possession and not necessarily lawful possession. (Vol 29) 1942 Mad 534 (543) : 43 Cri L Jour 741 \* (Vol 28) 1941 Oudh 515 (516, 517) : 42 Cri L Jour 710 \* (Vol 25) 1938 Mad 654 (655) : 39 Cri L Jour 922 \* (Vol 23) 1936 Nag 3 (4) \* (Vol 27) 1940 Sind 61 (62) : 41 Cri L Jour 493 : ILR (1940) Kar 421 (DB) \* (Vol 15) 1928 Cal 610 (639) : 56 Cal 290 : 30 Cri L Jour 69 (FB) \* ('05) 2 Cri L Jour 28 (30) (DB) (Bom) \* (Vol 11) 1924 Lah 678 (679) : 28 Cri L Jour 78 \* ('13) 14 Cri L Jour 633 (633) (All) \* (Vol 21) 1934 Nag 217 (219) : 36 Cri L Jour 52 : 31 Nag LR 97 \* ('79) 2 All 465 (467).

[2] Actual possession includes the possession of a mere trespasser. ('37) 1937 Mad WN 732 (733) \* (Vol 15) 1928 Cal 610 (619) : 56 Cal 290 : 30 Cri L Jour 69 (FB) \* (Vol 15) 1928 Nag 284 (287) : 24 Nag LR 143 : 30 Cri L Jour 902.

[But see ('71) 6 Mad HCR App xiii (xiii, xiv).]

[3] There should be effective occupation and control over the property. (Vol 25) 1938 Mad 654 (655) : 39 Cri L Jour 922 \* (Vol 9) 1922 Pat 371 (372) : 23 Cri L Jour 125 (Stealthy ploughing and cultivation of land is not tangible possession).

[4] The possession should be continuous. (Vol 9) 1922 Cal 502 (503) : 49 Cal 871 : 24 Cri L Jour 175 (DB) \* (Vol 21) 1934 Pat 565 (570) : 36 Cri L Jour 146 (DB) \* ('12) 16 Cal WN cclxvii (cclxvii) (DB).

[5] By continuous possession is meant such possession which a party in possession may have to exercise, has exercised, or exercises whenever he likes and be understood with reference to the object over which it is exercised. (Vol 14) 1927 Cal 313 (315) : 28 Cri L Jour 343 (DB).

[6] Actual possession means possession of the nature the property is capable of. (Vol 29) 1942 Mad 249 (251) : 43 Cri L Jour 487 \* (Vol 12) 1925 Oudh 251 (252) : 26 Cri L Jour 398 \* (Vol 26) 1939 Pat 209 (213) : 40 Cri L Jour 631 : 18 Pat 215 (DB).

[7] Actual possession is not confined to mere bodily, personal possession. ('72) 18 Suth WR Cr 11 (13) (DB).

[See however (Vol 25) 1938 Mad 654 (655) : 39 Cri L Jour 922 (Words actual "possession" only mean possession in fact as distinguished from possession implied by law (or constructive possession).)]

[8] In the following cases "actual possession" has been held to include :

(a) Master's through his servants. ('72) 18 Suth WR Cr 11 (13) (DB).

(b) Proprietors through his agent or manager. ('04) 1 Cri L Jour 49 (55) : 31 Cal 48 (FB) \* (Vol 4) 1917 Pat 606 (607) : 18 Cri L Jour 858.

(c) Landlord's through his immediate tenant. ('84) 1884 Pun Re No. 19 Cr p 35 (35) (DB) \* ('78) 3 Cal 320 (321) (DB) \* (Vol 32) 1945 Mad 255 (256) : 46 Cri L Jour 730 (Dispute between rival landlords—Magistrate can enquire as to who holds land irrespective of possession of tenant) \* (Vol 12) 1915 Mad 1105 (1106) : 16 Cri L Jour 284 (Do) \* ('80) 5 Cal L Rep 287 (289) (Do).

(d) Possession of a usufructuary mortgagee. ('72) 18 Suth WR Cr 11 (13) (DB).

[9] Where the dispute is between the landlord and his tenant, the Court cannot find possession of the landlord through his tenant. ('91) 2 Weir 107 (107) (DB) \* (Vol 2) 1915 Mad 1105 (1106) : 16 Cri L Jour 284 (285).

[10] The possession of a servant which is that of his master and permissive cannot be maintained as against his master. (Vol 10) 1923 Mad 60 (63) : 24 Cri L Jour 100 \* (Vol 13) 1926 Nag 286 (287, 288) : 27 Cr L Jour 212.

[11] Owner of unworked minerals sinking shaft and starting work on the Minerals, or granting mining leases to third party is in possession of the minerals in that area. (Vol 26) 1939 Pat 209 (212, 213) : 40 Cri L Jour 631 : 18 Pat 215 (DB).

**22. "Land or water or the boundaries thereof"—**[1] The following classes of disputes have been held to fall within the purview of this section.

(a) dispute regarding the right to collect the rent in respect of immovable property. ('89) 18 Cal 513 (522),

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523) (DB) \* (Vol 4) 1917 Pat 217 (218, 219) : 18 Cri L Jour 652\* (Vol 5) 1918 Mad 1203 (1203) : 18 Cri L Jour 156.

[See however ('07) 5 Cri L Jour 394 (395) : 10 Oudh Cas 89].

(b) dispute relating to possession of standing crops. ('08) 30 Cal 110 (111) (DB) \* (Vol 14) 1927 All 99 (100) : 27 Cri L Jour 1363.

(c) crops harvested but still on land. ('45) ILR (1945) Kar 72 (75) (DB) \* (Vol 4) 1917 Pat 183 (184) : 2 Pat L Jour 637 : 18 Cri L Jour 756 (DB).

(d) dispute as to trees growing on the land. (Vol 7) 1920 Cal 708 (710) : 22 Cri L Jour 131 (DB).

(e) dispute as to the right to the lac grown on the trees and as to the right to tap the trees. (Vol 21) 1934 Nag 112 (113) : 30 Nag LR 311 : 35 Cri L Jour 1381 \* (Vol 5) 1918 Pat 237 (237) : 3 Pat L Jour 316 : 19 Cri L Jour 656 (DB).

[But see (Vol 7) 1920 Cal 708 (710) : 22 Cri L Jour 131 (DB).]

(f) dispute as to possession of a bund. (Vol 17) 1930 Cal 59 (60) : 31 Cri L Jour 944 (DB).

(g) dispute as to mining and boring rights. (Vol 26) 1939 Pat 209 (211) : 18 Pat 215 : 40 Cri L Jour 631 (DB) \* (Vol 9) 1922 Cal 83 (84, 85) : 24 Cri L Jour 108 (DB).

(h) dispute as to right to ferry. ('99) 26 Cal 188 (193, 194) (DB).

(i) dispute as to right to fishery. (Vol 6) 1919 Pat 210 (212) : 4 Pat L Jour 154 : 20 Cri L Jour 199 \* ('07) 6 Cri L Jour 398 (399) : 35 Cal 117 (DB).

(j) dispute as to channel rights when the channel is used for irrigation purposes. (Vol 11) 1924 Oudh 341 (341, 342) : 25 Cri L Jour 227.

(k) dispute relating to the *batai* share of a zamindar in Sind. (Vol 23) 1936 Sind 143 (144) : 37 Cri L Jour 1030 (DB).

[2] The following classes of disputes have been held not to come within the purview of this section.

(a) disputes as to crops cut and removed from the land. (Vol 25) 1938 Pat 527 (528) : 40 Cri L Jour 125 \* ('03) 30 Cal 110 (111) (DB) \* (Vol 14) 1927 All 99 (100) : 27 Cri L Jour 1363 \* (Vol 15) 1928 Sind 193 (195) : 22 Sind LR 386 : 29 Cri L Jour 857 (DB).

[But see (Vol 15) 1928 Sind 68 (69) : 28 Cri L Jour 989 : 22 Sind LR 151 (DB)].

(b) disputes as to the right to share in the rents and profits of immovable property. (1910) 11 Cri L Jour 28 (29) : 36 Cal 986 (DB) \* (Vol 9) 1922 Oudh 199 (200) : 23 Cri L Jour 650 : 25 Oudh Cas 137 (DB).

(c) dispute as to the rights to weigh grain in a market. (Vol 9) 1922 All 430 (430) : 23 Cri L Jour 812.

(d) dispute as to the right to perform *pūja* in a temple. (Vol 13) 1926 Cal 437 (438, 439) : 52 Cal 959 : 27 Cri L Jour 239 (DB) \* (Vol 4) 1917 Mad 340 (341) : 17 Cri L Jour 235.

(e) dispute regarding collections and offerings in a temple. (Vol 13) 1926 Cal 437 (438, 439) : 52 Cal 959 : 27 Cri L Jour 239 (DB) \* (Vol 14) 1927 Nag 333 (334) : 23 Nag LR 84 : 28 Cri L Jour 837 \* (Vol 7) 1920 Pat 333 (333) : 5 Pat L Jour 246 : 21 Cri L Jour 672.

[See however (Vol 28) 1941 Nag 171 (174) : 42 Cri L Jour 675].

(f) dispute relating to collection of fees from pilgrims at *Śradh* ceremony at Gaya. ('06) 3 Cri L Jour 214 (215) (DB) (Cal).

(g) dispute regarding the right to remove sandal-wood paste from an idol. ('02) 4 Bom LR 438 (439) (DB).

(h) dispute as to right to joint possession of immovable property. (Vol 29) 1942 Sind 117 (119) : ILR (1942) Kar 120 : 43 Cri L Jour 376 (DB) \* (Vol 32) 1945 Sind 110 (113) : ILR (1945) Kar 78 : 47 Cri L Jour 78 (DB) \* (Vol 22) 1935 Nag 44 (45).

(i) dispute as to collection of fees called *khutagaraj* arhat and keali. (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538.

[3] Movable property would not ordinarily come within the purview of the section. (Vol 28) 1941 Oudh 515 (516) : 42 Cri L Jour 710 \* (Vol 20) 1933 Lah 409 (411) : 14 Lah 615 : 34 Cri L Jour 342 \* (Vol 8) 1921 Oudh 6 (9) : 24 Oudh Cas 167 : 22 Cri L Jour 625 \* (Vol 7) 1920 Mad 209 (211, 212) : 21 Cri L Jour 73 (DB) \* (Vol 9) 1922 All 528 (528) : 24 Cri L Jour 85.

[4] Movable property included in the immovable property is in the premises—Magistrate has jurisdiction to pass even in respect of them. ('12) 13 Cri L Jour 222 (223) (Mad) \* (Vol 20) 1933 Lah 409 (412) : 14 Lah 615 : 34 Cri L Jour 342.

[But see (Vol 7) 1920 All 225 (226) : 42 All 214 : 21 Cri L Jour 242 (DB)].

[5] The mere fact that the land is *shamilat* will not preclude the Court from making inquiry and taking proceedings under this section. (Vol 23) 1936 Lah 1015 (1015) : 36 Cri L Jour 123 \* (Vol 9) 1922 Lah 348 (349) : 2 Lah 372 : 23 Cri L Jour 825.

**23. Service and publication of the preliminary order—Sub-section (3).—**[1] The object of publication of the order is to bring the proceedings to the notice of other persons interested in the property and also to inform them of the grounds on which proceedings are taken. ('05) 2 Cri L Jour 618 (623, 624) : 33 Cal 68 (FB) \* (Vol 5) 1918 Pat 578 (581) : 19 Cri L Jour 71.

[2] The order should specify the date of enquiry. (Vol 17) 1930 Sind 52 (53) : 30 Cri L Jour 1124 (DB).

[3] The order should specify the place where enquiry is to be held. ('03) 7 Cal WN 705 (706) (DB).

[4] All processes for service or publication of the order should be issued at Government expense, and the parties named in the preliminary order should be ranged on one side, as first party, second party and so on. (Vol 12) 1925 Nag 143 (143) : 25 Cri L Jour 1109.

[5] The Magistrate should satisfy himself before the inquiry that proper service of the order has been effected. ('04) 1 Cri L Jour 44 (46) (DB) (Cal) \* ('04) 1 Cri L Jour 716 (717) (DB) (Cal).

[6] Where there is an allegation of absence of proper service the Magistrate should decide the truth or falsity thereof. ('04) 1 Cri L Jour 44 (46) (DB) (Cal) \* (Vol 7) 1920 Cal 541 (542) : 21 Cri L Jour 848 (DB).

**24. Omission to serve or publish the order.—**[1] Failure to publish or serve order as re-

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and could invalidate the proceedings only where the parties are prejudiced by the irregularity. ('05) 2 Cri L Jour 618 (633, 634): 33 Cal 68 (FB) ('04) 2 Cri L Jour 569 (DB) (Cal). (1 Cri L Jour 529 overruled) \* (Vol 26) 1939 Lah 233 (234): 40 Cri L Jour 784 \* ('07) 6 Cri L Jour 352 (352, 353): 30 All 41 \* (Vol 5) 1918 Pat 481 (481): 19 Cri L Jour 396 (DB) \* ('04) 1 Cri L Jour 1055 (1056): 7 Oudh Cas 334 \* (Vol 14) 1927 Nag 284 (234): 28 Cri L Jour 418 \* (Vol 3) 1916 Mad 320 (321, 322): 38 Mad 432 (DB) \* ('08) 7 Cri L Jour 28 (29): 30 Mad 548 \* (Vol 12) 1925 Rang 270 (270): 3 Rang 169: 27 Cri L Jour 660 \* (Vol 11) 1924 Nag 171 (172): 25 Cri L Jour 159 \* (Vol 13) 1926 Sind 53 (55): 26 Cri L Jour 1292 (DB) \* (Vol 2) 1915 All 9 (9): 16 Cri L Jour 224 (The mere fact that the dispute is not mentioned in the notice does not deprive the Magistrate of his jurisdiction) \* ('07) 6 Cri L Jour 113 (114): 1907 Pun Re No. 7 Cr \* (Vol 9) 1922 Pat 77 (78): 24 Cri L Jour 345 (DB).

[But see (Vol 5) 1918 Nag 46 (46): 20 Cri L Jour 816 \* ('04) 1 All L Jour 274n \* (Vol 4) 1917 Pat 71 (71): 19 Cri L Jour 112 \* (Vol 25) 1938 Lah 345 (346): 39 Cri L Jour 702.]

**25. Attachment in case of emergency**—[1] Interim attachment of property can be ordered only where breach of peace is so imminent as to call for immediate action and the power should be exercised with caution (Vol 13) 1926 Lah 205 (205): 7 Lah 134: 27 Cri L Jour 761 (Avoidance of future litigation not a proper ground).

[2] The question whether the matter is one of such emergency as to justify an attachment is one within the Magistrate's discretion. (Vol 20) 1933 Lah 409 (410): 14 Lah 615: 34 Cri L Jour 342.

[3] Any other temporary order in respect of the property pending inquiry into the question of possession cannot be passed under this section. (Vol 8) 1921 Lah 205 (205): 22 Cri L Jour 48 \* (Vol 12) 1925 Rang 111 (112): 26 Cri L Jour 324 (Prohibition against cultivation by either party cannot be passed).

[4] Attachment is not effected merely by an order of restraint on alienation as in civil cases (Vol 30) 1943 Pat 124 (125): 44 Cri L Jour 414: 21 Pat 743 (DB) \* (Vol 20) 1933 Lah 409 (410, 411): 14 Lah 615: 34 Cri L Jour 342 \* (Vol 7) 1920 Mad 209 (211): 21 Cri L Jour 73 (DB).

[But see (Vol 5) 1918 Pat 197 (198, 201): 3 Pat L Jour 147: 19 Cri L Jour 249 (DB).]

[5] The object of the provision is to keep effective control over the subject in dispute so as to prevent contending parties from creating breach of peace in their attempts to gain actual possession. (Vol 30) 1943 Pat 124 (126): 44 Cri L Jour 414: 21 Pat 743 (DB) \* (Vol 7) 1920 Mad 209 (211): 21 Cri L Jour 73 (DB) \* (Vol 12) 1925 Nag 297 (298): 26 Cri L Jour 1378: 21 Nag L R 191.

[6] The Magistrate should take possession of the land attached and manage it himself or appoint somebody to do so on his behalf under his supervision and control. (Vol 30) 1943 Pat 124 (125): 44 Cri L Jour 414: 21 Pat 743 (DB) (Magistrate may also settle the land on the highest bidder) \* (Vol 25) 1938 Rang 88 (89): 39 Cri L Jour 484 \* (Vol 12) 1925 Nag 297 (298): 26 Cri L Jour 1378: 21 Nag L R 191 \* (Vol 20) 1933 Lah 409 (411): 14 Lah 615: 34 Cri L Jour 342.

[But see ('05) 2 Cri L Jour 13 (14) (DB) (Cal).]

[7] Person appointed may be reimbursed with the costs of management. (Vol 25) 1938 Rang 88 (90): 39 Cri L Jour 484.

[8] Person appointed to manage the property has not the powers of receiver appointed under S. 146. (Vol 25) 1938 Rang 88 (89): 39 Cri L Jour 484 (Or of a receiver under Civil Procedure Code) \* Vol 7) 1920 Mad 209 (211): 21 Cri L Jour 73 (DB) \* ('12) 13 Cri L Jour 295 (295) (Mad) \* (Vol 20) 1933 Lah 409 (411): 14 Lah 615: 34 Cri L Jour 342.

[9] The Magistrate cannot appoint an interim receiver for the management of the property. (Vol 16) 1929 Lah 223 (224): 10 Lah 800: 30 Cri L Jour 411 \* ('10) 11 Cri L Jour 536 (536) (Mad) \* ('33) 1933 Mad WN 917 (918).

[10] Once an attachment is made under this section, the property attached passes into *custodia legis*. (Vol 30) 1943 Pat 124 (125): 44 Cri L Jour 414: 21 Pat 743 (DB) \* (Vol 27) 1940 Cal 163 (164): ILR (1939) 2 Cal 419: 41 Cri L Jour 396 (One of the parties to the proceeding removing standing crops attached by Magistrate—He can be legally convicted of theft) \* (Vol 23) 1936 All 141 (141): 37 Cri L Jour 346 (House attached—Neither party can enter it and remove any movables without obtaining an order from the Magistrate).

[11] The custody of the Court during attachment enures for the benefit of party found by the Magistrate to be in possession at the institution of the proceedings. ('90) 17 Cal 814 (819): 17 Ind App 62 (PC) \* (Vol 19) 1932 Cal 29 (31): 58 Cal 1070 (DB).

[12] The Magistrate has no jurisdiction to pass an order of attachment before drawing of the preliminary order. (Vol 8) 1921 Pat 353 (353): 23 Cri L Jour 64 \* ('78) 1 Cal L Rep 86 (87) (DB).

[See however (Vol 30) 1943 Pat 124 (125): 44 Cri L Jour 414: 21 Pat 743 (DB).]

[13] Order of attachment cannot be continued after the dropping of proceedings on the cessation of apprehensions of a breach of the peace. ('87) 1937 Mad W N 55 (55).

[14] Order of attachment ceases on the Magistrate finding possession in favour of a party. (Vol 38) 1946 Pat 380 (384): 25 Pat 19: 47 Cri L Jour 328 (DB).

[15] Where a party is dispossessed by an order of attachment under this section, he cannot file a summary suit under S. 9 of the Specific Relief Act for recovery of possession. ('08) 7 Cal L Jour 547 (548, 551, 552) (DB) \* (Vol 5) 1918 Cal 137 (137) (DB).

**26. "Crops or other produce subject to speedy and natural decay"—Sub-section (8)—**

[1] If the land with the crop is attached the Magistrate has full power to deal with the crop apart from the provisions of S. 145 (8). (Vol 30) 1943 Pat 124 (125, 126): 44 Cri L Jour 414: 21 Pat 743 (DB).

[2] The word "Produce" is not confined to what is grown from the ground but includes also finished articles or semi-finished articles made from raw material. (Vol 17) 1930 Oudh 165 (166): 5 Luck 462: 31 Cri L Jour 688.

**27. Procedure at the inquiry.**—[1] The procedure to be followed in the enquiry prescribed by the section itself is analogous to the procedure adopted in trials of summons cases. (Vol 10) 1923 Pat 53 (54): 24 Cri L Jour 595 (DB).

[2] It is not proper to allow one party to examine all his witnesses in chief and postpone the cross-examination until all the other witnesses are examined in

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chief. (Vol 10) 1923 Pat 53 (54) : 24 Cri L Jour 595 (DB).

[3] The inquiry should be commenced quickly. (Vol 10) 1923 Pat 53 (54) : 24 Cri L Jour 595 (DB) \* (Vol 21) 1934 Pat 471 (472) : 36 Cri L Jour 624.

[4] There should be a day-to-day enquiry until all evidence is taken and arguments are heard. The order should be passed as soon as possible. (Vol 11) 1924 Pat 683 (690) : 26 Cri L Jour 105.

[5] It is unnecessary for the Magistrate to formulate a decision on the question of possession, if it should present insuperable difficulties. ('01) 25 Bom 179 (184) (DB) \* (Vol 13) 1926 Bom 313 (313) : 27 Cri L Jour 734 (DB) (Magistrate should act under S. 107 or 146).

[6] Where a party does not appear and let in evidence the case will be disposed of *ex parte* after taking the evidence let in by the other side. (Vol 33) 1946 Mad 447 (447, 448) (DB).

**28. Issue of summons to witnesses—Sub-section (9)**—[1] Procedure adopted to summon witnesses in summons cases does not apply to proceedings under this section. (Vol 27) 1940 Oudh 22 (23) : 41 Cri L Jour 96 \* ('05) 2 Cri L Jour 679 (684) : 32 Cal 1093 (DB) \* ('03) 30 Cal 508 (514).

[But see ('85) 11 Cal 762 (766) (DB) \* ('94) 21 Cal 29 (33) (DB).]

[2] It is entirely a matter for the discretion of the Magistrate whether he will summon witnesses or not. (Vol 26) 1939 Pat 281 (282) : 40 Cri L Jour 276 \* (Vol 23) 1936 All 322 (323) : 58 All 920 : 37 Cri L Jour 694.

[See (Vol 25) 1938 Rang 229 (231) : 39 Cri L Jour 708. (Magistrate is not required to summon witnesses whether or not he thinks he needs them).]

**29. Power to adjourn enquiry**—[1] It is incumbent on the Magistrate to dispose of the case as quickly as possible with due regard to the rules of procedure prescribed by the section. (Vol 10) 1923 Pat 53 (54) : 24 Cri L Jour 595 (DB) \* (Vol 5) 1918 Cal 158 (158) : 19 Cri L Jour 799 (DB) \* ('13) 14 Cri L Jour 302 (302) (DB) (Cal).

[See however ('10) 11 Cri L Jour 7 (8) (DB) (Cal).]

[2] The Magistrate has a discretion in proper cases to adjourn the enquiry for the filing of written statements or production of witnesses. (Vol 12) 1925 Cal 263 (263) : 25 Cri L Jour 303 (DB) \* ('21) 22 Cri L Jour 335 (336) (DB) (Cal) \* (Vol 19) 1932 Sind 145 (147) : 26 Sind L R 353 : 34 Cri L Jour 216 (DB).

**30. Perusal of statements.**—[1] The Magistrate should take evidence in proof of statements made in the written statement. ('04) 1 Cri L Jour 631 (632) (DB).

[2] One of the parties being absent and the other filing statement alleging that he is in possession—Order in his favour cannot be passed on the strength of the statement alone. ('01) 5 Cal WN 71 (72) (DB) \* ('08) 8 Cri L Jour 27 (23) (DB) (Cal).

**31. "Hear the parties"**—[1] The Magistrate should not debar a party from exercising his right of audience. (Vol 32) 1945 Nag 127 (129) : ILR (1945) Nag 419 : 47 Cri L Jour 240 \* (Vol 4) 1917 Pat 284 (286) : 18 Cri L Jour 322 (On the ground that there was documentary evidence) \* (Vol 10) 1923 Pat 369 (370) : 24 Cri L Jour 557. (On the ground that party has not filed written statement).

**32. "Receive all such evidence as may be produced"**—[1] All evidence produced to prove possession must be heard. (Vol 27) 1940 Pat 382 (383) : 41 Cri L Jour 907 \* (Vol 26) 1939 Oudh 15 (16) : 4 Cri L Jour 33 \* (Vol 5) 1918 Cal 901 (902) : 18 Cri L Jour 1024 (DB) \* (Vol 3) 1916 Lah 378 (379) : 18 Cri L Jour 36 \* (Vol 16) 1929 Mad 847 (848) : 31 Cri L Jour 190 \* (Vol 21) 1934 Pat 471 (472, 473) : 36 Cri L Jour 624 \* (Vol 5) 1918 Cal 94 (95) : 19 Cri L Jour 10 (DB) \* (Vol 5) 1918 Nag 136 (136, 137) : 20 Cri L Jour 107 \* (Vol 5) 1918 Nag 138 (138) : 20 Cri L Jour 110 : (Vol 3) 1916 Mad 917 (918) : 16 Cri L Jour 789.

[See (Vol 25) 1938 Rang 229 (231) : 39 Cri L Jour 708.]

[2] It is not obligatory on the Magistrate to summon and hear witnesses cited by the parties unless he need them. (Vol 25) 1938 Rang 229 (231) : 39 Cri L Jour 708.

[But see (Vol 17) 1930 All 318 (318).]

[3] The Magistrate has a judicial discretion to curtail the number of witnesses in order to avoid delay or justice being defeated. (Vol 8) 1921 Pat 308 (310) : 22 Cri L Jour 430 \* (Vol 4) 1917 Mad 594 (596) : 17 Cri L Jour 217 \* ('06) 3 Cri L Jour 423 (425) (DB) (Cal) \* (Vol 11) 1924 Pat 534 (536, 537) : 24 Cri L Jour 95.

[4] The following are not valid grounds for refusing to receive oral evidence.

(a) that there was local inspection. (Vol 6) 1919 Ca 67 (67) : 46 Cal 1056 : 20 Cri L Jour 688 (DB) \* (Vol 7) 1920 Mad 566 (567) : 21 Cri L Jour 46 (DB) \* (Vol 8) 1921 Pat 176 (178) : 22 Cri L Jour 481.

(b) that there is documentary evidence. (Vol 9) 192 Lah 348 (349) : 2 Lah 372 : 23 Cri L Jour 225 \* ('04) 1 Cri L Jour 717 (718) (DB) (Cal) \* (Vol 7) 1920 Ma 566 (567) : 21 Cri L Jour 46 (DB).

(c) that the police report contained some admission by the party. ('09) 10 Cri L Jour 6 (7) (Mad).

[5] Mere rejection of document or refusal to receive certain evidence does not vitiate proceedings unless the omission has caused prejudice. (Vol 25) 1938 Ma 654 (656) : 39 Cri L Jour 922 \* (Vol 8) 1921 Pat 48 (484) \* (Vol 4) 1917 Pat 145 (146) : 19 Cri L Jour 529.

[6] In proceedings under this section, it is safer to rely on the documentary evidence than on oral evidence. (Vol 32) 1945 Sind 110 (112) : ILR (1945) Kar 78 : 4 Cri L Jour 78 (DB).

**33. "Consider the effect of such evidence and take such further evidence as he thinks necessary"**—[1] The question of actual possession cannot be decided on :

(a) No evidence at all. (Vol 11) 1924 Cal 544 (544) : 24 Cri L Jour 702 (DB) \* ('17) 22 Cal WN xxx (xxxix) \* (Vol 9) 1922 Mad 437 (438, 439) : 24 Cri L Jour 429 \* (Vol 3) 1916 Lah 368 (369) : 1916 Pun Re No. Or : 17 Cri L Jour 129 \* ('82) 1882 All WN 18 (18).

(b) The personal impressions of Magistrate. (Vol 1922 Oudh 256 (256) : 25 Oudh Cas 148 : 23 Cri L Jour 684.

(c) The report of local inspection. ('71) 16 Sri WB Or 13 (13, 14) (DB) \* ('07) 6 Cri L Jour 384 (385) : 31 Mad 82.

(d) The police report. (Vol 14) 1927 Cal 327 (329) : 28 Cri L Jour 329 (DB) \* (Vol 7) 1920 Pat 483 (485) : 21 Cri L Jour 735 \* ('06) 10 Cal WN cii (cii) (DB).

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[See also (Vol 28) 1941 Mad 751(751): 43 Cri L Jour 344 (Where an order under S. 145, Criminal PC, is to a large extent based on statements alleged to have been made by the petitioners to the Sub-Inspector of Police which are not on record nor were the petitioners questioned about these statements, the order must be set aside).]

(e) Statement of parties not made on oath. ('71) 16 Suth WR Cr 13 (13, 14) (DB).

[2] The Magistrate cannot consider the evidence given in another case as evidence in the proceedings before him even though that case was pending in his own Court as a Revenue Court. (Vol 26) 1939 Oudh 15 (16) : 40 Cri L Jour 33.

[3] The Magistrate cannot treat as conclusive the refusal of a party to take a special oath though it is open for him to draw proper inference from it along with other evidence. (Vol 27) 1940 Pat 113 (114, 115) : 41 Cri L Jour 101.

[4] Where the evidence before him is not sufficient to enable him to come to a conclusion or where the party refuses to take oath, the Magistrate should himself call for further evidence by his exercising the power of summoning witnesses—(S. 540) to enable him to decide the question of possession. ('37) 1937 Mad WN 326 (326, 327) \* (Vol 11) 1924 Pat 509 (511) \* (Vol 1) 1914 Cal 812 (812) : 15 Cri L Jour 202 (DB).

[5] Even where one party is *ex parte* the Magistrate should examine the evidence of the other party before he passes an order in his favour. ('02) 6 Cal WN 925 (925) (DB) \* (Vol 16) 1929 Mad 847 (848) : 31 Cri L Jour 190.

[6] On the admission by a party of possession of the other Magistrate should pass the order without calling further evidence. (Vol 25) 1938 Mad 654 (656) : 39 Cri L Jour 922 \* ('03) 7 Cal WN 351 (352) (DB) (Admission by counsel) \* ('11) 12 Cri L Jour 47 (48) (DB) \* ('46) 1946 Pat WN 278 (281) (Order finding possession in a person denying right is vitiated. Any evidence pointing to possession in such person is highly suspicious).

[7] The proceeding can be decided on the balance of evidence. (Vol 27) 1940 Pat 113 (114) : 41 Cri L Jour 101.

[8] The duty of weighing evidence as regards possession is reserved purely for the trial Court. (Vol 32) 1945 Oudh 12 (15) : 46 Cri L Jour 680.

[9] Magistrate dealing with case on remand should take into consideration the evidence of witnesses who had been examined before the remand. Omission to do so is a serious error. ('46) 1946 Pat WN 278 (281).

**34. Procedure in recording evidence.**—[1] Evidence in proceedings under this chapter should be recorded in the manner provided by Ss 356, 357 and 359. (Vol 12) 1925 Oudh 286 (286) : 26 Cri L Jour 0 \* (Vol 2) 1915 Cal 664 (665) : 16 Cri L Jour 192 : 2 Cal 831 (DB).

[2] Irregularity in recording the evidence will not vitiate the proceedings unless, it has occasioned failure of justice and has prejudiced the parties. (Vol 8) 1931 All 2 (3) : 32 Cri L Jour 368 \* (Vol 18) 1931 All 3 (6) : 53 All 172 : 32 Cri L Jour 372 \* (Vol 15) 1928 Oudh 112 (112) : 29 Cri L Jour 70 \* (Vol 19) 1932 Mad 145 (146) : 34 Cri L Jour 216 : 26 Sind LR 353 (DB).

[3] The Magistrate must record the evidence himself and cannot delegate the duty. (Vol 19) 1932 Mad 368 (369) : 33 Cri L Jour 536 (Order passed on evidence recorded by subordinate Magistrate is illegal) \* ('07) 6 Cri L Jour 384 (384, 385) : 31 Mad 82.

[4] The parties to a proceeding under this section are not "accused persons". (Vol 13) 1925 Cal 822 (831) : 26 Cri L Jour 1194 : 52 Cal 721 (FB) \* (Vol 12) 1925 Oudh 286 (286) : 26 Cri L Jour 70.

[5] Part of evidence recorded by one Magistrate—The successor can record the rest—Parties cannot demand *de novo* enquiry. (Vol 11) 1924 Pat 786 (786, 787) : 25 Cri L Jour 89 \* ('10) 11 Cri L Jour 440 (440) : 37 Cal 812 (DB) \* (Vol 10) 1923 Cal 483 (484) : 24 Cri L Jour 569 (DB).

[But see ('75) 23 Suth WR Cr 62 (62) (DB).]

**35. Local inquiry and local inspection.**—[1] Local inspection of the property may be made by the Magistrate to enable him to understand the evidence with reference to its topography (Vol 26) 1939 Lah 108 (110) : ILR (1938) Lah 611 : 40 Cri L Jour 519 \* (Vol 10) 1923 Pat 31 (32) : 24 Cri L Jour 507 (DB) \* (Vol 10) 1923 Pat 366 (368) : 24 Cri L Jour 487.

[2] A Magistrate cannot direct a subordinate Magistrate to inquire into the question of possession and to make a report thereon. ('79) 3 Cal Rep 134 (135, 136) (DB) \* (Vol 19) 1932 Mad 368 (369) : 33 Cri L Jour 536 \* ('12) 13 Cri L Jour 777 (778) (All).

[3] Local inspection should not be made unless for the purpose of understanding the evidence in the case. (Vol 10) 1923 Pat 366 (368) : 24 Cri L Jour 487 \* (Vol 9) 1922 Pat 249 (251) : 25 Cri L Jour 412.

[4] A local inspection cannot take the place of legal evidence, nor can the result thereof be used as a basis for the decision. (Vol 9) 1922 Pat 249 (251) : 25 Cri L Jour 412 \* (Vol 10) 1923 Pat 366 (368) : 24 Cri L Jour 487.

[5] The Magistrate should hold the local inspection only after due notice to the parties. (Vol 7) 1920 Pat 749 (749) : 22 Cri L Jour 424.

[6] The Magistrate should make a record of any relevant facts observed at such inspection. (Vol 9) 1922 Pat 294 (294) : 25 Cri L Jour 545.

[7] Magistrate making local inspection of site and preparing inspection notes in presence of parties—No objection raised by parties—There is no irregularity in procedure adopted. (Vol 26) 1939 Lah 108 (110) : ILR (1938) Lah 611 : 40 Cri L Jour 519.

[8] Failure to make such a memorandum is not by itself sufficient to vitiate the proceedings, unless there is prejudice to the parties. (Vol 12) 1925 Cal 1246 (1247) : 53 Cal 46 : 26 Cri L Jour 1524 (DB).

[9] Where the evidence of one of the parties was believed by the Magistrate as to the fact of possession he is justified in refusing local inspection. (Vol 32) 1945 Oudh 12 (15) : 46 Cri L Jour 680.

**36. Possession at the date of the Preliminary order.**—[1] The Magistrate must give a finding as to which of party if any was in possession of the property on the date of the preliminary order. (Vol 24) 1937 Rang 202 (203) : 38 Cri L Jour 805 \* ('87) 1937 Mad WN 55 (55) \* (Vol 23) 1936 Nag 271 (272) : ILR (1937) Nag 174 : 38 Cri L Jour 375 \* (Vol 23) 1936 Nag 3 (4)

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\* (Vol 10) 1923 Mad 141 (142) : 23 Cri L Jour 655 \*  
 \* (Vol 19) 1932 Sind 145 (147) : 26 Sind LR 353 : 34  
 Cri L Jour 216 \* ('06) 10 Cal WN xlvii (xlvii) (DB) \*  
 ('91) 13 All 362 (363) \* (Vol 33) 1946 Pat 330 (235) :  
 25 Pat 19 : 47 Cri L Jour 328 (DB).

[2] Except when the case comes under sub-section (4) the Magistrate is not concerned with the question of previous possession. ('91) 13 All 362 (363) (Decision on possession upon evidence taken six months previously by another officer, illegal) \*('09) 9 Cri L Jour 505 (506) (Mad) \* ('01) 5 Cal WN 900 (903, 904) (DB).

[See (Vol 4) 1917 Cal 82 (82) : 18 Cri L Jour 80 (DB).]

[3] The question as to how the possession was obtained is not relevant though the facts may be taken into consideration in deciding the question of possession at the date of the preliminary order. (Vol 2) 1915 Mad 1176 (1177) : 16 Cri L Jour 239 (DB).

[4] The nature of property and the acts of possession that may be exercised in respect of it should be considered in coming to a decision. ('89) 16 Cal 281 (286) (DB) \* (Vol 26) 1939 Pat 209 (212, 213) : 18 Pat 215 : 40 Cri L Jour 631 (DB).

[5] A single act of trespass will not constitute dispossession of the party who is otherwise in possession thereof. (Vol 21) 1934 Pat 565 (570) : 36 Cri L Jour 146.

[See (Vol 26) 1939 Pat 151 (154) : 40 Cri L Jour 339.]

[6] Order under S. 144 restraining acts of possession—Subsequent proceedings under this section—Possession should be found with the party who was in possession at the time of the order under S. 144. (1900) 27 Cal 785 (788, 789) (DB).

[7] Right to future possession should not be decided without reference to possession at the date of preliminary order. (Vol 11) 1924 Pat 589 (591) : 3 Pat 288 : 27 Cri L Jour 220 (DB) (Arbitrator to whom question of possession was referred giving award as to future possession without reference to possession on the date of order—Magistrate should drop proceedings) \* (Vol 16) 1929 Nag 285 (287, 288) : 31 Cri L Jour 191.

[8] Magistrate actually deciding question of possession on the date of preliminary order omitting to mention so in the final order—Irregularity is not material. (Vol 5) 1918 Cal 901 (904) : 18 Cri L Jour 1024 (DB).

[9] Subject of dispute considerable area of land—Possession claimed through ryots—Question to be decided is who is in possession of the constituent parts piece by piece. ('74) 21 Suth WR Cr 55 (55) (DB).

[10] Dispute between landlord and tenants—Different sets of tenants claiming different plots—Possession of each plot should be considered separately—Joint inquiry not illegal unless prejudice is caused. (Vol 25) 1938 Pat 511 (513) : 40 Cri L Jour 17 (Joint enquiry not necessarily illegal if no prejudice is caused) \* (Vol 33) 1946 Pat 389 (391).

## 37. Reference to arbitration and compromise.—

[1] It is not proper to delegate the inquiry as to possession, even with the consent of parties, to arbitrators. (Vol 28) 1941 All 42 (43) : 42 Cri L Jour 246 : ILR (1941) All 14 \* (Vol 4) 1917 Pat 191 (192, 193) : 2 Pat L Jour 86 : 18 Cri L Jour 145 \* (Vol 8) 1921 Cal 637

(638) : 22 Cri L Jour 623 \* (Vol 4) 1917 Pat 624 (624, 625) : 18 Cri L Jour 685 \* ('05) 2 Cri L Jour 347 (349) : 32 Cal 552 (DB).

[2] On a compromise of the dispute the Magistrate should cancel preliminary order and stay further proceedings. (Vol 29) 1942 Pat 289 (289) : 43 Cri L Jour 172 \* (Vol 12) 1925 Oudh 190 (193) (DB) \* (Vol 8) 1921 Cal 637 (638) : 22 Cri L Jour 623 (DB).

[See ('39) 1939 Nag L Jour 197 (198).]

[3] Even where the Magistrate passes an order in terms of the compromise, it should in reality be treated as an order under Sub-s. (5). ('11) 12 Cri L Jour 32 (33) (DB) (Cal).

[4] Where an order passed in terms of the compromise purports to be a final order, such an order is without jurisdiction and the Magistrate is competent to institute fresh proceedings in respect of the subject of dispute. ('11) 12 Cri L Jour 32 (33) (DB) (Cal).

[But see (Vol 10) 1923 Lah 46 (47) : 23 Cri L Jour 724.]

[5] Question of possession as on the date of preliminary order referred to arbitrators—Findings of arbitrators may be accepted as evidence and order under Sub-s. (6) may be passed. (Vol 29) 1942 Pat 289 (289) : 43 Cri L Jour 172 \* ('03) 7 Cal WN 461 (462) \* ('02) 6 Cal WN cix (cx) (DB).

[See (Vol 5) 1918 Pat 383 (384) : 3 Pat L Jour 248 : 19 Cri L Jour 266 (DB).]

38. Question of title.—[1] The Magistrate should confine himself to the question of actual possession, and has no power to inquire into and decide on the rights of the parties to possession of the property. (Vol 31) 1944 Oudh 25 (27) : 45 Cri L Jour 137 \* (Vol 28) 1941 Oudh 515 (516, 517) : 42 Cri L Jour 710 \* (Vol 27) 1940 Mad 904 (905) : 42 Cri L Jour 67 \* (Vol 27) 1940 Sind 61 (62) : 41 Cri L Jour 493 : ILR (1940) Kar 421 (DB) \* (1857-59) 7 Moo Ind App 283 (309) (PC).

[See also (Vol 30) 1943 Sind 152 (155) : ILR (1943) Kar 112 : 44 Cri L Jour 761 (DB) (Criminal Court will not decide questions of ownership and title. Case under Cattle Trespass Act, 1871, S. 10).]

[2] Questions relating to title, where such consideration is necessary in order to effectively decide the question of possession can be gone into. (Vol 26) 1939 Pat 209 (212) : 40 Cri L Jour 631 : 18 Pat 215 (DB) \* ('10) 11 Cri L Jour 353 (353) : 34 Mad 138 \* (Vol 7) 1920 Pat 499 (499) : 21 Cri L Jour 748 \* (Vol 24) 1937 Oudh 510 (512) : 38 Cri L Jour 1107.

[3] Question of title to possession can be considered to corroborate or supplement other evidence as to possession. (Vol 5) 1918 Pat 650 (651) : 19 Cri L Jour 717 \* (Vol 9) 1922 Mad 188 (189) : 23 Cri L Jour 197 \* (Vol 10) 1923 Cal 303 (304) : 24 Cri L Jour 141 (DB) (Evidence balanced on both sides—Enquiry into title justified to act on the presumption that possession follows title) \* (Vol 5) 1918 Pat (658, 659) : 19 Cri L Jour 764 (DB) \* (Vol 21) 1934 Cal 95 (96) : 35 Cri L Jour 489 (DB).

[4] The presumption that possession follows title cannot be applied to cases where evidence on both sides is unreliable. (Vol 10) 1923 Cal 303 (304) : 24 Cri L Jour 141 (DB) (Magistrate should pass order under S. 146 \* (Vol 3) 1916 Cal 253 (254) (DB).

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39. Effect of prior proceedings on the inquiry into possession.—[1] Where a decree of Civil Court awards possession of property or the possession is delivered to a party by that Court the Magistrate is bound to find possession in favour of the party and maintain such possession. ('43) ILR (1943) All 150 (153, 154) \* (Vol 26) 1939 Rang 388 (389) : 41 Cri L Jour 123 : 1940 Rang LR 157 \* (Vol 24) 1937 Pat 557 (557) : 38 Cri L Jour 1096 \* ('05) 2 Cri L Jour 761 (762) : 32 Cal 796 (DB) \* (Vol 9) 1922 Pat 197 (199) : 23 Cri L Jour 321 (DB) \* (Vol 7) 1920 Pat 483 (484) : 21 Cri L Jour 735 \* (Vol 3) 1916 Cal 339 (339, 340) : 17 Cri L Jour 182 (DB) \* ('05) 2 Cri L Jour 236 (237) (All) \* ('10) 11 Cri L Jour 655 (656) (Low Bur.).

[See however ('05) 2 Cri L Jour 670 (679) : 33 Cal 33 (DB) (Magistrate not bound by decree though it may be of great evidentiary value to throw light on the fact of possession on the date of preliminary order) \* (Vol 6) 1919 Nag 98 (99) : 20 Cri L Jour 445 (Do) \* (Vol 6) 1919 Cal 526 (528) : 20 Cri L Jour 840 (DB) (Do) \* (Vol 27) 1940 Nag 265 (267) : 41 Cri L Jour 799. (This principle will apply to possession obtained against the judgment-debtor but not when the party in possession at the time is not the judgment-debtor but one of the decree-holders claiming exclusive title).

[2] Fact of delivery of possession or entry in record of rights raises presumption of continuity of possession.—Party claiming against it must show effective dispossession by them subsequently. (Vol 28) 1941 Pat 516 (517) : 42 Cri L Jour 876 \* (Vol 20) 1933 Pat 586 (587) : 35 Cri L Jour 154 \* ('37) 38 Cri L Jour 881 (882) (Lah) \* (Vol 13) 1926 Lah 479 (480) : 27 Cri L Jour 815 \* (Vol 15) 1928 Cal 610 (616) : 30 Cri L Jour 69 : 56 Cal 290 (FB) \* (Vol 9) 1922 Mad 356 (357) : 23 Cri L Jour 92.

[3] Weight to be attached to a previous order of a Civil or Criminal Court depends on the circumstances of each case. (Vol 28) 1941 Pat 516 (517) : 42 Cri L Jour 876 \* (Vol 12) 1925 Cal 186 (186, 187) : 25 Cri L Jour 1104 (DB) \* (Vol 2) 1915 Mad 83 (84) : 15 Cri L Jour 663 \* (Vol 21) 1934 Pat 471 (472) : 36 Cri L Jour 624 \* (Vol 15) 1923 Cal 344 (347) : 55 Cal 826 : 29 Cri L Jour 503 (DB) \* (Vol 6) 1919 Nag 98 (99) : 20 Cri L Jour 445 \* (1908) 8 Cri L Jour 392 (392) : 31 Mad 416 \* (Vol 1) 1914 Mad 78 (81) : 15 Cri L Jour 559 \* ('05) 2 Cri L Jour 236 (237) (All).

[4] Lapse of time since the previous order or decree was passed diminishes its evidentiary value. (Vol 27) 1940 Pat 135 (136) : 41 Cri L Jour 171 \* (Vol 5) 1918 Cal 662 (663) : 18 Cri L Jour 718 (DB).

[5] A delivery of symbolical possession is of little value as against third persons in possession under independent title. (Vol 5) 1918 Cal 662 (663) : 18 Cri L Jour 718 \* (Vol 3) 1916 Mad 640 (640) : 16 Cri L Jour 736 \* ('79) 4 Cal 378 (379) (DB).

[6] Magistrate holding at variance with a previous decree or order should give his reasons for doing so. (Vol 3) 1916 Pat 292 (296) : 17 Cri L Jour 369 : 1 Pat L Jour 336 (FB).

[See ('10) 11 Cri L Jour 184 (185) (DB) (Cal).]

[7] Cannot discard other evidence relating to actual possession on the ground that there has been a previous delivery of possession in respect of the property. (Vol 5) 1918 Cal 662 (663) : 18 Cri L Jour 718 (DB).

40. Joint possession.—[1] Dispute between persons entitled to joint possession—Magistrate has no jurisdiction to interfere under this section. (Vol 32) 1945 Oudh 62 (63) \* ('37) 1937 Oudh WN 214 (217) \* ('07) 5 Cri L Jour 296 (297) (DB) (Cal) \* (Vol 7) 1920 Pat 835 (836) : 21 Cri L Jour 224 \* (Vol 9) 1922 Pat 423 (425) : 23 Cri L Jour 379 \* ('04) 1 Cri L Jour 847 (848) : 32 Cal 249 (DB) (Claim to exclusive management of partnership business by one co-partner—Case is not governed by S. 145) \* ('12) 13 Cri L Jour 789 (790) (DB) (Cal) (Where public claim right of possession both parties are included in that term "public" and therefore possession being joint S. 145 does not apply).

[See however (Vol 12) 1925 Pat 618 (619) : 26 Cri L Jour 1187 (But where parties claim exclusive possession S. 145 will apply).]

[But see (Vol 27) 1940 Pat 135 (136) : 41 Cri L Jour 171 \* (Vol 34) 1947 Lah 227 (229, 230) \* (1938) 19 Pat L Tim 211 (212) \* (Vol 28) 1941 Oudh 515 (516, 517) : 42 Cri L Jour 710 (Magistrate acquires jurisdiction and is not concerned whether parties have title to joint possession or separate possession) \* ('13) 14 Cri L Jour 269 (271) : 40 Cal 982 (DB).]

[2] In the inquiry into actual possession the Court may act in the following ways :

(a) It can hold that one was in possession on the date of preliminary order and uphold that possession. (Vol 27) 1940 Nag 265 (266) : 41 Cri L Jour 799 \* (Vol 21) 1934 Nag 196 (197) : 35 Cri L Jour 1384 : 30 Nag LR 800 \* (Vol 11) 1924 Cal 444 (445) : 24 Cri L Jour 304 (DB) \* (Vol 2) 1915 Mad 1105 (1107) : 16 Cri L Jour 284 (285, 286) \* ('13) 14 Cri L Jour 269 (271) : 40 Cal 982 (DB) (Order should be passed upholding the possession against the others) \* (Vol 7) 1920 Mad 209 (210, 212) : 21 Cri L Jour 73 (DB).

[But see ('04) 1 Cri L Jour 847 (848) : 32 Cal 249 \* ('06) 4 Cri L Jour 215 (216) (DB) (Cal).]

(b) Managing member's possession can be upheld against the other members of the joint family. ('08) 8 Cri L Jour 205 (206, 207) : 31 Mad 318 (DB) \* (Vol 17) 1930 Bom 172 (173, 174) : 31 Cri L Jour 933 (DB) \* (Vol 14) 1927 Oudh 316 (316) : 28 Cri L Jour 877.

(c) It may find possession with one party in respect of one portion and with the other in respect of the rest and pass orders maintaining possession with each of them in respect of such portions. ('07) 5 Cri L Jour 490 (490, 491) (DB) (Cal) \* (Vol 10) 1923 Pat 369 (371) : 24 Cri L Jour 557 \* (Vol 2) 1915 Mad 1105 (1107) : 16 Cri L Jour 284 \* ('10) 14 Cal WN lxxix (lxxix) (DB).

(d) It may find that there is joint possession in which case he should not pass an order either upholding joint possession or giving possession to one. (Vol 32) 1945 Sind 110 (113) : ILR (1945) Kar 78 : 47 Cri L Jour 78 (DB) \* (Vol 27) 1940 Mad 904 (905) : 42 Cri L Jour 67 \* (Vol 7) 1920 Mad 209 (211) : 21 Cri L Jour 73 (DB) \* ('13) 14 Cri L Jour 495 (496) (All) \* (Vol 2) 1934 Oudh 153 (153) : 35 Cri L Jour 1056 \* (Vol 6) 1919 Mad 812 (813) : 19 Cri L Jour 977 \* (Vol 10) 1923 Pat 546 (547) : 24 Cri L Jour 869 \* (Vol 7) 1920 Cal 894 (894) : 22 Cri L Jour 350 (DB) \* ('11) 12 Cri L Jour 408 (409) : 38 Cal 889 (DB) \* (Vol 28) 1941 Oudh 515 (516) : 42 Cri L Jour 710.

[3] Dispute between two parties—Members of one party in possession under one title—Magistrate upholding the possession without considering their



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separate possession—Order is not bad. (Vol 38) 1946 Pat 330 (335) : 25 Pat 103 : 47 Cri L Jour 328 (DB).

41. Forcible and wrongful dispossession "within two months next before date of order".—[1] Party dispossessed forcibly should be treated as if he had been in possession on the date of the preliminary order and restored to possession such party under Sub s. (6) (Vol 26) 1939 Rang 388 (389) : 1940 Rang LR 157 : 41 Cri L Jour 123 (DB) \*(Vol 19) 1932 Sind 145 (148) : 26 Sind LR 353 : 34 Cri L Jour 216 (DB) \*(Vol 20) 1933 Cal 424 (426) : 24 Cri L Jour 810 (DB).

[See however (Vol 24) 1937 Pat 557 (558) : 38 Cri L Jour 1096.]

[2] The proviso is based on the principle that a forcible and wrongful dispossession cannot be recognised under criminal law. (Vol 15) 1928 Cal 610 (638, 639) : 56 Cal 290 : 30 Cri L Jour 69 (FB).

[3] The proviso merely recites the circumstances under which a presumption of possession may be made in favour of the dispossessed party. ('13) 14 Cri L Jour 223 (225) (All) (The proviso does not debar a Magistrate from deciding the question of actual possession on other grounds also).

[4] The proviso is not, however, mandatory. (Vol 30) 1943 Mad 402 (402) : 44 Cri L Jour 557.

[5] After deciding possession as on the date of preliminary order it is not necessary to consider the question whether there was forcible dispossession within two months next before such order. (Vol 26) 1939 Oudh 31 (32) : 14 Luck 240 : 39 Cri L Jour 963 \*(Vol 23) 1936 Nag 271 (272) : 38 Cri L Jour 375 : ILR (1937) Nag 174.

[6] Before applying the proviso the actual date of dispossession in respect of every item should be found out. (Vol 4) 1917 Lah 171 (172) : 18 Cri L Jour 660 : 1917 Pun Re No. 40 Cr.

[7] Person forcibly dispossessed applying within two months—Court not passing preliminary order until expiry of two months—Court cannot restore possession of property. ('08) 4 Cri L Jour 425 (426) (Lah) \*(Vol 22) 1935 All 85 (37) : 36 Cri L Jour 102 : 57 All 488 \*(Vol 18) 1931 Nag 38 (39) : 26 Nag LR 377 : 32 Cri L Jour 476 \*(Vol 23) 1936 Nag 271 (272) : 38 Cri L Jour 375 : ILR (1937) Nag 174 \*(Vol 28) 1941 Oudh 515 (517) : 42 Cri L Jour 710 \*(Vol 16) 1929 Oudh 526 (526) : 5 Luck 440 : 31 Cri L Jour 678 \*(Vol 27) 1940 Sind 33 (37) : 41 Cri L Jour 486 : ILR (1940) Kar 162 (DB) \*(Vol 32) 1945 Mad 216 (216) : 46 Cri L Jour 787.

[But see (1939) 49 Mad LW 473 (473) \*(Vol 16) 1929 Mad 198 (198) : 52 Mad 66 : 30 Cri L Jour 144.]

[8] Where no preliminary order at all was passed, the Magistrate has no power to apply the first proviso to Sub-section (4). (Vol 20) 1933 Lah 143 (144).

[9] Party restrained by injunction under S. 144 from entering into property cannot exclude that period from two months. (Vol 4) 1917 Cal 100 (101) : 18 Cri L Jour 801 (DB).

[10] Order under S. 144 merely forerunner of proceedings under this section—Period of two months should be counted backwards from the date of order under S. 144. (Vol 29) 1942 Pat 489 (490) : 44 Cri

42. "Forcibly and wrongfully", meaning of.—[1] The dispossession should be both forcible and wrongful. (Vol 27) 1940 Sind 83 (86) : 41 Cri L Jour 486 : ILR (1940) Kar 162 (DB) \*(Vol 12) 1925 Pat 33 (34) : 3 Pat 809 : 26 Cri L Jour 268 (DB) \*(Vol 13) 1926 Bom 91 (92, 93, 94) : 27 Cri L Jour 66 (DB) (Person with warrant for delivery of possession making forcible entry does not cause wrongful dispossession. But person having right to possession, taking law into his hands, making forcible entry causes wrongful and forcible dispossession).

[2] The word "wrongfully" thus means no more than "otherwise than in due course of law". (Vol 8) 1921 Cal 553 (554) : 22 Cri L Jour 637 (DB)\* (Vol 14) 1927 Cal 944 (944) : 28 Cri L Jour 245 (DB).

[3] Person temporarily dispossessed by *ex parte* order under S. 144 re-entering the property after expiry of order does not cause wrongful dispossession of the person temporarily holding possession. (Vol 30) 1943 Mad 402 (403) : 44 Cri L Jour 557.

[4] Show of criminal force sufficient to intimidate those in possession and deter them from resistance even though without actual force or violence is enough to constitute forcible dispossession. (Vol 8) 1921 Cal 553 (554) : 22 Cri L Jour 637 (DB).

[See (Vol 4) 1917 Cal 173 (174) : 17 Cri L Jour 449 (DB).]

[5] Ouster of trespasser and removal of his things from out of the land unaccompanied by actual physical violence cannot amount to unlawful and forcible entry into land. (Vol 27) 1940 Sind 167 (168) : 42 Cri L Jour 27 : ILR (1940) Kar 504 (DB) \*(Vol 14) 1927 Cal 261 (262) : 28 Cri L Jour 210 (DB).

[6] One party in possession through its servants—Other party getting notice issued by District Magistrate on incorrect representations—Servants made to vacate by showing notice—Eviction is forcible. (Vol 34) 1947 Mad 133 (134).

43. Cancellation of the preliminary order—Sub-section (5).—[1] Jurisdiction of Magistrate ceases at any stage of the enquiry when he finds that there is or has been no dispute and he should cancel the preliminary order. (Vol 27) 1940 Sind 51 (52, 53) : 41 Cri L Jour 507 : ILR (1939) Kar 775 (DB) \*(Vol 26) 1939 Oudh 284 (285) : 40 Cri L Jour 930 : 15 Luck 19 \*(39) 1939 Nag L Jour 197 (198) \*(Vol 10) 1923 Cal 577 (577) : 25 Cri L Jour 291 (DB) \*(01) 25 Bom 179 (184, 185) (DB) \*(Vol 16) 1929 Cal 328 (329) : 31 Cri L Jour 409 (DB) \*(Vol 7) 1920 Lah 286 (287) : 1 Lah 451 : 23 Cri L Jour 4 \*(Vol 12) 1925 Mad 1252 (1253) : 49 Mad 232 : 27 Cri L Jour 95 \*(Vol 15) 1928 Mad 859 (859) : 29 Cri L Jour 456.

[2] A party to the proceeding is not in the position of a plaintiff in a Civil Suit and has no right to require a decision on the points in dispute. (Vol 12) 1925 Mad 1252 (1253) : 49 Mad 232 : 27 Cri L Jour 95 \*(1903) 30 Cal 112 (117) (DB).

[3] Even third parties ("persons interested") are given the right to show that no such dispute exists or has existed under this Sub-section. (Vol 12) 1925 Mad 1252 (1253) : 49 Mad 232 : 27 Cri L Jour 95 \*(07) 5 Cri L Jour 91 (92, 93) : 29 Mad 561 (DB) \*(21) 25 Cal WN 1vi (1vi) (DB) \*(Vol 19) 1932 Oudh 21 (22) : 33 Cri L Jour 46.

[4] The Magistrate, himself, *suo motu*, can drop pro-



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940 Sind 167 (168) : 42 Cri L Jour 27 : ILR (1940) Kar 504 (DB) \* (Vol 32) 1945 Sind 110 (113) : ILR (1945) Kar 78 : 47 Cri L Jour 78 (DB) \* (1903) 30 Cal 112 (117) (DB) \* (Vol 27) 1940 Sind 51 (52, 53) : LR (1939) Kar 775 : 41 Cri L Jour 507 (DB) \* (Vol 2) 1925 Mad 1252 (1253) : 49 Mad 232 : 27 Cri L Jour 95 \* (Vol 4) 1917 Mad 237 (237) : 17 Cri L Jour 38 (DB) \* (Vol 11) 1924 Pat 689 (691) : 26 Cri L Jour 05 \* (Vol 8) 1921 Lah 92 (92, 93) : 2 Lah 364 : 23 Cri L Jour 292.

[See however (Vol 23) 1936 Lah 1012 (1013) : 38 Cri L Jour 242.]

[5] In the following cases it was held that, the Magistrate could drop proceedings *suo motu*.

(a) Appointment of receiver by Civil Court, in respect of the property in dispute. (Vol 22) 1935 Oudh 255 (257) : 36 Cri L Jour 464.

(b) Where the Magistrate decides that the possession is joint. (Vol 32) 1945 Sind 110 (113) : ILR (1945) Kar 78 : 47 Cri L Jour 78 (DB).

[6] The following were held not circumstances *per se* putting an end to the dispute likely to cause breach of the peace :

(a) Institution of Civil Suit. (Vol 22) 1935 Oudh 255 (256) : 36 Cri L Jour 464 : 10 Luck 564.

(b) Incidental decision in criminal proceeding as to the fact of possession. (Vol 12) 1925 Pat 593 (595) : 36 Cri L Jour 870.

[See also (Vol 2) 1915 Cal 157 (157) : 15 Cri L Jour 100 (DB).]

(c) One party undertaking not to enter land, the subject of dispute. (Vol 5) 1918 Cal 901 (903) : 18 Cri L Jour 1024 (DB).

(d) Statement by each party, without reference to the intentions of the other party, that they had no intention of breaking the peace. (Vol 30) 1943 Cal 559 (560) : 45 Cri L Jour 107 (DB).

(e) Expiry of lease under which one of the parties is in possession where it is not admitted he has given up possession and so dispute deemed to exist. (Vol 33) 1946 Pat 330 (335) : 25 Pat 19 : 47 Cri L Jour 928 (DB).

[7] The question whether the proceedings should be dropped is within the Magistrate's discretion. (Vol 11) 1924 Mad 795 (795, 796) : 47 Mad 713 : 25 Cri L Jour 378.

[8] Proceedings cannot be dropped under sub-section (5) merely because there is no further violence—Continuance of breach of peace is not necessary for passing final order. (Vol 34) 1947 Mad 133 (134).

[9] Magistrate acting *suo motu* is not obliged to record any evidence or to afford opportunities to the parties to adduce evidence to the contrary. (Vol 11) 1924 Mad 795 (795, 796) : 47 Mad 713 : 25 Cri L Jour 378 \* (Vol 16) 1929 Cal 328 (329) : 31 Cri L Jour 409 (DB) \* (Vol 12) 1925 Mad 1252 (1253) : 49 Mad 232 : 27 Cri L Jour 95.

[10] No revision lies against an order dropping proceedings. (Vol 12) 1925 Mad 1252 (1253) : 49 Mad 232 : 27 Cri L Jour 95 \* (Vol 16) 1929 Cal 328 (329) : 31 Cri L Jour 409 (DB) \* ('03) 30 Cal 112 (117, 118) (DB).

[See however ('09) 10 Cri L Jour 560 (563) (DB) (Cal) (Order not based upon any material can be set aside in revision) \* (Vol 11) 1924 Pat 689 (691) : 26 Cri L Jour 105 (Do) \* (Vol 5) 1918 Pat 500 (501, 502) : 19 Cri L Jour 712 (Do).]

[11] After dropping down proceedings the Magistrate cannot pass any order :

(a) on the claims of parties. (Vol 27) 1940 Sind 33 (36) : ILR (1940) Kar 162 : 41 Cri L Jour 486 (DB) \* (Vol 29) 1942 Sind 117 (119) : ILR (1942) Kar 120 : 43 Cri L Jour 876 (DB) \* (Vol 12) 1925 Mad 1252 (1253) : 49 Mad 232 : 27 Cri L Jour 95 \* (Vol 3) 1916 Pat 418 (420) : 17 Cri L Jour 286 (287) (DB) \* (Vol 13) 1926 Oudh 182 (182, 183) : 26 Cri L Jour 1398.

(b) as to disposal of the property. (Vol 26) 1939 Oudh 284 (286) : 40 Cri L Jour 930 : 15 Luck 19 \* ('30) 1930 Mad WN 771 (773) \* (Vol 12) 1925 Nag 297 (298) : 21 Nag LR 191 : 26 Cri L Jour 1378.

(c) as to the crops on the land. ('06) 3 Cri L Jour 466 (467) (DB) (Cal) \* (Vol 12) 1925 Mad 1252 (1253, 1254) : 49 Mad 232 : 27 Cri L Jour 95.

[But see (1905) 2 Weir 108 (108) (DB).]

[12] Where the proceedings are dropped the parties should seek remedy in a competent Court or in any manner they choose. (Vol 12) 1925 Mad 1252 (1254) : 49 Mad 232 : 27 Cri L Jour 95.

[13] Any attachment effected in the course of the proceedings automatically ceases and the parties are restored to their position before the order. (Vol 15) 1928 Mad 859 (859, 860) : 29 Cri L Jour 466.

[See ('08) 30 Cal 112 (118) (DB) (There was no attachment in this case).]

[14] Rents and other income from the property, lying as deposits in Court, should be kept, as such, till the parties establish their rights in proper proceedings. (Vol 12) 1925 Mad 327 (328) : 26 Cri L Jour 512 \* (Vol 2) 1915 Mad 588 (589) : 16 Cri L Jour 104 \* (Vol 26) 1939 Oudh 284 (286) : 40 Cri L Jour 930 : 15 Luck 19.

[15] The Magistrate cannot pass an order under section 517 on the cancellation of the preliminary order. ('06) 3 Cri L Jour 466 (467) (DB) (Cal).

[See however (Vol 29) 1942 Sind 117 (119) : 43 Cri L Jour 876 : ILR (1942) Kar 120 (DB) (An order for the purpose of restoring parties to their original position can be passed).]

[16] Proceedings once dropped, cannot be revived. ('93) 20 Cal 867 (869) (DB) \* (Vol 10) 1923 Cal 814 (814) : 23 Cri L Jour 195 (DB) \* (Vol 8) 1921 Pat 176 (177) : 22 Cri L Jour 481 \* (Vol 10) 1923 Lah 81 (81) : 3 Lah 401 : 24 Cri L Jour 160.

[17] Fresh proceedings on fresh materials can be started. ('02) 6 Cal WN 323 (324) (DB) \* ('93) 20 Cal 867 (869, 870) (DB) \* (Vol 4) 1917 Pat 368 (369) : 18 Cri L Jour 763 \* (Vol 8) 1921 Pat 176 (177) : 22 Cri L Jour 481.

44. Finality of the preliminary order.—[1] Preliminary order is final unless cancelled under Sub-section (5) and proceedings cannot be struck off for any other reason. (Vol 23) 1936 Lah 1012 (1013) : 38 Cri L Jour 242 \* (Vol 8) 1921 Cal 631 (632) : 22 Cri L Jour 484 (DB) \* ('09) 10 Cri L Jour 560 (562, 563) (DB) (Cal) \* (Vol 6) 1919 Pat 37 (37) : 24 Cri L Jour 464 (DB) \* (Vol 11) 1924 Pat 689 (691) : 26 Cri L Jour 105.

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[2] Magistrate, at the time of the final order, need not come to a finding that there is or was no likelihood of a breach of the peace. (Vol 8) 1921 Cal 631 (632) : 22 Cri L Jour 484 (DB) \* (Vol 14) 1927 Oudh 359 (359, 360) : 28 Cri L Jour 847 \* (Vol 7) 1920 Pat 745 (746) : 22 Cri L Jour 205.

45. "Any other person interested".—[1] "Person interested" who is entitled to show that no dispute exists or has existed is not a party to the proceedings. ('03) 80 Cal 155 (199) (FB).

[2] The Magistrate cannot pass a final order under Sub-s. (6) in favour of the person who comes in merely for the purpose of bringing the proceedings to an end and who is not a party. (Vol 5) 1918 Cal 117 (118) : 19 Cri L Jour 653 (DB).

[3] A third person will not be allowed to intervene after compromise between the parties which eliminates the danger to the peace. ('39) 1939 Nag L Jour 197 (198).

[4] A tenant of part of the property in dispute is a "person interested" within the meaning of sub-section (5). ('10) 11 Cri L Jour 371 (371) : 37 Cal 285 (DB).

46. Order under this section.—[1] Magistrate need not record, in the final order, a finding as to the likelihood of a breach of the peace. ('40) 71 Cal L Jour 152 (155) (DB) \* (Vol 26) 1939 Lah 108 (109) : 40 Cri L Jour 519 : ILR (1938) Lah 611 \* (Vol 10) 1923 Lah 253 (253) : 24 Cri L Jour 631 \* (Vol 12) 1925 Oudh 605 (606) : 26 Cri L Jour 1581.

[2] A definite finding as to which of the parties was in possession of the subject of the dispute on the date of the preliminary order must be in the final order. (Vol 10) 1923 Mad 142 (143) : 23 Cri L Jour 670 \* ('08) 7 Cri L Jour 336 (337) (DB) (Cal).

[3] The finding as to possession should be based on proper inquiry and on the evidence both oral and documentary adduced before him. (Vol 10) 1923 Mad 180 (181) : 24 Cri L Jour 64 \* (Vol 27) 1940 Sind 33 (38) : 41 Cri L Jour 486 : ILR (1940) Kar 162 (DB) \* (Vol 8) 1921 Pat 483 (484) \* ('13) 14 Cri L Jour 138 (139) (Lah) \* (Vol 10) 1923 Mad 180 (181) : 24 Cri L Jour 64 \* ('84) 7 Mad 460 (465, 466) (DB) \* (Vol 15) 1928 Nag 255 (256) : 29 Cri L Jour 312 \* (Vol 10) 1923 Pat 588 (588) : 24 Cri L Jour 432.

[4] The final order must be supported by statement of reasons inducing the Magistrate to come to such a conclusion. (Vol 12) 1925 Cal 1040 (1045) : 26 Cri L Jour 915 (DB) \* (Vol 9) 1922 Cal 382 (382) : 49 Cal 187 : 22 Cri L Jour 499 (DB).

[5] The Magistrate has no general powers to pass any final order except as provided by Sub-s. (6) ('68) 9 Suth WR Cr 20 (21) (DB) \* (Vol 2) 1915 Bom 98 (98) : 18 Cri L Jour 434 (DB) \* ('05) 2 Cri L Jour 552 (554) : 32 Cal 602 (DB) (Direction for removal of bund cannot be given) \* ('13) 14 Cri L Jour 138 (139) (Lah) (Demolition of superstructure standing on the land cannot be ordered).

[6] The final order should accurately specify the property in dispute with boundaries, descriptions, etc. (Vol 7) 1920 Cal 904 (905) : 23 Cri L Jour 385 (DB).

[7] The Magistrate has no jurisdiction to pass a final order in respect of lands not covered by the preliminary order. (Vol 26) 1939 Pat 565 (566) : 40 Cri L Jour

629 \* ('07) 11 Cal WN xliii, (DB) \* (Vol 11) 1924 Pat 589 (591) : 3 Pat 288 : 27 Cri L Jour 220 (DB) \* ('14) 18 Cal WN xci (xcii) (DB).

[See (Vol 23) 1936 Oudh 188 (189) : 37 Cri L Jour 1058.]

[8] An order which includes lands outside the proceedings and in which the lands in dispute are indistinguishable is bad wholly; where the lands can be distinguished that part which relates to other lands alone is bad. (Vol 34) 1947 Pat 175.

[9] No final order can be passed in respect of any movable property. (Vol 14) 1907 Nag 333 (334) : 28 Cri L Jour 687 : 23 Nag L R 84 \* ('07) 6 Cri L Jour 291 (292) : 4 Low Bur Rul 65.

[See (Vol 11) 1924 Oudh 331 (332) : 25 Cri L Jour 440 (Proceedings under S. 145 cannot be instituted with respect to movables).]

[10] If, the order is passed in respect of both movable and immovable property, only that part of the order which relates to immovable property is valid. (Vol 4) 1917 Pat 183 (185) : 18 Cri L Jour 756 : 2 Pat L Jour 637 (DB).

[11] An order in favour of a person who was not a party to the proceedings is without jurisdiction. (Vol 26) 1939 Pat 187 (187) : 40 Cri L Jour 220 \* (Vol 23) 1936 Oudh 188 (189) : 37 Cri L Jour 1058.

[12] Use of form No. 22 in Sch. V is not obligatory. (Vol 5) 1918 Cal 901 (903) : 18 Cri L Jour 1024 (DB).

[13] Use of printed form in the judgment is not desirable. (Vol 10) 1923 Mad 142 (143) : 23 Cri L Jour 670.

47. "Declare that such person is entitled to possession".—[1] The Magistrate should declare that the person found to be in possession on the date of the preliminary order is entitled to the possession of the property until evicted in due course of law. (Vol 27) 1940 Sind 61 (63) : 41 Cri L Jour 493 : ILR (1940) Kar 421 (DB) \* (Vol 8) 1921 Pat 176 (178) : 22 Cri L Jour 481 \* (Vol 5) 1918 Cal 117 (118) : 19 Cri L Jour 653 (DB) \* ('02) 6 Cal WN 104 (105) (DB).

[2] Order that one party should be in possession throughout the year but that during certain seasons he should be in joint possession with another is without jurisdiction. (Vol 13) 1922 Cal 1022 (1025) (DB).

[3] An order that one party should be in possession until he reaped the harvest and then surrender possession to the other party cannot be passed. ('78) 1 Cal L Rep 136 (139, 140) (DB).

[4] The Magistrate cannot declare possession of a portion only of the property leaving out the other portions for pathways. ('13) 14 Cri L Jour 391 (392) (DB) (Cal).

[5] The Magistrate cannot permit the other party to cultivate the land, pending establishment of his possessory rights. ('72) 18 Suth WR Cr 27 (27) (DB).

[6] Magistrate cannot order division of the crops on the land. ('08) 8 Cri L Jour 387 (388) (DB) (Cal).

[7] The Magistrate can find possession of the property restricted in its enjoyment and declare such restricted possession. (Vol 11) 1924 Bom 452 (453) : 48 Bom 512 : 26 Cri L Jour 772 (DB) \* (Vol 4) 1917 Mad 840 (841) : 17 Cri L Jour 235.

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8] Declaration of possession in favour of applicant order directing him to restore cemeteries to their old site and allow Mahomedans to go near them to take the blessing of God is beyond Magistrate's powers. (Vol 26) 1939 Mad 791 (792): 41 Cri L Jour 18.

18. **Evicted in due course of law.**—[1] Final order is effective only up to the time that a competent court passes an order of delivery to one of the parties passes an order for protecting the property. (Vol 19) 32 Cal 29 (31): 58 Cal 1070 (1900) 22 All 214 (215, 8) (DB).

[See (Vol 23) 1936 Nag 271 (272): ILR (1937) Nag 4: 38 Cri L Jour 375 (Order is meant to be effective only until the question of title is decided by the Civil court).]

[2] The order of eviction need not necessarily be by Civil Court but should be by a Court acting under statutory authority to award possession. (Vol 4) 1917 at 220 (220)—18 Cri L Jour 632 (Order recording possession by settlement officer is not an order of eviction). (Vol 12) 1925 All 210 (211) (Decree in ejectment under Agra Tenancy Act is such an order).

[3] The term "evicted" applies to cases both where no person is found disentitled to possession at all or is entitled to the extent he has been awarded by the Magistrate. (Vol 7) 1920 Mad 209 (211): 21 Cri L Jour 3 (DB).

[4] Dismissal of suit for confirmation of possession by the other party does not amount to being "evicted" in the absence of a separate suit for recovery by the unsuccessful party to the proceedings. ('89) 11 Suth WR Cr 43 (44) (DB).

49. **Restoration of possession.**—[1] Subsection (6), enables the Magistrate, to put person forcibly and wrongfully dispossessed, in actual possession. (Vol 14) 1927 Mad 304 (306).

50. **Effect of order under this section.**—[1] An order under this section is final and conclusive and is effective until the party in whose favour the order is made is evicted in due course of law. (Vol 8) 1921 Oudh 119 (119): 24 Oudh Cas 21: 22 Cri L Jour 384 (Vol 19) 1932 Cal 29 (31): 58 Cal 1070 (DB) (Vol 78) 2 Cal L Rep 62 (67) (DB) (Vol 81) 5 Bom 387 (392) (Vol 12) 1925 Pat 593 (594): 26 Cri L Jour 870.

[2] The remedy of the unsuccessful party is to file a civil suit. (Vol 23) 1936 All 322 (324): 58 All 920: 37 Cri L Jour 694 (Vol 23) 1936 Cal 659 (661): 38 Cri L Jour 79 (DB).

[3] If the parties to the two sets of proceedings are the same or derived their interest from the same parties, the order in the previous proceedings operates as a bar to the institution of fresh proceedings. (Vol 26) 1939 Pat 611 (618): 41 Cri L Jour 191: 18 Pat 544 (DB) (Vol 38) 39 Cri L Jour 868 (869) (Oudh) (Vol 23) 1936 Cal 659 (661): 38 Cri L Jour 79 (DB) (Vol 10) 1923 Cal 95 (96): 24 Cri L Jour 97 (DB) (Vol 7) 1920 Pat 211 (212): 21 Cri L Jour 753.

[4] Where parties to the proceedings are not the same fresh proceedings can be initiated by the Magistrate. (Vol 26) 1939 Pat 611 (619): 18 Pat 544: 41

Cri L Jour 191 (DB) (Vol 25) 1938 Pat 1 (4): 39 Cri L Jour 268 (Vol 22) 1935 Cal 494 (494) (DB).

[But see (Vol 30) 1943 Oudh 229 (231): 44 Cri L Jour 459 (Vol 28) 1941 Pat 607 (608): 42 Cri L Jour 791 (Vol 16) 1929 Pat 505 (506): 30 Cri L Jour 840.]

[5] The previous order should not be made the basis for the subsequent order. Though it may be considered as a part of the evidence to show that one of the parties got possession in the prior proceedings. ('40) 44 Cal WN 928 (929) (DB).

[6] No express provision exists authorizing the Court to place the successful party in possession or to pass consequential order by way of the execution of the final order. ('08) 7 Cal L Jour 547 (551) (DB) (Vol 10) 11 Cri L Jour 26 (27) (DB) (Cal).

[7] The practical result of the order is to enable the successful party to take possession of the property. (Vol 30) 1943 Oudh 229 (231): 44 Cri L Jour 459 (Vol 8) 7 Cal L Jour 547 (551) (DB).

[See however (Vol 2) 1915 Cal 816 (818).]

[8] The Magistrate should enforce his order against persons disobeying it either by instituting proceedings against them under S. 188 Penal Code, or by proceedings under S. 144 or S. 107. ('08) 7 Cal L Jour 547 (551) (DB) (Proceedings under S. 188 IPC) (Vol 26) 1939 Pat 611 (618): 41 Cri L Jour 191: 18 Pat 544 (DB) (Do) (Vol 21) 1934 Nag 114 (116, 117): 35 Cri L Jour 820 (Do) (Vol 86) 13 Cal 175 (178) (DB) (Do) (Vol 13) 14 Cri L Jour 63 (64) (Lah) (Do) (Vol 30) 1943 Oudh 229 (231): 44 Cri L Jour 459 (Proceeding may be taken under S. 107) (Vol 28) 1941 Pat 607 (608): 42 Cri L Jour 791 (Proceedings under S. 107 of this code) (Vol 9) 1922 Pat 210 (211): 25 Cri L Jour 541 (Proceedings under S. 107 or 144 may be taken.)

[9] A final order does not in any manner affect the rights of the parties. ('01) 25 Bom 179 (184) (DB) (Vol 20) 1933 Lah 409 (412): 14 Lah 615: 34 Cri L Jour 342 (Vol 10) 1923 All 77 (78): 45 All 162 (DB).

[10] A final order does not give rise to a presumption in civil Court in favour of the successful party. (Vol 10) 1923 Pat 401 (402) (Vol 4) 1917 Mad 365 (366) (DB) (Chapter XII) proceedings instituted subsequent to suit—Magistrate's order as to possession is not conclusive (Vol 34) 1947 Lah 173 (174) (Finding as to possession cannot be questioned but civil Court can decide that person in possession had no title). (Vol 2) 1915 Mad 926 (926) (DB) (Judge can decide differently on the materials before him).

[11] The unsuccessful party to the proceedings need not sue to vacate the order of the Magistrate. (Vol 11) 1924 Mad 224 (225) (DB) (1864) Suth WR Act X, 54 (55) (Vol 74) 21 Suth WR 79 (79) (DB) (Vol 12) 1912 Pun WR No. 137 page 367 (369): 1922 Pun Re No. 84 (DB).

[12] The onus is on the unsuccessful party to prove his better title to the property than the person whose possession has been declared by the Magistrate. (Vol 10) 1923 PC 128 (130): 2 Pat 676: 50 Ind App 183 (PC) (Vol 02) 29 Cal 187 (199): 29 Ind App 24 (PC) (1900) 27 Cal 943 (947): 27 Ind App 136 (PC).

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[13] The order of the Magistrate is admissible in evidence in the subsequent civil suit to prove the fact of the dispute, to show how it was settled, who were the parties thereto, and who was placed in possession by the Magistrate. ('02) 29 Cal 187 (198) : 29 Ind App 24 (PC) ✕ (Vol 17) 1930 Cal 450 (452) : 57 Cal 987 (DB).

[14] The findings of the Magistrate on questions of fact relating to possession are inadmissible. (Vol 26) 1939 Lah 188 (190) ✕ (Vol 3) 1916 Cal 582 (592) (SB) ✕ (Vol 17) 1930 Cal 450 (452) : 57 Cal 987 (DB).

[See (Vol 25) 1938 Sind 132 (137) : ILR (1939) Kar 18 (DB).]

[15] An order under Sub-s. (6) dispossessing a person will not be a ground for a suit under S 9 of the Specific Relief Act. ('08) 7 Cal L Jour 547 (550, 551) (DB).

[16] Dispossession occurring long before order—Order held not a bar to suit under specific Relief Act. ('08) 30 All 331 (333) (DB) ✕ (73) 20 Suth WR 12 (12) (DB) ✕ (Vol 16) 1929 Rang 21 (22) : 6 Rang 667.

[17] The Magistrate has no power to review the final order passed by him under Sub-s. (6). (Vol 22) 1935 Rang 447 (447) : 13 Rang 302 : 37 Cri L Jour 92 ✕ ('08) 7 Cri L Jour 401 (403) : 35 Cal 350 (DB).

[18] The Magistrate can at any time correct clerical or arithmetical mistakes in the order or errors arising therein from any accidental slip or omission. (Vol 5) 1918 Cal 472 (472) : 18 Cri L Jour 995 (DB) ✕ ('90) 2 Weir 107 (107) ✕ (Vol 5) 1918 Cal 238 (238) : 19 Cri L Jour 732 (DB).

[19] Pending proceedings under this section is no bar to the Magistrate deciding the person in possession at the time of rioting in a trial for that offence. (Vol 13) 1926 Cal 945 (946) : 53 Cal 471 : 27 Cri L Jour 975 (DB).

**51. Effect of an order under this section on limitation.**—[1] Person bound by an order under this section must file a suit to recover the property within three years from the final order. (Vol 30) 1943 Cal 67 (70) : ILR (1942) 2 Cal 332 (DB) ✕ (Vol 22) 1942 Pat 287 (288) ✕ (1896) 23 Cal 731 (737) (FB).

[See (Vol 8) 1921 Oudh 191 (192) (Person not bound by order—Article 47 does not apply) ✕ ('67) 8 Suth WR 490 (491) (DB) ✕ ('68) 9 Suth WR Cr 480 (481) (DB).]

[2] Failure to bring the suit for recovery within three years extinguishes the right to the property. (Vol 28) 1941 Pesh 65 (67) : 42 Cri L Jour 872 ✕ (Vol. 30) 1943 Cal 67 (70) : ILR (1942) 2 Cal 332 (DB) ✕ (Vol 24) 1937 All 300 (303) ✕ (Vol 23) 1936 Mad 188 (189) (DB) ✕ (Vol 14) 1927 Mad 304 (306) ✕ (Vol 22) 1935 Pat 164 (164, 165) : 14 Pat 424 (DB).

[3] The three years period of limitation has no application in the following cases :

(a) where the order of the Magistrate is without jurisdiction. (Vol 7) 1920 Cal 820 (821) (DB) ✕ (Vol 3)

1916 Mad 320 (321) : 38 Mad 432 (DB) ✕ (Vol 5) 1918 Cal 901 (902, 903) : 18 Cri L Jour 1024 (DB).

(b) where the suit is for redemption of the property, and not for recovery of the property. (Vol 15) 1928 Nag 97 (98) : 23 Nag L R 164.

(c) where the suit is brought by a person in whose favour the order is passed. (Vol 14) 1927 Mad 304 (305, 306) (Magistrate's order confirmed plaintiff's possession).

(d) where there is no existing right to sue for possession on the date of the Magistrate's order. ('92) 19 Cal 646 (650) (DB).

(e) where no order respecting immovable property is passed as a result of the dismissal of the application or the dropping of proceedings ('12) 16 Ind Cas 735 (736) (DB) (Cal) ✕ (Vol 13) 1926 Cal 1022 (1025) (DB).

[4] Three years has to be computed from the date of the order and not from date of dismissal of revision application. (Vol 5) 1918 Pat 504 (504, 505) (DB) ✕ ('08) 12 Cal WN 840 (841) ✕ (Vol 33) 1946 Mad 444 (446) (DB).

**52. Persons bound by the order.**—[1] All persons concerned in the dispute and who had notice of the proceedings are bound by the order though they are not parties. ('09) 10 Cri L Jour 64 (64) (DB) (Bom) ✕ (Vol 17) 1930 Cal 63 (64) : 31 Cri L Jour 945 (DB) ✕ (Vol 17) 1930 Mad 48 (49) : 52 Mad 787 (DB) (Order against manager of joint Hindu family binds all the other members) ✕ (Vol 10) 1923 All 151 (152) : 45 All 306 (DB) (Do) ✕ (Vol 23) 1936 Nag 192 (197) : ILR (1936) Nag 205 : 38 Cri L Jour 307 (Sons are bound by order against father) ✕ ('38) 39 Cri L Jour 868 (869) (Oudh) (Do) ✕ (Vol 5) 1918 Pat 504 (504, 505) (DB) (Order against representative binds the rest of the community) ✕ (Vol 16) 1929 Pat 505 (506) : 30 Cri L Jour 840 (Order finds all persons interested in the property).

[But see (Vol 25) 1938 Pat 1 (5) : 39 Cri L Jour 268 ✕ (Vol 22) 1935 Lah 115 (118) (DB) ✕ (Vol 28) 1941 Pesh 65 (67) : 42 Cri L Jour 872 ✕ (Vol 8) 1921 Oudh 191 (192) (Order directed against A personally—Even if A made his application as manager of joint family, order will not bind other members of the family).]

[2] The order does not operate as a judgment *in rem* in favour of the party in whose favour possession was maintained. (Vol 16) 1929 Pat 505 (506) : 30 Cri L Jour 840.

[3] An order under this section does not create any title by prescription against parties not bound by the order. ('80) 7 Ind App 73 (81) (PC). ✕ (Vol 14) 1927 Mad 304 (306).

**53. Conversion of proceedings.**—[1] The jurisdiction of the Magistrate to institute proceedings under S. 107 is not ousted by the fact that the dispute relates to immovable property. (Vol 29) 1942 Pat 331 (333) : 43 Cri L Jour 637 ✕ (Vol 30) 1943 Pat 44 (47) : 44 Cri L Jour 25 (DB) ✕ ('11) 12 Cri L Jour 569 (571) : 39 Cal 150 (FB) ✕ (Vol 10) 1923 Nag 54 (54) : 23 Cri L Jour 567 ✕ (Vol 3) 1916 Mad 621 (621, 622) : 16 Cri L Jour 211.

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[2] Institution of simultaneous proceedings under this section and S. 107 is a matter for the discretion of the Magistrate. ('11) 12 Cri L Jour 569 (571) : 39 Cal 150 (FB) ✕('12) 13 Cri L Jour 526 (526) : 34 All 449 ✕('13) 14 Cri L Jour 559 (562) : 36 Mad 315 (DB) ✕('12) 13 Cri L Jour 566 (566) (All).

[See however (Vol 6) 1919 Cal 465 (465) : 19 Cri L Jour 367 (DB) (Simultaneous proceedings undesirable) ✕(Vol 4) 1917 Pat 632 (633) : 18 Cri L Jour 328 (Do).]

[3] A proceeding under S. 107 cannot be converted into one under S. 145. (Vol 5) 1918 Pat 625 (625) : 19 Cri L Jour 320 ✕('04) 1 All L Jour 185n (185n).

[4] In a proceeding under S. 145 the Magistrate cannot take security from any or all of the parties. ('06) 10 Cal WN clxx (DB) ✕(Vol 3) 1916 All 237 (238) : 17 Cri L Jour 527 ✕(Vol 1) 1914 Sind 8 (10) : 8 Sind LR 207 : 16 Cri L Jour 235 (DB).

[5] Proceedings under S. 144 converted one under this section in the presence of parties who took active part—*Held*, there was no illegality. (Vol 5) 1918 Pat 481 (481, 482) : 19 Cri L Jour 396 (DB).

[6] Order under S. 147 converted into one under this section without notice and without a preliminary order should be set aside. ('09) 9 Cri L Jour 565 (565) (DB) (Mad).

**54. Revision.**—[1] An application for revision should be made without unreasonable delay. (Vol 27) 1940 Pat 135 (137) : 41 Cri L Jour 171 ✕(Vol 16) 1929 Pat 404 (405) : 30 Cri L Jour 1053 : 8 Pat 468 ✕('73) 19 Suth. WR Cr 39 (39, 40) (DB).

[2] The application for revision should be made only by persons who have a present claim to the possession of the property in dispute and not by persons having only contingent or future rights to possession. ('02) 24 All 443 (445).

[3] It should be made in the first instance to the Sessions Judge or to the District Magistrate and not to the High Court. (Vol 13) 1926 Nag 285 (285, 286) : 27 Cri L Jour 71.

[4] The District Magistrate and the Sessions Judge have power only to make a report under S. 438 and not to revise the order. (Vol 28) 1941 Pat 105 (106) : 42 Cri L Jour 340 ✕(Vol 12) 1925 Cal 1234 (1234) : 26 Cri L

Jour 1166 (DB) ✕(Vol 9) 1922 Pat 449 (450) ✕('02) 1902 Pun Re No. 23, p 59 (62, 63).

[5] The District Magistrate and the Sessions Judge have no powers to order further inquiry under S. 436. (Vol 15) 1928 Rang 292 (293) : 30 Cri L Jour 709 ✕(Vol 3) 1916 Pat 132 (132) : 18 Cri L Jour 488 (DB) ✕('93) 20 Cal 729 (732) (DB) ✕(Vol 33) 1946 Mad 412 (413).

[6] The High Court will not interfere if no order has been passed by the Magistrate. (Vol 5) 1918 Mad 164 (165) : 19 Cri L Jour 63.

[7] Where an order under S. 145 (1) has been passed the High Court will not interfere unless the Magistrate has acted with gross irregularity. (Vol 31) 1944 All 210 (210) : 45 Cri L Jour 769 : ILR (1944) All 285 ✕(Vol 34) 1947 Lah 227 (228, 229) (Decision as to likelihood of breach of the peace and as to possession based on evidence—No interference).

[8] The High Court will not, go into the evidence unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law. (Vol 29) 1942 Pat 489 (490) : 44 Cri L Jour 95 ✕('46) 1946 Pat WN 278 (282) (Finding as to possession on document irrelevant to the hearing as well as in respect of the property—Document also vitiated by serious mistakes of record—Order will be set aside).

[9] When the High Court is exercising revisional jurisdiction it has no power to appoint a receiver pending disposal of the revision application. (Vol 13) 1926 Mad 139 (140) : 27 Cri L Jour 126 (DB).

[10] High Court acting in revision award costs in respect of the application. (Vol 12) 1925 Mad 438 (440) : 48 Mad 262 : 26 Cri L Jour 707 (FB) ✕('93) Oudh S.C. No. 227 p. 453 (454) (DB).

[See however (Vol 8) 1921 Cal 30 (31) : 22 Cri L Jour 213 : 48 Cal 522 (SB) (Order can be revised and consequential orders passed in exercise of powers vested under S. 107 of Government of India Act).]

[11] Mere delay in drawing up the formal proceedings after the receipt of the police-report is no ground for interference in revision unless injustice is caused by the Magistrate's order. (Vol 20) 1933 Pat 601 (602) : 35 Cri L Jour 91.

[12] A judgment of a single Judge passed in revision in proceedings under this section is open to appeal under Clause 15 of the Letters Patent. ('07) 5 Cri L Jour 343 (343, 344) (SB) (Mad).

146. (2) If the Magistrate decides that none of the parties was then in such possession, c  
 Power to attach subject is unable to satisfy himself as to which of them was then in such posse  
 of dispute. sion of the subject of dispute, he may attach it until a competent Court  
 has determined the rights of the parties thereto, or the person entitled to possession thereof :

a[Provided that the District Magistrate or the Magistrate who has attached the subject (c  
 dispute may withdraw the attachment at any time if he is satisfied that there is no longer an  
 likelihood of a breach of the peace in regard to the subject of dispute.]

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit a[and if a  
 receiver of the property, the subject of dispute, has been appointed by any Civil Court]s appoi  
 a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of  
 receiver appointed under the Code of Civil Procedure.<sup>b</sup>

a[Provided that, in the event of a receiver of the property, the subject of dispute, bei  
 subsequently appointed by any Civil Court, possession shall be made over to him by the receiv  
 appointed by the Magistrate, who shall thereupon be discharged.]

[1882—S. 146 ; 1872—S. 321 ; 1861—S. 319.]

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 29.

[b] *See* now the Code of Civil Procedure, 1908 (Act 5 [v] of 1908).

## SECTION 146—Synopsis

1. Scope.
2. Inquiry into possession.
3. "None of the parties then in such possession."
4. "Unable to satisfy himself as to which of them was then in such possession."
5. Separate possession of different parts of the property and joint possession.
6. Decision of a competent Court.
7. Order of attachment.
8. Effect of an order of attachment.
9. Effect of order of attachment on adverse possession and limitation.
10. Withdrawal of attachment.
11. Appointment of a receiver—Sub-section (2).
12. Powers of the receiver.
13. Remuneration of the receiver.
14. Disobedience to an order under this section.
15. Review.
16. Revision.

1. **Scope.**—[1] Proceedings under this section are only in continuation of those under S. 145. (Vol 23) 1936 All 177 (178) : 37 Cri L Jour 215 \* (Vol 6) 1919 Cal 930 (934) : 19 Cri L Jour 681 (SB).

[2] In the case of absence of cogent evidence of possession on either side it would be more proper to proceed under this section than under S. 145. (Vol 6) 1919 Cal 930 (934) : 19 Cri L Jour 681 (SB).

[3] The object of attachment is to prevent breach peace in attempts to obtain actual possession. (Vol 1920 Mad 209 (211) : 21 Cri L Jour 73 (DB) \* (Vol 2 1933 Lah 195 (195) : 14 Lah 414 (DB) \* (Vol 13) 19 Cal 722 (786) (DB) \* ('97) 20 All 120 (121) (DB).

[4] An order of attachment should not be made except on full inquiry and in exceptional cases. (Vol 1940 Pat 113 (114) : 41 Cri L Jour 101 \* ('38) 16 Oudh W N 673 (675) \* (Vol 11) 1924 Pat 804 (804 25 Cri L Jour 1295).

[5] Magistrate unable to decide right of easement He cannot order attachment of lands concerned. (V 29) 1942 Mad 77 (77, 78) : 43 Cri L Jour 103.

[6] Magistrate cannot order attachment of stock medicines in a shop. (Vol 28) 1941 Oudh 515 (516 42 Cri L Jour 710).

2. **Inquiry into possession** —[1] Before or on of attachment, proceedings should have been properly instituted under S. 145. ('05) 2 All L Jour 149 (150) (Vol 1) 1914 Mad 78 (81) : 15 Cri L Jour 559 \* (Vol 1923 Cal 703 (703) : 20 Cri L Jour 802 (DB) \* ('4 Mad HCR App xx (xx) \* (Vol 6) 1919 Nag 158 (15 20 Cri L Jour 117 \* ('13) 40 Cal 105 (108) : 13 Cr Jour 486 (DB) \* (Vol 11) 1924 Pat 804 (804) : Cri L Jour 1295 \* ('09) 9 Cri L Jour 272 (273) : 1 S L R 33 (DB) \* (Vol 1) 1914 Oudh 31 (31) : 15 Cr

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Jour 470 ✕ (Vol 10) 1923 Nag 297 (298) : 24 Cri L Jour 880 ✕ (Vol 4) 1917 Pat 110 (111) : 19 Cri L Jour 225 (DB).

[2] The Magistrate should, on inquiry, give a finding as to possession. (Vol 23) 1936 All 177 (178) : 37 Cri L Jour 215 ✕ (Vol 2) 1915 Mad 1176 (1177) : 16 Cri L Jour 239 (DB) ✕ (Vol 15) 1928 Nag 325 (326) : 29 Cri L Jour 861 ✕ (Vol 15) 1928 Cal 703 (703) : 30 Cri L Jour 802 (DB) ✕ ('11) 15 Cal WN lxxi (lxxi)(DB) ✕ (Vol 8) 1921 Pat 166 (166) : 22 Cri L Jour 323 ✕ ('30) 1930 Mad WN 771 (772) ✕ (Vol 19) 1932 All 325 (325) : 33 Cri L Jour 157.

[3] The Magistrate need not give any finding as to the likelihood of a breach of the peace again at the time of the order of attachment when such finding has been already arrived at under Section 145, Sub-section (1). (Vol 19) 1932 All 633 (634) : 34 Cri L Jour 480.

**3. "None of the parties was then in such possession".**—[1] The Magistrate cannot attach property in dispute where he finds that a third person was in possession. (Vol 7) 1920 Cal 898 (898) : 22 Cri L Jour 464 (DB) ✕ ('02) 2 Weir 106 (107) ✕ ('99) 3 Cal WN 329 (331) (DB).

[2] The Magistrate cannot declare the possession of third person. (Vol 8) 1921 Pat 173 (174) : 22 Cri L Jour 616.

[3] Third person not claiming to be in possession—Magistrate may attach the property. (Vol 6) 1919 Pat 130 (131) : 20 Cri L Jour 215.

**4. "Unable to satisfy himself as to which of them was then in such possession."**—[1] The Magistrate cannot pass an order on the ground that :

(a) He cannot decide rights of parties to possession. ('01) 11 Cri L Jour 560 (560) (Mad) ✕ ('04) 6 Bom L R 723 (724, 725) ✕ ('05) 2 Cri L Jour 28 (30) (DB) (Bom) ✕ (Vol 10) 1923 Pat 363 (363) ✕ (1864) 1864 Suth W R Sup Cr 28 (29).

(b) He cannot interpret terms of a competent Court's decree. ('78) 1 Cal L Rep 273 (274) (DB) ✕ (Vol 11) 1924 Pat 711 (712) : 25 Cri L Jour 88.

[2] Inability to determine possession must be upon the evidence adduced. (1900) 27 Cal 785 (789) (DB) ✕ (Vol 8) 1921 Pat 173 (174) : 22 Cri L Jour 616 ✕ (Vol 10) 1923 Pat 588 (588) : 24 Cri L Jour 432 ✕ (Vol 6) 1920 Cal 884 (885) : 20 Cri L Jour 17 (DB).

[3] The Magistrate cannot, without proper inquiry and without receiving evidence, hold that he is unable to decide the fact of possession. (Vol 23) 1936 All 17 (178) : 37 Cri L Jour 215 ✕ (Vol 5) 1918 Cal 284 (285) 18 Cri L Jour 988 (DB) ✕ (Vol 9) 1922 Cal 280 (280) 23 Cri L Jour 688 (DB) ✕ ('70) 6 Mad HCR iv (iv) (Vol 11) 1924 Pat 47 (48) : 24 Cri L Jour 754 ✕ (Vol 1922 Pat 544 (545) : 23 Cri L Jour 277.

[4] Where the parties do not adduce any evidence the Magistrate can attach the property. (Vol 17) 1919 Pat 29 (30) : 9 Pat 639 : 30 Cri L Jour 894 (DB) ('10) 11 Cri L Jour 27 (27) (DB) (Cal).

[5] Evidence equally unreliable on both sides Magistrate cannot consider question of title to draw a presumption as to possession. (Vol 10) 1923 Cal 3 (304, 305) : 24 Cri L Jour 141 (DB).

[6] The fact that it was difficult to decide the question of possession will not justify an order under this Section. ('39) 1939 Nag L Jour 213 (214) ✕ ('38) 19 Oudh WN 673 (675) ✕ (Vol 11) 1924 Pat 804 (804) : Cri L Jour 1295.

[7] Evidence for one party, though weak, preferable to evidence for the other party—It is the Magistrate's duty to decide in favour of the former. (Vol 27) 1919 Pat 113 (114) : 41 Cri L Jour 101.

[8] Where the land, in dispute, was under water two months preceding the proceedings, and hence could not have been possessed by anybody during that time it was held that the proper course for the Magistrate was to pass an order under this section. (Vol 4) 1917 (182 (82) : 18 Cri L Jour 80 (DB).

[9] Possession of one of the parties on the date of the preliminary order admitted—Magistrate can attach the property. (Vol 17) 1930 Lah 422 (422, 431) Cri L Jour 1075.

[10] Order of attachment cannot be passed where competent Court has :

(a) determined rights and possession of parties to property. (Vol 13) 1926 All 685 (686) : 48 All 397 Cri L Jour 559.

(b) decreed possession in favour of one party. 31) 1944 Mad 472 (473) (DB) ✕ (Vol 26) 1939 I 388 (389) : 41 Cri L Jour 123 : 1940 Rang L R (DB).

**5. Separate possession of different parties to the property and joint possession.**—[1]

**Section 146 (cont'd.)**

party in possession of a specific portion and the other in possession of the rest—Magistrate should not attach the entire property. ('05) 2 Cri L Jour 408 (410) (DB) (Cal) ✕ ('88) 2 Weir 108 (109) (DB).

[But see ('95) 22 Cal 297 (305) (DB).]

[2] Where the dispute is in respect of a specific portion of the property in possession of one of the parties, no order of attachment should be passed as regards that portion of the property. (Vol 28) 1941 Pat 607 (608) : 42 Cri L Jour 791.

[3] Parties in joint possession on date of preliminary order—An order of attachment can be passed. (Vol 19) 1932 All 688 (684) : 34 Cri L Jour 480 ✕ (Vol 17) 1930 Bom 172 (173) : 31 Cri L Jour 933 (DB) ✕ (Vol 19) 1932 Pat 366 (368) : 12 Pat 87 : 34 Cri L Jour 115 (DB).

[But see (Vol 2) 1915 Mad 396 (397) : 15 Cri L Jour 572 (DB).]

[4] The attachment of an undivided share in a village is not permissible. (Vol 28) 1941 Mad 744 (744).

**6. Decision of a competent Court.**—[1] The following have been held, orders of a competent Court, determining rights of parties to possession.

(a) Order of the Collector under S. 41 of the Bengal Survey Act. (Vol 26) 1939 Pat 348 (349) : 40 Cri L Jour 797 (Distinguishing (Vol 13) 1926 Cal 316 which held that mere entry in the record of rights without an order under S. 41 of the Bengal Survey Act was not a decision of a competent Court) ✕ ('10) 11 Cri L Jour 372 (372) : 37 Cal 331.

(b) Order under S. 40 of the United Provinces Land Revenue Act. (Vol 9) 1922 Oudh 300 (301) : 24 Cri L Jour 537 : 25 Oudh Cas 242 (Though order is no determination of title the property in mutation proceedings) ✕ (Vol 13) 1926 Oudh 179 (179) : 26 Cri L Jour 1551 ✕ (Vol 11) 1924 All 777 (778) : 25 Cri L Jour 1242 : 46 All 879.

(c) Order deciding right to trusteeship of temple under the Madras Hindu Religious Endowments Act—Order by the Religious Endowments Board. (Vol 28) 1941 Mad 803 (804) (implied).

[2] Order of the Revenue Divisional Officer in Madras, deciding the question of registry of immovable property is not an order of a competent Court in respect of possession. (Vol 6) 1919 Mad 953 (954) : 19 Cri L Jour 443.

[3] The party filing a civil suit may establish either title or right to possession. (Vol 12) 1925 Pat 168 (170)

(DE) ✕ (Vol 9) 1922 Oudh 300 (301) : 25 Oudh Cas 242 : 24 Cri L Jour 537.

[4] Where a competent Court has determined the rights of the parties the Magistrate cannot retain control of the property. (Vol 30) 1943 Nag 246 (248) : ILR (1943) Nag 752 : 44 Cri L Jour 739 ✕ (Vol 1) 1914 Low Bur 218 (219) : 15 Cri L Jour 500 ✕ (Vol 20) 1933 Pat 224 (231) : 12 Pat 261 (DB).

[5] Magistrate should deliver possession on the basis of Judgment of a competent Court. (Vol 30) 1943 Nag 246 (248) : 44 Cri L Jour 739 : ILR (1943) Nag 752 ✕ (Vol 28) 1941 Mad 803 (804) ✕ (Vol 3) 1916 Mad 507 (507) : 16 Cri L Jour 481.

[See however (Vol 23) 1936 All 177 (178) : 37 Cri L Jour 215 (Successful party should be put in possession by the Court which has declared his right—Magistrate himself cannot put him in possession).]

[6] Judgment of competent Court need not be *inter partes*. (Vol 11) 1924 Cal 812 (813) : 25 Cri L Jour 937 (DB) ✕ (Vol 4) 1917 Mad 453 (454) : 17 Cri L Jour 331.

[7] Judgment of competent Court may be in the nature of an *obiter*. (Vol 11) 1924 Cal 812 (813) : 25 Cri L Jour 937 (DB).

[8] Judgment of competent Court may, merely declare the title of a person, and need not expressly say that, he is entitled to possession of the property. (Vol 28) 1941 Mad 803 (804).

[9] The following were held to be no reasons for the Magistrate to continue to keep the property in attachment:

(a) That only symbolical possession is decreed. ('10) 14 Cal W N xci (xe) (DB).

(b) That appeal is pending against judgment of competent Court. (Vol 29) 1942 Pesh 11 (13) : 43 Cri L Jour 384 ✕ (Vol 5) 1918 Lah 390 (391) : 19 Cri L Jour 261 ✕ (Vol 1) 1914 Low Bur 218 (219) : 15 Cri L Jour 500.

(c) That period of limitation for appeal from judgment of competent Court has not expired. (Vol 11) 1924 All 777 (777) : 25 Cri L Jour 1242 : 46 All 879.

[10] Where during the period of attachment a third party entered into possession of the attached property and subsequently one of the parties to the dispute obtained a decree establishing his title to the property, it was held that the Magistrate could not order the third party to put the successful party in possession. (Vol 30) 1943 Nag 246 (248) : ILR (1943) Nag 752 : 44 Cri L Jour 739.



Section 146—Note 6 (*contd.*)

[11] Where on the decision of the trial Court the Magistrate released the property from attachment in favour of the successful party and the decision was reversed on appeal, it was held that the Magistrate had no jurisdiction to pass an order regarding delivery of possession of the property. (Vol 29) 1942 Pesh 11 (13) : 43 Cri L Jour 384.

7. Order of attachment.—[1] Actual taking and keeping of possession is contemplated when an order of attachment is passed. (Vol 30) 1943 Nag 246 (247) : 44 Cri L Jour 739 : I L R (1943) Nag 752 \* (Vol 7) 1920 Mad 209 (211) : 21 Cri L Jour 73 (DB) \* (Vol 12) 1925 Nag 297 (298) : 26 Cri L Jour 1378 : 21 Nag L R 191.

[2] The Magistrate has power to make an order respecting the management and control of the property during the period of attachment. (Vol 12) 1925 Nag 297 (298) : 26 Cri L Jour 1378 : 21 Nag L R 191 \* ('72) 17 Suth W R Cr 38 (39) (DE).

[3] Where the property is temple property the Magistrate has power to make necessary arrangements for the performance of the daily puja. ('93) 2 Weir 112 (112) (DB) \* ('86) 2 Weir 110 (111, 112) (DB).

[4] Where the properties of a *mutt* are attached the Magistrate has power to pass an order regarding the jewellery or moveable property appurtenant to the *mutt*. (Vol 14) 1927 All 125 (125) : 27 Cri L Jour 429. (Jewellery.) \* (Vol 3) 1916 Pat 42 (43) : 18 Cri L Jour 287 : 1 Pat L Jour 856 (DB). (Moveable property.)

8. Effect of an order of attachment. — [1] The possession of Court during attachment enures to the benefit of the person who is ultimately found, by a competent Court, to be entitled to the property and not the party previously in possession without title. (Vol 16) 1929 Mad 38 (41, 43) (DB) \* ('06) 30 Mad 12 (14) (DB) \* (Vol 9) 1922 Cal 419 (421) : 49 Cal 544 (DB) \* (Vol 20) 1933 Lah 195 (195) : 14 Lah 414 (DB) \* (Vol 13) 1926 Cal 782 (786) (DB) \* (Vol 26) 1939 Mad 456 (459) : I L R (1939) Mad 803 (SB).

[2] Attachment does not operate as dispossession of rightful owner. (Vol 3) 1916 Cal 751 (752) (DB) \* ('03) 26 Mad 410 (415) (DB).

[3] Party claiming the property need bring a suit for only a declaration of his right to the property. (Vol 3) 1916 Cal 751 (752) (DB) \* (Vol 9) 1922 Cal 419 (420) : 49 Cal 544 (DB) \* (Vol 20) 1933 Lah 195 (196) : 14 Lah 414 (DB).

[4] Party claiming property cannot bring a suit for possession against the other party. (Vol 16) 1929 Mad 38 (41) (DB) \* (Vol 9) 1922 Cal 419 (420) : 49 Cal 544 (DB) \* (Vol 14) 1927 Nag 316 (317).

[5] Party claiming property cannot claim *mesne profits* from the other party during the period of attachment. (Vol 11) 1924 Cal 1010 (1012) : 51 Cal 853 (DB).

[6] The order of attachment is effective only up to the time a competent Court decides the rights of the parties or passes such orders as may be necessary for the protection of the property. (1900) 22 All 214 (215) (DB).

[7] Acts during attachment cannot prejudicially affect the rights of the parties found entitled to the property. (Vol 20) 1933 Pat 224 (231) : 12 Pat 261 (DB).

[8] Government have no right to the profits derived from the property during the period of attachment. ('93) 1893 All W N 100 (101) \* ('11) 12 Cri L Jour 403 (404) (Lah).

[9] Order of attachment—Order subsequently found to be erroneous and without jurisdiction — Person aggrieved has no cause of action for damages against the party who procured such order. ('10) 14 Cal W N 96 (98) (DB) \* ('11) 12 Cri L Jour 14 (15) (Cal) \* ('83) 6 Mad 426 (427, 428) (DB).

[10] Third parties injured on Magistrate taking possession of the attached property.—They can either apply to the Magistrate to withdraw the attachment on the ground that no fear of breach of the peace exists any longer or they can file a suit to establish that they are the persons entitled to possession. (Vol 30) 1943 Nag 246 (247) : 44 Cri L Jour 739 : I L R (1943) Nag 752.

9. Effect of order of attachment on adverse possession and limitation. — [1] Where the wrongdoer was in possession at the time of attachment, the effect of the attachment would be to interrupt his possession and to hold the property adversely to him on behalf of the rightful owner. (Vol 8) 1921 Cal 584 (586) (DB).

[2] For determining the period of limitation within which the rightful owner should bring a suit to establish his rights to the property attached, it has been held :

(a) That Article 47 of the Limitation Act has no application. (Vol 16) 1929 Mad 38 (43) (DB) \* ('97) 20 All 120 (122, 123) (DB) \* ('01) 28 Cal 86 (88) (DB) \* ('03) 26 Mad 410 (413) (DB).

(b) That Articles 142 and 144 of the Limitation Act have no application. ('03) 26 Mad 410 (413) (DB) \* (Vol 3) 1916 Cal 751 (752) (DB).

[But see ('97) 20 All 120 (123).]

(c) Suit for declaration of title to the attached property should be brought within six years of the date of attachment under Art. 120, Limitation Act. But even where the suit is barred under that Article, the title is not extinguished and the Magistrate should accept the finding in a suit as to the determination of title and release the property from the attachment. ('03) 26 Mad 410 (415, 418) (DB).

(d) Article 120 applies but the attachment should be treated as a continuing wrong where the rightful owner had been dispossessed. (Vol 3) 1916 Cal 751 (753, 754) (DB) \* (Vol 9) 1922 Cal 419 (420, 421) : 49 Cal 544 (DB) \* (Vol 12) 1925 Nag 236 (236) : 20 Nag L R 195.

(e) Attachment is a continuing wrong irrespective of the question of dispossession. (Vol 25) 1936 Pat 212 (215). (Following (Vol 20) 1933 Pat 224 : 12 Pat 261 (DB).)

10. Withdrawal of attachment. — [1] Different views are held as to whom the Magistrate should hand over the property on withdrawal of attachment when he is satisfied that there is no likelihood of a breach of the peace :

(a) Property can be handed over only with the consent of parties. (Vol 31) 1944 All 210 (211) : I L R (1944) All 285 : 45 Cri L Jour 769. (Unless there is agreement, attachment should not be withdrawn.)

(b) Property may be handed over to any party, the Magistrate thinks fit. (Vol 13) 1926 Oudh 146 (146, 147) : 26 Cri L Jour 1629. (In handing over possession, Magistrate should exercise a sound discretion.)

11. Appointment of a receiver.—Sub-section (2). — [1] Receiver can be appointed only under the circumstances mentioned in the section and after the completion of the inquiry. ('12) 13 Cr L J 536 (536) (Mad).

[2] Person who has shown a partiality for one of the parties, or a party to the action, should not be appointed a receiver unless by consent or unless there are special circumstances justifying his appointment in preference to others. (Vol 14) 1927 Pat 393 (394) : 7 Pat 1 : 28 Cri L Jour 776 (DB).

12. Powers of the receiver.—[1] A receiver has, subject to the control of the Court, all the powers of a receiver appointed under the Code of Civil Procedure. ('12) 13 Cri L Jour 295 (295) (Mad).

[2] The receiver has the power to grant leases. (Vol 20) 1933 Mad 67 (68) : 33 Cri L Jour 960 : 56 Mad 157 (DB).

[See also (Vol 31) 1944 Pat 87 (87, 90) : 23 Pat 185 (FB).]

<sup>a</sup>147. (1) Whenever any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied, from a police-report or other information, *Disputes concerning rights of the first class is satisfied, from a police-report or other information, use of immovable property, etc.* that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water as explained in section 145, sub-section (2) (whether such rights be claimed as an easement or otherwise), within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or, by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims, and shall thereafter inquire into the matter in the manner provided in section 145, and the provisions of that section shall, as far as may be, be applicable in the case of such inquiry.

(2) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right :

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution.

(3) If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.

(4) An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction.]

[1882—S. 147; 1872—S. 532; 1861—S. 320.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 30 for the original section.

#### Section 146 — Note 12 (*contd.*)

[3] Receiver obtaining permission to grant lease without disclosing material facts — Lease for an indefinite period in favour of one of the parties — *Held* that the Court had jurisdiction to set aside the lease. (Vol 20) 1933 Mad 67 (69) : 33 Cri L Jour 960 : 56 Mad 157 (DB).

[4] A receiver should obtain necessary directions and instructions from the Magistrate. (Vol 2) 1915 Cal 236 (237) : 15 Cri L Jour 725 (DB).

[5] The receiver has a right to take possession of such property as has accreted to the original subject-matter of the dispute during the attachment. ('10) 11 Cri L Jour 288 (290) (DB) (Cal).

13. Remuneration of the receiver. — [1] The remuneration to receivers should not exceed the total realizations from the property. (Vol 12) 1925 Nag 462 (462, 463) : 27 Cri L Jour 22.

[2] The remuneration for receivers under Civil Procedure Code does not furnish any standard for the remuneration to receivers under this section. (Vol 12) 1925 Nag 462 (462) : 27 Cri L Jour 22.

14. Disobedience to an order under this section. — [1] Any person entering the attached property is liable for the offence of criminal trespass. (Vol 30) 1943 Nag 246 (248) : 44 Cri L Jour 739 : 1 L R (1943) Nag 752 (98) 8 Mad L Jour 253 (256) (DB).

15. Review. — [1] A Magistrate has no power to review an order under this section passed by himself or by his predecessor. (Vol 4) 1917 Pat 28 (30) : 19 Cri L Jour 105 (Vol 4) 1917 Pat 110 (111) : 19 Cri L Jour 225 (13) 14 Cri L Jour 605 (606) : 16 Oudh Cas 192 (Vol 13) 1926 All 242 (242) : 48 All 258 : 27 Cri L Jour 466.

[2] Clerical error can be corrected in review. (Vol 4) 1917 Pat 110 (111) : 19 Cri L Jour 225.

16. Revision. — [1] The High Court is not only competent to set aside an erroneous order but also to pass such orders as should have been made by the Magistrate upon the facts, proved at the enquiry. ('95) 22 Cal 297 (305) (DB) (Vol 4) 1917 Cal 82 (82) : 18 Cr L J 80 (DB).

[2] Mere brevity of an order is no ground for interference. (Vol 10) 1923 Cal 483 (483) : 24 Cri L Jour 575 (DB).

[3] Order will be set aside, if the Magistrate failed to give full judicial consideration to the evidence. (Vol 6) 1919 Cal 99 (100) : 20 Cri L Jour 342 (DB) (Vol 4) 1917 All 262 (263) : 18 Cri L Jour 557.

[4] The High Court will not ordinarily interfere with orders passed by the Magistrate with regard to the management of the property. ('02) 29 Cal 382 (384) (DB) (Vol 14) 1927 Pat 393 (394) : 7 Pat 1 : 28 Cri L Jour 776 (DB).

[5] High Court will interfere in revision when elementary rule founded on the desire of Courts to place the parties on a footing of absolute equality are offended. (Vol 14) 1927 Pat 393 (394) : 7 Pat 1 : 28 Cri L Jour 776 (DB).

[6] The District Magistrate has no power to revise an order passed by a subordinate Magistrate. (Vol 9) 1922 Pat 554 (554, 555) : 23 Cri L Jour 562.

#### SECTION 147 — SYNOPSIS.

1. Scope of the section.
2. Nature of proceedings under this section.
3. Who may institute proceedings under this section.
4. "Is satisfied from police-report or other information."
5. "Dispute likely to cause a breach of the peace."
6. Right of user of land or water.
7. "Easement or otherwise."
8. Preliminary order in writing.
9. "Parties concerned in such dispute."
10. Notice.
11. Inquiry into the existence of the right.
12. Exercise of the right.
13. "Order prohibiting any interference with the exercise of such right."
14. "Prohibiting the exercise of such right."
15. Decision of a Civil Court.
16. Conversion of proceedings.
17. Revision.

Section 147 (*contd.*)

1. Scope of the section. — [1] A Magistrate is not bound to institute proceedings in respect of a dispute regarding rights of user of land or water. (Vol 13) 1926 Lah 550 (550, 551) : 27 Cri L Jour 801 & ('69) 2 Beng L R App 9 (10).

[2] A Magistrate is not prohibited from proceeding under this section merely on the ground that proceedings under S. 107 are pending. (Vol 23) 1936 Sind 147 (147) : 37 Cri L Jour 1036 : 29 Sind L R 443 (DB).

[3] A Magistrate can proceed against the parties under S. 107 or under S. 144, especially if an inquiry into such dispute would involve an investigation into complicated questions relating to the title of the parties. ('96) 23 Cal 557 (562, 563) (DB) & ('05) 10 Cal W N viii (viii) (DB) & ('06) 3 Cri L Jour 31 (33) : 29 Mad 97 (DL).

[4] Proper course for the Magistrate to adopt is to take action under this section rather than make temporary orders under S. 144 or S. 107 without any inquiry into to the respective claims of the parties. (Vol 23) 1936 Pat 59 (60) : 37 Cri L Jour 378 & (Vol 26) 1939 All 182 (184) : 40 Cri L Jour 383.

[5] The procedure prescribed in this section has to be strictly followed. ('67) 7 Suth W R Cr 45 (46) (DB).

2. Nature of proceedings under this section. — [1] The District Magistrate has power to transfer a proceeding under this section, under the provisions of Ss. 192 and 528. (Vol 10) 1923 Pat 366 (367) : 24 Cri L Jour 487.

3. Who may institute proceedings under this section. — [1] Where a Magistrate comes to a proper conclusion that no case for proceeding is made out the High Court will not in revision direct him to initiate proceedings. (Vol 26) 1939 Pat 111 (112) : 40 Cri L Jour 345.

4. "Is satisfied from police-report or other information." — [1] The jurisdiction of the Magistrate to institute proceedings under this section arises on his being satisfied that a dispute exists concerning the right of user of land or water and further that such a dispute is likely to cause a breach of the peace. (Vol 27) 1940 Cal 330 (330) : 41 Cri L Jour 728 (DB).

[2] The Magistrate must record a finding that he is satisfied on the materials before him that the dispute relating to the right of way was likely to cause breach of the peace. ('96) 6 Mad L Jour 193 (194) (DB) & ('96) 23 Cal 557 (562) (DB). (Evidence recorded during trial is not sufficient to give the Magistrate jurisdiction which he does not otherwise possess.) & ('12) 16 Cal W N xcix (xcix) (DB). (Do.)

[3] Magistrate making use of police-report for satisfying himself regarding existence of dispute — Examination of Police Officer to ascertain correctness of report, not necessary. (Vol 18) 1931 All 14 (15) : 53 All 215 : 32 Cri L Jour 309.

[4] The Magistrate cannot drop the proceedings merely on the ground that the dispute relates to a right exercisable only at particular seasons and that the season is over. (Vol 28) 1941 Pat 281 (282) : 42 Cri L Jour 620.

5. "Dispute likely to cause a breach of the peace." — [1] The Magistrate has to be satisfied that a real present dispute exists and that it is likely to cause a breach of the peace. ('36) 37 Cri L Jour 512 (513) (DB) (Cal) & (Vol 28) 1941 Pat 281 (282) : 42 Cri L Jour 620 & ('96) 23 Cal 557 (561) (DB) & ('12) 16 Cal W N xcix (xcix) (DB) & ('10) 11 Cri L Jour 729 (730) (DB) (Cal) & (Vol 24) 1937 Cal 513 (514) : 38 Cri L Jour 1071.

[2] The object of this section is not to provide the parties an alternative to a civil action. ('66) 6 Suth W R Cr 74 (74) (DB).

[3] The section contemplates to prevent disturbance of the public peace. ('74) 22 Suth W R Cr 48 (49) (DB).

6. Right of user of land or water. — [1] This section applies only to cases where the dispute relates to the right of user of land or water. ('13) 14 Cri L Jour 605 (606) : 16 Oudh Cas 192 & (Vol 21) 1934 Pat 86 (88) : 13 Pat 153 : 35 Cri L Jour 481 (DB).

[2] The expression "land or water" is not confined to private property only and is wide enough to include public property such as public roads, streets and pathways. (Vol 13) 1926 Pat 348 (350) : 27 Cri L Jour 841 & (Vol 11) 1924 Nag 294 (295) : 25 Cri L Jour 353 (DB) & (Vol 1) 1914 Mad 712 (713) : 15 Cri L Jour 362. (Section 133 is no bar to institute proceedings if Court has jurisdiction.) & (Vol 14) 1927 Mad 985 (985, 986) : 28 Cri L Jour 948 : 51 Mad 174.

[3] The power of the Magistrates to pass orders in respect of public streets or pathways should not be exercised until it is clearly proved that there is a right by custom or by grant or by statute, in one section of the public to prevent another section of the public from using the public street or pathway on particular occasions or for particular purposes, when such use is ordinarily and *prima facie* lawful. (Vol 3) 1916 Mad 775 (778) : 16 Cri L Jour 767 (DB) & ('10) 11 Cri L Jour 721 (722) (DB) (Mad) & (Vol 14) 1927 Mad 985 (985, 986) : 28 Cri L Jour 948 : 51 Mad 174.

[4] A "right" under the section must be a legal right. (Vol 24) 1937 Cal 513 (514) : 38 Cri L Jour 1071 (DB) & (Vol 22) 1935 Mad 350 (352) : 37 Cri L Jour 4 : 58 Mad 876 (DB).

[5] The following are rights of user of land or water:

(a) a right to take a car in procession along a public road to temple. (Vol 12) 1925 Bom 536 (537) : 26 Cri L Jour 1422 (DB).

(b) a right to enter a temple and perform puja therein or to worship therein. (Vol 25) 1938 Mad 537 (538) : 39 Cri L Jour 705 & ('01) 3 Bom L R 416 (418) (DB) & (Vol 20) 1933 Mad 245 (246) : 34 Cri L Jour 88.

[But see ('10) 11 Cri L Jour 292 (292) : 37 Cal 578 (DB) & (Vol 4) 1917 Mad 840 (840) : 17 Cri L Jour 235.]

(c) a right to enter a mosque and officiate as Kazi therein. ('06) 4 Cri L Jour 58 (59) : 29 Mad 237.

(d) a right to bury the dead in a burial ground. (Vol 15) 1928 Mad 598 (599) : 51 Mad 522 : 29 Cri L Jour 644.

(e) a right to enter a samadhi. (Vol 17) 1930 All 452 (454) : 31 Cri L Jour 1217.

(f) a right to erect a bund. (Vol 17) 1930 Cal 59 (59) : 31 Cri L Jour 944 (DB).

(g) a right to go upon land of another for the purpose of collecting gratuities for a certain religious purpose. (Vol 4) 1917 Cal 256 (257) : 18 Cri L Jour 113 (DB).

(h) a right of way absolute. ('01) 5 Cal W N 335 (336) & ('68) 4 Mad H C R App xi (xii).

(hh) a right of way limited by the exclusion of vehicular traffic. (Vol 8) 1921 Pat 227 (228) : 22 Cri L Jour 739.

(i) a right to lay warps in a street. (Vol 6) 1919 Mad 812 (813) : 19 Cri L Jour 977.

(j) a right to let off water through its natural course. ('11) 12 Cri L Jour 319 (320) (DB) (Cal).

(k) a right to fish. ('96) 23 Cal 557 (560) (DB) & ('96) 23 Cal 55 (59) (DB) & (Vol 21) 1934 Pat 86 (88) : 13 Pat 153 : 35 Cri L Jour 481 (DB). (Right to catch fish in waters upon the land of another — Dispute as to such right — Section applies.)

(l) a right to moor boats and dry fishing nets on the land of another. (Vol 7) 1920 Cal 561 (562) : 21 Cri L Jour 697 (DB).

(m) a right to use the water emanating from the river and running through a particular channel. (Vol 6) 1919 Pat 174 (175) : 20 Cri L Jour 209.

(n) a right to irrigate from a tank. ('93) Oudh S. C. No. 64, p. 73 (74).

Section 147 — Note 5 (*contd.*)

(c) a right to use the water of a well. (Vol 11) 1924 Nag 294 (295) : 25 Cri L Jour 353.

(n) a right to ply ferries. ('99) 3 Cal W N 148 (149) (DB).

(q) a right to drain off surplus water. (Vol 23) 1936 Pat 59 (60) : 37 Cri L Jour 378.

(r) a right to receive offerings at a shrine depending upon the right to sit in a particular spot. (Vol 28) 1941 Nag 171 (174) : 42 Cri L Jour 675.

[6] A right of privacy is not a right of user of any land or water. ('88) 1888 Rat Un Re Cri Cas 357 (358) (DB) \* ('13) 14 Cri L Jour 400 (401) (DB) (Bom).

[7] The right of a Mahomedan to worship on the land of another which is dependent upon the will of such person cannot be enforced under this section. (Vol 12) 1925 Pat 433 (435) : 27 Cri L Jour 44.

[8] The following are not rights of user of land or water :

(a) A right to an undivided share in a property. ('83) 5 All 607 (608).

(b) A right to remove sandalwood paste from the person of an idol. ('09) 4 Bom L R 438 (439) (DB).

(c) A right to a dignity or privilege not properly cognizable by a Civil Court. ('90) 14 Bom 25 (27) (DB).

(d) A dispute relating to offerings in temple. (Vol 25) 1938 Mad 537 (538) : 39 Cri L Jour 705.

(e) An obstruction of a drain into which the sewage of complainant's premises fell. ('66) 5 Suth W R Cr 58 (59) (DB).

7. "Easement or otherwise." — [1] The introduction, in 1928, of the words "or otherwise" makes the section applicable to rights not resembling easements. ('42) 46 Cal W N 313 (316) (DB) \* (Vol 17) 1930 All 452 (454) : 31 Cri L Jour 1217 \* (Vol 17) 1930 Mad 865 (865) : 32 Cri L Jour 215 \* (Vol 21) 1934 Pat 86 (88) : 35 Cri L Jour 481 : 13 Pat 153 (DB).

[2] The word "easement" is not used in the restricted sense in which it is used under the English law. ('96) 23 Cal 55 (59) (DB).

[3] The word "easement" is not confined to the right of easement acquired by uninterrupted enjoyment for a period of twenty years as provided by S. 26 of the Limitation Act. ('09) 10 Cri L Jour 292 (292, 293) (DB) (Cal).

[4] It is enough if the right existed and was exercised during the last season or within three months next before the commencement of the proceedings. (Vol 17) 1930 Mad 865 (865) : 32 Cri L Jour 215 \* ('78) 2 Cal L Rep 555 (557) (DB).

8. Preliminary order in writing. — [1] The preliminary order should direct the parties to attend the Court of the Magistrate making the order. (Vol 8) 1921 Pat 333 (333) : 22 Cri L Jour 483.

9. "Parties concerned in such dispute." — [1] Once an inquiry has been instituted, the Magistrate has full power and is indeed required to add such persons as seem necessary for the proper decision of the dispute. ('42) 46 Cal W N 313 (315) (DB).

[2] The proprietor of the land in which a right of way is claimed is a necessary party to a proceeding though such person may not be actually concerned in the dispute. ('98) 2 Cal W N 670 (672) (DB).

[3] It is sufficient if the actual claimants are impleaded. ('96) 23 Cal 55 (59) (DB).

[4] The omission to implead necessary parties does not render the proceedings illegal unless prejudice is caused to the parties. (Vol 18) 1926 Pat 196 (197) : 27 Cri L Jour 142 \* (Vol 6) 1919 Pat 174 (176) : 20 Cri L Jour 209.

[5] An order passed without the necessary parties on record will not be binding on such parties. (Vol 28) 1941 Mad 989 (940) : 43 Cri L Jour 186 \* (Vol 6) 1919 Pat

174 (176) : 20 Cri L Jour 209 \* (Vol 12) 1925 Cal 263 (264) : 25 Cri L Jour 674 (DB) \* (Vol 5) 1918 Nag 138 (138) : 20 Cri L Jour 110.

[6] The Magistrate has no power to add parties after the commencement of the inquiry. ('01) 5 Cal W N 67 (70) : 28 Cal 734 (DB).

10. Notice. — [1] The provision as to the service of notice is imperative and the Magistrate should not pass final orders without issuing a notice. (Vol 23) 1936 All 759 (761) : 38 Cri L Jour 46 \* (Vol 20) 1933 Lah 145 (147) : 34 Cri L Jour 616.

[2] A notice issued under S. 145 is not a sufficient compliance with this section. (Vol 20) 1933 Lah 145 (147) : 34 Cri L Jour 616.

[3] A notice served under S. 144 would be sufficient notice where proceedings are converted into one under this section. (Vol 23) 1936 Pat 59 (60) : 37 Cri L Jour 378.

## 11. Inquiry into the existence of the right. —

[1] The Magistrate would be justified in passing an order in favour of one party if he thinks, on a summary inquiry into the rights of the parties, that there are reasonable grounds showing the existence of the right in favour of such party. (Vol 13) 1926 Pat 348 (351) : 27 Cri L Jour 841.

[2] A Magistrate should not refer the matter to a Civil Court without any inquiry. ('70) 14 Suth W R Cr 28 (29) (DB).

[3] The Magistrate should not pass an order on any of the following grounds :

(a) Of the convenience of the parties. (Vol 1) 1914 Oudh 381 (382) : 17 Oudh Cas 263 : 15 Cri L Jour 668 \* (1865) 2 Suth W R Cr 64 (64) (DB).

(b) On the basis of any private information furnished to him. (Vol 11) 1924 Pat 717 (718) : 25 Cri L Jour 455.

(c) On a consideration of sentimental caste objections. (Vol 3) 1916 Mad 775 (777) : 16 Cri L Jour 767 (DB).

[4] The Magistrate should come to a judicial decision on satisfactory proof regarding the rights of the parties. ('69) 4 Mad H O R App xxiv (xxvi, xxvii).

[5] As the subject-matter of the dispute is a right of user of land or water, the Magistrate cannot pass any order of attachment. (Vol 29) 1942 Mad 77 (77) : 43 Cri L Jour 103 \* (Vol 7) 1920 Cal 708 (710) : 22 Cri L Jour 131 (DB).

[6] A Magistrate has also no power to pass any interlocutory order restraining the parties from exercising their rights pending the inquiry. (Vol 27) 1940 Cal 330 (330) : 41 Cri L Jour 728 (DB) \* (Vol 19) 1932 Nag 83 (84) : 33 Cri L Jour 556.

[7] If the case is emergent and calls for immediate action, he has power to prevent a breach of the peace by taking action under S. 144. (Vol 3) 1916 Mad 775 (777) : 16 Cri L Jour 767 (DB).

[8] There is no provision as to cases where the Magistrate is unable to decide one way or the other about the existence of the alleged right. (Vol 29) 1942 Mad 77 (78) : 43 Cri L Jour 103.

12. Exercise of the right. — [1] Where the Magistrate finds that the right claimed exists, he should also give a finding as to whether such right was exercised within the period mentioned in the section. (Vol 8) 1921 Pat 486 (486) : 22 Cri L Jour 463 \* (Vol 11) 1924 Pat 784 (784) : 25 Cri L Jour 996 \* ('13) 14 Cri L Jour 303 (303) (DB) (Cal) \* (Vol 24) 1937 Cal 513 (514) : 38 Cri L Jour 1071 (DB).

[2] It is not necessary to give a finding as to the exercise of the right where the Magistrate decides that the right itself does not exist. ('13) 17 Cal W N cxxlvii (cxxlviii).

[3] No specific instance of the exercise of the right need be proved where a general continuous exercise of

148. (1) Whenever a local inquiry is necessary for the purposes of this Chapter, any *Local inquiry.* District Magistrate or Sub-Divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as

Section 147—Note 12 (*contd.*)

such right is satisfactorily proved. (Vol 13) 1926 Pat 348 (351) : 27 Cri L Jour 841.

[4] The Magistrate may draw a presumption under S. 114 of the Evidence Act that the party having the right of user of the land, also exercised such right in the absence of clear evidence to the contrary. (Vol 18) 1931 Mad 495 (496) : 32 Cri L Jour 972.

[5] The word "exercise" does not mean "successfully and completely to assert." It is sufficient if the person having such right makes even a small gesture in the assertion of such right. (Vol 18) 1931 Mad 495 (496) : 32 Cri L Jour 972.

[6] The period of three months has to be calculated from the date the Magistrate draws up formal proceedings and passes the preliminary order after satisfying himself as to the existence of breach of the peace. (42) 46 Cal W N 313 (315) (DB) \* (Vol 13) 1926 Cal 1051 (1052) : 53 Cal 851 : 27 Cri L Jour 1089 (DB) \* (Vol 17) 1930 All 452 (455) : 31 Cri L Jour 1217 \* (Vol 17) 1930 Pat 291 (292) : 31 Cri L Jour 361.

[See however (Vol 23) 1936 Pat 44 (44, 45) : 37 Cri L Jour 327 (DB) \* (Vol 17) 1930 Pat 349 (351) : 31 Cri L Jour 791 (DB).]

[7] There is a conflict of decision on the applicability of the proviso in a case, where a person was prevented from exercising his right within the given period, because of circumstances beyond his control.

(a) The proviso has no application. (Vol 12) 1925 Bom 536 (537) : 26 Cri L Jour 1422 (DB).

(b) The proviso applies. (Vol 18) 1931 Mad 495 (496) : 32 Cri L Jour 972.

13. Order prohibiting any interference with the exercise of such right. — [1] The order is directed against the person who is interfering with such right. (Vol 17) 1930 Mad 865 (866) : 32 Cri L Jour 215.

[2] The Magistrate has authority to issue a mandatory injunction. (Vol 28) 1941 Lah 210 (211) : 42 Cri L Jour 651 \* (Vol 17) 1930 Mad 865 (866, 867) : 32 Cri L Jour 215 \* (Vol 28) 1941 Mad 752 (752) : 42 Cr L J 780.

[But see (Vol 29) 1942 Cal 244 (245) : I L R (1942) 2 Cal 75 (FB) ( (Vol 20) 1933 Cal 752 : 34 Cri L Jour 1230 (DB), (Vol 27) 1940 Cal 545 : I L R (1940) 1 Cal 468 : 42 Cri L Jour 94 (D B), Overruled.) \* (Vol 25) 1938 Nag 297 (298) : 39 Cri L Jour 584 : I L R (1938) Nag 580 \* (44) 1944 Pat W N 321 (322) (D B).

[3] An order passed under this sub-section, should be in the words of Form No. 24 of Schedule V to the Code. (Vol 28) 1941 Lah 210 (211) : 42 Cri L Jour 651.

[4] The Magistrate has to prevent arbitrary interference with the right; he has no power to pass a purely declaratory order under this section. (84) 7 Mad 49 (51) (DB) \* (80) 5 Cal 194 (197) (D B).

14. "Prohibiting the exercise of such right." —

[1] The amendment of 1923 specifically provides that in case the Magistrate finds that a right, as claimed, does not exist, he should pass an order prohibiting such party from exercising that right. (Vol 17) 1930 Pat 291 (292) : 31 Cri L Jour 361.

[2] Magistrate finds that right existed — Right not exercised within prescribed time — Prohibitory order cannot be passed. (44) 1944 Pat W N 321 (323) (D B) \* (Vol 12) 1925 Bom 536 (537) : 26 Cri L Jour 1422 (D B).

[3] Magistrate issuing warning to counter petitioners, without taking evidence, not to create breach of peace

by reciting sankalpam at certain tank — Order, held, to be without jurisdiction. (Vol 33) 1946 Mad 412 (413).

15. Decision of a Civil Court. — [1] Magistrate has no power to institute proceedings when the right, in dispute, is not a right that can be adjudicated upon by Civil Court. (90) 14 Bom 25 (27) (D B).

16. Conversion of proceedings. — [1] Where the Magistrate institutes proceedings under S. 145, and, subsequently, discovers that the dispute relates to a right of user of land or water, within the meaning of this section, he should not ordinarily convert proceeding into one under this section without passing a preliminary order, and providing opportunities to the parties to adduce evidence with regard to the existence of such right. (09) 11 Cri L Jour 61 (62) : 1909 Pun Re No. 12 Cr.

[2] A proceeding under S. 133 cannot be converted into a proceeding under this section unless the conditions necessary to give the Magistrate jurisdiction under this section are established and a preliminary order under this section is passed. (11) 12 Cri L Jour 43 (44) (D B) (Cal).

17. Revision. — [1] The High Court will not interfere with a finding of fact arrived at by the Magistrate and the remedy of the person aggrieved by such a finding is to bring a suit in a civil Court. (Vol 13) 1926 Mad 154 (154) \* (Vol 9) 1922 Pat 214 (214).

[2] Where a Magistrate is satisfied that a dispute does exist the High Court cannot permit him to abuse the procedure by dropping the proceedings on an untenable ground and indirectly passing an order which he could not directly have passed without hearing all the evidence and the order of the Magistrate dropping the proceedings will be set aside. (Vol 28) 1941 Pat 281 (282) : 42 Cri L Jour 620.

[3] An order which ought to have been made by the Magistrate can be passed by the High Court in revision. (Vol 28) 1941 Lah 210 (211) : 42 Cri L Jour 651.

[4] Where the Magistrate converts the proceeding under S. 145 into one under this section, without observing such formality, and passes an order thereon, and the parties are not prejudiced thereby, the order will not be set aside in revision. (Vol 12) 1925 Cal 1022 (1023) : 26 Cri L Jour 558 (DB) \* (Vol 11) 1924 Bom 452 (452) : 43 Bom 512 : 26 Cri L Jour 772 (DB).

[5] Proceedings which ought to have been conducted under S. 147, conducted under S. 145 — Proceedings being substantially the same, no revision lies. (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538 \* (Vol 23) 1936 All 320 (321) : 37 Cri L Jour 705.

SECTION 148 — SYNOPSIS.

1. Scope.
2. "Local inquiry" meaning of.
3. Ex parte enquiry.
4. Who can hold the enquiry.
5. Report of the enquiry.
6. Costs—Sub-section (3).
7. Amount of costs.
8. When order for costs should be made.
9. For and against whom order can be passed.
10. Notice
11. Recovery of costs.
12. Revision.

1. Scope. — [1] It is not in every case that a local inquiry should be held; but, where it assists the Magis-

may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under this Chapter *Order as to costs.* <sup>a</sup>[\* \* \* \*] the Magistrate passing a decision under section 145, section 146 or section 147 may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. <sup>b</sup>[Such costs may include any expenses incurred in respect of witnesses, and of pleaders' fees, which the Court may consider reasonable.]

[1882—S. 148; 1872—S. 533.]

[a] The words "for witnesses, or pleaders' fees, or both" were *repealed* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 31. [b] *Substituted, ibid.*, for "all costs so directed to be paid may be recovered as if they were fines."

#### Section 148—Note 1 (*con'd.*)

trate in determining the boundaries of the property in dispute, it should be held. (Vol 6) 1919 Cal 884 (885) : 20 Cri L Jour 17 (DB).

[2] The object of a local inquiry is to aid the Magistrate in appreciating the evidence as to the main point. ('06) 3 Cri L Jour 193 (194) (DB) \* (Vol 10) 1923 Pat 31 (32) : 24 Cri L Jour 507 (DB) \* (Vol 10) 1923 Pat 366 (367) : 24 Cri L Jour 487 \* ('11) 12 Cri L Jour 319 (319) (DB) (Cal).

[3] A local inquiry should not be directed on matters which may be proved by evidence. (Vol 5) 1918 Nag 136 (137) : 20 Cri L Jour 107 \* ('08) 8 Cri L Jour 150 (150) \* (Vol 10) 1923 Pat 31 (32) : 24 Cri L Jour 507 (DB) \* ('79) 3 Cal L Rep 134 (136) (DB).

[4] An order completely transferring the function of making investigation into the dispute to a subordinate Magistrate is not proper. (Vol 19) 1932 Mad 368 (369) : 33 Cri L Jour 536 \* ('07) 6 Cri L Jour 384 (384, 385) : 31 Mad 82 \* ('79) 3 Cal L Rep 134 (136) (DB).

[5] The order deputing the inquiry must show the necessity for an inquiry. ('08) 8 Cri L Jour 150 (150).

2. "Local inquiry," meaning of. — [1] A person deputed to hold an inquiry under this section is competent to examine witnesses. (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538 \* (Vol 5) 1918 Mad 791 (793) : 18 Cri L Jour 715 (DB) \* (Vol 6) 1919 Mad 166 (167) : 20 Cri L Jour 773.

[2] Survey of lands, after inquiry from all parties, is not a "local inquiry" but merely a ministerial act. (Vol 9) 1922 Pat 224 (225) : 1 Pat 75 : 23 Cri L Jour 152 (DB).

3. *Ex parte* inquiry. — [1] Inquiry should not be held without due notice to the parties. (Vol 7) 1920 Pat 749 (749) : 22 Cri L Jour 424.

4. Who can hold the inquiry. — [1] The section does not prevent a District Magistrate or Sub-divisional Magistrate from making the inquiry himself. ('01) 5 Cal W N 686 (688) \* ('11) 12 Cri L Jour 319 (319, 320) (DB) (Cal) \* (Vol 10) 1923 Pat 366 (367, 368) : 24 Cri L Jour 487 \* (Vol 9) 1922 Pat 294 (294) : 25 Cri L Jour 545.

[See ('06) 3 Cri L Jour 193 (194) (DB).]

[2] The person deputed to make the inquiry must be a Magistrate and not a *kanungo*. ('81) 7 Cal L Rep 352 (353) (DB).

[3] The person deputed to make the inquiry must be a Magistrate and not an *amin*. ('73) 20 Suth W R Cr 57 (57) (DB).

[See however ('11) 12 Cri L Jour 480 (480) (DB) (Cal).]

[4] A person deputed under this section must make the inquiry himself and cannot delegate it to some other person. (Vol 5) 1918 Nag 136 (137) : 20 Cri L Jour 107.

[5] A ministerial act can be deputed to a pleader or a commissioner, or an *amin*, or a *kanungo*. (Vol 9) 1922 Pat 224 (225) : 1 Pat 75 : 23 Cri L Jour 152 (DB) \* ('11) 12 Cri L Jour 480 (480) (DB) (Cal).

5. Report of the enquiry. — [1] The report of the Magistrate holding the enquiry may be read as evidence. (Vol 5) 1918 Nag 136 (136) : 20 Cri L Jour 107.

[2] The party affected by the report should be given an opportunity of rebutting it. (Vol 5) 1918 Nag 136 (136) : 20 Cri L Jour 107 \* ('74) 21 Suth W R Cr 25 (26) (DB).

[3] If evidence taken by the Magistrate at the enquiry is acted upon, without objection from the parties, the Magistrate does not act without jurisdiction. (Vol 5) 1918 Mad 791 (792, 793) : 18 Cri L Jour 715 (DB) \* (Vol 6) 1919 Mad 166 (167) : 20 Cri L Jour 773 \* ('79) 3 Cal L Rep 134 (136) (DB). (Agreement to abide by the enquiry.)

[4] Acting upon the evidence, taken at the enquiry may amount to an irregularity curable by S. 537. (Vol 5) 1918 Mad 791 (792, 793) : 18 Cri L Jour 715 (DB).

[5] The report of an *amin* deputed for inquiry does not automatically form part of the record. ('73) 20 Suth W R Cr 57 (57) (DB).

[6] In order that *kanungo's* report may form part of the record so as to be admissible under S. 157 of the Evidence Act, he must go into the witness box and give his deposition. ('11) 12 Cri L Jour 480 (480) (DB) (Cal) \* ('73) 20 Suth W R Cr 57 (57) (DB). (Amin's report.)

[7] On receipt of the report, the deputing Magistrate must hold further inquiry. (Vol 5) 1918 Mad 791 (792, 793) : 18 Cri L Jour 715 (DB) \* (Vol 19) 1932 Mad 368 (369) : 33 Cri L Jour 536.

[8] The deputing Magistrate must take evidence tendered by the parties. (1900) 4 Cal W N 779 (780) (DB) \* (Vol 9) 1922 Pat 294 (296) : 25 Cri L Jour 545 \* ('06) 3 Cri L Jour 193 (194) (DB) \* (Vol 9) 1922 Pat 249 (251) : 25 Cri L Jour 412 \* (Vol 7) 1920 Lah 114 (115) : 21 Cri L Jour 563 \* (Vol 8) 1921 Cal 272 (272) (DB).

[9] It is not illegal to act upon the report alone, when no evidence is tendered by the parties. (Vol 5) 1918 Mad 791 (792) : 18 Cri L Jour 715 (DB) \* (Vol 4) 1917 Mad 854 (854) : 17 Cri L Jour 478 \* ('13) 14 Cri L Jour 302 (302, 303) (DB) (Cal).

6. Costs — Sub-section (3). — [1] The powers under the Civil Procedure Code as to costs cannot be imported into criminal proceedings. (Vol 13) 1926 Bom 91 (96) : 27 Cri L Jour 661 (DB).

[2] Costs in respect of proceedings under this chapter can be awarded only under this section. ('05) 2 Cri L Jour 552 (554) : 32 Cal 602 (DB).

[3] High Court, in revision, can pass an order as to costs incurred in the original proceedings as an incidental or consequential order under S. 439 read with S. 423 (d). (Vol 13) 1926 Bom 91 (96) : 27 Cri L Jour 661



Section 148—Note 6 (*contd.*)

(DB) \* (Vol 20) 1933 Rang 288 (291) : 35 Cri L Jour 1 : 11 Rang 361 (FB).

[4] High Court can pass an order as to costs incurred in the revision proceeding as a consequential and incidental order. (Vol 13) 1926 Bom 91 (96) : 27 Cri L Jour 661 (DB) \* (Vol 20) 1933 Rang 288 (291) : 35 Cri L Jour 1 : 11 Rang 361 (FB). (Whether an order under sub-s. (3) is consequential or incidental is to be determined upon the circumstances of each case.)

[But see (Vol 20) 1933 All 264 (269) : 55 All 301 : 34 Cri L Jour 414 (FB) \* (Vol 12) 1925 Mad 438 (440) : 48 Mad 262 : 26 Cri L Jour 707 (FB).]

[5] Original case tried by one Magistrate — His successor cannot pass an order for costs. (Vol 30) 1943 Mad 478 (478, 479) : 44 Cri L Jour 778 : I L R (1944) Mad 144 \* ('10) 11 Cri L Jour 335 (336) : 13 Oudh Cas 66 (DB).

[6] Original case tried by one Magistrate — Any other Magistrate cannot pass an order for costs. (Vol 16) 1929 Pat 93 (94) : 30 Cri L Jour 252 \* (Vol 7) 1920 Cal 320 (320) : 47 Cal 974 : 21 Cri L Jour 751 (DB).

[7] Magistrate trying the case passed an order for costs — Assessment may be made by his successor. ('16) 11 Cri L Jour 335 (336) : 13 Oudh Cas 66 (DB) \* (Vol 2) 1915 Mad 92 (92) : 15 Cri L Jour 676 (DB) \* ('96) 23 Cal 37 (39) (DB) \* ('06) 4 Cri L Jour 171 (172) (DB) (Cal).

[But see ('94) 21 Cal 609 (611) (DB).]

7. Amount of costs. — [1] Magistrate is competent to order the payment of remuneration of the manager appointed to manage the land attached. (Vol 32) 1945 Sind 3 (4) : I L R (1944) Kar 204 : 46 Cri L Jour 240 (DB).

[2] Order for costs, which can be awarded only under this section should be passed after due enquiry into the amount of costs incurred. (Vol 16) 1929 Pat 93 (94) : 30 Cri L Jour 252 \* (Vol 3) 1916 Pat 396 (396) : 17 Cri L Jour 348 (DB).

[3] The sum awarded should only be a reasonable one and need not be arrived at after exact calculation. (Vol 19) 1932 All 325 (326) : 33 Cri L Jour 157.

[4] Number of witnesses and number of hearings should be considered in fixing a reasonable sum. (Vol 21) 1934 Cal 80 (80) : 35 Cri L Jour 478 (DB).

[5] Scale of award should not be too liberal. ('05) 2 Cri L Jour 408 (411) (DB) (Cal) \* (Vol 18) 1931 All 3 (6) : 53 All 172 : 32 Cri L Jour 372.

[6] Witnesses may be examined locally to avoid expenses. (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538.

[7] Value of property in dispute is not by itself a sure test in assessing costs. (Vol 18) 1931 All 3 (6) : 53 All 172 : 32 Cri L Jour 372.

8. When order for costs should be made. — [1] An order awarding costs should be passed simultaneously with the final order on the merits. (Vol 28) 1941 Mad 374 (374) : 42 Cri L Jour 518 \* ('38) 1938 Mad W N 1011 (1011) \* (Vol 21) 1934 Cal 80 (80) : 35 Cri L Jour 478 (DB) \* (Vol 15) 1928 Sind 193 (194) : 22 Sind L R 386 : 29 Cri L Jour 857 (DB) \* ('11) 12 Cri L Jour 376 (376) (DB) (Cal).

[See however (Vol 30) 1943 Mad 478 (478) : 44 Cri L Jour 778 : I L R (1944) Mad 144.]

[2] The actual assessment may be made subsequently. ('13) 14 Cri L Jour 570 (571) (Mad) \* (Vol 2) 1915 Mad 92 (92) : 15 Cri L Jour 676 (DB) \* ('11) 12 Cri L Jour 376 (376) (DB) (Cal) \* ('10) 11 Cri L Jour 335 (336) : 13 Oudh Cas 66 (DB) \* ('06) 4 Cri L Jour 171 (172) (DB) (Cal).

[3] Where it is not possible to pass an order at the time of the final order, Magistrate may reserve judg-

ment as to costs. (Vol 21) 1934 Cal 95 (96) : 35 Cri L Jour 489 (DB) \* (Vol 10) 1923 Mad 87 (88) : 24 Cri L Jour 80 \* (Vol 5) 1918 Pat 658 (660) : 19 Cri L Jour 764 (DB) \* ('11) 12 Cri L Jour 319 (320) (DB) (Cal).

[4] Order must be made within a reasonable time and cannot be passed after great delay. ('38) 1938 Mad W N 1011 (1011) \* (Vol 16) 1929 Pat 93 (94) : 30 Cri L Jour 252 \* (Vol 7) 1920 Cal 320 (321) : 47 Cal 974 : 21 Cri L Jour 751 (DB) \* (Vol 5) 1918 Pat 481 (482) : 19 Cri L Jour 396 (DB) \* (Vol 20) 1933 All 264 (269) : 55 All 301 : 34 Cri L Jour 414 (FB) \* (Vol 10) 1923 Mad 87 (88) : 24 Cri L Jour 80 \* ('11) 12 Cri L Jour 376 (376) (DB) (Cal) \* ('10) 11 Cri L Jour 335 (336) : 13 Oudh Cas 66 (DB).

9. For and against whom order can be passed.

— [1] No order can be passed against a person who is not a party to the proceeding. (Vol 13) 1926 Oudh 269 (269) : 27 Cri L Jour 21.

[See however (Vol 24) 1937 Pat 559 (559, 560) : 33 Cri L Jour 1999.]

[2] When one party has substantially succeeded, the opposite party, who had wrongfully dispossessed the first, should pay the costs. (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538 \* (Vol 13) 1926 Bom 91 (96) : 27 Cri L Jour 661 (DB) \* (Vol 15) 1928 Sind 193 (195) : 22 Sind L R 386 : 29 Cri L Jour 857 (DB).

[3] A party denying complainant's right cannot escape liability though little interested in but made a party to the proceedings. (Vol 18) 1931 All 3 (7) : 53 All 172 : 32 Cri L Jour 372.

[4] An order for costs can be passed even in favour of the legal representatives of the successful party. (Vol 2) 1915 Mad 92 (92) : 15 Cri L Jour 676.

[5] Sub-section (3) covers a case where both the parties are ordered to pay the costs. (Vol 32) 1945 Sind 3 (4) : 46 Cri L Jour 240 : I L R (1944) Kar 204 (DB).

10. Notice. — [1] When an order awarding costs is passed simultaneously with the final order on the merits, no notice to the parties is necessary. (Vol 21) 1934 Cal 80 (80) : 35 Cri L Jour 478 (DB).

[2] Magistrate reserving judgment should give notice to the party against whom he intends to make an order for costs and *ex parte* order will be without jurisdiction. (Vol 21) 1934 Cal 95 (96) : 35 Cri L Jour 489 (DB) \* (Vol 10) 1923 Mad 87 (88) : 24 Cri L Jour 80 \* (Vol 5) 1918 Pat 658 (660) : 19 Cri L Jour 764 (DB) \* ('11) 12 Cri L Jour 319 (320) (DB) (Cal).

[But see (Vol 32) 1945 Sind 3 (4) : 46 Cri L Jour 240 : I L R (1944) Kar 204 (DB) \* (Vol 20) 1933 All 264 (269) : 55 All 361 : 34 Cri L Jour 414 (FB).]

[3] A Magistrate passing an order of assessment of costs cannot subsequently set it aside on the ground that it was passed without due notice to the parties. ('06) 4 Cri L Jour 171 (172) (DB) (Cal).

11. Recovery of costs. — [1] A party to the proceedings cannot bring a civil suit for the recovery of costs awarded or refused by an order under this section. ('07) 11 Cal W N colxiii (colxiii).

[2] A civil suit, by a witness, for his costs against the party, for whom he appeared, is maintainable. ('04) 8 Cal W N 178 (180).

[3] Magistrate or his successor cannot refuse to recover costs on grounds of delay. (Vol 10) 1923 Pat 57 (57) : 24 Cri L Jour 126.

12. Revision. — [1] High Court will not interfere with the discretion exercised by the trial Court. (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538 \* ('05) 2 Cri L Jour 408 (411) (DB) (Cal).

[2] High Court will not interfere with an order for costs passed by the trial Court. (Vol 2) 1915 Mad 825 (826) : 16 Cri L Jour 156.

[3] Where the trial Court fails to exercise discretion or exercises it on wrong principles High Court will

## CHAPTER XIII.

## PREVENTIVE ACTION OF THE POLICE.

*Police to prevent cognizable offences.* 149. Every police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

[1882 — S. 149 ; 1872 — S. 95 ; 1861 — S. 102.]

150. Every police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

[1882 — S. 150 ; 1872 — S. 96 ; 1861 — S. 103.]

151. A police-officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

[1882 — S. 151 ; 1872 — S. 97 ; 1861 — S. 104.]

152. A police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immovable, or the removal or injury of any public landmark or buoy or other mark used for navigation.

[1882 — S. 152 ; 1872 — S. 98, paras. 1, 2 ; 1861 — S. 105.]

153. (1) Any officer in charge of a police-station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

[1882 — S. 153 ; 1872 — S. 98 ; 1861 — S. 129.]

Section 148 — Note 12 (*contd.*)

interfere in revision and award costs to the successful party. (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538  
 \* (Vol 24) 1937 Pat 559 (559) : 38 Cri L Jour 1099.

## Section 149 — Note 1

[1] Preventive action started under this chapter may lapse into investigation under Chapter XIV. (Vol 18) 1931 Cal 745 (747, 748) : 58 Cal 1312 : 33 Cri L Jour 188 (DB).

[2] A power to prevent the commission of an offence does not include a power to remove banners from a Hindu procession on the ground that those banners being obnoxious to Mahomedans would produce a breach of peace. ('94) 17 Mad 37 (42) (DB).

[3] A police officer cannot remove an axe carried by a person under the impression that such person was on his way to attack his enemy. (Vol 13) 1926 Lah 19 (20) : 6 Lah 392 : 26 Cri L Jour 1631.

[4] A police officer is not empowered to pass any order either against the person from whom an offence is apprehended or against the would-be victims of the offence. (Vol 12) 1925 All 165 (169) : 47 All 205 : 26 Cri L Jour 599 (DB).

[5] A police officer cannot shirk his duty of interposing effectively by being content with passing an oral order not to do an act. (Vol 12) 1925 All 165 (169) : 47 All 205 : 26 Cri L Jour 599 (DB).

## Section 151 — Note 1

[1] In the absence of emergency, an arrest under this section is illegal. (Vol 17) 1930 Lah 348 (349, 350) : 31 Cri L Jour 294 (DB).

## Section 153 — Note 1

[1] Before concluding that any weight or measure is false, there must be some standard weight or measure prescribed by authority or recognized by custom. (Vol 1) 1914 Lah 42 (44) : 1913 Pun Re No. 20 Cr : 15 Cri L Jour 11 \* ('09) 9 Cri L Jour 415 (415) : 1908 Upp Bur Bul 3rd Qr Penal Code 17.

[2] To assume indiscriminately that weights used by some shopkeeper are the correct one and proceed for comparison is not proper. (Vol 1) 1914 Lah 42 (44) : 1913 Pun Re No. 20 Cr : 15 Cri L Jour 11.

[3] Reasonable allowance should be made for wear and tear. (Vol 1) 1914 Lah 42 (44) : 1913 Pun Re No. 20 Cr : 15 Cri L Jour 11.

[4] Five seer weight short by one tola, cannot be regarded as false. ('83) 1883 All W N 224 (224).



## PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO  
INVESTIGATE.

## CHAPTER XIV.

154. Every information relating to the commission of a cognizable offence if given orally to Information in an officer in charge of a police-station, shall be reduced to writing by him or cognizable cases. under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the <sup>a</sup>[Provincial Government] may prescribe in this behalf.

[1882 — S. 154; 1872 — S. 112; 1861 — S. 139.]

[a] *Substituted* by A. O. for "Local Government".

## SECTION 154 — SYNOPSIS.

1. Scope and object of the section.
2. What is first information.
3. "Relating to the commission of a cognizable offence."
4. "Shall be reduced to writing by him or under his direction, and be read over."
5. "Shall be signed by the person giving it."
6. "Officer in charge of a police station."
7. Importance of the first information.
8. How to use first information report.
9. First information by accused.
10. Duty of the prosecution to tender first information report in evidence.
11. Grant of copies of first information.
12. Effect of giving false information under this section.
13. Effect of the police-officer in charge recording first information falsely.
14. Power of High Court to interfere under S. 561A.

1. Scope and object of the section. — [1] One of the modes by which a person aggrieved may put the criminal law into motion is by giving information under this section. ('90) 17 Cal 574 (577) (FB).

[2] The information given under this section is a basis upon which an investigation is commenced. ('12) 13 Cri L Jour 65 (89) (Cal) & (Vol 12) 1925 Cal 831 (833); 52 Cal 499; 26 Cri L Jour 1213 (DB).

[3] Receipt and recording of information is not a condition precedent to criminal investigation. (Vol 32) 1945 P C 18 (20) : I L R (1945) Lah 1 : 46 Cri L Jour 413 : 71 Ind App 203 : I L R (1945) Kar (PC) 89 (PC).

[4] The objects of the section are as follows :

(a) To inform the Magistrate and the District Superintendent of the Police, of the offence reported at the station. ('97) 20 All 151 (154) (DB).

(b) To make known to the Judicial Officer trying the case the materials and facts on which the investigation was commenced. (Vol 29) 1942 Pat 113 (117) : 21 Pat 153 : 43 Cri L Jour 90 (DB) & ('03) 7 Cal W N 345 (347, 348) (DB) & ('07) 6 Cri L Jour 86 (88) (DB).

(c) To protect the accused against subsequent variations or additions. (Vol 18) 1931 Pat 150 (151) : 32 Cri L Jour 638 (DB).

[5] The section is inapplicable to cases arising in Calcutta as a result of S. 1, sub-s. (2). (Vol 27) 1940 Cal 97 (103) : I L R (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB) & (Vol 26) 1939 Cal 545 (555) : I L R (1939) 1 Cal 162 : 41 Cri L Jour 72 (DB).

[6] Case against public servant requiring previous sanction of Local Government — Magistrate cannot order cancellation of first information or suspend investigation pending such sanction. (Vol 32) 1945 Cal 385 (386, 387) : ILR (1944) 2 Cal 183 : 47 Cri L Jour 142 (DB).

2. What is first information. — [1] The information recorded under this section is known as "First information." (Vol 32) 1945 P C 18 (20) : I L R (1945) Lah 1 : ILR (1945) Kar (P C) 89 : 46 Cri L Jour 413 : 71 Ind App 203 (PC) & (Vol 18) 1931 Cal 745 (748) : 58 Cal 1312 : 33 Cri L Jour 138 (DB). (Though the word "first" is nowhere mentioned in the Code.)

[2] The first information is usually given by the complainant or by some body on his behalf. (Vol 11) 1924 All 207 (207) : 25 Cri L Jour 490 & (Vol 28) 1941 Rang 209 (211) : 1941 Rang L R 346 : 43 Cri L Jour 157 (DB). (Person giving report not required to possess personal knowledge. Station writer recording Telephone message in respect of a crime may sign it as the informant.)

[3] First information is that information which is given first in point of time. (Vol 10) 1923 Pat 158 (159) : 23 Cri L Jour 406 (DB) & ('95) 22 Cal 50 (72) (DB) & (Vol 12) 1925 All 303 (304) : 47 All 280 & ('03) 7 Cal W N 345 (347, 348) (DB).

[See however (Vol 23) 1936 Pat 11 (12) : 36 Cri L Jour 235 (DB). (Report by different persons at different times, not far separated at two stations — Both the reports are independent first information reports.) & (Vol 22) 1935 Pesh 165 (168) : 37 Cri L Jour 406 (DB). (Do.) & (Vol 33) 1946 Nag 173 (182) : I L R (1946) Nag 126 (DB). (Do.)]

[4] All statements recorded after the commencement of investigation are not first information reports but statements coming under S. 162. (Vol 24) 1937 Cal 309 (310, 311) : ILR (1937) 2 Cal 308 : 38 Cri L Jour 1067 (DB) & (Vol 14) 1927 Cal 17 (19) : 54 Cal 237 : 28 Cri L Jour 99 (DB) & (Vol 7) 1920 Pat 42 (43) : 21 Cri L Jour 743 (DB) & (Vol 10) 1923 Pat 550 (553) : 2 Pat 517 : 24 Cri L Jour 641 (DB) & (Vol 16) 1929 Nag 43 (44, 45) : 40 Cri L Jour 38 & (Vol 12) 1925 Rang 364 (365, 366) : 3 Rang 577 : 26 Cri L Jour 1532.

[5] Where no formal investigation is started upon the information such information will not be first information. (Vol 29) 1942 Oudh 60 (63) : 43 Cri L Jour 115 & (Vol 18) 1931 Cal 745 (748, 749) : 58 Cal 1312 : 33 Cri L Jour 138 (DB) & (Vol 2) 1915 Mad 312 (314) : 15 Cri L Jour 622 (DB). (Police making a few preliminary enquiries on a village gossip or a telegraphic message is not investigation.) & (Vol 33) 1946 Nag 173 (182) : I L R (1946) Nag 126 (D B). (First report given at a time when the machinery of Government was in a state of suspension and no investigation started on it — Subsequent information given of the same offence on which investigation commenced—*Held* that the latter is first information.)

[6] The following are illustrations of what are and what are not first information :—

(a) Village Magistrate transmitting information received by him to the police—Police obtaining statement

## Section 154—Note 2 (contd.)

from the person who informed the village Magistrate—Information by the village Magistrate is the first information while the statement is one falling under S. 162. (Vol 17) 1930 All 746 (749) : 32 Cri L Jour 152 (DB) \* ('10) 11 Cri L Jour 286 (286) (DB) (Mad) \* ('08) 9 Cri L Jour 170 (177) : 32 Mad 258 (FB) \* ('02) 6 Cal W N 921 (922) (DB).

(b) Information by a person to the police about a woman lying with her throat cut not recorded—Subsequent information by the father of woman treated as first information—*Held*, it was only a statement recorded in investigation and that the former information was first information. (Vol 9) 1922 Pat 535 (539) : 1 Pat 401 : 24 Cri L Jour 129 (DB).

(c) Wife of murdered man giving information to police about the disappearance of the person and suspicion of foul play, which was not recorded—Police drawing up *ruqa* after discovery of dead body—*Held* that, former and not *ruqa* is the first information. (Vol 13) 1926 Lah 179 (180) : 27 Cri L Jour 121 (DB).

(d) Sub-Inspector making entry in the diary of certain names of persons alleged to be culprits—Sub-Inspector leaving *thana* instructing *moharir* to record statement—*Held*, entries in diary did not constitute information under the section. (Vol 25) 1938 Lah 737 (739) : 40 Cri L Jour 435 (DB).

(e) Vague information about rioting—Subsequent information recorded by police officer—*Held*, first vague information was not first information. (Vol 29) 1942 Oudh 60 (62, 63) : 43 Cri L Jour 115.

(f) Person belonging to accused's party giving information of offence—Real complaint though lodged later, cannot be set aside to be used as statement under S. 162. (Vol 17) 1930 Cal 130 (131) : 31 Cri L Jour 771 (DB).

(g) Statement by a person suffering from gun shot wound, made soon after the shooting, is not a first information. (Vol 33) 1946 Nag 173 (182) : 1 I L R (1946) Nag 126 (DB).

[7] Telephonic or telegraphic messages are not information under this section. (Vol 15) 1928 Mad 791 (792) : 29 Cri L Jour 717 (DB) \* (Vol 2) 1915 Mad 312 (313) : 15 Cri L Jour 622 (DB) \* (Vol 12) 1925 Cal 959 (961) : 26 Cri L Jour 579 (DB) \* (Vol 18) 1931 Sind 13 (13) : 32 Cri L Jour 543 (DB) \* (Vol 22) 1935 Cal 403 (404) : 36 Cri L Jour 919 (DB).

[See however (Vol 23) 1941 Rang 209 (211) : 1941 Rang L R 346 : 43 Cri L Jour 157 (DB).]

[8] Police proceeding to spot after receipt of telegram or telephonic message and obtaining signed statement from informant—*Held*, it was first information. (See cases under previous points.)

[See however (Vol 21) 1934 Lah 413 (414) : 15 Lah 814 (DB) \* (Vol 17) 1930 Lah 457 (459) : 31 Cri L Jour 444 (DB).]

[9] Statement obtained after investigation cannot be converted as first information, by getting it signed. (Vol 29) 1942 Cal 593 (597) : 1 I L R (1942) 1 Cal 436 : 44 Cri L Jour 145 (DB) \* (Vol 24) 1937 Cal 309 (310) : 1 I L R (1937) 2 Cal 308 : 38 Cri L Jour 1067 (DB) \* (Vol 7) 1920 Nag 170 (171) : 16 Nag L R 30 : 21 Cri L Jour 486 \* (Vol 12) 1925 Mad 106 (112) : 25 Cri L Jour 401. (Getting the statement signed.)

[10] Recording should be done immediately the information is given and should not be postponed till the officer has some good reason to believe that the offence has been committed. ('07) 6 Cri L Jour 86 (88) (DB) (Cal).

[11] The Court alone can decide whether a statement is first information or one under S. 162. (Vol 10) 1923 Pat 550 (557) : 2 Pat 517 : 24 Cri L Jour 641 (DB) \* (Vol 17) 1930 Cal 130 (131) : 31 Cri L Jour 771 (DB).

[12] List of stolen property filed shortly after first information was recorded in diary—*Held*, the list is part of the first information. (Vol 30) 1943 All 216 (217) : 44 Cri L Jour 555.

3. "Relating to the commission of a cognizable offence."—[1] Recording becomes a necessity where it is an information and also relates to a cognizable offence even on the face of it. (Vol 18) 1931 Cal 745 (748, 750) : 53 Cal 1312 : 33 Cri L Jour 138 (DB). (Complete or satisfactory proof or evidence need not be given at the time.) \* (Vol 15) 1928 Pat 634 (636) : 29 Cri L Jour 728 (DB).

[2] Report to the police that the person saw a mob of armed men moving towards a certain place is not information of any offence. (Vol 14) 1927 Pat 100 (102) : 28 Cri L Jour 77.

4. "Shall be reduced to writing by him or under his direction, and be read over."—[1] It is in the interest of the public that the statements should be recorded faithfully and truly. ('98) 20 All 307 (310) (DB) \* ('75) 23 Suth W R 32 (32) (DB) \* (Vol 10) 1923 Pat 550 (553) : 2 Pat 517 : 24 Cri L Jour 641 (DB).

[2] The Police officer is bound to record the information at once. ('12) 13 Cri L Jour 65 (89) (Cal). (Recording several days after occurrence and there has been further developments—*Held*, no first information.)

[3] The information must be taken as the informant gives it; hence first information drawn up by a police-officer and finally settled by an attorney is not a "First information." ('12) 13 Cri L Jour 65 (90) (Cal).

[4] No suit for damage will lie on refusal by a police-officer to record the information. (Vol 13) 1926 Mad 54 (55) (DB).

5. "Shall be signed by the person giving it."—[1] The signature of the informant is necessary as a guarantee of the correctness of the information. (Vol 18) 1931 Cal 745 (750) : 53 Cal 1312 : 33 Cri L Jour 138 (DB).

[2] Police-Officer can compel an informant to sign only under this section. ('08) 9 Cri L Jour 170 (176) : 32 Mad 258 (FB).

6. "Officer in charge of a police-station."—[1] An information given to a police-officer who is on tour and who is not an officer in charge of a police station does not come within this section. (Vol 15) 1928 Cal 771 (772) : 30 Cri L Jour 803 (DB).

[2] An information given to a Magistrate, does not come within this section. (Vol 17) 1930 Lah 457 (459) : 31 Cri L Jour 444 (DB).

[3] A Magistrate cannot direct the police to treat a complaint presented to himself as the first information. (Vol 15) 1928 Pat 359 (361) : 29 Cri L Jour 374.

[4] Officers in charge of police out-posts in Sind are not empowered to record first information. (Vol 31) 1944 Sind 33 (37, 38) : 1 I L R (1944) Kar 123 : 45 Cri L Jour 650 (DB).

[5] An information given to a Deputy Superintendent of Police of a murder during a dacoity is first information under this section and is, therefore, admissible in evidence. (Vol 10) 1923 Mad 694 (697) : 25 Cri L Jour 7 (DB).

[6] Any police officer can receive information even though he has no territorial jurisdiction to investigate the case, but he has to forward such information to the officer of a station who has jurisdiction to investigate the offence. (Vol 2) 1915 Mad 312 (314) : 15 Cri L Jour 622 (DB).

7. Importance of first information. — [1] The object of provisions providing for first information report, is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished. (Vol 32) 1945 P C 18 (20) : 71 Ind App 203 : 1 I L R (1945) Lah 1 : 46 Cri L Jour 413 : 1 I L R (1945) Kar (P C) 89 (P C).

Section 154—Note 7 (*contd.*)

[2] The first information should be very carefully scrutinized. (Vol 30) 1943 All 216 (217) : 44 Cri L Jour 555 ✱ (Vol 11) 1924 Lah 413 (415) : 24 Cri L Jour 177.

[3] Delayed information should be viewed with grave suspicion. (Vol 30) 1943 All 216 (217) : 44 Cri L Jour 555 ✱ (Vol 23) 1936 All 747 (750) : 37 Cri L Jour 1104 (DB) ✱ (26) 27 Cri L Jour 821 (821) (Lah) ✱ (Vol 13) 1926 Lah 496 (496) : 27 Cri L Jour 903 (DB) ✱ (Vol 11) 1924 Cal 975 (976) : 51 Cal 924 : 26 Cri L Jour 15 (DB).

[4] Delay in giving the information by itself is not fatal to the evidentiary value of it unless satisfactory reasons for the delay is not forthcoming. (Vol 31) 1944 Sind 94 (97) : I L R (1943) Kar 294 : 45 Cri L Jour 526 (DB) ✱ (Vol 29) 1942 Bom 71 (78) : I L R (1942) Bom 384 : 43 Cri L Jour 529 (FB) ✱ (Vol 25) 1938 Lah 714 (717) : 40 Cri L Jour 261 ✱ (Vol 11) 1924 Cal 975 (976) : 51 Cal 924 : 26 Cri L Jour 15 (DB) ✱ (Vol 3) 1916 Cal 98 (99) : 42 Cal 784 : 16 Cri L Jour 411 (DB). (No satisfactory explanation — Held fatal to prosecution.)

[5] Omission to mention the names of accused where there were opportunities to see the offenders in the act is a circumstance in favour of the accused. (Vol 17) 1930 Bom 244 (247) : 31 Cri L Jour 1104 ✱ (Vol 9) 1922 Lah 410 (413) : 25 Cri L Jour 533 ✱ (Vol 33) 1946 Lah 229 (233) (DB). (Raises doubt as to accused's identity.) ✱ (11) 12 Cri L Jour 551 (552) (DB) (Mad) ✱ (Vol 16) 1929 Nag 222 (222, 223) : 30 Cri L Jour 331 ✱ (Vol 15) 1928 Oudh 417 (418) : 29 Cri L Jour 989 ✱ (Vol 15) 1928 Pat 359 (362) : 29 Cri L Jour 374 ✱ (Vol 16) 1929 Pat 705 (707) : 31 Cri L Jour 468 (DB) ✱ (Vol 18) 1931 Sind 13 (14) : 32 Cri L Jour 543 (DB).

[6] Omission or inclusion of the names of accused in the report by itself is no conclusive proof either of their innocence or guilt. (Vol 28) 1941 Pat 395 (396) : 42 Cri L Jour 504. (Omission.) ✱ (Vol 15) 1928 Lah 880 (886) : 29 Cri L Jour 835. (Do.) ✱ (Vol 19) 1932 Oudh 99 (101, 102) : 7 Luck 552 : 33 Cri L Jour 331 (DB). (Do.) ✱ (Vol 3) 1916 Lah 215 (216) : 17 Cri L Jour 450 (Inclusion.)

[7] Omission to mention the names of eye-witnesses who are brought forward in trial is a suspicious circumstance. (Vol 5) 1918 Lah 69 (70) : 1918 Pun Re No. 4 Cr : 19 Cri L Jour 613 (DB) ✱ (Vol 10) 1923 Lah 391 (392) : 25 Cri L Jour 264 (DB) ✱ (Vol 21) 1934 Oudh 315 (317, 318) : 9 Luck 687 : 35 Cri L Jour 836 (DB).

[See however (Vol 15) 1928 Lah 507 (509) : 29 Cri L Jour 343. (Independent evidence as to their presence present—Omission to mention name not a sole ground for rejecting the evidence.) ✱ (Vol 20) 1933 Lah 1005 (1006) : 35 Cri L Jour 420 (DB).]

[But see (Vol 15) 1928 Lah 657 (659) : 29 Cri L Jour 378.]

[8] No presumption, under S. 114 (g), Evidence Act against the prosecutor arises, by the non-examination of witness mentioned in the report. (Vol 19) 1932 Cal 118 (119, 120) : 58 Cal 1335 : 33 Cri L Jour 135 (DB).

[See however (Vol 13) 1926 Cal 728 (729, 730) : 27 Cri L Jour 398 (DB). (Where such persons are kept back intentionally presumption arises.) ✱ (Vol 9) 1922 Lah 28 (29) ✱ (Vol 21) 1934 Cal 458 (459) : 35 Cri L Jour 904 (DB). (Witnesses examined interested in prosecution — Failure to examine the witnesses mentioned in the first information will tell heavily against prosecution.)]

[9] Difference between the report and the actual evidence tendered in Court raises grave suspicion. (26) 27 Cri L Jour 225 (227) (Lah) ✱ (Vol 20) 1933 Oudh 148 (150) : 8 Luck 301 : 34 Cri L Jour 498 (DB) ✱

(11) 12 Cri L Jour 497 (500) (DB) (Mad) ✱ (Vol 18) 1931 Lah 157 (158) : 32 Cri L Jour 729.

[10] Minor discrepancies between the report based upon hearsay and the evidence of eye-witnesses in the trial is of no consequence. (Vol 30) 1943 Lah 89 (92) : 44 Cri L Jour 552 (DB).

[11] The first information need not contain minute details. (Vol 15) 1928 Lah 913 (914) : 30 Cri L Jour 571 (DB) ✱ (Vol 15) 1928 Lah 17 (19) : 8 Lah 605 : 28 Cri L Jour 983 (DB) ✱ (04) 1 Cri L Jour 708 (709) (DB).

[12] The prosecution is not tied down rigidly to the words in the first information. (Vol 11) 1924 Lah 591 (591) : 25 Cri L Jour 465.

[13] The terms of the first information, which is perhaps given under circumstances of haste and without knowledge of the true facts, ought not to be viewed too narrowly. (05) 2 Cri L Jour 255 (257) (DB) (Cal).

[14] The first information report cannot be treated as part of substantive evidence and the absence of it is no reason to throw out the case. (Vol 30) : 1943 Oudh 451 (452) : 45 Cri L Jour 75.

[15] Inconsistency between first information report by complainant and his evidence at trial—Prosecution witnesses ought to be asked to explain in examination-in-chief — No weight can be attached to failure of defence to cross-examine complainant on the point. (Vol 34) 1947 Pat 23 (25) : 25 Pat 298 (DL).

8. How to use first information report. — [1] First information report cannot be used as substantive or primary evidence of the truth of its contents. (Vol 31) 1944 Cal 323 (323) : I L R (1943) 2 Cal 331 (DB) ✱ (Vol 30) 1943 Cal 647 (648) : 45 Cri L Jour 210 (DB). (It may of course be used under S. 145, Evidence Act.) ✱ (Vol 30) 1943 Cal 74 (74) : I L R (1942) 2 Cal 144 : 44 Cri L Jour 322 (DB). (Report also dying declaration — Can be used as such.) ✱ (Vol 25) 1938 Rang 282 (283) : 39 Cri L Jour 771 (DB). (Do.) ✱ (Vol 30) 1943 Cal 612 (613) : 45 Cri L Jour 170 (DB) ✱ (Vol 30) 1943 Oudh 451 (452) : 45 Cri L Jour 75 ✱ (Vol 29) 1942 Pat 113 (117) : 21 Pat 153 : 43 Cri L Jour 90 (DB) ✱ (Vol 27) 1940 Oudh 209 (211) : 15 Luck 429 : 42 Cri L Jour 483 ✱ (Vol 26) 1939 All 242 (244) : 40 Cri L Jour 559 : I L R (1939) All 377 ✱ (36) 37 Cri L Jour 858 (859) (Nag) ✱ (Vol 22) 1935 Pesh 165 (167) : 37 Cri L Jour 225.

[2] It cannot be substituted for evidence given on oath and when there is no other evidence, the facts mentioned in the information alone cannot be relied upon to convict the accused. (Vol 11) 1924 All 164 (165) : 24 Cri L Jour 812 ✱ (Vol 25) 1938 Rang 282 (283) : 39 Cri L Jour 771 (DB) ✱ (02) 26 Mad 191 (192) ✱ (Vol 16) 1929 All 916 (917) : 31 Cri L Jour 7 ✱ (Vol 17) 1930 Oudh 249 (249) : 31 Cri L Jour 1025 ✱ (Vol 20) 1933 Pesh 94 (95) : 35 Cri L Jour 476 (DB).

[3] It is misdirection on the part of a Judge to ask the jury to accept the statement in the first information in preference to the evidence in the case. (Vol 25) 1938 Cal 460 (462) : 39 Cri L Jour 674 (DB) ✱ (10) 11 Cri L Jour 557 (557) (DB) (Cal).

[4] The first information can be used only to corroborate or contradict the evidence under Ss. 157 and 145 of the Evidence Act. (Vol 17) 1930 Mad 632 (634) : 53 Mad 590 : 31 Cri L Jour 712 (DB) ✱ (Vol 31) 1944 Cal 323 (323) : I L R (1943) 2 Cal 331 (DB) ✱ (Vol 30) 1943 Cal 647 (648) : 45 Cri L Jour 210 (DB) ✱ (Vol 29) 1942 Pat 113 (117) : 21 Pat 153 : 43 Cri L Jour 90 (DB) ✱ (Vol 15) 1928 Lah 913 (914) : 30 Cri L Jour 571 (DB) ✱ (Vol 27) 1940 Oudh 209 (211) : 15 Luck 429 : 42 Cri L Jour 483 ✱ (Vol 26) 1939 All 242 (244) : 40 Cri L Jour 559 : I L R (1939) All 377 ✱ (36) 37 Cri L Jour 858 (859) (Nag) ✱ (Vol 22) 1935 Pesh 165 (168) : 37 Cri L Jour 225 (DB) ✱ (Vol 12) 1925 All 303 (304) : 47 All 280 : 26 Cri L Jour 554 ✱ (Vol 15) 1928 Lah 507

Section 154.—Note 8 (*contd.*)

(509) : 29 Cri L Jour 343 (DB) ✕ (Vol 21) 1934 Rang 60 (60) : 35 Cri L Jour 808 ✕ (Vol 33) 1946 Nag 173 (132) : 1 L R (1946) Nag 126 (DB).

[See also (Vol 31) 1944 Sind 33 (37, 38) : 1 L R (1944) Kar 123 : 45 Cri L Jour 650 (DB). (Information given at police outpost in Sind is not first information report within this section but can be admitted as corroborative evidence.)]

[See however (Vol 30) 1943 Cal 74 (74) : 1 L R (1942) 2 Cal 144 : 44 Cri L Jour 322 (DB). (The relevancy of the statements should be clear before they can be used.) ✕ (Vol 26) 1939 All 242 (244) : 40 Cri L Jour 559 : 1 L R (1939) All 377. (Do.) ✕ (Vol 17) 1930 Lah 450 (452) : 31 Cri L Jour 475 (DB). (The first information report is, however, admissible under Evidence Act, S. 32, cl. (1)) ✕ (Vol 18) 1931 Lah 38 (40) : 32 Cri L Jour 522 (DB). (The first information report, apart from its use under S. 145 or 155, Evidence Act, if proved may be of value as one of *res gestae*.) ✕ (Vol 5) Oudh Cas 246 (249) (DB). (Statements made in first information report may be admissible under S. 32 of the Evidence Act.)]

[5] Theoretically, the defence can prove the information to impeach the informant's credit under S. 155 or to contradict him under S. 145. (Vol 26) 1939 All 242 (244) : 40 Cri L Jour 559 : 1 L R (1939) All 377 ✕ (Vol 14) 1927 Cal 17 (19) : 54 Cal 237 : 28 Cri L Jour 99 (D B).

[6] The first information report can be used to corroborate or discredit the informant only and not witnesses other than the informant. (Vol 31) 1944 Cal 323 (324) : 1 L R (1943) 2 Cal 381 (DB) ✕ (Vol 28) 1941 Cal 533 (534) : 42 Cri L Jour 871 (DB).

[7] Report should be admissible under the other provisions of the Evidence Act before it can be submitted to the jury for consideration and not because the prosecution depends on it. (Vol 30) 1943 Cal 74 (74, 75) : 1 L R (1942) 2 Cal 144 : 44 Cri L Jour 322 (DB).

[8] The first information report should be placed before the jury with proper directions. (Vol 30) 1943 Cal 74 (75) : 1 L R (1942) 2 Cal 144 : 44 Cri L Jour 322 (D B).

[9] First information not formally proved by prosecution — Yet defence should not be refused the use of it — Prosecution which suggests it is garbled, should prove it. (38) 39 Cri L Jour 917 (922) (DB) (Nag).

[10] Failure by the police to observe the procedure, laid down in this section, does not make the first information report inadmissible in evidence. (Vol 22) 1935 Pesh 165 (168) : 37 Cri L Jour 225 (DB). (Only effect is to make it less certain for corroborating or contradicting.)

[11] Unless the informant is examined, the information cannot be put in evidence. (Vol 28) 1941 Bom 146 (147) : 1 L R (1941) Bom 333 : 42 Cri L Jour 519 (DB) ✕ (Vol 22) 1935 Pesh 165 (168) : 37 Cri L Jour 225 (DB) ✕ (Vol 7) 1920 Cal 988 (989) : 22 Cri L Jour 410 (DB) ✕ (99) 1 Bom L R 433 (435) (DB) ✕ (Vol 21) 1934 Sind 100 (101) : 35 Cri L Jour 1332 (DB).

[See (Vol 32) 1945 P C 18 (20) : 71 Ind App 203 : 1 L R (1945) Lah 1 : 46 Cri L Jour 413 : 1 L R (1945) Kar (P C) 89 (P C).]

[12] Information which is based entirely upon hearsay cannot be tendered in evidence by the prosecution. (13) 14 Cri L Jour 593 (593) (Lah) ✕ (Vol 12) 1925 Lah 418 (419) : 6 Lah 437 : 26 Cri L Jour 1489 ✕ (04) 1 Cri L Jour 62 (65) (DB) (Cal) ✕ (Vol 17) 1930 Sind 211 (215) : 24 Sind L R 252 : 31 Cri L Jour 1046 (DB) ✕ (Vol 12) 1925 Cal 959 (960) : 26 Cri L Jour 579. (Map prepared by police on information cannot be used.)

[See also (Vol 28) 1941 Bom 146 (147) : 1 L R (1941) Bom 333 : 42 Cri L Jour 519 (DB) ✕ (Vol 28) 1941 Rang

209 (211) : 1941 Rang L R 346 : 43 Cri L Jour 157 (DB). (First information report may be merely hearsay and need not necessarily be given by a firsthand knowledge of the fact.)]

[13] The real first information should be found and that alone is admissible as evidence. (Vol 7) 1920 Cal 988 (989) : 22 Cri L Jour 410.

[14] An information recorded under this section is a public document and a certified copy of it is admissible in evidence. (93-96) 1 Upp Rur Rul 24 (25). (Dissenting from 1872-1892 Low Bur Rul 572.)

[See (Vol 17) 1930 Lah 1067 (1068).]

[But see (72-92) 1872-1892 Low Bur Rul 572 (572).]

9. First information by accused. — [1] First information given by accused himself, when in the nature of confession, is admissible in evidence. (Vol 22) 1935 Bom 26 (27) : 59 Bom 120 : 36 Cri L Jour 539 (DB) ✕ (09) 10 Cri L Jour 193 (194) (SB) (Cal) ✕ (25) 26 Cri L Jour 1492 (1493) (DB) (Lah) ✕ (Vol 6) 1919 Lah 466 (469) : 1918 Pun Re No. Or 36 : 20 Cri L Jour 83 (DB) ✕ (Vol 10) 1923 Nag 251 (253) : 24 Cri L Jour 570 (DB) ✕ (93) 21 Cal 392 (395).

[2] Statement made by the accused in the information not amounting to a confession, is admissible. (Vol 32) 1945 Sind 132 (144) : 1 L R (1944) Kar 456 (D B) ✕ (21) 22 Cri L Jour 694 (695) (DB) (Lah) ✕ (Vol 8) 1921 Cal 111 (112) : 22 Cri L Jour 562 (DB). (Preliminary narrative if proved held admissible.) ✕ (Vol 28) 1941 Nag 86 (89) : 1 L R (1940) Nag 679 : 42 Cri L Jour 390 (DB). (Do.) ✕ (Vol 10) 1923 Lah 232 (235) : 25 Cri L Jour 811 (DB). (Where the Sub-Inspector of Police deposed that the accused made a statement to him that they were present in the fight, such statement is not confession.) ✕ (Vol 4) 1917 P C 25 (27) : 44 Cal 876 : 44 Ind App 137 : 13 Nag L R 100 : 18 Cri L Jour 471 (P C). (Statement by A that B beat him shortly before he murdered B's wife held admissible in the trial for the murder.)

[See however (Vol 22) 1935 Bom 26 (28) : 59 Bom 120 : 36 Cri L Jour 539 (DB). (Admissibility of portion of report only doubted.)]

[3] Police Officer who received the information acts objectionably if he asks for the repetition of the information in the presence of witnesses. (Vol 28) 1941 Nag 86 (91) : 1 L R (1940) Nag 679 : 42 Cri L Jour 390 (DB).

10. Duty of the prosecution to tender first information report in evidence. — [1] The prosecution is bound by practice to produce in Court the first information given to the police and recorded by them. (Vol 11) 1924 Lah 591 (591) : 25 Cri L Jour 465 ✕ (03) 7 Cal W N 345 (346, 347) (DB) ✕ (Vol 15) 1928 Pat 359 (361) : 29 Cri L Jour 374 ✕ (Vol 13) 1926 Cal 139 (144) : 53 Cal 372 : 27 Cri L Jour 266 (DB) ✕ (Vol 21) 1934 Nag 94 (95, 96) : 35 Cri L Jour 957 : 30 Nag L Rep 262.

[2] The failure to record such statement or the non-production of the information has very serious consequences as it prejudices the accused and deprives him of the right of cross-examination. (Vol 9) 1922 Pat 535 (539) : 1 Pat 401 : 24 Cri L Jour 129 (DB).

[See however (Vol 30) 1943 Oudh 451 (452) : 45 Cri L Jour 75. (Case under S. 323, Penal Code—Failure to give information not fatal.)]

[3] The prosecution is not strictly bound down to the case in the first information and the police can show that the first information is not accurate. (Vol 19) 1932 Oudh 99 (102) : 33 Cri L Jour 381 : 7 Luck 552 (DB) ✕ (38) 39 Cri L Jour 917 (922) (DB) (Nag) ✕ (Vol 11) 1924 Lah 591 (591) : 25 Cri L Jour 465.

[4] The prosecution need not examine all the witnesses mentioned in the first information report. (Vol 29) 1942 Oudh 60 (66) : 43 Cri L Jour 115.

<sup>a</sup>155. (1) When information is given to an officer in charge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

*Information in non-cognizable cases.* (2) No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case.

[1892—S. 155; 1872—Ss. 110, 111, 113; 1861—Ss. 133, 134.]

[a] This section, so far as it applied to the police in the town of Bombay, was *repealed* by the City of Bombay Police Act, 1902 (Bom. 4 [IV] of 1902), S. 2 (1) and Sch. A.

#### Section 154 (contd.)

11. Grant of copies of first information. — [1] The accused is entitled to have a copy of the information which can be had under the orders of the Court or a superior to the officer in charge of the police station. (Vol 29) 1942 Bom 121 (122) : 43 Cri L Jour 621 (FB) ✕ (Vol 24) 1937 Sind 303 (303) : 39 Cri L Jour 57 (DB).

12. Effect of giving false information under this section. — [1] For giving false information under this section punishment under S. 182 or 211, Penal Code may be inflicted. ('06) 4 Cri L Jour 68 (69) (DB) (Cal) ✕ (Vol 6) 1919 All 159 (159) : 20 Cri L Jour 114 ✕ (Vol 5) 1918 All 85 (85) : 19 Cri L Jour 895 ✕ (Vol 17) 1930 Oudh 414 (414) ✕ ('03) 1 Weir 122 (122) (DB) ✕ ('05) 2 Cri L Jour 171 (175) : 32 Cal 180 (DB).

[See (Vol 23) 1936 Sind 94 (97) : 30 Sind L R 75 : 37 Cri L Jour 870 (DB). (Section 182, Penal Code is not confined to information falling under S. 154, Criminal P. C.)]

[2] Where the information is referred as false but the informant presses his case before the Magistrate, he cannot be prosecuted before the Magistrate disposes of the case. (Vol 19) 1932 Cal 550 (551) : 33 Cri L Jour 724 (DB) ✕ (Vol 20) 1933 Cal 614 (615) : 34 Cri L Jour 1077.

[But see (Vol 18) 1931 Cal 634 (635) : 58 Cal 1065 : 32 Cri L Jour 1241 ✕ ('84) 7 Mad 292 (294, 295) (DB).]

[3] A mere expression of suspicion without any definite charge will not make a person liable for prosecution. ('12) 13 Cri L Jour 303 (304) (Mad) ✕ ('05) 2 Cri L Jour 66 (72) : 1905 Pun Re No. 12 Cr ✕ (Vol 6) 1919 Cal 501 (502) : 19 Cri L Jour 336 (DB) ✕ (Vol 7) 1920 All 196 (197) : 21 Cri L Jour 576.

[4] A person can be charged for abetment if he instigates another to give false information. ('03) 7 Cal W N 556 (558) (DB).

[5] False information given to screen offender — Informant punishable under S. 211 in addition to Ss. 201 and 203, Penal Code. (Vol 6) 1919 Cal 679 (680) : 46 Cal 427 : 19 Cri L Jour 903 (DB).

[6] The informant is not liable to be prosecuted under S. 193, Penal Code, for giving false information. ('13) 14 Cri L Jour 56 (56) : 35 All 102 ✕ ('95) 17 All 436 (437) (DB).

[7] Person defamed by the information given to the police can prosecute the informant under S. 500, Penal Code as well. (Vol 4) 1917 Mad 600 (602) : 17 Cri L Jour 381 ✕ (Vol 13) 1926 Lah 278 (278) : 27 Cri L Jour 899 ✕ (Vol 11) 1924 All 535 (536) : 46 All 671 (FB). (Confirming on appeal (Vol 10) 1923 All 167.)

[8] A suit for damages for malicious prosecution will lie against the informant to the police. (Vol 6) 1919 Upp Bur 37 (37, 38) : 3 Upp Bur Rul 67. (Information merely on expression of honest opinion to police—Police left to take action as they chose — No damages

can be recovered.) ✕ (Vol 7) 1920 Pat 489 (490) (DB) ✕ (Vol 7) 1920 Mad 789 (790) (DB) ✕ (Vol 6) 1919 Mad 229 (230, 231) : 42 Mad 880 (DB) ✕ (Vol 1) 1914 Lah 531 (533) : 1915 Pun Re No. 1 ✕ (Vol 2) 1915 All 51 (53).

[See however (Vol 7) 1920 Mad 712 (713) (DB).]

[9] The informant can be ordered to pay compensation to the accused under S. 250. (Vol 7) 1920 Sind 73 (74) : 13 Sind L R 166 : 21 Cri L Jour 49 (DB).

13. Effect of the police-officer in charge recording first information falsely. — [1] A police-officer who records the first information falsely is liable to be punished under Ss. 177 and 218, Penal Code. ('97) 20 All 151 (153, 154) (DB) ✕ ('99) 27 Cal 144 (150, 151) (DB) ✕ (Vol 18) 1931 Pat 150 (152) : 32 Cri L Jour 638 (DB) ✕ (Vol 21) 1934 Sind 6 (9, 10) : 35 Cri L Jour 736 (DB). (Stating that the report was recorded before visiting scene of occurrence while in fact it was drawn up afterwards.)

[2] Defamatory statement by police-officer in the false report—He can be prosecuted under S. 500, Penal Code. (Vol 17) 1930 Lah 159 (163) : 31 Cri L Jour 584.

14. Power of High Court to interfere under section 561A. — [1] The exercise by the police of the statutory right of investigation under S. 154 and S. 156 cannot be interfered with by the High Court under S. 561A. (Vol 32) 1945 P C 18 (22) : 71 Ind App 203 : I L R (1945) Lah 1 : 46 Cri L Jour 413 : I L R (1945) Kar (P C) 89 (PC).

#### SECTION 155 — SYNOPSIS.

1. Applicability of the section to presidency towns.
2. Procedure when information is given.
3. Who can order an investigation — Sub-section (2).
4. Order for investigation.
5. Powers and duties of the police under sub-section (3).
6. Report under this section, whether a public document.

1. Applicability of the section to presidency towns. — [1] This section applies to the police in the town of Calcutta. ('88) 15 Cal 595 (606) (FB) ✕ (Vol 12) 1925 Cal 587 (589) : 52 Cal 67 : 26 Cri L Jour 782.

2. Procedure when information is given. — [1] Failure to enter or entering information falsely is punishable under S. 177, Penal Code. ('97) 20 All 151 (153, 154) (DB) ✕ (Vol 17) 1930 Lah 159 (162) : 31 Cri L Jour 584.

[2] The object of the section is to inform the Magistrate of the district and the District Superintendent of Police of the offences which have been reported at the police-station. ('97) 20 All 151 (154) (DB).

[3] The information given to the police-officer in respect of a non-cognizable offence cannot amount to an institution of criminal proceedings within the meaning

**156. (1)** Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

*Investigation into cognizable cases.*

Section 155—Note 2 (*contd.*)  
of S. 211, Penal Code. (Vol 19) 1932 Cal 511 (512) : 59 Cal 334 : 33 Cri L Jour 631 (DB).

[4] A charge under S. 182, Penal Code cannot be brought against the informant the ground that information was false. (Vol 19) 1932 Pat 170 (170) : 33 Cri L Jour 314 \* (Vol 20) 1933 Oudh 374 (375) : 34 Cri L Jour 1149.

[But see (Vol 27) 1940 Oudh 413 (414) : 41 Cri L Jour 778 : 16 Luck 55 (DB).]

[5] The police-officer has no power to take proceedings by himself without an express order from a Magistrate. (Vol 19) 1932 Cal 511 (511) : 59 Cal 334 : 33 Cri L Jour 631 (DB) \* (Vol 20) 1933 Oudh 374 (375) : 34 Cri L Jour 1149\* (Vol 19) 1932 Pat 170 (170) : 33 Cri L Jour 314.

[6] After entering information in the diary the police-officer should refer the information to the Magistrate. (Vol 29) 1942 Cal 593 (597) : 44 Cri L Jour 145 : ILR (1942) 1 Cal 436 (DB) \* ('02) 26 Bom 150 (156) (FB) \* (Vol 14) 1927 Bom 440 (441) : 51 Bom 498 : 28 Cri L Jour 939 (DB).

[7] The police-officer may report the case to the Magistrate for orders under sub-s. (2) in addition to the referring the informant to the Magistrate. ('10) 11 Cri L Jour 156 (156) (DB) (Mad) \* (Vol 17) 1930 Lah 159 (162, 163) : 31 Cri L Jour 584 \* (Vol 18) 1931 Oudh 172 (174) : 32 Cri L Jour 860 : 6 Luck 668.

3. Who can order an investigation—Sub-section (2).—[1] District Magistrate can order an investigation into a case under S. 294A, Penal Code, even though such offence cannot be tried without a complaint from the Provincial Government. (Vol 19) 1932 Lah 581 (581) : 33 Cri L Jour 678.

4. Order for investigation.—[1] It is open to the Magistrate to order an investigation when he receives a police-report in a non-cognizable case. ('68) 10 Suth W R Cr 49 (49, 50) (DB) \* ('88) 12 Bom 161 (163) (DB).

[2] Investigation may be ordered even if Magistrate has reason for doubting correctness of report. (Vol 1) 1914 Upp Bur 31 (31) : 2 Upp Bur Rul 19 : 16 Cri L Jour 97.

[3] The police-officer is bound to make the investigation. ('68) 1868 Pun Re No. 21 Cr, p. 51 (51) (DB).

[4] It is only under the orders of a Magistrate that the police can investigate into a non-cognizable offence. (Vol 32) 1945 P C 18 (19) : 46 Cri L Jour 413 : 71 Ind App 203 : ILR (1945) Lah 1 : ILR (1945) Kar (P C) 89 (P C) \* (Vol 30) 1943 Lah 28 (30) : ILR (1943) Lah 805 : 44 Cri L Jour 301 (DB) \* (Vol 29) 1942 Cal 593 (597) : I L R (1942) 1 Cal 436 : 44 Cri L Jour 145 (DB) \* (Vol 28) 1941 Pat 395 (397) : 42 Cri L Jour 504 \* (Vol 27) 1940 Oudh 413 (414) : 16 Luck 55 : 41 Cri L Jour 778 (DB).

[5] Non-cognizable case investigated by police without orders—It may be tried by the Magistrate. (Vol 26) 1939 Rang 273 (274) : 40 Cri L Jour 799.

[6] An order for investigation can be made in respect of offences under any local or special law. ('70) 14 Suth W R Cr 41 (44).

[7] Order by District Magistrate to an officer of the criminal investigation department to make a confidential enquiry for the purpose of ascertaining whether any grounds exist for instituting criminal proceedings, is not an order for investigation under this section. (Vol 14) 1927 Bom 501 (509) : 28 Cri L Jour 1012 (DB).

[8] An order for investigation in a particular non-cognizable case cannot be used to investigate a separate non-cognizable case. (Vol 30) 1943 Lah 28 (30) : ILR (1943) Lah 805 : 44 Cri L Jour 301 (DB).

5. Powers and duties of the police under sub-section (3). — [1] Investigation under this chapter includes investigation under sub-s. (3) of this section. (Vol 29) 1942 Cal 593 (597) : I L R (1942) 1 Cal 436 : 44 Cri L Jour 145 (DB) \* (Vol 18) 1931 All 263 (264) : 53 All 407 : 32 Cri L Jour 465.

[2] Police-officer authorised to investigate non-cognizable cases under the provisions of the Opium Act — The investigation is not one under Chapter XIV. (Vol 29) 1942 Cal 593 (597) : 44 Cri L Jour 145 : I L R (1942) 1 Cal 436 (DB).

[3] A police-officer, empowered to investigate, can:—  
(a) Exercise powers conferred by S. 161. ('83) 8 Bom 216 (219) (DB).

(b) Record statements under S. 162. (Vol 6) 1919 All 276 (277) : 41 All 311 : 20 Cri L Jour 231.

(c) Make a search under S. 165. (Vol 19) 1932 Lah 581 (582) : 33 Cri L Jour 678.

(d) Send up a charge sheet or report that the evidence is insufficient. ('12) 13 Cri L Jour 691 (692) (DB) (Cal).

[4] It is the duty of the police-officer to keep a diary of the proceedings in investigation under S. 172. (Vol 5) 1918 Lah 171 (175) : 19 Cri L Jour 517 : 1918 Pun Re No 16 Cr.

[5] After the investigation the police-officer should send in a report of the investigation under S. 173, even if the order of the Magistrate is silent as to such report. (Vol 2) 1915 Bom 80 (80) : 16 Cri L Jour 161 \* ('13) 14 Cri L Jour 218 (218, 219) (All).

[6] The power to arrest without warrant is expressly taken away by this section. ('97-01) 1 Upp Bur Rul 31 (33) \* ('83) 1 Weir 343 (343).

[7] Arrest without warrant is illegal. ('83) 1 Weir 343 (343).

[8] The police officer exercising powers under this sub-section need not be an officer in charge of a police-station. (Vol 30) 1943 Lah 28 (31) : ILR (1943) Lah 805 : 44 Cri L Jour 301 (DB).

6. Report under this section, whether a public document. — [1] Report under this section is a public document and is admissible in evidence. (Vol 17) 1930 Lah 1067 (1068).

#### SECTION 156 — SYNOPSIS.

1. "Cognizable case."
2. Officer in charge of a police-station.
3. Territorial limits to the power of investigation.
4. Offences requiring sanction.
5. Irregularities in investigation—Sub-section (2).
6. Order for investigation—Sub-section (3).
7. Sessions Judge—Power to order investigation.
8. Powers and duties of the police in investigation.

1. "Cognizable case." — [1] The power to investigate extends to any cognizable case. It is not limited to offence only. ('93) 1893 All W N 124 (124) (DB). (Person arrested under S. 55 (c).)

[2] The power is not limited by any condition that the police-officer should have something written before he can take action. (Vol 32) 1945 P C 18 (20) : 46 Cri L Jour 413 : 71 Ind App 203 : I L R (1945) Lah 1 : I L R (1945) Kar (PC) 89 (PC).

2. Officer in charge of a police-station. — [1] An Inspector of the provincial criminal investigation



(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

[1882—S. 156; 1872—Ss. 109, 114 paras 2, 3.]

#### Section 156 — Note 2 (*contd.*)

department can make an investigation under this section. (12) 13 Cri L Jour 305 (316, 317) : 35 Mad 247 (SB) \* (12) 13 Cri L Jour 352 (362, 368) : 35 Mad 397 (LB).

[2] If the officer-in-charge of the police-station is ill, the next in the rank who is in charge of the station then can investigate, even though he is not generally empowered to investigate cognizable cases. (Vol 10) 1923 Pat 547 (549) : 2 Pat 379 : 24 Cri L Jour 375.

[3] In serious cases, such as of rioting, it is desirable that investigation is made by a senior officer. (Vol 20) 1933 Lah 871 (876) : 35 Cri L Jour 137.

3. Territorial limits to the power of investigation. — [1] Where a girl is taken away from her husband's house in district *M* and is brought to district *D*, the police at *D* can investigate into the crime. (Vol 20) 1933 All 665 (666) : 55 All 977 : 34 Cri L Jour 1215.

4. Offences requiring sanction. — [1] The police have a statutory right to investigate a cognizable offence without the sanction of any Court. (Vol 32) 1945 P C 18 (21, 22) : 71 Ind App 203 : I L R (1945) Lah 1 : 46 Cri L Jour 413 : I L R (1945) Kar (PC) 89 (PC).

[2] A Magistrate has no power to cancel the first information report for want of sanction or to direct the stay of investigation till the sanction is obtained. (Vol 32) 1945 Cal 385 (386, 387) : I L R (1944) 2 Cal 183 : 47 Cri L Jour 142 (DB).

[3] High Court has no power to quash the investigation not sanctioned in the exercise of its inherent powers. (Vol 32) 1945 P C 18 (21, 22) : 71 Ind App 203 : I L R (1945) Lah 1 : 46 Cri L Jour 413 : I L R (1945) Kar (P C) 89 (PC).

5. Irregularities in investigation—Sub-section (2). — [1] The principle underlying sub-s. (2) is that a conviction or acquittal does not depend upon the question what particular officer actually conducts the investigation which results in the trial. That is determined mainly by the evidence that is given at the trial. (Vol 15) 1928 Bom 162 (165) : 52 Bom 238 : 29 Cr L J 551 (DB).

[2] The failure to properly investigate cannot vitiate the trial. If there is anything suspicious in the investigation, it is for the Court to consider the same in determining the truth of the charge. (Vol 18) 1931 Pat 150 (152) : 32 Cri L Jour 638 (DB).

6. Order for investigation — Sub-section (3). — [1] Where no complaint has been made to a Magistrate, but the latter gets information in respect of any cognizable case, he may order the police to investigate it. (06) 4 Cri L Jour 183 (190, 191, 192) (DB) (Bom).

[2] Where a complaint has been made in respect of any offence and the Magistrate considers, before the issue of process to the accused that the matter should be investigated, he should order such investigation under S. 202, and not under this sub-section. (Vol 13) 1926 Cal 586 (587) : 53 Cal 610 : 27 Cri L Jour 602 (DB) \* (Vol 27) 1940 Sind 215 (216) : I L R (1940) Kar 431 : 42 Cri L Jour 162 (DB) \* (Vol 16) 1929 Bom 72 (73, 74) : 53 Bom 339 : 30 Cri L Jour 781 (DB).

[3] This sub-section does not provide an alternative procedure to that laid down in S. 202. (Vol 27) 1940 Sind 215 (216) : I L R (1940) Kar 431 : 42 Cri L Jour 162 (DB) \* (Vol 15) 1928 Mad 1268 (1269) : 30 Cri L Jour 326 \* (Vol 20) 1933 Sind 136 (137, 138) : 27 Sind L R 67 : 34 Cri L Jour 763 (DB).

[4] It is the duty of the Magistrate to examine the complainant and follow the procedure laid down in Chap. XVI. (Vol 27) 1940 Sind 215 (217) : ILR (1940) Kar 431 : 42 Cri L Jour 162 (DB).

[5] A Magistrate has no power to order an investigation after the issue of process to the accused. It is incumbent upon him to proceed in accordance with Chap. XXI and hear the evidence. (Vol 29) 1942 Lah 256 (256, 257) : I L R (1943) Lah 726 : 43 Cri L Jour 865 (DB).

7. Sessions Judge — Power to order investigation. — [1] A Sessions Judge cannot direct the police to make an investigation. (10) 11 Cri L Jour 330 (330, 331) : 1910 Pun Re No. 11 Cr.

8. Powers and duties of the police in investigation. — [1] It is the duty of the police in making an investigation to discover the truth and not simply to obtain evidence for the purpose of securing a conviction. (Vol 20) 1933 All 314 (317) : 55 All 379 : 34 Cri L Jour 689 (DB).

[2] Investigation should not be merely to extract admissions from the suspect. (Vol 27) 1940 Nag 186 (191) : I L R (1940) Nag 232 : 41 Cri L Jour 757.

[3] The police in conducting the investigation must act in such a way as to inspire full confidence in every body concerned. (Vol 21) 1934 Lah 692 (693) : 36 Cri L Jour 679 \* (Vol 20) 1933 Lah 871 (876) : 35 Cri L Jour 137.

[4] A general power to enter houses indiscriminately in the neighbourhood of the place where a cognizable offence may have been committed is not contemplated by this section. (Vol 15) 1928 All 185 (186) : 29 Cri L Jour 272.

[5] The number of investigations into a crime is not limited by law, and where one has been complete another may be begun on fresh information received. (Vol 6) 1919 Mad 751 (752) : 19 Cri L Jour 901 (DB) \* (Vol 19) 1932 Lah 103 (108, 109) : 33 Cri L Jour 97 (DB).

[But see (Vol 19) 1932 Lah 611 (612, 613) : 33 Cri L Jour 912. (Charge framed in a challan case—District Magistrate's order to police for a further investigation was held improper.)]

[6] The investigating officer is a material witness for the prosecution and his non-production is a serious omission which cannot but throw suspicion on the whole prosecution case. (Vol 9) 1922 Pat 582 (584, 585) : 1 Pat 630 : 24 Cri L Jour 91 (DB).

[7] It is desirable that the investigating officer corroborates the result of his investigation by independent evidence. (Vol 4) 1917 All 224 (228) : 18 Cri L Jour 1028 (DB).

[8] The practice of engineering an offence, [by an investigating officer, in order to find out whether a person when tempted will commit an offence is to be strongly deprecated. (Vol 3) 1916 All 242 (243) : 17 Cri L Jour 139.

157. (1) If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers <sup>a</sup>[not being below such rank as the <sup>b</sup>[Provincial Government] may, by general or special order, prescribe in this behalf] to proceed, to the spot, to investigate the facts and circumstances of the case, <sup>c</sup>[and, if necessary, to take measures] for the discovery and arrest of the offender :

Provided as follows :

- Where local investigation dispensed with.* (a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot ;
- Where police-officer in charge sees no sufficient ground for investigation.* (b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, <sup>a</sup>[and, in the case mentioned in clause (b), such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the <sup>b</sup>[Provincial Government] the fact that he will not investigate the case or cause it to be investigated.]

[1892—S. 157; 1872—S. 114 para 1, Ss. 116, 117; 1861—Ss. 135, 136, 137.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 32.* [b] *Substituted by A. O. for "Local Government".* [c] *Substituted by Act 18 of 1923, S. 32 for "and to take such measures as may be necessary."*

#### Section 157 — Note 1

[1] This section does not apply to the City of Bombay and Calcutta. (Vol 27) 1940 Cal 97 (103) : 1 L R (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB) \* ('97) 21 Bom 495 (498, 499) \* ('88) 15 Cal 595 (606) (FB).

[2] The words "from information received" refer to the information furnished and recorded under S. 154. ('10) 11 Cri L Jour 201 (201) (DB).

[3] The words "or otherwise" are wide enough to include even information derived from a telegram or village gossip. (Vol 2) 1915 Mad 312 (313) : 15 Cri L Jour 622 (DB).

[4] Investigation may be commenced even when police are led to believe through their own knowledge or by means of credible though informal intelligence that a cognizable offence has been committed. (Vol 32) 1945 P O 18 (20) : 46 Cri L Jour 413; 71 Ind App 203; 1 L R (1945) Lah 1 : 1 L R (1945) Kar (P C) 89 (PC).

[5] Where the police came to know of a complaint which had been made to a Magistrate, such knowledge is sufficient on which they could proceed to investigate. (Vol 10) 1923 Pat 547 (549) : 2 Pat 379 : 24 Cri L Jour 375 (D B).

[6] This section provides for the making of a report by the police to the Magistrate before investigation which is called an "occurrence report." ('99) 1899 All W N 87 (89).

[7] The object of the report under this section is to enable a Magistrate to have early information of every serious crime so that he may be in a position to act if necessary under section 159. (Vol 18) 1931 Pat 150 (151) : 32 Cri L Jour 638 (DB).

[8] The omission to send the "occurrence report" cannot vitiate a trial in the absence of prejudice to the accused. ('10) 11 Cri L Jour 498 (499) : 4 Sind L R 38 (DB) \* (Vol 18) 1931 Pat 150 (151, 152) : 32 Cri L Jour 638 (DB).

[9] Police Officers hearing village gossip or receiving

anonymous petitions — Few enquiries to ascertain if formal investigation desirable—Such enquiries are not "investigation." (Vol 2) 1915 Mad 312 (314): 15 Cri L Jour 622 (DB).

[10] There is nothing to prevent the police of one station from acting in the jurisdiction of another police-station. (Vol 2) 1915 Lah 376 (377) : 1915 Run Re No. 12 Cr : 16 Cri L Jour 551.

[11] The object of investigation is to search for the truth and not to collect evidence to secure a conviction. (Vol 20) 1933 All 314 (317) : 55 All 579; 34 Cri L Jour 689 (DB).

[12] The officer in charge of police-station is not bound to act on the information. (Vol 11) 1924 All 535 (535) : 46 All 671 (FB) \* ('71) 16 Suth W R Cr Cir 7.

[13] An Inspector of the Criminal Investigation Department is an officer superior in rank to an officer in charge of a police-station and can make an investigation. ('12) 13 Cri L Jour 305 (316, 317) : 35 Mad 247 (SB).

[14] The occurrence report is not an act or record of acts of a public officer and is, therefore, not a public document and that an accused is not entitled either to obtain a copy of it or to inspect it before it is filed. ('97) 20 Mad 189 (196, 205) (FB) \* (Vol 18) 1931 Pat 150 (151) : 32 Cri L Jour 638 (DB).

[15] A police constable deputed is not empowered to enter, without warrant, a house in search of property though he might do so in search of the person who is charged with cognizable offence. ('70) 7 Bom H C R Cr 50 (52). (Case under the provisions of the Code of 1861 corresponding to this section.)

[16] Delay in investigation causes serious prejudice to an accused person. (Vol 19) 1932 Lah 345 (347) : 13 Lah 573 : 33 Cri L Jour 220 (DB).

[17] When there is any delay in investigation, it is the duty of a Court to enquire fully into the circumstances of the delay and consider its bearing upon the case. (1900) 2 Bom L R 1092 (1094) (DB).



153. (1) Every report sent to a Magistrate under section 157 shall, if the <sup>a</sup>[Provincial Government] so directs, be submitted through such superior officer of police as the <sup>a</sup>[Provincial Government], by general or special order, appoints in that behalf.

(2) Such superior officer may give such instructions to the officer in charge of the police-station at he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

[1882—S. 158; 1872—S. 117 para 2.]

[a] Substituted by A. O. for "Local Government."

159. Such Magistrate, on receiving such report, may direct an investigation or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

[1882—S. 159; 1872—S. 115; 1861—S. 135.]

160. Any police-officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

[1882—S. 160; 1872—S. 118; 1861—S. 144.]

#### Section 158 — Note 1

[1] This section does not apply to police of Calcutta and Bombay. (Vol 27) 1940 Cal 97 (103) : I L R (1940) 1 Cal 231 : 41 Cri L Jour 329 (DB) \* ('88) 15 Cal 595 (606) (FB) \* ('97) 21 Bom 495 (499).

#### Section 159 — Note 1

[1] The holding of an inquiry under this section on a final report under S. 173 after investigation will be without jurisdiction. ('99) 1899 All W N 87 (89) \* (1900) 4 Cal W N 351 (352) (DB) \* ('09) 10 Cri L Jour 424 (426) : 32 All 30 (DB) \* ('04) 1 Cri L Jour 539 (540) : 1904 Upp Bur Rul 1st Qr Cr P C 4.

[2] The Magistrate has no power to proceed against the informant under this section. ('04) 1 Cri L Jour 539 (540) : 1904 Upp Bur Rul 1st Qr. Cr P C 4.

[3] A Magistrate having before him a police-report submitted to him may determine as he thinks fit, either to take no further steps, or to take cognizance of the offence under S. 190 (1) (b) or proceed under S. 203. ('78) 2 Weir 119 (119).

[4] A subordinate Magistrate deputed to investigate a case and to record the evidence of the witnesses for the purposes of a preliminary enquiry has no power to question the accused and record his statement under S. 364. ('98) 2 Cal W N 702 (708) (DB).

[5] Inquiry not held by officer suggested by Magistrate in his order — Submission of charge sheet by investigating police is not illegal. (Vol 22) 1935 Cal 731 (732) : 62 Cal 469 : 37 Cri L Jour 139 (DB).

[6] The expression "preliminary inquiry" is used in a sense different from that in S. 288. (Vol 9) 1922 Mad 40 (41) : 45 Mad 230 : 23 Cri L Jour 680 (DB).

[7] On receipt of the report of a preliminary enquiry, the Magistrate should proceed in the same way as he would deal with a report received from a police-officer. ('03) 30 Cal 923 (926) (DB).

#### SECTION 160 — SYNOPSIS.

1. Scope and object of the section.
2. "Any police-officer making an investigation."
3. "By order in writing."
4. Who can be summoned under this section.
5. Service of order in writing.
6. Production of documents.
7. "Before himself."

8. "Such person shall attend."

9. Effect of disobedience of summons.

10. Power of District Magistrate.

1. Scope and object of the section. — [1] This section aims at securing the attendance of persons who would supply the necessary information in regard to the commission of an offence and who would be examined as witnesses in the enquiry or trial to be held in regard to the said offence. (Vol 16) 1929 Nag 17 (20) : 24 Nag L R 158:30 Cri L Jour 258 (FB) \* ('81) 7 Cal 121 (126) (FB) \* ('84) 7 Mad 274 (275) (FB) \* (1900) 27 Cal 295 (302) (DB).

[2] Any one who is present at the time of investigation, if acquainted with the circumstances of the case, may be examined though not summoned. (Vol 17) 1930 Pat 510 (512) : 9 Pat 577 : 31 Cri L Jour 1123.

[3] This section does not apply to the police in Calcutta. (Vol 27) 1940 Cal 97 (103) : 41 Cri L Jour 329 : I L R (1940) 1 Cal 231 (DB).

2. "Any police-officer making an investigation". — [1] The evidence of a witness called by a Head Constable not making an investigation would not form the basis of a charge under S. 191 or S. 192 of the Penal Code. ('89) 16 Cal 349 (354, 355) (DB) \* ('85) 1885 All W N 43 (44).

3. "By order in writing." — [1] Disobedience of a verbal order to appear before the police officer is not punishable. (Vol 27) 1940 Nag 186 (189) : I L R (1940) Nag. 232 : 41 Cri L Jour 757 \* ('95) 1 Weir 86 (86).

[2] Constable asking a person to accompany him without an order in writing by the investigating officer — Constable cannot be said to act in the discharge of his duty and assault on him is not offence under S. 353 Penal Code. (Vol 5) 1918 Nag 137 (137) : 20 Cri L Jour 48.

[3] Absence of an order in writing though an irregularity will have no effect at all if such irregularity has been waived by the persons ordered to obey the order (Vol 27) 1940 Nag 186 (189) : I L R (1940) Nag 232 : 4 Cri L Jour 757.

4. Who can be summoned under this section — [1] The words "any person" must be given the plain meaning and include a person who may be subsequently accused. (Vol 26) 1939 P C 47 (51) : I L (1939) Kar (P C) 123 : 66 Ind App 66 : 18 Pat 234

161. (1) Any police-officer making an investigation under this Chapter <sup>a</sup> [or any police-officer not below such rank as the <sup>b</sup> [Provincial Government] may, by general or special order, prescribe in this behalf, acting on the requisition of such officer] may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

<sup>c</sup>[(3) The police-officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement, of each such person whose statement he records.]

[1882—S. 161; 1872—Ss. 118, 119 paras. 1, 2, 121; 1861—S. 145.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 35.

[b] Substituted by A. O. for "Local Government." [c] Sub-section (3) was added by the Code of Criminal Procedure (Amendment) Act, 1945 (2 [II] of 1945), S. 2. [29-3-1945.]

#### Objects and Reasons.

"Clause 161. — We have amended this clause by reverting to the law as it stood under the Codes of 1861 and 1872. Under those Codes, a person examined by a police-officer was bound to answer all material questions, but was not liable to be prosecuted for giving false evidence in respect of his answers under S. 193 of the Indian Penal Code (see I L R 7 Cal 121 (F B) and 10 Cal 405). It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength or by the aid of a statement supposed to have been given to a police-officer, but which is not given on oath, which he has not signed, and which he

has had no opportunity of verifying. Such statements may be hurriedly taken down as rough notes, the police-officer is not trained in taking evidence, and the notes are often fairied out by another officer. They bear no resemblance to depositions, and ought to have no weight as such attached to them. We are aware that there are inconveniences in abolishing the direct liability for giving false evidence to the police, but the balance of expediency seems to us to be in favour of the old law. The provisions of Ss. 202 and 203 of the Indian Penal Code appear to us to afford a sufficient safeguard against false information." —S. C. R., 1898.

#### Section 150 — Note 4 (contd.)

1941 Rang L R 789n : 40 Cri L Jour 364 (PC) (Vol 27) 1940 Nag 186 (189) : I L R (1940) Nag 232 : 41 Cri L Jour 757.

[But see ('84) 7 Mad 274 (275) (FB).]

5. Service of order in writing. — [1] Provisions of S. 72, Criminal P. C., do not apply to orders issued by the police-officers investigating under this chapter. (Vol 5) 1918 Mad 815 (816) : 18 Cri L Jour 733.

6. Production of documents. — [1] The police-officer cannot summon a person for the purpose of production of documents. ('02) 4 Bom L R 644 (645) (DB).

7. "Before himself." — [1] A police-officer cannot order a person to appear before a Magistrate so that the Magistrate may record that person's statement under S. 164. ('89) 1889 Rat 463 (469) (DB).

8. "Such person shall attend." — [1] There is no provision of law empowering the police to compel a person to attend if he disobeys an order for attendance. ('02) 4 Bom L R 79 (80) (DB).

[2] District Magistrate cannot issue a warrant for arrest and production before the investigating officer of a person who disobeys an order for attendance. ('97) 24 Cal 320 (323, 324) (DB).

[3] The police officer arresting and detaining a person disobeying an order for attendance may become liable for an offence of wrongful confinement. ('86) 2 Weir 121 (121, 122).

[4] It will not amount to an offence of [wrongful] confinement if the person disobeying an order for attendance is merely taken to the police-station and asked to wait till the Sub-Inspector sees him. (Vol 17) 1930 Oudh 505 (508).

9. Effect of disobedience of summons. — [1] A person can be prosecuted for disobedience of summons if following conditions are fulfilled.

(a) Police officer should be investigating an offence. ('89) 16 Cal 349 (354, 355) (DB) & ('86) 1885 All W N 43 (44).

(b) The order should be in writing. ('95) 1 Weir 36 (86).

[2] A person refusing to attend cannot be convicted under S. 186 of the Penal Code. ('96) 1896 Rat 850 (851) (DB).

[3] Section 177 of the Penal Code will not apply to statements made to the police. ('69) 12 Suth W R Cr 23 (24) (DB).

[4] A refusal to receive a notice or subpoena under this section is not an offence under S. 173 of the Penal Code. (Vol 13) 1926 All 304 (304) : 48 All 224 (Vol 5) 1918 Oudh 412 (412) : 21 Oudh Cas 150 : 19 Cri L Jour 801 (Vol 5) 1918 All 409 (410) : 40 All 577 : 19 Cri L Jour 746.

10. Power of District Magistrate. — [1] District Magistrate cannot interfere (except by way of suggestion and advice) with discretion given to the police-officer to summon a witness. ('78) 1878 Rat 133 (133, 134) (DB).

#### SECTION 161 — SYNOPSIS.

1. Scope and object of the section.
2. "Any police-officer"—Sub-section (1).
3. "May examine orally."
4. Record of statements.
5. Statements—Attestation of.
6. "Any person supposed to be acquainted with the facts and circumstances of the case."
7. "Shall be bound to answer" — Sub-section (2).
8. Refusal to answer.

1. Scope and object of the section. — [1] The examination contemplated by this section is not of a judicial character and need not be in the presence of the accused or his agents. ('06) 4 Cri L Jour 79 (81) : 33 Cal 1023 (DB).

[2] This section does not apply to merely threatened or contemplated offences. (Vol 13) 1926 Mad 521 (522, 523) : 49 Mad 315 (DB).

[3] This section cannot be invoked for detaining a person in police custody without complying with the

162. <sup>a</sup>[(1) No statement made by any person to a police-officer in the course of an investigation

*Statements to Police not to be signed; use of such statements in evidence.*

tion under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that

Section 161 — Note 1 (*contd.*)

provisions of S. 167. (Vol 32) 1945 Nag 8 (17) : I L R (1945) Nag 6 (DB).

2. "Any police-officer" — Sub-section (1). — [1] An inspector of the provincial criminal investigation department is, for the purposes of this section, a police-officer investigating within a local area extending over the whole province. ('12) 13 Cri L Jour 305 (316, 317) : 35 Mad 247 (SB)\*('12) 13 Cri L Jour 352 (362): 35 Mad 397 (FB).

3. "May examine orally." — [1] The mere fact that a witness does not readily come forward immediately after the investigation begins, is no reason to discredit his testimony. (Vol 18) 1931 Lah 529 (530) : 32 Cri L Jour 1032 (DB).

[2] The police-officer should not extract information by using force; such evidence is useless. (Vol 3) 1916 All 360 (360) : 17 Cri L Jour 351.

4. Record of statements. — [1] It is not necessary that the statement should, if recorded, be recorded in the form of questions and answers. It is enough if the statement is an answer to one or more questions put to the witness. ('92) 15 All 11 (13) (DB) \* ('96) 1896 Pun Re No. 7 Cr, p. 18 (19) (DB).

[2] If the police-officer does reduce into writing any statement made under this section, he does so in his official capacity. ('97-01) 1 Upp Bur Rul 29 (30). (Held that he was charged with preparation of document and that was liable to be punished under S. 167, Penal Code.)

5. Statements — Attestation of. — [1] It is not illegal for a police-officer to obtain the signatures of persons present at the time to authenticate his record of such statement as witnesses. ('92) 15 All 11 (14).

6. "Any person supposed to be acquainted with the facts and circumstances of the case." — [1] This section contemplates an examination of the accused also. (Vol 26) 1939 P C 47 (51) : 18 Pat 234 : I L R (1939) Kar (P C) 123 : 66 Ind App 66 : 1941 Rang L R 789n : 40 Cri L Jour 364 (PC)\* (Vol 19) 1932 Mad 391 (399, 401) : 55 Mad 903 : 33 Cri L Jour 418 (FB)\* (Vol 27) 1940 Nag 186 (189) : I L R (1940) Nag 232 : 41 Cri L Jour 757.

[2] The police having sufficient evidence to arrest a person examined and then arrested him instead of immediate arrest — It was held that this course was improper. (1900) 27 Cal 295 (297, 302) (DB).

[3] A police-officer is not authorized to summon a person and ask him his opinion as a "jury man." If asked, that person is not bound to answer. ('75) 1875 Rat 92 (92) (DB).

[4] A person cannot be summoned and asked to examine the hands of any other person to see if there are marks showing that the hands were tied with rope. ('75) 1875 Rat 92 (92) (DB).

[5] A person who was surety for accused whose appeal was pending cannot be examined as to the whereabouts of the accused who absconded after the dismissal of the appeal. ('85) 1885 All W N 43 (44).

7. "Shall be bound to answer" — Sub-section (2). — [1] The words "shall be bound to answer all the

questions" does not constitute an express provision of law to state the truth. ('81) 7 Cal 121 (126) (FB)\* (1900) 25 Mad 544n (546n) (DB) \* ('13) 14 Cri L Jour 302 (202) : 6 Sind L R 277 (DB)\* (Vol 4) 1917 Low Bur 12 (14) : 18 Cri L Jour 844.

[2] A person making a false statement in answer to questions under this section cannot be convicted for an offence under Ss. 193, 203, 211 or 177 of the Penal Code. ('08) 7 Cri L Jour 3 (4) (Al). (S. 193) \* (Vol 4) 1917 Low Bur 82 (82) : 18 Cri L Jour 98. (Obiter dictum)\* (Vol 20) 1933 Rang 119 (119) : 34 Cri L Jour 781\* ('10) 11 Cri L Jour 438 (438) (Al). (S. 203)\* (Vol 7) 1920 Upp Bur 20 (21) : 3 U.B.R. 204 : 21 Cri L Jour 700\* ('09) 9 Cri L Jour 170 (177) : 32 Mad 258 (FB). (S. 211)\* (Vol 19) 1932 Mad 24 (24) : 33 Cri L Jour 173 \* (Vol 22) 1935 Rang 97 (98) : 37 Cri L Jour 9. (S. 177.)

[3] A person giving a false answer to a question under this section can be prosecuted under S. 182 of the Penal Code. (Vol 20) 1933 Pat 555 (555) : 34 Cri L Jour 1216\* (Vol 16) 1929 Pat 4 (7) : 7 Pat 715 : 30 Cri L Jour 177 (SB)\* ('77) 1877 Rat 124 (126) (DB) \* (Vol 23) 1936 Sind 94 (97) : 30 Sind L R 75 : 37 Cri L Jour 870 (DB).

[But see (Vol 1) 1914 Lah 360 (360) : 15 Cri L Jour 650 \* (Vol 22) 1935 Rang 97 (98) : 37 Cri L Jour 9\* (Vol 12) 1925 Rang 364 (366) : 3 Rang 577 : 26 Cri L Jour 1532 \* (Vol 24) 1937 Rang 232 (233) : 38 Cri L Jour 980. (Except in very very exceptional circumstances such person cannot be prosecuted.)]

8. Refusal to answer. — [1] A refusal to answer questions under this section is not an offence under S. 176 or S. 187 of the Penal Code. (1900) 23 Mad 544 (546) (DB)\* ('08) 9 Cri L Jour 105 (106) : 1908 Pun Re No. 27 Cr (DB) \* (Vol 18) 1931 Rang 26 (27) : 8 Rang 511 : 32 Cri L Jour 201. (S. 179.)

## SECTION 162 — SYNOPSIS.

1. Scope and object.
2. "Statement," meaning of.
3. "Statement made to a police-officer."
4. Statements made by an accused to a police-officer.
5. Effect of this section on S. 27, Evidence Act.
6. Effect of this section on S. 8, Evidence Act.
7. Statements of approvers to the police.
8. "In the course of an investigation under this Chapter."
9. "If reduced into writing."
10. Statement not to be signed.
11. Proviso — Limited use of previous statements.
12. "Nor shall any such statement or any record thereof. . ."
13. "At any inquiry or trial in respect of any offence under investigation at the time when such statement was made."
14. Application for copies — When to be made.
15. Duty of Court to grant copies.
16. "On the request of the accused."
17. Contradicting witness under the section—Procedure.
18. Re-examination.

any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination :

Provided, further that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.]

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872, or to affect the provisions of section 27 of that Act].

[1882—S. 162; 1872—Ss. 119 para. 3, 121; 1861—Ss. 145, 147.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (13 [XVIII] of 1923), S. 34, for the original sub-s. (1). [b] Added, *ibid.*, (Second Amendment) Act, 1941 (15 [XV] of 1941), S. 2. [26-11-1941.]

#### Objects and Reasons.

"We discussed the provisions of the proposed new section 162 at length and considered in detail the opinions received in connection with it. We recognise the force of some of the criticisms directed against the section, but we do not think that power should be given to contradict by means of police diaries a prosecution witness who has turned hostile, and still less should power be given in respect of a defence witness. We have, therefore, left the clause (i. e. clause 35) unaltered."

—S. C. R., (XVIII of 1923.)

Amendment made in 1941.—"Before the decision of the Privy Council in (Vol. 26) 1939 P. C. 47 (which

suggested the possibility — without deciding the question — that the words of section 162 might *pro tanto* repeal the provisions of section 27 of the Indian Evidence Act (1872), it was regarded as settled law that statements made to a police-officer in the circumstances provided for by section 27 of the Evidence Act, 1872, were admissible and were not shut out by the operation of section 162 of the Code of Criminal Procedure. The Indian High Courts subsequently displayed a division of opinion on this point. The amendment of section 132 of the Code by Act XV of 1941 has set the matter at rest."

—See S. C. R., 1941.

#### Provincial Amendment.

Before the amendment of sub-section (2) by Act XV of 1941, that sub-section had already been amended to the same effect by the following Provincial Acts :

1. Bombay Act XII of 1941 (19-6-1941).
2. N.-W. F. P. Act VIII of 1940.

3. Punjab Act XI of 1940 (19-6-1940).
4. U. P. Act IX of 1940 (7-9-1940).

#### SECTION 162 — SYNOPSIS (*contd.*)

19. "Whether in a police-diary or otherwise."
20. Effect of admitting in evidence statements in-admissible under this section.
21. Effect of refusal to grant copies to accused under this section.
22. Failure to observe provisions of this section.
23. "Dying declarations."

1. Scope and object. — [1] No statement made by any person to a police officer in the course of an investigation under this chapter shall be used for any purpose except by the accused, and for the purpose of contradicting the witness as provided by S. 145, Evidence Act. (Vol 31) 1944 F C 38 (39) : 1944 F C R 223 : 46 Cri L Jour 317 : 1 L R (1944) Kar (FC) 158 (FC) & ('02) 1902 Pan L R No. 27, p. 127 (127) (D B) & (Vol 13) 1926 Pat 20 (22) : 27 Cri L Jour 362 (DB) & (Vol 22) 1935 All 717 (719) : 36 Cri L Jour 773 (DB) & (Vol 21) 1934 Nag 198 (198) : 35 Cri L Jour 1463.

[2] The statement must be made to a police-officer in the course of an investigation under Chap. XIV. (Vol 29) 1942 Cal 593 (596) : 1 L R (1942) 1 Cal 436 : 44 Cri L Jour 145 (DB).

[3] The effect of this section is to limit, considerably, the provisions of the Evidence Act in regard to the matters covered by it. (Vol 20) 1933 Pat 589 (592, 593) : 35 Cri L Jour 379 (DB) & (Vol 13) 1926 Rang 116 (121) : 4 Rang 72 : 27 Cri L Jour 881 (FB) & (Vol 13) 1926 Pat 232 (236, 237) : 5 Pat 63 : 27 Cri L Jour 484 (DB) & ('10) 11 Cri L Jour 117 (117, 119) : 13 Oudh Cas 7 (DB) & (Vol 12) 1925 Lah 399 (400) : 6 Lah

171 : 27 Cri L Jour 438 (DB) & (Vol 14) 1927 Cal 372 (372) : 28 Cri L Jour 446 (DB) & (Vol 14) 1927 Cal 17 (19) : 54 Cal 237 : 28 Cri L Jour 99 (DB) & ('07) 6 Cri L Jour 164 (187) : 32 Bom 111 (FB) & (Vol 31) 1944 Mad 385 (386) : 46 Cri L Jour 294 : 1 L R (1944) Mad 897 (DB) & ('81) 7 Cal 121 (126) (FB) & (Vol 20) 1933 Mad 372 (372) : 56 Mad 475 : 34 Cri L Jour 582.

[See also ('10) 11 Cri L Jour 235 (238) (All).]

[4] The section protects persons from being pinned down to statements recorded by the police. (Vol 6) 1919 Mad 487 (498) : 20 Cri L Jour 354 (DB) & (Vol 6) 1919 Upp Bur 38 (39) : 3 Upp Bur Rul 84 : 19 Cri L Jour 726 (DB) & (Vol 27) 1940 All 291 (299) : 41 Cri L Jour 647 (DB) & (Vol 32) 1945 Nag 1 (5) : 1 L R (1945) Nag 151 : 46 Cri L Jour 448 (DB) & ('36) 37 Cri L Jour 1117 (1118) (Cal) & (Vol 31) 1944 Pat 67 (70) : 45 Cri L Jour 624 : 22 Pat 681 (DB) & (Vol 26) 1939 P C 47 (51) : 40 Cri L Jour 364 : 18 Pat 234 : 1 L R (1939) Kar (P C) 128 : 1941 Rang L R 789n : 66 Ind App 66 (PC).

[5] The section applies only to a statement and if what is recorded does not amount to a statement of a witness, the accused is not entitled to a copy thereof. (Vol 22) 1935 Sind 145 (175, 176) : 28 Sind L R 397 : 36 Cri L Jour 1161 (DB).

[6] Evidence of conduct of a witness is not shut out by this section. (Vol 27) 1940 Sind 168 (170, 172) : 41 Cri L Jour 924 : 1 L R (1940) Kar 487 (DB).

2. "Statement" — Meaning of.—[1] "Statement" includes both oral and written statements. (Vol 25) 1938 Mad 893 (894) : 40 Cri L Jour 108 & (Vol 15) 1928 Mad 1028 (1032) : 51 Mad 987 : 29 Cri L Jour 1098 (F B). ((Vol 12) 1925 Mad 579 : 48 Mad 640 : 26 Cri L

Section 162—Note 2 (*contd.*)

Jour 721, Overruled. (Vol 22) 1935 Sind 145 (172) : 23 Sind L R 397 : 38 Cri L Jour 1161 (D B).

[2] "Statement" will include signs and gestures. (Vol 30) 1943 Cal 644 (646) : 45 Cri L Jour 258 (D B) (Vol 13) 1926 Rang 112 (113) : 27 Cri L Jour 658.

[3] A list of stolen properties supplied to police during investigation is a "statement" within this section. (Vol 16) 1929 Cal 448 (448) : 31 Cri L Jour 127 (DB) (Vol 12) 1925 Cal 959 (960) : 26 Cri L Jour 579 (DB) (Vol 19) 1932 Lah 488 (489) : 34 Cri L Jour 379 (DB) (Vol 12) 13 Cri L Jour 244 (245) (DB) (Mad).

[But see (Vol 30) 1943 All 216 (217) : 44 Cri L Jour 555.]

[4] Memorandum of facts occurring at scene of occurrence prepared by witness and handed over to investigating officer—Memorandum cannot be used by witness to refresh memory. (Vol 33) 1946 Cal 483 (487) : 47 Cri L Jour 564 (D B).

[5] The word "statement" does not include record of a search made by police. See (Vol 12) 1925 Mad 574 (576) : 26 Cri L Jour 840 (D B).

[See however (Vol 30) 1943 Cal 644 (645, 646) : 45 Cri L Jour 258 (DB).]

[6] "Statement" does not include signatures taken on blank paper for the purpose of comparison. (Vol 19) 1932 Bom 406 (409) : 36 Bom 304 : 33 Cri L Jour 666.

[7] Investigation with regard to charge of conspiracy to defraud Government, by misappropriating various sums—Complaints made by various persons to investigating officer, as to fresh instances of embezzlement, are not 'statements' coming under this section. (Vol 32) 1945 Mad 284 (286) : 47 Cri L Jour 149 : I L R (1946) Mad 219 (D B).

[8] Evidence of identification amounts to a statement within this section and, therefore, the fact of such identification is not admissible in evidence in the usual course. (Vol 27) 1940 Cal 182 (183) : I L R (1939) 2 Cal 569 : 41 Cri L Jour 405 (D B) (Vol 22) 1935 Cal 311 (311, 312) : 62 Cal 918 : 36 Cri L Jour 1470 (D B) (Vol 30) 1943 Cal 644 (645) : 45 Cri L Jour 258 (D B) (Vol 27) 1940 Sind 168 (170, 172) : I L R (1940) Kar 487 : 41 Cri L Jour 924 (DB).

[But see (Vol 28) 1941 Mad 675 (676) : 42 Cri L Jour 848 (DB) (Vol 36) 1936 Mad W N 177 (179) (D B) (Vol 16) 1929 Nag 36 (38) : 29 Cri L Jour 963 (Vol 26) 1939 Cal 176 (176) : 40 Cri L Jour 240 (DB) (Vol 7) 1920 Pat 334 (343) : 21 Cri L Jour 257 (DB).]

[9] A mediator's report containing the record of the proceedings at an identification parade is not admissible in evidence. (Vol 28) 1941 Mad 675 (676) : 42 Cri L Jour 848 (D B).

[10] A witness may say in the Court what he saw or did during police investigation. (Vol 27) 1940 Sind 168 (171, 172) : 41 Cri L Jour 924 : I L R (1940) Kar 487 (D B).

[11] A statement of a police-officer recorded by himself in his diary at the scene of occurrence, is not a statement coming under this section. (Vol 31) 1944 Cal 243 (243) : I L R (1944) 1 Cal 133 : 46 Cri L Jour 28 (DB) (Vol 36) 1936 Mad W N 177 (179) (DB).

3. "Statement made to a police-officer."—[1] This section applies only to a statement made to a police-officer. (Vol 31) 1944 Cal 243 (243) : I L R (1944) 1 Cal 133 : 46 Cri L Jour 28 (DB) (Vol 26) 1939 P C 47 (52) : 40 Cri L Jour 364 : 18 Pat 234 : I L R (1939) Kar (P C) 123 : 66 Ind App 66 : 1941 Rang L R 789 (P C).

[2] A statement made to a third person in the presence of a police-officer is not within this section. (Vol 31) 1944 Sind 38 (43) : 45 Cri L Jour 393 : I L R (1944) Kar 86 (DB) (Vol 31) 1944 Pat 67 (70) : 45 Cri L Jour 624 : 22 Pat 681 (DB).

[3] A statement made to a person, assisting the police in the investigation of a case, does not come within this section. (Vol 27) 1940 Lah 129 (147) : I L R (1940) Lah 242 : 41 Cri L Jour 591 (FB).

[4] Special officer empowered by Madras Government under S. 12 (3) of Hoarding and Profiteering Prevention Ordinance is a police-officer within S. 162. (Vol 33) 1946 Mad 430 (430, 431) : 47 Cri L Jour 865 (DB).

4. Statements made by an accused to a police-officer.—[1] Where a statement to a police-officer is a confession by an accused person, it is, independent of this section, inadmissible in evidence against the accused under S. 25 of the Evidence Act. (Vol 16) 1929 All 855 (856) : 30 Cri L Jour 867 (DB) (Vol 10) 1923 Bom 65 (65, 66) : 46 Bom 961 : 24 Cri L Jour 870 (Vol 19) 1932 Mad 24 (24) : 33 Cri L Jour 173 (Vol 1) 1914 Oudh 32 (33) : 15 Cri L Jour 474 (DB) (Vol 4) 1917 Low Bur 112 (112) : 17 Cri L Jour 512 (Vol 12) 13 Cri L Jour 465 (465, 466) (Low Bur.) (Vol 17) 1930 Sind 305 (307, 308) : 32 Cri L Jour 173 (Vol 20) 1933 Cal 146 (147) : 34 Cri L Jour 638 (DB) (Vol 15) 1928 All 25 (29) : 29 Cri L Jour 26 (DB) (Vol 77) 2 Bom 61 (64) (DB) (Vol 20) 1933 Cal 308 (310) : 34 Cri L Jour 530 (DB) (Vol 20) 1933 Lah 167 (167) : 34 Cri L Jour 1175 (Vol 21) 1934 Oudh 19 (20) : 35 Cri L Jour 664 (DB) (Vol 21) 1934 Lah 695 (695) : 36 Cri L Jour 697 (Vol 29) 1942 Rang 62 (63) : 1941 Rang L R 784 (Vol 28) 1941 Mad 101 (102) : 42 Cri L Jour 308 : I L R (1941) Mad 81 (DB) (Vol 27) 1940 Nag 186 (189) : 41 Cri L Jour 757 : I L R (1940) Nag 232.

[2] A statement to a police-officer by an accused person, not amounting to a confession, is inadmissible in evidence under the provisions of this section. (Vol 19) 1932 Mad 391 (398) : 55 Mad 903 : 33 Cri L Jour 418 (FB) (Vol 26) 1939 P C 47 (51) : 40 Cri L Jour 364 : 18 Pat 234 : I L R (1939) Kar (P C) 123 : 66 Ind App 66 : 1941 Rang L R 789 (P C) (Vol 32) 1945 Cal 137 (140) : 46 Cri L Jour 580 : I L R (1944) 2 Cal 76 (DB).

5. Effect of this section on S. 27, Evidence Act.—[1] The effect of the amendment of sub-s. (2) in 1941 by the addition of words to the effect that this section shall not affect the provisions of S. 27 of the Evidence Act is that, statements, which come under both these sections, may be proved as against the person making it. (Vol 32) 1945 Cal 137 (141) : 46 Cri L Jour 580 : I L R (1944) 2 Cal 76 (DB) (Vol 33) 1946 Nag 120 (125) : I L R (1945) Nag 931 : 47 Cri L Jour 441 (DB).

[2] A record of a confession leading to the discovery of stolen properties would be admissible in evidence to the extent specified in S. 27 of the Evidence Act. (Vol 30) 1943 Mad 710 (710) : I L R (1944) Mad 224 : 45 Cri L Jour 171.

6. Effect of this section on S. 8, Evidence Act.—[1] It has been held in the following cases that a statement made to a police-officer in the course of the investigation, may be admitted in evidence under S. 8, Evidence Act if such statement accompanies and explains conduct, which conduct is relevant under S. 8. (Vol 19) 1932 Mad 391 (406) : 55 Mad 903 : 33 Cri L Jour 418 (FB) (Vol 22) 1935 Mad 479 (482) : 36 Cri L Jour 1107 (DB).

[2] The following case holds that the prohibition contained in this section extends even to statements which are admissible as evidence of conduct. (Vol 30) 1943 Mad 527 (528) : 44 Cri L Jour 766.

[3] Conduct of the accused in disclosing the places where certain articles were concealed and producing such articles is admissible under S. 8, Evidence Act. (Vol 33) 1946 Nag 120 (125) : I L R (1945) Nag 931 : 47 Cri L Jour 441 (DB).

7. Statements of approvers to the police.—[1] A statement by an approver to a police-officer in the

**Section 162 — Note 7 (contd.)**

course of an investigation comes within the provisions of this section. (Vol 11) 1924 All 207 (208) : 25 Cri L Jour 490 \* ('74) 11 Bom H C R 196 (197) \* (Vol 12) 1925 Cal 161 (163) : 26 Cri L Jour 307 (DB) \* (Vol 15) 1928 Lah 257 (257) : 9 Lah 389 : 29 Cri L Jour 348 (DB) \* (Vol 17) 1930 Pat 510 (512) : 9 Pat 577 : 31 Cri L Jour 1123 \* (Vol 21) 1934 Lah 102 (103) : 35 Cri L Jour 517.

8. "In the course of an investigation under this chapter."—[1] It is only a statement made in the course of an investigation that is prohibited from being used in evidence. (Vol 26) 1939 P C 47 (52) : 40 Cri L Jour 864 : 18 Pat 234 : I L R (1939) Kar (P C) 123 : 66 Ind App 66 : 1941 Rang L R 787n (PC) \* (Vol 26) 1939 Cal 330 (330) : 40 Cri L Jour 665 (DB) \* (Vol 26) 1939 Mad 780 (780) : 40 Cri L Jour 922 (DB) \* (Vol 24) 1937 Cal 309 (311) : I L R (1937) 2 Cal 308 : 38 Cri L Jour 1067 (DB).

[2] A statement made to a police-officer before the investigation began or after the investigation has ended does not fall within this section. (Vol 23) 1936 Rang 455 (456) : 37 Cri L Jour 1137 (DB) \* (Vol 22) 1935 Pesh 165 (168) : 37 Cri L Jour 225 (DB) \* (Vol 13) 1926 Rang 116 (119) : 4 Rang 72 : 27 Cri L Jour 881 (FB) \* (Vol 29) 1942 Oudh 60 (68) : 43 Cri L Jour 115 \* (Vol 26) 1939 Mad 66 (69) : 40 Cri L Jour 308 (DB) \* (Vol 23) 1936 Pat 11 (12) : 37 Cri L Jour 235 (DB) \* (Vol 20) 1933 Lah 987 (990) : 35 Cri L Jour 654 (DB) \* (Vol 20) 1933 Bom 266 (269) : 57 Bom 400 : 34 Cri L Jour 870 (DB) \* (Vol 16) 1929 Pat 4 (5, 7, 9) : 7 Pat 715 : 30 Cri L Jour 177 (DB) \* (Vol 18) 1931 Oudh 83 (83) : 32 Cri L Jour 630 : 6 Luak 582 (DB) \* (Vol 15) 1928 Mad 791 (792) : 29 Cri L Jour 717 (DB) \* (Vol 10) 1923 Lah 315 (316) : 25 Cri L Jour 5 (DB) \* (Vol 18) 1931 Cal 745 (750) : 58 Cal 1312 : 33 Cri L Jour 138 (DB) \* (Vol 17) 1930 Cal 130 (131) : 31 Cri L Jour 771 (DB).

[See (Vol 27) 1940 All 291 (299) : 41 Cri L Jour 647 (DB).]

[See however (Vol 25) 1938 Lah 787 (789) : 40 Cri L Jour 435 (DB).]

[3] Statement made to a police-officer while acting under S. 174 is one in the course of investigation and is inadmissible under this section. (Vol 14) 1927 Mad 512 (512) : 40 Mad 750 : 28 Cri L Jour 463 \* (Vol 23) 1936 Lah 341 (344) : 37 Cri L Jour 504 : 16 Lah 345 (DB).

[See also (Vol 20) 1933 All 665 (665) : 55 All 979 : 34 Cri L Jour 1215.]

[But see (Vol 20) 1933 Cal 861 (863) : 35 Cri L Jour 530 (DB).]

[4] The statement must be made as a step in a pending investigation to be used in that investigation. (Vol 27) 1940 All 291 (300) : 41 Cri L Jour 647 (DB).

[5] The question whether a statement was recorded in the course of an investigation or not is a question of fact. (Vol 29) 1942 Oudh 60 (68) : 43 Cri L Jour 115 (DB) \* (Vol 26) 1939 Mad 66 (68) : 40 Cri L Jour 308 (DB) \* (Vol 28) 1941 Oudh 359 (365) : 42 Cri L Jour 589 (DB) \* (Vol 29) 1942 Cal 593 (597) : 44 Cri L Jour 145 : I L R (1942) 1 Cal 436 (DB). (Officer-in-charge of police-station, being the first informant, arresting accused and taking his statement—Formal first information report recorded later on—*Held*, statement was made during course of investigation.) \* (Vol 28) 1941 Rang 309 (212) : 1941 Rang L R 346 : 43 Cri L Jour 157 (DB). (Telephone message recorded as first information report—Subsequent statement is one made in course of investigation.) \* (Vol 32) 1945 Mad 284 (286) : 47 Cri L Jour 149 : I L R (1946) Mad 219 (DB). (Investigation into offence of conspiracy to defraud Government by misappropriating various sums—Complaints regarding fresh embezzlements preferred during investigation, are

admissible in evidence to show how fresh instances of embezzlement came to be investigated.) \* (Vol 32) 1945 Cal 159 (166) : 46 Cri L Jour 692 (DB). (Where the investigating officer records a statement, a so-called first information, but the true first information is recorded earlier on the same day, the later information cannot be used for any purpose at the trial under the provisions of S. 162.) \* (Vol 33) 1946 Cal 483 (487) : 47 Cri L Jour 564 (DB). (Order of Magistrate for investigation obtained in anticipation of offence under S. 161, Penal Code—Statement made by witness to investigating officer, after commission of offence, must be held to be one under S. 162, Criminal P. C.)

[6] Statements made to an officer of the criminal investigation department, who is investigating an offence, of which he has received information, are statements made in the course of an investigation. (Vol 25) 1938 Mad 893 (894) : 40 Cri L Jour 108. (Following 35 Mad 247.)

[7] The statement of an accused person at the time of his arrest comes within the purview of this section where the arrest is made in the course of the investigation. (Vol 22) 1935 Mad 479 (482) : 36 Cri L Jour 1107 (DB).

[8] Where the investigation is not under this chapter this section will not apply. (Vol 29) 1942 Bom 71 (75) : I L R (1942) Bom 384 : 43 Cri L Jour 529 (FB) \* (Vol 17) 1930 Bom 158 (159) : 54 Bom 528 : 31 Cri L Jour 1003 \* (Vol 27) 1940 Cal 167 (168) : I L R (1939) 2 Cal 429 : 41 Cri L Jour 408 \* (Vol 13) 1926 Cal 586 (588) : 53 Cal 650 : 27 Cri L Jour 602 (DB) \* (Vol 21) 1934 Cal 616 (617) : 61 Cal 967 : 35 Cri L Jour 1178 (DB) \* (Vol 20) 1933 Mad 688 (689) : 56 Mad 987 : 34 Cri L Jour 951.

[See (Vol 29) 1942 Sind 122 (127) : 44 Cri L Jour 367 : I L R (1942) Kar 252 (DB).]

[But see ('69) 11 Suth W R Cr 35 (35) (DB).]

[9] An investigation by an officer-in-charge of a police-station into an offence under S. 9 (a) of the Opium Act is an investigation under this chapter. (Vol 29) 1942 Cal 593 (597) : I L R (1942) 1 Cal 436 : 44 Cri L Jour 145 (DB).

[10] A departmental inquiry is not an investigation under this chapter. (Vol 29) 1942 Oudh 163 (167) : 43 Cri L Jour 139 \* (Vol 1) 1914 Cal 396 (406) : 40 Cal 898 (SB) \* (Vol 7) 1920 Lah 349 (350) : 1 Lah 410 : 21 Cri L Jour 518 \* (Vol 14) 1927 Bom 501 (504, 505, 509) : 28 Cri L Jour 1012 (DB) \* (Vol 22) 1935 Sind 13 (14) : 36 Cri L Jour 581 : 29 Sind L R 92 (FB).

[See (Vol 6) 1919 Mad 487 (492) : 20 Cri L Jour 354 (DB).]

[See also (Vol 31) 1944 Pat 67 (70) : 45 Cri L Jour 624 : 22 Pat 681 (DB).]

9. "If reduced into writing."—[1] A police-officer, to whom a statement is made by any person in the course of investigation, is not bound to reduce such statement into writing. (Vol 32) 1945 Nag 1 (4) : 46 Cri L Jour 448 : I L R (1945) Nag 151 (DB) \* (Vol 31) 1944 Nag 318 (319) : I L R (1945) Nag 486 : 46 Cri L Jour 195 \* (Vol 8) 1921 Sind 16 (17) : 18 Sind L R 342 : 26 Cri L Jour 1137 (D B) \* (Vol 15) 1923 Bom 352 (361) : 52 Bom 832 : 30 Cri L Jour 278 (F B).

[2] Police-officer not correctly recording a statement may become liable to be punished under Ss. 167 and 218, Penal Code. (Vol 15) 1928 Bom 352 (361) : 52 Bom 832 : 30 Cri L Jour 278 (F B).

[See (Vol 20) 1933 P C 124 (132) : 34 Cri L Jour 322 (P C).]

[3] The paper on which statements are taken should be attached to the police-diary which should contain a narrative of events. (Vol 32) 1945 Nag 1 (4) : 46 Cri L Jour 448 : I L R (1945) Nag 151 (D B) \* (Vol 11) 1924 Nag 33 (33) : 25 Cri L Jour 141 (DB).



Section 162 — Note 9 (*contd.*)

[4] Police officers charged with the duty of investigating crimes should not be in a position to take statements of witnesses, extract as much as they think is relevant or important for entry in their diaries and then destroy the original statement. (Vol 32) 1945 Nag 1 (4) : 46 Cri L Jour 448 : I L R (1945) Nag 151 (D B) & (Vol 16) 1929 Rang 87 (88) : 6 Rang 672 : 30 Cri L Jour 538.

[5] The police officer need not take down the statement in direct form, or in the very words used by the witnesses. (Vol 20) 1933 Nag 4 (4, 5) : 28 Nag L R 291 : 34 Cri L Jour 127.

[6] Only gist or memorandum of what the witness said taken down — It is a "statement" within this section. (Vol 22) 1935 Sind 145 (172) : 28 Sind L R 397 : 36 Cri L Jour 1161 (D B) & (Vol 31) 1944 Mad 385 (386) : 46 Cri L Jour 294 : I L R (1944) Mad 897 (DB) & (Vol 30) 1943 Cal 644 (645, 646) : 45 Cri L Jour 358 (DB) & (Vol 14) 1927 Cal 644 (646) : 28 Cri L Jour 805 (DB) & (Vol 20) 1933 Pat 589 (593) : 35 Cri L Jour 379 (D B) & (Vol 18) 1931 All 262 (262, 263) : 53 All 458 : 32 Cri L Jour 562 & (Vol 22) 1935 Sind 145 (172) : 28 Sind L R 397 : 36 Cri L Jour 1161.

[7] Statements in the form, "A supported B" or "A corroborated B". There ought to be a clear indication of the substance of the statement of A which the recording officer regards as supporting or corroborating B. (Vol 32) 1945 Pat 109 (112, 113) : 23 Pat 656 : 46 Cri L Jour 513 (DB).

[8] Statements of two or more witnesses taken down by police-officer jointly — Accused is not entitled to copies of the "statements". (Vol 32) 1945 Cal 159 (167) : 46 Cri L Jour 692 (DB) & (Vol 24) 1937 Oudh 201 (203, 204) : 38 Cri L Jour 165 (D B) & (Vol 17) 1930 Lah 457 (458, 459) : 31 Cri L Jour 444 (D B) & (Vol 19) 1932 Cal 375 (377) : 33 Cri L Jour 725 (DB).

[9] Police-officer examines a witness S and takes down his statement—Then he examines A who repeats the same story — The police-officer states "A corroborates S"—Accused is entitled to copies of statements of S and A and can use them as contemplated by the section. (Vol 14) 1927 Pat 325 (326) : 28 Cri L Jour 597 & (Vol 20) 1933 Cal 861 (863) : 35 Cri L Jour 530 (DB).

[10] A map prepared by police-officer containing statements of witnesses is within the section. (Vol 31) 1944 Cal 339 (346, 364) : 45 Cri L Jour 771 : I L R (1944) 2 Cal 405 (D B) & (Vol 13) 1926 Cal 550 (551) : 27 Cri L Jour 222 (DB).

10. Statement not to be signed.—[1] The Police-officer to whom the statement is made in the course of investigation should not require the witness to sign such statement. ('87) 11 Bom 659 (661) (D B) & (Vol 5) 1918 Mad 731 (732, 733) : 19 Cri L Jour 38 (DB).

[See also (Vol 27) 1940 Oudh 209 (210) : 15 Luck 429 : 42 Cri L Jour 483 & (Vol 18) 1931 Oudh 172 (175) : 32 Cri L Jour 860 : 6 Luck 668 & (Vol 21) 1934 Sind 78 (83) : 35 Cri L Jour 1170 (D B) & ('39) 40 Cri L Jour 19 (20) : 14 Luck 302.]

[2] Statement made during investigation signed by person making it—It does not thereby become an information under S. 154. (Vol 12) 1925 Mad 106 (109, 112) : 25 Cri L Jour 401 (DB).

[3] Witness who had signed a statement to the police denied his signature at the trial. He was sought to be prosecuted under S. 193, Penal Code — Held that procedure contravened policy of Ss. 161 and 162 of the Code. ('13) 14 Cri L Jour 302 (302) : 6 Sind L R 277 (D B).

[4] Statement made to police officer signed by person making it — Trial is not vitiated if accused is not prejudiced thereby. (Vol 33) 1946 Nag 173 (182) : I L R (1946) Nag 126 : 47 Cri L Jour 85 (DB).

11. Proviso — Limited use of previous statements.—[1] In order that the proviso might apply it is essential that :

(a) The witness must have been called for the prosecution.

(b) The person who uses it, is the accused;

(c) The statement is used for the purpose of contradicting such witness under S. 145 of the Evidence Act.

(d) The statement of the witness in question, must have been reduced into writing; and the written statement must be proved. (Vol 25) 1938 All 571 (573) : 40 Cri L Jour 4 (DB) & (Vol 24) 1937 Bom 60 (62) : 38 Cri L Jour 327 (DB).

[2] If the conditions laid down in the proviso are not fulfilled, a statement made to the police in the course of investigation cannot be proved even though the person who made the statement is dead, unless the statement comes within S. 32, clause (1) of the Evidence Act. ('38) 40 Pun L R 421 (421, 422).

[3] Witness called by defence—His previous statement cannot be used either by prosecution or by defence for the purpose of contradicting or corroborating him under the provisions of Evidence Act. (Vol 23) 1936 Bom 154 (160) : 60 Bom 148 : 37 Cri L Jour 688 (DB) & ('92) 15 All 25 (27) & (1900) 1900 Pun Re No. 18 Cr, p. 42 (42) (DB) & (Vol 13) 1926 Lah 367 (368) : 7 Lah 264 : 27 Cri L Jour 803 (DB) & (Vol 5) 1918 Upp Bur 16 (16) : 3 Upp Bur Rul 81 : 19 Cri L Jour 715 & (Vol 6) 1919 Upp Bur 38 (38) : 3 Upp Bur Rul 84 : 19 Cri L Jour 726 & (Vol 17) 1930 Oudh 60 (62) : 4 Luck 726 : 31 Cri L Jour 689 (DB) & (Vol 12) 1925 Oudh 1 (8) : 27 Oudh Cas 40 : 25 Cri L Jour 49 & (Vol 13) 1926 Cal 550 (551) : 27 Cri L Jour 222 (DB).

[4] Witness called by Court, and not by prosecution — A previous statement made by him to the police cannot be used either by prosecution or by accused for any purpose. (Vol 14) 1927 Lah 713 (714) : 28 Cri L Jour 828.

[See also (Vol 14) 1927 Cal 372 (372) : 28 Cri L Jour 446 (D B).]

[But see (Vol 5) 1918 Pat 459 (460) : 3 Pat L Jour 568 : 19 Cri L Jour 512 (DB).]

[5] Person neither called for prosecution nor for defence—His statement to police cannot be made use of in any manner. (Vol 17) 1930 Lah 313 (320) : 10 Lah 794 : 31 Cri L Jour 343.

[6] In the following case it was held, that where a statement made by a deceased person was admitted under S. 32, clause (3) of the Evidence Act, it could be contradicted under S. 153 of that act by a statement made by him to the police. (Vol 13) 1926 Lah 122 (124) : 26 Cri L Jour 1425 (DB).

[7] Only accused can claim to use previous statement of a prosecution witness for the purpose specified in the proviso. (Vol 32) 1945 Nag 1 (5) : 46 Cri L Jour 448 : I L R (1945) Nag 151 (D B) & (Vol 25) 1938 All 571 (573) : 40 Cri L Jour 4 & (Vol 18) 1931 Cal 622 (625) : 32 Cri L Jour 1245 (DB) & (Vol 14) 1927 Cal 17 (19) : 54 Cal 237 : 28 Cri L Jour 99 (DB).

[8] The prosecution cannot use it against the accused. (Vol 28) 1941 Lah 471 (478) : 43 Cri L Jour 268 (D B) & (Vol 13) 1926 Cal 320 (321) : 27 Cri L Jour 263 (DB) & (Vol 19) 1932 Oudh 247 (248) : 33 Cri L Jour 566 (DB) & (Vol 17) 1930 All 746 (749) : 32 Cri L Jour 152 (DB) & (Vol 2) 1915 All 144 (145) : 16 Cri L Jour 281 & ('98) 22 Bom 596 (601) (D B) & (Vol 27) 1940 Pat 605 (607) : 41 Cri L Jour 587 (DB) & (Vol 13) 1926 Cal 793 (794) : 27 Cri L Jour 641 (D B) & (Vol 12) 1925 Lah 399 (399) : 6 Lah 171 : 27 Cri L Jour 438 (DB) & (Vol 20) 1933 Pat 488 (492) : 34 Cri L Jour 892 & (Vol 20) 1933 Nag 384 (385) : 30 Nag L R 55 : 35 Cri L Jour 577.

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[But see (36) 27 Cri L Jour 1117 (1118) (D B) (Cal) \* (Vol 5) 1913 Pat 459 (459) : 3 Pat L Jour 568 : 19 Cri L Jour 512 (DB).]

[9] The Court cannot exercise its powers under S. 165 of the Evidence Act, and use the statements as evidence. (32) 1932 Mad W N 625 (628, 629) \* (Vol 18) 1931 Cal 189 (190) : 58 Cal 1009 : 32 Cri L Jour 841 (DB) \* (Vol 13) 1926 Cal 147 (148) : 27 Cri L Jour 277 (DB) \* (Vol 5) 1918 Upp Bur 16 (16) : 19 Cri L Jour 715 : 3 Upp Bur Rul 81.

[See however (Vol 30) 1943 Cal 521 (526, 527) : I L R (1943) 1 Cal 543 : 45 Cri L Jour 96 (DB).]

[10] The Court cannot compare the evidence given by prosecution witnesses with previous statements made by them without their being brought on record as provided by this section and as result of such comparison convict the accused. (Vol 27) 1940 Pat 605 (607) : 41 Cri L Jour 587 (D B) \* (Vol 14) 1927 Rang 74 (79) : 4 Rang 471 : 28 Cri L Jour 219 \* (07) 6 Cri L Jour 224 (224) (DB) (Bom).

[See also (Vol 2) 1915 Cal 702 (703, 704) : 16 Cri L Jour 313 (DB).]

[11] The Court cannot after comparison of the statements of witnesses in the police-diary, use the statements to the prejudice of the accused by saying that the defence is improving its story at every stage. (Vol 20) 1933 Pat 440 (441) : 34 Cri L Jour 948.

[12] The Court cannot circumvent the provisions of this section by a process of deduction and arrive at a conclusion on the statement as to what it did or did not contain. (Vol 29) 1942 Cal 495 (496) : 43 Cri L Jour 797 (DB).

[13] The Court cannot refer to failure of defence to use previous statements under this section and direct jury to draw therefrom, an adverse inference against accused. (Vol 17) 1930 Pat 513 (516) : 9 Pat 606 : 32 Cri L Jour 72 (DB).

[14] A previous statement by a prosecution witness falling under this section can be used by the accused only for the purpose of contradicting such witness under S. 145 of the Evidence Act. (Vol 29) 1942 Mad 288 (289) : 43 Cri L Jour 582 \* (Vol 28) 1941 Lah 471 (478) : 43 Cri L Jour 268 (DB) \* (Vol 27) 1940 Pat 605 (607) : 41 Cri L Jour 587 (D B) \* (Vol 15) 1928 Rang 150 (151) : 6 Rang 187 : 29 Cri L Jour 701 (DB) \* (Vol 13) 1926 Rang 116 (116, 118) : 4 Rang 72 : 27 Cri L Jour 881 (FB) \* (Vol 12) 1925 Cal 1017 (1018) : 27 Cri L Jour 129 (DB) \* (Vol 30) 1943 Cal 521 (526) : I L R (1943) 1 Cal 543 : 45 Cri L Jour 99 (DB) \* (Vol 31) 1944 F C 38 (39) : I L R (1944) Kar (FC) 158 : 46 Cri L Jour 317 : 1944 F C R 228 (FC) \* (Vol 11) 1924 Bom 510 (511) : 26 Cri L Jour 223 (DB) \* (Vol 18) 1931 Pat 152 (156, 157) : 32 Cri L Jour 797 : 10 Pat 107 (DB) \* (Vol 17) 1930 Bom 158 (159) : 54 Bom 528 : 31 Cri L Jour 1003 \* (Vol 13) 1926 Lah 367 (368) : 7 Lah 264 : 27 Cri L Jour 803 (DB).

[15] Previous statement by prosecution witness cannot be used as substantive evidence in favour of or against the accused. (Vol 29) 1942 Mad 288 (289) : 43 Cri L Jour 582 \* (Vol 28) 1941 Lah 471 (478) : 43 Cri L Jour 268 (DB) \* (Vol 10) 1923 All 469 (470) : 25 Cri L Jour 204 \* (95) 1895 Rat 833 (839) \* (83) 9 Cal 455 (458) (DB) \* (08) 7 Cri L Jour 325 (328) : 31 Mad 127 (DB) \* (Vol 15) 1923 Pat 31 (32) : 7 Pat 50 : 28 Cri L Jour 843 (DB) \* (Vol 14) 1927 Lah 79 (80) : 28 Cri L Jour 112 \* (Vol 12) 1925 Cal 161 (163) : 26 Cri L Jour 307 (DB) \* (87) 11 Bom 657 (658) (DB).

[16] Police officer jointly recording statements of two or more witnesses.—Such joint statement cannot be legally used as statement of any particular prosecution witness for the purpose of contradicting that witness.

(Vol 24) 1937 Oudh 201 (203, 204) : 38 Cri L Jour 165 (DB).

[17] This section does not prevent a police officer from explaining his conduct even though it may inferentially have reference to the statements made by witnesses. (Vol 16) 1929 Cal 298 (300) : 56 Cal 1106 : 30 Cri L Jour 1015 (DB) \* (Vol 17) 1930 Lah 484 (485) : 31 Cri L Jour 442 (DB) \* (Vol 18) 1931 Lah 177 (177) : 32 Cri L Jour 632 (DB).

[18] As to whether the statement before the police can be used to show that the witness omitted to state a particular fact, see the following cases. (Vol 25) 1938 Pat 579 (582) : 40 Cri L Jour 147 (DB) \* (Vol 31) 1944 Pat 390 (391) : 46 Cri L Jour 186 \* (Vol 31) 1944 Mad 385 (386, 387) : 46 Cri L Jour 294 : I L R (1944) Mad 897 (DB) \* (Vol 20) 1933 Mad 372 (373, 374) : 56 Mad 475 : 34 Cri L Jour 582 \* (Vol 15) 1928 Lah 257 (258) : 9 Lah 389 : 29 Cri L Jour 348 (DB) \* (Vol 19) 1932 Lah 103 (111) : 33 Cri L Jour 97 (DB) \* (Vol 14) 1927 Cal 257 (258) : 53 Cal 980 : 28 Cri L Jour 273 (DB) \* (Vol 32) 1945 Cal 159 (172, 173) : 46 Cri L Jour 692 (DB) \* (Vol 24) 1937 Nag 50 (53) : I L R (1937) Nag 277 : 38 Cri L Jour 330 (DB) \* (Vol 20) 1933 Nag 136 (144) : 29 Nag L R 251 : 34 Cri L Jour 505 (DB) \* (Vol 17) 1930 Cal 802 (802) : 32 Cri L Jour 359 \* (Vol 23) 1936 Pat 46 (48) : 37 Cri L Jour 320 (DB).

[19] The prosecution is not bound to produce in Court every person examined by the police. But the police ought not to avoid calling any witness merely because he is likely to give evidence in favour of the accused. (Vol 21) 1934 All 908 (918) : 57 All 267 : 36 Cri L Jour 152 (DB).

[20] Public Prosecutor ought to inform pleader for defence that information of value to the defence is found in police papers so as to enable him to apply for copies under this section. (Vol 20) 1933 Rang 378 (381) : 35 Cri L Jour 792 (DB).

[21] A *mashirnama* can be used for refreshing the memory of a witness under S. 159, Evidence Act, as to what the witness had done or seen but not as to what was said. (Vol 27) 1940 Sind 168 (171) : I L R (1940) Kar 487 : 41 Cri L Jour 924 (DB).

12. "Nor shall any such statement or any record thereof . . ." — [1] The amendment of the section in 1923 by the insertion of the words "nor shall any such statement or any record thereof . . ." be used for any purpose," makes it clear that no oral evidence of the statement is admissible in evidence. (Vol 15) 1928 Mad 1028 (1031) : 29 Cri L Jour 1098 : 51 Mad 967 (FB). (Overruling (Vol 12) 1925 Mad 579 : 48 Mad 640 : 26 Cri L Jour 721 (DB).)

13. "At any inquiry or trial in respect of any offence under investigation at the time when such statement was made." — [1] Under the present section it is clear that statements made during the course of investigation can be used in a subsequent case which was not under investigation when the witness made the statement. (Vol 29) 1942 Cal 277 (279) : 43 Cri L Jour 693 (DB) \* (Vol 25) 1938 Nag 110 (111) : 39 Cri L Jour 68 : I L R (1940) Nag 320 \* (Vol 23) 1936 Lah 359 (360) : 17 Lah 472 : 38 Cri L Jour 246 \* (Vol 20) 1933 Mad 65 (65) : 56 Mad 154 : 34 Cri L Jour 137 (DB) \* (Vol 14) 1927 Rang 113 (116) : 5 Rang 26 : 28 Cri L Jour 433 (DB) \* (Vol 12) 1925 Sind 257 (258) : 19 Sind L R 6 : 26 Cri L Jour 433 (DB) \* (Vol 20) 1933 Pat 555 (555) : 34 Cri L Jour 1216 \* (Vol 19) 1932 All 442 (443) : 34 Cri L Jour 109 (DB) \* (Vol 18) 1931 Cal 637 (639) : 33 Cri L Jour 60 (DB).

[2] Complaint made to police who, after investigation under Chapter XIV, rejecting it as false—Complainant, then, pressing complaint before the Court—In the trial, that takes place on such complaint, statement of witnesses to the police during investigation can be used



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only in accordance with S. 162. (Vol 20) 1933 Pat 555 (555) : 34 Cri L Jour 1216.

[3] The statement made during investigation can be used in proceedings under Ss. 517 and 523 of the Code and also in a subsequent civil suit. (Vol 14) 1927 Nag 24 (25) : 28 Cri L Jour 14 \* (Vol 30) 1943 Lah 312 (313) : 45 Cri L Jour 153 \* (55) 9 Bom 131 (134) (DB) \* (Vol 7) 1920 Nag 219 (220) : 21 Cri L Jour 414 \* (Vol 19) 1932 Oudh 137 (138).

[4] Commitment proceedings are within the ambit of the section. (Vol 21) 1934 Nag 138 (139).

## 14. Application for copies—When to be made.—

[1] The accused is not, as a matter of course, entitled to get copies of statements made to the police during the course of investigation. ('94) 16 All 207 (208) (DB).

[2] Witness called by prosecution under circumstances mentioned in the proviso—Accused may be given copies of statements made to police. ('07) 6 Cri L Jour 346 (347) : 30 Mad 466 (DB).

[3] The witness, a copy of whose statement is required, should be in the witness box when the application for copies is made. (Vol 22) 1935 Rang 370 (372) : 13 Rang 570 : 36 Cri L Jour 1487 (FB) \* (Vol 15) 1928 Bom 23 (24) : 52 Bom 195 : 29 Cri L Jour 221 (DB) \* (Vol 22) 1935 Rang 98 (100) : 13 Rang 1 : 36 Cri L Jour 665 (DB) \* ('07) 6 Cri L Jour 346 (347) : 30 Mad 466 (DB) \* (Vol 21) 1934 All 340 (342) : 56 All 750 : 36 Cri L Jour 65 (DB) \* (Vol 16) 1929 Cal 182 (184, 185) : 56 Cal 840 : 30 Cri L Jour 580 (DB).

[See also (Vol 16) 1929 Nag 172 (174) : 30 Cri L Jour 728.]

[But see (Vol 32) 1945 Cal 159 (168) : 46 Cri L Jour 692 (DB). (Vol 14) 1927 Cal 514 : 54 Cal 307 : 28 Cri L Jour 582, dissented from.] \* (Vol 24) 1937 Pesh 10 (11) : 38 Cri L Jour 347 (DB).]

[4] Warrant case — Copies not applied for during cross-examination of prosecution witnesses before charge and before prosecution witnesses were called for further cross-examination — Held that, copies could not be granted till witnesses were again in the box for cross-examination. (Vol 17) 1930 Mad 185 (185, 186) : 31 Cri L Jour 414.

[5] Witness tendered by prosecution but discharged without being examined—Thereafter application made for a copy of his statement to the police — It should be refused. (Vol 16) 1929 Pat 34 (36) : 7 Pat 153 : 30 Cri L Jour 273 (DB) \* ('89) 16 Cal 612n (618n) \* ('05) 4 Cri L Jour 79 (85) : 33 Cal 1023 (DB).

[6] Different views are held as to whether accused is entitled to get copies as soon as the prosecution witness enters the witness box, or only after his examination-in-chief is over:

(a) It was held in the following cases that the opportune moment to ask for copies was when the examination-in-chief of the witness was over and the defence was about to begin its cross-examination. (Vol 29) 1942 Mad 451 (451) : 44 Cri L Jour 400 \* (Vol 15) 1928 Bom 23 (24, 25) : 52 Bom 195 : 29 Cri L Jour 221 (DB) \* (Vol 18) 1931 All 34 (35) : 53 All 94 : 32 Cri L Jour 578 \* (Vol 16) 1929 Cal 182 (184) : 56 Cal 840 : 30 Cri L Jour 580 (DB) \* (Vol 15) 1928 Pat 593 (593) : 29 Cri L Jour 715.

[See (Vol 17) 1930 Mad 185 (185, 186) : 31 Cri L Jour 414.]

(b) In the following cases it was held that the right to apply for copies accrues the moment the witnesses appear before the Court to be examined. (Vol 15) 1928 Pat 215 (215, 216, 217) : 7 Pat 205 : 29 Cri L Jour 297 (DB) \* (Vol 14) 1927 Nag 24 (25) : 28 Cri L Jour 14.

[See also (Vol 16) 1929 Cal 182 (184, 185) : 56 Cal 840 : 30 Cri L Jour 580 (DB) \* (Vol 21) 1934 Nag 138 (139).]

(c) According to the High Court of Lahore, though the accused person is not entitled to a copy of the statement until the witness is sought to be cross-examined, there is no harm in granting such copies at an earlier stage. (Vol 16) 1929 Lah 429 (430) : 30 Cri L Jour 760.

(d) It was held in the following cases that the accused was not entitled to copies until, not only the cross-examination had begun but until the cross-examination had laid the foundation for the suggestion that the evidence given by the witness in Court is contradicted by such statement. (Vol 14) 1927 Cal 514 (515) : 54 Cal 307 : 28 Cri L Jour 582 (DB) \* (Vol 14) 1927 Pat 243 (244, 248) : 6 Pat 329 : 28 Cri L Jour 709 (DB) \* (Vol 13) 1926 Mad 183 (184) : 32 Cri L Jour 100 (DB).

(e) The above view has been dissented from in the following decisions. (Vol 32) 1945 Cal 159 (168) : 46 Cri L Jour 692 (DB) \* (Vol 16) 1929 Cal 182 (184, 185) : 56 Cal 840 : 30 Cri L Jour 580 (DB) \* (Vol 15) 1928 Bom 23 (24) : 52 Bom 195 : 29 Cri L Jour 221 (DB) \* (Vol 18) 1931 All 34 (35) : 53 All 94 : 32 Cri L Jour 578 \* (Vol 15) 1928 Pat 593 (593) : 29 Cri L Jour 715 \* (Vol 15) 1928 Pat 215 (216) : 7 Pat 205 : 29 Cri L Jour 297 (DB).

[7] The application for copies need not be in writing. (Vol 17) 1930 All 737 (738) : 31 Cri L Jour 555.

15. Duty of Court to grant copies. — [1] Under the proviso to the section as it stood before the amendment of 1923 the grant of copies was a matter of judicial discretion. ('96) 1896 Rat 874 (875) \* (Vol 1) 1914 Mad 376 (376, 377) : 15 Cri L Jour 289.

[2] Under the present section Court is bound to grant copies, unless it is of opinion that any part of such statement is not relevant to the subject-matter of the enquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests. (Vol 32) 1945 Cal 159 (167) : 46 Cri L Jour 692 (DB) \* (Vol 26) 1939 Pat 174 (176) : 17 Pat 622 : 40 Cri L Jour 509 (DB) \* (Vol 24) 1937 Mad 822 (823) : I L R (1938) Mad 180 : 39 Cri L Jour 54 \* (Vol 24) 1937 Pesh 10 (11) : 38 Cri L Jour 347 (DB) \* (Vol 23) 1936 Nag 249 (250) : I L R (1937) Nag 178 : 38 Cri L Jour 936 \* (Vol 22) 1935 Rang 370 (372) : 13 Rang 570 : 36 Cri L Jour 1487 (FB) \* (Vol 14) 1927 Cal 514 (515) : 54 Cal 307 : 28 Cri L Jour 582 (DB) \* (Vol 17) 1930 All 737 (738) : 31 Cri L Jour 555 \* (Vol 16) 1929 Nag 240 (240) : 30 Cri L Jour 1097 \* (Vol 17) 1930 Sind 153 (153, 154, 156) : 24 Sind L R 239 : 31 Cri L Jour 592 (DB) \* (Vol 16) 1929 Pat 268 (270) : 8 Pat 279 : 30 Cri L Jour 858 (DB) \* (Vol 21) 1934 Nag 138 (139) \* (Vol 22) 1935 Sind 145 (175) : 28 Sind L R 397 : 36 Cri L Jour 1161 (DB) \* (Vol 15) 1928 Bom 23 (24) : 52 Bom 195 : 29 Cri L Jour 221 (DB) \* (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB) \* (Vol 18) 1931 All 262 (262) : 53 All 458 : 32 Cri L Jour 562.

[3] Statements not recorded in full but, only memorandum of the same recorded — Court cannot refuse copies. (Vol 32) 1945 Cal 159 (167) : 46 Cri L Jour 692 (DB) \* (Vol 23) 1936 Nag 249 (250) : I L R (1937) Nag 178 : 38 Cri L Jour 936 \* (Vol 18) 1931 All 262 (262) : 53 All 458 : 32 Cri L Jour 562.

[4] A Court cannot refuse to grant copies on the ground that there was no contradiction between what the witness says in his evidence and his previous statement or that the statements were of "no real value as evidence." (Vol 24) 1937 Mad 822 (823) : I L R (1938) Mad 180 : 39 Cri L Jour 54 \* (Vol 18) 1931 All 273 (274) : 32 Cri L Jour 370 \* (Vol 17) 1930 Sind 153 (153, 154, 156) : 24 Sind L R 239 : 31 Cri L Jour 592 (DB) \* (Vol 16) 1929 Pat 268 (270) : 8 Pat 279 : 30 Cri L Jour 858 (DB) \* (Vol 20) 1933 All 535 (539) : 55 All 689 : 35 Cri L Jour 360 (DB) \* (Vol 16) 1929 Nag 172 (174) : 30 Cri L Jour 728 \* (Vol 21)

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1934 Nag 138 (139) \* (Vol 22) 1935 Rang 98 (100):13 Rang 1 : 36 Cri L Jour 665 (DB) \* (Vol 14) 1927 Nag 24 (25) : 28 Cri L Jour 14.

[5] It is a condition precedent to the grant of copies that reference should be made by the Court to see whether any portion of the statement should be excluded under the second proviso and to satisfy itself that the document of which a copy is required is really a statement within the section. (Vol 15) 1928 Pat 215 (217) : 7 Pat 205 : 29 Cri L Jour 297 (DB) \* (Vol 22) 1935 Rang 98 (100) : 13 Rang 1 : 36 Cri L Jour 665 (DB) \* (Vol 32) 1945 Cal 159 (168):46 Cri L Jour 692 (DB).

[6] A reference to the statement should be made by the Court as soon as the request is made on behalf of the accused. The Court is not at liberty to postpone referring to the statement till after the witness's evidence is concluded. (Vol 8) 1921 Lah 93 (94) : 22 Cri L Jour 578 (DB) \* (Vol 22) 1935 Rang 98 (100, 101):13 Rang 1 : 36 Cri L Jour 665 (DB).

[7] Whenever necessary the cross-examination of the witness must be adjourned until the necessary copy has been given. (Vol 22) 1935 Rang 98 (100, 101) : 13 Rang 1 : 36 Cri L Jour 665 (DB).

[8] It would be sufficient compliance with the section to allow the defence pleader to see the statement of the witness to the police and to cross-examine thereon while the copy is being prepared. (Vol 29) 1942 Mad 451 (451): 44 Cri L Jour 400 \* (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB).

[9] Request made for a copy of previous statement of a witness — Copy of all statements made by such witness during investigation should be furnished. (Vol 16) 1929 Pat 268 (270) : 8 Pat 279 : 30 Cri L Jour 858 (D B).

[10] Accused is entitled to a copy of the whole statement made by a witness excepting the portion that may be excluded under the second proviso to the section. (Vol 22) 1935 Rang 98 (100) : 13 Rang 1:36 Cri L Jour 665 (DB).

[11] In granting a copy of statement material portions omitted by oversight on the part of typist—Omission discovered only in appellate Court — Appellate Court should furnish accused with a correct copy and also give the accused an opportunity to recall the witness and cross-examine him. (Vol 7) 1920 Pat 378 (381): 21 Cri L Jour 289 (DB).

[12] An accused is not entitled to copies of statements recorded in the course of investigation of other cases. (Vol 23) 1936 Lah 359 (361) : 17 Lah 472:36 Cri L Jour 246 \* (Vol 22) 1935 Nag 23 (24).

[13] An investigation made by a police-officer under S. 202 not being an investigation under this chapter the statements of witnesses recorded by him during such investigation form part of the criminal case and therefore the Court is not entitled to refuse the grant of copies of such statements. (Vol 29) 1942 Rang 51 (51):1941 Rang L R 590 (DB).

[14] Defence pleader asking a witness a question concerning his statement to the police — It is the duty of the Court to ask the pleader whether or not he wished to have a copy of that witness's statement to the police supplied to him — Pleader not desiring copy of statement—All questions concerning the witness's statement to the investigating officer should be disallowed—Pleader desiring copy—It should be supplied and should be used for the purpose of cross-examining the witness and brought on the record in the proper way. (Vol 22) 1935 Rang 299 (301) : 36 Cri L Jour 1880.

[15] Copies of statements obtained by some method, not contemplated by this section, should not be used by the defence. (Vol 32) 1945 Cal 159 (169) : 46 Cri L Jour 692 (DB).

[16] Investigating officer failed to produce in Court notes made of the statement of an important witness—Reason for failure to do so being that it would be impossible for him to trace the notes then — Proceedings quashed. (Vol 23) 1936 Nag 249 (250):I L R (1937) Nag 178 : 38 Cri L Jour 936.

16. "On the request of the accused." — [1] A Court is not justified in admitting the previous statements of witnesses to the police, unless the accused or his advocate requests the Court to refer to them and to grant copies. The Court may, however, suggest to the accused that he should ask for a reference to the police papers. (Vol 22) 1935 Rang 370 (373) : 13 Rang 570:36 Cri L Jour 1487 (FB) \* (Vol 14) 1927 Rang 80 (80) : 4 Rang 356 : 27 Cri L Jour 1871 (DB).

[2] An oral request may be enough. (Vol 17) 1930 All 737 (738) : 31 Cri L Jour 555.

[3] It has been held that a Court is not entitled to look into the police papers, even privately, unless requested to do so by the accused. (Vol 22) 1935 Rang 98 (100) : 13 Rang 1:36 Cri L Jour 665 (DB), (Dissenting from (Vol 20) 1933 Rang 378:35 Cri L Jour 792 (DB).)

[But see (Vol 22) 1935 Rang 370 (372):13 Rang 570: 36 Cri L Jour 1487 (FB)\* (Vol 30) 1943 Cal 521 (526, 527):45 Cri L Jour 99 : I L R (1943) 1 Cal 543 (DB).]

[4] Objection raised in appeal on the ground that copies of statements were not granted under this section —Appellate Court ordering such copies to be furnished to the appellant—It is not open to latter if there are no contradictions between the witness's deposition in the Court and his previous statement, to contend that appellate Court should not look at the statements unless requested to do so by him. (Vol 22) 1935 Rang 98 (102): 13 Rang 1 : 36 Cri L Jour 665 (DB).

17. Contradicting witness under the section — Procedure.—[1] The only way in which the previous statement of a witness can be used, is by contradicting the witness by such writing, and this can be done only by drawing his attention to such parts of the recorded statement, as are intended to be used for the purpose of contradiction, and allowing him an opportunity to explain any contradiction. (Vol 32) 1945 Cal 159 (170): 46 Cri L Jour 692 (DB) \* (Vol 30) 1943 All 49 (55):44 Cri L Jour 280 \* (Vol 21) 1934 All 956 (957) : 36 Cri L Jour 188 \* (Vol 22) 1935 Rang 299 (301) : 36 Cri L Jour 1880 \* (Vol 20) 1933 Mad 233 (239): 56 Mad 231: 34 Cri L Jour 481 (DB). (Statement made by witness to police in course of investigation cannot be used to corroborate his evidence.) \* (Vol 15) 1928 Lah 17 (19): 8 Lah 605 : 28 Cri L Jour 983 (D B) \* (Vol 13) 1926 Pat 20 (22) : 27 Cri L Jour 362 (D B) \* (Vol 20) 1933 Pat 589 (591, 592, 593, 596) : 35 Cri L Jour 379 (D B) \* (Vol 17) 1930 Lah 491 (495) : 11 Lah 460 : 31 Cri L Jour 1071 (DB).

[See also (Vol 18) 1931 Cal 189 (190) : 58 Cal 1009 : 32 Cri L Jour 841 (DB).]

[2] Those parts of the statement to the police, which are used for contradicting the witness, must be proved and brought on the record. (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB).

[3] The contradiction must be established by proving that the part of the recorded statement used for the purpose of contradicting a witness actually represents what was said by him to the police-officer. It is not merely sufficient to prove the writing as contemplated by S. 145, Evidence Act. (Vol 32) 1945 Cal 159 (169, 170) : 46 Cri L Jour 692 (DB).

[4] The statement may be proved by getting an admission from the witness that he made it. (Vol 32) 1945 Cal 159 (170, 171) : 46 Cri L Jour 692 (D B) \* (Vol 30) 1943 All 49 (55):44 Cri L Jour 280 \* (Vol 22)

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1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB) \* (Vol 19) 1932 Lah 103 (110) : 33 Cri L Jour 97 (DB).

[5] The record may be proved by asking the police-officer, when he gets into the witness box, whether the witness made such statements to him and whether the record was made by him, or, if the officer is not available, by showing that the statement was written in the handwriting of the particular officer. (Vol 32) 1945 Cal 159 (170, 171) : 46 Cri L Jour 692 (DB) \* (Vol 30) 1943 All 49 (55) : 44 Cri L Jour 280 (DB) \* (Vol 26) 1939 Lah 521 (522) : I L R (1939) Lah 305 : 41 Cri L Jour 174 (DB) \* (Vol 4) 1917 Low Bur 12 (15) : 18 Cri L Jour 844 \* (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB) \* (Vol 14) 1927 Cal 514 (515) : 28 Cri L Jour 582 : 54 Cal 307 (DB) \* (Vol 25) 1938 All 571 (573) : 40 Cri L Jour 4 \* (18) 14 Cri L Jour 437 (437) : 7 Sind L R 10 (DB) \* (Vol 15) 1928 Lah 507 (510) : 29 Cri L Jour 303 (DB) \* (Vol 11) 1924 Bom 510 (511) : 26 Cri L Jour 223 (DB).

[6] If necessary, in order to avoid delay, cross-examination may be allowed subject to subsequent proof of the statement. (Vol 26) 1939 Lah 268 (269) : I L R (1939) Lah 509 : 40 Cri L Jour 708 (DB) \* (Vol 25) 1938 Nag 110 (111) : 39 Cri L Jour 68 : I L R (1940) Nag 320 \* (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB).

[See also (Vol 24) 1937 Bom 60 (62) : 38 Cri L Jour 327 (DB).]

[7] The record need not be proved before the witness's attention is drawn to it in cross-examination. The proof of the writing can be given after it is put to the witness. (Vol 26) 1939 Lah 268 (269) : I L R (1939) Lah 509 : 40 Cri L Jour 708 (DB).

[But see (Vol 15) 1928 Bom 23 (25) : 52 Bom 195 : 29 Cri L Jour 221 (DB) \* (Vol 15) 1928 Rang 150 (151) : 6 Rang 137 : 29 Cri L Jour 701 (DB) \* (Vol 19) 1932 Lah 103 (111) : 33 Cri L Jour 97 (DB).]

[8] It is the duty of the defence to prove the statements of which they make use in cross-examination and where they have not done so, it is not open to them, thereafter, to object that, such statements have been brought on the record without proof. (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB).

[9] Procedure prescribed by S. 145, Evidence Act, not adopted and witness's attention not drawn to written record — It cannot be used in evidence and the police-officer cannot be asked about it. (Vol 32) 1945 Cal 159 (170) : 46 Cri L Jour 692 (DB) \* (Vol 30) 1943 All 49 (55) : 44 Cri L Jour 280 \* (Vol 15) 1928 All 280 (282, 283) : 29 Cri L Jour 472 (DB) \* (Vol 13) 1926 Lah 54 (58, 59) : 26 Cri L Jour 1308 (DB) \* (Vol 13) 1926 Lah 365 (366) : 27 Cri L Jour 607 \* (Vol 20) 1933 Mad 233 (239) : 56 Mad 231 : 34 Cri L Jour 481 (DB) \* (Vol 22) 1935 Rang 98 (100) : 13 Rang 1 : 36 Cri L Jour 665 (DB) \* (Vol 15) 1928 Rang 150 (151) : 6 Rang 137 : 29 Cri L Jour 701 (DB) \* (106) 4 Cri L Jour 79 (88) : 33 Cal 1023 (DB).

[10] The cross-examination of the witness must be confined to the contradiction between his two statements. (Vol 22) 1935 Rang 98 (100) : 13 Rang 1 : 36 Cri L Jour 665 (DB).

[11] Only those portions of the statements, as have been used to contradict the witness, will form part of the judicial record. The other parts of the statement cannot be relied upon by either side in determining the guilt or innocence of the accused and should not be relied upon by the Judge. (Vol 29) 1942 Mad 58 (60) \* (Vol 24) 1937 Oudh 201 (203) : 38 Cri L Jour 165 (DB) \* (Vol 17) 1930 Lah 449 (450) : 31 Cri L Jour 199 (DB) \* (Vol 13) 1926 Pat 20 (22) : 27 Cri L Jour 362 (DB).

[12] The procedure laid down in this section applies whether the witness admits or denies the previous statement. (Vol 20) 1933 All 535 (539) : 55 All 689 : 35 Cri L Jour 360 (DB).

[13] Witness called and the statement to police made the subject of cross-examination—Court should make a reference to that written statement and make a note of what the written statement actually says. (Vol 20) 1933 All 535 (539) : 55 All 689 : 35 Cri L Jour 360 (DB).

[14] As to the necessity of putting the writing to the witness, before it can be used as evidence, see the under-mentioned cases. (Vol 24) 1937 Oudh 201 (203) : 38 Cri L Jour 165 (DB). (Statements exhibited entirely without getting witness to admit or deny them are not admissible.) \* (Vol 2) 1915 P C 7 (11) : 39 Bom 441 : 42 Ind App 135 (PC).

[15] Prosecution witness declared hostile—Prosecution cannot contradict him, by reference to his statements before police. (Vol 34) 1947 Pat 107 (110) : 47 Cri L Jour 780.

18. Re-examination. — [1] Under the guise of re-examination, the statement before the police cannot be used to corroborate a prosecution witness. (Vol 16) 1929 Pat 268 (270) : 8 Pat 279 : 30 Cri L Jour 855 (DB).

[2] During cross-examination of an investigating police-officer, he is asked whether a certain witness stated a certain fact to him during investigation — He answers the question in the negative—Matter as to what witness actually stated to the police during the investigation must be cleared up in re-examination of investigating officer. (Vol 25) 1938 Pat 579 (585) : 40 Cri L Jour 147 (DB).

[3] Even if Public Prosecutor fails to clear up matters in re-examination, it is the duty of Court in fairness to the case and to the witness to bring out facts which will clear up the negative answer and this will be a legitimate use of the police-diary by the Court. (Vol 25) 1938 Pat 579 (585) : 40 Cri L Jour 147 (DB).

19. "Whether in a police-diary or otherwise." — [1] The addition of the words "whether in a police-diary or otherwise" by the amendment of 1923 makes it clear that the statement of witnesses during investigation, even though taken down in the special diary, can be used by the accused for the purposes specified in the proviso. (Vol 14) 1927 Cal 644 (645, 646) : 28 Cri L Jour 805 (DB) \* (Vol 15) 1928 Cal 260 (261) : 29 Cri L Jour 531 (DB) \* (Vol 14) 1927 Oudh 321 (323) : 2 Luck 605 : 28 Cri L Jour 802 (DB) \* (Vol 20) 1933 Nag 4 (5) : 28 Nag L R 291 : 34 Cri L Jour 127 \* (Vol 16) 1929 Rang 87 (88) : 6 Rang 672 : 30 Cri L Jour 538.

[See also (Vol 18) 1931 Pat 150 (151) : 32 Cri L Jour 683 (DB).]

[2] The object of the section as amended is that a police-officer should no longer claim privilege in respect of statement on the ground that it is recorded under S. 172. (Vol 14) 1927 Cal 644 (646) : 28 Cri L Jour 805 (DB) \* (Vol 22) 1935 Sind 145 (172) : 28 Sind L R 397 : 36 Cri L Jour 1161 (DB).

[3] Police-diary, not containing any statement by any witness, but, being only a brief record of what the investigating officer saw on the spot, and of information, which he ascertained as a result of questioning several people—Accused is not entitled to use it in the manner provided by S. 162. (Vol 28) 1939 Cal 252 (253) : 40 Cri L Jour 386 (DB).

20. Effect of admitting in evidence statements inadmissible under this section. — [1] Consent of parties cannot transform inadmissible evidence into admissible one. (Vol 10) 1923 Lah 630 (631) (DB) \* (Vol 13) 1926 Pat 211 (212, 213) : 27 Cri L Jour 753 (DB) \* (Vol 18) 1931 Pat 345 (345) : 32 Cri L Jour 1025.

Section 162 — Note 26 (*contd.*)

[2] Inadmissible evidence received — It is only an error curable under S. 537 — It is a question of fact in every case whether there has been a failure of justice consequent upon such reception of evidence. (Vol 29) 1942 Cal 495 (196) : 43 Cri L Jour 797 (DB) \* (Vol 33) 1943 Pat 127 (128) (DB) \* (Vol 26) 1939 P C 47 (53) : 18 Pat 234 : I L R (1939) Kar P C 123 : 36 Ind App 66 : 40 Cri L Jour 364 : 1911 Rang L R 789<sub>n</sub> (PC) \* ('39) I L R (1939) 1 Cal 337 (338, 343) (DB) \* (Vol 24) 1937 Oudh 331 (337) : 33 Cri L Jour 491 \* (Vol 23) 1936 Pat 581 (582) : 38 Cri L Jour 102 \* (Vol 17) 1930 Bom 595 (596, 597) : 54 Bom 934 : 32 Cri L Jour 239 (DB) \* (Vol 18) 1931 Bom 311 (312, 313) : 55 Bom 435 : 32 Cri L Jour 1077 (DB) \* (Vol 13) 1926 Lah 367 (368) : 7 Lah 264 : 27 Cri L Jour 803 (DB) \* (Vol 17) 1930 Lah 313 (320) : 10 Lah 794 : 31 Cri L Jour 343 \* ('94) 2 Weir 302 (302) \* (Vol 12) 1925 Oudh 1 (8) : 27 Oudh Cas 40 : 25 Cri L Jour 49 \* (Vol 13) 1926 Pat 211 (213) : 27 Cri L Jour 753 (DB).

[See (Vol 12) 1925 Rang 101 (102) : 26 Cri L Jour 321.]

[3] The Court of appeal or revision holding that inadmissible evidence has been received — It should wholly ignore such evidence and see if there is other evidence on record to justify the decision of the lower Court. ('76) 1 Cal 207 (217) (DB) \* (Vol 19) 1932 Sind 201 (205) : 26 Sind L R 302 : 34 Cri L Jour 147 (DB) \* (Vol 20) 1933 Bom 266 (270) : 57 Bom 400 : 34 Cri L Jour 870 (DB) \* ('10) 11 Cri L Jour 96 (97) (DB) (Cal) \* (Vol 13) 1926 Pat 20 (23) : 27 Cri L Jour 362 (DB) \* ('07) 6 Cri L Jour 164 (167) : 32 Bom 111 (FB).

[4] The Privy Council will not interfere on the mere ground of wrong reception of evidence. (Vol 12) 1925 P C 52 (53) : 6 Lah 45 : 52 Ind App 131 : 26 Cri L Jour 1020 (PC).

[5] Evidence inadmissible under this section used to demolish the most important portion of defence case — Its admission would prejudice the accused to a great extent — Verdict of jury which has been allowed to consider such evidence cannot be upheld. (Vol 31) 1944 Cal 339 (346, 364) : 45 Cri L Jour 771 : I L R (1944) 2 Cal 405 (DB) \* (Vol 26) 1939 Cal 330 (330) : 40 Cri L Jour 665 (DB).

21. Effect of refusal to grant copies to accused under this section. — [1] Refusal to grant copies of statements to accused is error curable under S. 537. (Vol 22) 1935 Sind 145 (178) : 28 Sind L R 397 : 36 Cri L Jour 1161 (DB) \* (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB).

[2] Court wrongly refusing to give copies to accused — Accused prejudiced — Conviction quashed and new trial ordered. (Vol 18) 1931 All 262 (263) : 53 All 458 : 32 Cri L Jour 562 \* (Vol 18) 1931 All 273 (274) : 32 Cri L Jour 370 \* ('74) 11 Bom H C R 120 (124) \* (Vol 14) 1927 Cal 644 (646) : 28 Cri L Jour 805 (DB) \* (Vol 15) 1928 Cal 260 (261) : 29 Cri L Jour 531 (DB) \* (Vol 20) 1933 Nag 4 (5) : 28 Nag L R 291 : 34 Cri L Jour 127 \* (Vol 14) 1927 Nag 24 (25) : 28 Cri L Jour 14 \* (Vol 16) 1929 Pat 268 (270) : 8 Pat 279 : 30 Cri L Jour 858 (DB).

[See ('83) 2 Weir 573 (574).]

[3] Extent of prejudice to accused in each case must determine whether trial should be held altogether vitiated or whether the defect can be remedied. (Vol 15) 1928 Lah 257 (258) : 9 Lah 389 : 29 Cri L Jour 348 (DB) \* (Vol 19) 1932 Lah 103 (111, 112) : 33 Cri L Jour 97 (DB).

[4] It has been held in the following cases that a refusal of accused's request for copies under this section, is a matter which will vitiate the trial and cannot be cured under S. 537. (Vol 32) 1945 Nag 1 (5) : 40 Cri L Jour 448 : I L R (1945) Nag 151 (DB) \* (Vol

26, 1939 Pat 174 (176) : 40 Cri L Jour 509 : 17 Pat 622 (DB) \* (Vol 23) 1936 Nag 249 (250) : I L R (1937) Nag 178 : 38 Cri L Jour 936.

[5] Lower Court wrongly refusing to furnish copy of prior statement of a witness — Proper course in appeal is that, counsel should be furnished with a copy of the statement and any contradictions between that statement and one made in Court by the witness should be taken as left unexplained by him — The case may also be remanded to lower Court in a proper case. (Vol 15) 1928 Lah 257 (258) : 9 Lah 389 : 29 Cri L Jour 348 (DB) \* (Vol 16) 1929 Nag 240 (240) : 30 Cri L Jour 1097 (DB).

[6] Committing Magistrate refusing copies of statements — Committal need not be quashed because accused has an opportunity to use the statement in the Sessions Court. (Vol 15) 1928 Pat 215 (216) : 7 Pat 205 : 29 Cri L Jour 297 (DB).

22. Failure to observe provisions of this section. — [1] A failure to observe the provisions of this section is only an error curable under the provisions of S. 537. (Vol 33) 1946 Cal 483 (487) : 47 Cri L Jour 564 (DB) \* (Vol 22) 1935 Sind 145 (178) : 28 Sind L R 397 : 36 Cri L Jour 1161 (DB) \* (Vol 22) 1935 Rang 98 (101) : 13 Rang 1 : 36 Cri L Jour 665 (DB) \* (Vol 32) 1945 Mad 284 (286) : I L R (1946) Mad 219 : 47 Cri L Jour 149 (DB) \* (Vol 21) 1934 Sind 78 (83) : 35 Cri L Jour 1170 (DB).

[But see (Vol 32) 1945 Nag 217 (218) : 46 Cri L Jour 710 \* (Vol 18) 1931 Oudh 172 (175) : 32 Cri L Jour 860 : 6 Luck 668.]

23. "Dying declarations." — [1] A dying declaration made to a police-officer during the course of investigation is not subject to limitations mentioned in the main clause of the section. (Vol 28) 1941 Rang 301 (303) : 43 Cri L Jour 123 : 1941 Rang L R 258 \* (Vol 10) 1923 Cal 463 (465) : 24 Cri L Jour 193 (DB) \* (Vol 14) 1927 Cal 17 (19) : 54 Cal 237 : 28 Cri L Jour 99 (DB) \* (Vol 17) 1930 Lah 60 (61) : 31 Cri L Jour 79 (DB) \* (Vol 19) 1932 Lah 14 (15) : 32 Cri L Jour 1118 (DB) \* (Vol 3) 1916 Mad 1211 (1212) : 16 Cri L Jour 759 (DB) \* (Vol 18) 1931 Mad 430 (434) : 54 Mad 678 : 33 Cri L Jour 115 (DB) \* ('93) 7 O P L R Cr 14 (14).

[2] The admission of dying declarations as evidence rests on the doctrine of necessity. ('13) 14 Cri L Jour 510 (511) : 7 Low Bur Rul 33.

[3] When a man gasps out his story soon after the occurrence it may be said that there was no time for him to fabricate or for his friends to suggest falsehood. (Vol 18) 1931 Mad 180 (180) : 32 Cri L Jour 357 \* ('10) 11 Cri L Jour 171 (176) (Lah) \* ('11) 12 Cri L Jour 528 (529) (DB) (Mad).

[4] Dying declaration should be scrutinized with great care — It is not safe to base a conviction merely on dying declaration. (Vol 28) 1941 Lah 368 (369) : 43 Cri L Jour 59 (DB) \* (Vol 17) 1930 All 532 (533) : 31 Cri L Jour 862 (DB) \* ('01) 25 Bom 45 (46) (DB) \* (Vol 12) 1925 Cal 876 (881) : 52 Cal 987 : 26 Cri L Jour 1256 (DB) \* (Vol 20) 1933 Oudh 333 (336) : 8 Luck 570 : 35 Cri L Jour 45 (DB) \* (Vol 16) 1929 Pat 249 (253) : 31 Cri L Jour 136 (DB) \* (Vol 20) 1933 Rang 95 (96) : 34 Cri L Jour 747 (DB) \* ('30) 1930 Mad W N 1211 (1214) (DB) \* (Vol 12) 1925 Lah 549 (550) : 26 Cri L Jour 890 (DB).

[5] Court, after taking everything into consideration convinced that dying declaration is true — It is its duty to convict the accused, notwithstanding that there is not corroboration in the true sense. (Vol 32) 1945 Nag 153 (155) : I L R (1945) Nag 613 : 47 Cri L Jour 92 (DB).

[6] The dying declaration is admissible only when the cause of declarant's death is in issue. (Vol 12) 1925 All 227 (228) : 26 Cri L Jour 547 \* (Vol 3) 1916 Lah

163. (1) No police-officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

(2) But no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will.

[1882 — S. 163; 1872 — Ss. 120, 184; 1861 — Ss. 98, 146.]

164. (1) <sup>a</sup>[Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the <sup>b</sup>[Provincial Government] may, if he is not a police-officer] record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion best fitted for the circumstances of the case. Such confes-

Section 162 — Note 23 (*contd.*)

106 (106) : 1916 Pun Re No. 20 Cr : 17 Cri L Jour 438 (DB) \* (Vol 11) 1924 Nag 115 (116) : 26 Cri L Jour 1121 (DB) \* ('01) 1901 Pun Re No. 17 Cr, p. 15 (47) (DB).

[7] Dying declarations taken—Questions and answers should be taken down. (Vol 30) 1943 Pat 397 (401) : 45 Cri L Jour 213 : 22 Pat 338 (DB) \* (Vol 12) 1925 Cal 376 (381, 382) : 52 Cal 987 : 26 Cri L Jour 1256 (DB).

[8] The dying declaration does not cease to be so merely because the declarant lingers for a few days and then dies. (Vol 16) 1929 Lah 64 (65) : 30 Cri L Jour 65 (DB).

[9] Where a person who made the declaration chances to live, his statement cannot be admitted in evidence as dying declaration under S. 32 of the Indian Evidence Act though it may be relied on under S. 157 of the said Act to corroborate the testimony of the complainant when examined in the case. ('02) 4 Bom L R 434 (435) (DB).

#### Section 163 — Note 1

[1] The expression "Police Officer" is also found in Ss. 25 to 27 of the Evidence Act.

[2] The words "Person in authority" occur in S. 24 of the Evidence Act, also. The principle and object of that section and of this section are the same.

[3] Whether any threat or inducement was offered in any particular case is a question of fact, to be decided with reference to the circumstances of each case. (Vol 16) 1929 Pat 275 (277) : 8 Pat 289 : 30 Cri L Jour 675 (DB).

[4] Onus of proving existence of inducement, threat or promise is on accused — In the absence of evidence, illegal pressure will not be presumed. ('74) 11 Bom H C R 137 (138) (DB) \* (Vol 5) 1918 Cal 72 (72) : 19 Cri L Jour 959 (DB) \* ('02) 6 Cal W N cccxxvi (cccxxvi) \* ('90) 1890 All W N 173 (174) \* ('26) 27 Cri L Jour 983 (984) (DB) (Lah).

[5] Statement retracted as having been made under unlawful inducement — Court should have before it the police officers who had come into contact with the person, for the purpose of making a search, by examining them as to the mode in which they had dealt with the accused, and as to what led up to the making of such statement. ('85) 1885 All W N 59 (59) (FB) \* (Vol 20) 1933 All 31 (33) : 34 Cri L Jour 489 : 55 All 91 (DB) \* ('71) 8 Bom H C R Cr 126 (137, 138) (DB) \* ('01) 25 Bom 543 (546, 547) (DB) \* ('02) 6 Cal W N cccxxvi (cccxxvi) \* (Vol 12) 1925 Lah 605 (608) : 6 Lah 415 : 27 Cri L Jour 514 (DB) \* ('01) 25 Bom 168 (173, 174) (DB) \* ('13) 14 Cri L Jour 417 (417, 418) (Low Bur) \* ('72-92) 1872-1892 Low Bur Rul 423 (424) \* ('66) 5 Suth W R Cr 6 (6) (DB).

[6] In order that an act or omission may amount to

an inducement, threat or promise, it must be such that without it, the person would not have made the statement. ('19) 11 Cri L Jour 894 (894, 895) : 37 Cal 735.

[7] Inducement etc., need not be express, but may be implied from the circumstances of the case. (Vol 16) 1929 Pat 275 (277) : 8 Pat 289 : 30 Cri L Jour 675 (DB).

[8] An act, in order to amount to inducement etc., must be such as would make the person suppose that, the advantage to be gained or evil to be avoided would be of a temporal nature. (Vol 13) 1926 All 246 (247) : 27 Cri L Jour 158 \* (Vol 9) 1922 Lah 263 (265) : 25 Cri L Jour 939 (DB) \* (Vol 12) 1925 Cal 587 (590) : 52 Cal 67 : 26 Cri L Jour 782 \* ('02) 6 Cal W N cccxxv (cccxxv).

[9] An act in order to amount to inducement etc., must be sufficient, in the opinion of the Court, to make the accused suppose that he would get the advantage. It is left to the Court entirely to form its own opinion as to whether the inducement, threat or promises, held out in any particular case, if sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. (Vol 19) 1932 Sind 64 (66) : 26 Sind L R 191 : 33 Cri L Jour 650 (DB) \* (Vol 12) 1925 Lah 605 (608) : 6 Lah 415 : 27 Cri L Jour 514 (DB).

[10] In scrutinizing the case of inducement etc., the Court has to perform a threefold function: It has to determine the sufficiency of inducement, threat or promise, as affording certain grounds; it has to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition mentioned in S. 24 of the Evidence Act, and it has to judge as a Court, if the confession appears to have been caused in consequence of inducement, threat or promise. (Vol 12) 1925 Cal 587 (590, 591) : 52 Cal 67 : 26 Cri L Jour 782.

#### SECTION 164 — SYNOPSIS.

1. Scope and applicability of the section.
2. Who can record a statement or confession.
  3. "If he is not a police-officer."
4. Magistrate acting under the section need not have jurisdiction in the case—Explanation.
5. Confessions to Magistrates of foreign States — Admissibility in evidence.
6. "Statement or confession."
7. Verification proceedings.
8. "May record."
9. "In the course of an investigation . . . inquiry or trial."
10. Mode of recording and procedure.
11. "Shall then be forwarded."
12. Warning to the accused.
13. Confession must be voluntary.

signs shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) "[A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

"[I have explained to (name) that he is not bound to make a confession and that if he does so, any confession he may make may be used as evidence against him and I believe] that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,  
Magistrate."

*Explanation.*—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

[1882 — S. 164; 1872 — S. 122.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 35, for "Every Magistrate not being a police-officer may". [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by Act (18 [XVIII] of 1923), S. 35, for "No Magistrate". [d] *Substituted, ibid.*, for "I believe".

#### Objects and Reasons.

"The intention of the Bill was to leave the position in regard to statements made under section 164 unaltered, but to confine the recording of confessions under that Section to superior Magistrates. We approve the Bill in so far as it deals with confessions and we think that statements also should not be recorded under the Section by Third Class Magistrates at all or by Second Class Magistrates unless specially empowered.

We consider that a statutory obligation should be laid on a Magistrate acting under the Section to warn an accused person about to make a confession that the same may be used against him, and we think that the certificate prescribed by sub-section (3) should record the fact that the warning had been given."

— S. C. R., [XVIII of 1923].

#### SECTION 164 — SYNOPSIS (*contd.*)

14. Statement of witness to be voluntary.

15. "Upon questioning the person."

16. Memorandum at the foot of the confession.

17. Accused when should be produced before Magistrate.

18. Confession immediately after police custody.

19. Confessing accused sent back to police custody.

20. Retracted confessions.

1. Scope and applicability of the section. — [1] A statement or confession made to a Magistrate but not recorded by him under this section cannot be admitted in evidence on the oral testimony of the Magistrate. (Vol 23) 1936 P C 253 (257, 258) : 17 Lah 629 : 37 Cri L Jour 897 : 63 Ind App 372 (PC).

[2] The confession or statement made to a Magistrate becomes a matter, required by the law to be reduced to writing, and by virtue of the provisions of S. 91 of the Evidence Act, no evidence of such confession or statement is admissible except the record thereof prepared under this section. (Vol 27) 1940 Pat 163 (169) : 19 Pat 301 : 41 Cri L Jour 533 & (Vol 26) 1939 Rang 219 (223) : 1939 Rang L R 97 : 40 Cri L Jour 691 & (Vol 25) 1938 Lah 594 (601) : 39 Cri L Jour 907 & (Vol 24) 1937 Lah 208 (210) : 38 Cri L Jour 583 & (Vol 24) 1937 Nag 257 (259) : 1 L R (1937) Nag 416 : 38 Cri L Jour 987.

[3] It has been held in the following case that a confession contained in a document delivered to a Magistrate is admissible in evidence although the confession has not been recorded under this section. (Vol 26) 1939 All 242 (246) : 1 L R (1939) All 377 : 40 Cri L Jour 559.

[4] The following case holds that a confession made to a Magistrate, not empowered to record confessions under this section, holding an inquiry into the cause of

the death of a person is admissible in evidence. (Vol 24) 1937 Sind 212 (215) : 31 Sind L R 460 : 38 Cri L Jour 968.

[5] As the jurisdiction and powers of a Magistrate are, under S. 12, limited to the district in which he is appointed, he can exercise the power of recording a confession in such district only. (Vol 8) 1921 All 61 (62) : 22 Cri L Jour 567.

2. Who can record a statement or confession.

— [1] A third class Magistrate cannot act under this section, as amended in 1923. (Vol 17) 1930 Lah 60 (61) : 31 Cri L Jour 79.

[2] A Presidency Magistrate cannot record a statement or confession made in the course of an investigation in the towns of Calcutta or Bombay by the police of Calcutta or Bombay. ('88) 15 Cal 595 (606) (FB) & ('97) 21 Bom 495 (498, 499) & (Vol 12) 1925 Cal 587 (589, 590) : 52 Cal 67 : 26 Cri L Jour 782.

[But see (Vol 13) 1926 Pat 279 (282) : 5 Pat 171 : 27 Cri L Jour 957.]

[3] Though a coroner is deemed to be a Magistrate for the purposes of S. 26 of the Evidence Act, under S. 19 of the Coroners Act, he is not required to comply with the formalities for recording confessions under S. 164. (Vol 32) 1945 Bom 265 (268) : 46 Cri L Jour 714 (FB) & (Vol 13) 1926 Bom 151 (152) : 50 Bom 111 : 27 Cri L Jour 466.

[4] A Magistrate not having power to record a confession or statement under S. 164, cannot record a confession under that section in the course of an inquiry under S. 176. (Vol 24) 1937 Sind 212 (215) : 31 Sind L R 460 : 38 Cri L Jour 968.

[5] It has been held in the following case that where a statement is relevant under S. 32 (1) of the Evidence Act, its admissibility is not affected by the fact that it



Section 164 — Note 2 (*contd.*)

was not recorded by a Magistrate having power under this section. (Vol 28) 1941 Rang 301 (302, 303) : 43 Cri L Jour 123 : 1941 Rang L R 258.

3. "If he is not a police-officer." — [1] Under S. 25 of the Evidence Act, no confession made to a police-officer can be proved against a person accused of any offence. *See also* (Vol 21) 1934 Pat 256 (257) : 35 Cri L Jour 1217. (Sub-divisional Magistrate is not a police-officer.)

[2] A confession made to a police *patel* in Bombay is inadmissible. ('93) 17 Bom 485 (486).

[3] A confession made to a Deputy Superintendent of Police, who is also a Magistrate, is inadmissible. 7 Bur L R 100 & (Vol 17) 1930 Rang 227 (228) : 8 Rang 52 : 31 Cri L Jour 823 & ('76) 1 Cal 207 (215, 216).

[4] Enquiry conducted by a Magistrate instead of a police-officer under Regulation 737 of the Police Regulation — Statements made by witnesses before him must be treated as made to a Magistrate and unless they are recorded as required by this section, they cannot be admitted in evidence. (Vol 27) 1940 Nag 186 (190) : I L R (1940) Nag 232 : 41 Cri L Jour 757.

4. Magistrate acting under the section need not have jurisdiction in the case.—Explanation. — [1] A Magistrate acting under this section need not necessarily be one having jurisdiction in the case. ('70) 7 Bom H C R Crown Cases 56 (57) & ('73) 10 Bom H C R 166 (174) (FB) & ('97) 10 C P L R Cr 16 (19) & ('89) 1889 Rat 468 (469, 470) & (Vol 5) 1918 Pat 179 (183) : 3 Pat L Jour 291 : 19 Cri L Jour 135.

[See however ('86) 1886 Rat 254 (261) & ('02) 29 Cal 453 (457).]

[2] A Magistrate directing police investigation, is not incompetent to act under this section. ('11) 12 Cri L Jour 489 (491, 492) : 5 Sind L R 31.

[3] Magistrate going to hold preliminary inquiry afterwards — He is not incompetent to act under this section. ('10) 11 Cri L Jour 453 (463, 470) : 37 Cal 467 & ('80) 5 Cal 954 (956) (FB) & ('99) 3 Cal W N 387 (391) & ('77) 1877 Rat 121 (121).

[4] Merely because Magistrate has begun an enquiry into the guilt of persons alleged to have been confederates of the confessing prisoner he is not incompetent to act under this section. (Vol 19) 1932 Lah 103 (109) : 33 Cri L Jour 97.

5. Confessions to Magistrates of foreign States — Admissibility in evidence. — [1] The words "police-officer" and "Magistrate" in S. 26 of the Evidence Act include police-officers and Magistrates of foreign States also. ('98) 22 Bom 235 (237, 238) & (Vol 20) 1933 All 286 (286, 287) : 34 Cri L Jour 704 & (Vol 12) 1925 Bom 529 (530) : 49 Bom 642 : 26 Cri L Jour 1478 & (Vol 8) 1921 Nag 39 (40) : 17 Nag L R 113 : 23 Cri L Jour 673.

[See (Vol 21) 1934 Sind 103 (105) : 35 Cri L Jour 1328.]

[2] Confession made before a Magistrate of foreign State is not inadmissible in evidence. (Vol 25) 1938 All 625 (629) : I L R (1938) All 875 : 40 Cri L Jour 132 & ('07) 6 Cri L Jour 377 (377) : 1907 Pun Re No. 8 Cr & (Vol 8) 1921 Nag 39 (40) : 17 Nag L R 113 : 23 Cri L Jour 673 & (Vol 21) 1934 Lah 873 (874) : 15 Lah 491 : 36 Cri L Jour 383.

[See (Vol 21) 1934 Sind 103 (105) : 35 Cri L Jour 1328.]

[See also ('90) 9 Cri L Jour 595 (597) : 1890 All W N 199.]

[3] Confession made before a Magistrate of foreign state will not be entitled to the same weight as a confession recorded by a Magistrate in British India in strict compliance with the terms of S. 164 of the Code. ('09) 9 Ori L Jour 297 (301) : 1909 Pun Re No. 2 Cr.

[4] Confession made before a Magistrate of foreign State — All that has to be seen is whether there is anything in the substantive or natural law to vitiate it. (Vol 19) 1932 Lah 367 (368) : 33 Cri L Jour 460.

[5] Different views are held as to whether confession or statement made before Magistrate of foreign state can be presumed to be genuine under S. 80 of the Evidence Act:

(a) The Allahabad High Court has held that, it can be so presumed. (Vol 25) 1938 All 625 (629) : I L R (1938) All 875 : 40 Cri L Jour 132 & ('90) 12 All 595 (597) : 1890 All W N 199.

(b) In the following cases it was held that, no presumption under that section could be drawn; and, that it was necessary to examine the Magistrate who took down the confession as a witness in the case before the document could be admitted in evidence. (Vol 1) 1914 Bom 41 (41) : 15 Cri L Jour 433 & ('81) 2 Weir 125 (125).

6. "Statement or confession." — [1] The section provides for the recording of confessions by accused persons and statements by any persons including an accused. (Vol 24) 1937 Nag 254 (255) : I L R (1937) Nag 524 : 38 Cri L Jour 648 (DB) & ('93) 1893 Pun Re No. 2 Cr p. 23 (27) & (Vol 12) 1925 Cal 926 (927) : 26 Cri L Jour 1279 (DB) & (Vol 9) 1922 Cal 342 (345) : 49 Cal 167 : 22 Cri L Jour 562 (DB). (Dissenting from 2 Cal W N 702.) & (Vol 6) 1919 Pat 534 (590) : 24 Cri L Jour 723 (DB) & ('78) 2 Bom 643 (644) & ('12) 13 Cri L Jour 33 (34) : 5 Sind L R 174 & (Vol 4) 1917 Mad 316 (317) : 17 Cri L Jour 195 : 39 Mad 977 (DB).

[See also (Vol 19) 1932 Mad 748 (752) : 56 Mad 63 : 33 Cri L Jour (814) (DB).]

[2] A statement is to be recorded in the manner prescribed for recording evidence, while a confession should be recorded in the manner provided by S. 364. (Vol 31) 1944 Nag 105 (118) : I L R (1944) Nag 274 : 45 Cri L Jour 673 (FB) & (Vol 24) 1937 Nag 254 (256) : 38 Cri L Jour 648 : I L R (1937) Nag 524 (DB) & ('93) 1893 Pun Re No. 2 Cr, p. 23 (27) & ('78) 2 Bom 643 (644) & (Vol 4) 1917 Mad 316 (317) : 17 Cri L Jour 195 : 39 Mad 977 (DB).

[3] Confession by an accused person cannot be made the basis of a prosecution for perjury under S. 193, Penal Code. (Vol 4) 1917 Mad 316 (317, 318) : 17 Cri L Jour 195 : 39 Mad 977 (DB) & ('83) 1933 Mad W N 251 (252).

[4] A statement may be made the basis of a charge for perjury. (Vol 20) 1933 Lah 321 (323) : 14 Lah 507 : 34 Cri L Jour 469 (DB) & ('06) 4 Cri L Jour 183 (191) (Bom) & (Vol 4) 1917 Mad 316 (318) : 17 Cri L Jour 195 : 39 Mad 977 (DB) & (Vol 20) 1933 Mad 767 (768) : 35 Cri L Jour 503 (DB) & (Vol 12) 1925 Oudh 660 (660, 661) : 26 Cri L Jour 1457 & ('12) 13 Cri L Jour 33 (35) : 5 Sind L R 174 & ('78) 2 Bom 643 (644) & ('99) 22 All 115 (117) (DB) & (Vol 21) 1934 Lah 981 (982) : 16 Lah 153 : 36 Cri L Jour 402.

[5] A statement cannot form the basis of a charge of giving false evidence in any stage of a judicial proceeding within S. 193, Penal Code. But the statement can be made the basis of a charge under the second part of S. 193. (Vol 8) 1921 Bom 3 (14) : 45 Bom 834 : 22 Cri L Jour 241 (FB) & (Vol 19) 1932 Lah 254 (254) : 33 Cri L Jour 413 & ('99) 1899 All W N 39 (39, 40).

[6] A statement recorded under this section by a Magistrate who has no jurisdiction to commit the case to the Court of Session is not one made in a stage of judicial proceeding within S. 193, Penal Code. ('87) 11 Bom 702 (704) & ('12) 13 Cri L Jour 709 (710) (Bom).

[7] Divergence between statement recorded under this section and statement of the witness at the trial — Proceedings taken under S. 476 for his prosecution — It will not be expedient to have him prosecuted if the

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statement at the trial is true and it is only the statement recorded under this section that is false. (Vol 28) 1941 Bom 408 (409, 410) : 43 Cri L Jour 167 : I L R (1942) Bom 26 (DB).

[8] A confession means an admission of certain facts which constitute an offence, made by a person who is charged with the offence which is the subject-matter of the statement. (Vol 22) 1935 Cal 681 (682) : 37 Cri L Jour 69 (DB) \* (12) 13 Cri L Jour 352 (393) : 35 Mad 397 (FB) \* (84) 6 All 509 (539) (FB).

[See (Vol 23) 1936 Pat 358 (359) : 37 Cri L Jour 862 (DB).]

[See also (Vol 21) 1924 Pat 651 (652) : 36 Cri L Jour 447 \* (Vol 26) 1939 P C 47 (52) : 66 Ind App 66 : 18 Pat 284 : I L R (1939) Kar P C 123 : 1941 Rang L R 789n : 40 Cri L Jour 864 (PO) \* (Vol 32) 1945 Bom 152 (154) : ILR (1945) Bom 278 : 46 Cri L Jour 541 (DB) \* (Vol 28) 1941 Sind 129 (131) : 42 Cri L Jour 741 : ILR (1941) Kar 257 (DB).]

[9] Whether a statement is to be called a confession or not, depends not merely on the nature of the statement itself but on the use that was intended to be made of it. (12) 13 Cri L Jour 352 (393) : 35 Mad 397 (FB) \* (Vol 4) 1917 Mad 316 (317) : 17 Cri L Jour 195 : 39 Mad 977 (DB).

[10] A "statement" which is not a confession, as for example, one which inculcates a co-accused, but exculpates the person making it, cannot be used as confession, whether against the person making it or against others with whom he may be jointly tried. (Vol 4) 1947 Mad 316 (318) : 17 Cri L Jour 195 : 39 Mad 977 (DB) \* (05) 2 Cri L Jour 22 (23, 24) (All) \* (Vol 17) 1930 All 746 (747, 748) : 32 Cri L Jour 152 (DB) \* (09) 10 Cri L Jour 369 (370, 371, 372) (Bom) \* (Vol 16) 1929 Bom 296 (301) : 53 Bom 479 : 31 Cri L Jour 65 (DB) \* (Vol 5) 1918 Cal 88 (90) : 45 Cal 557 : 19 Cri L Jour 305 (DB) \* (Vol 6) 1919 Cal 696 (699) : 46 Cal 411 : 20 Cri L Jour 24 (DB) \* (Vol 12) 1925 Lah 532 (533) : 26 Cri L Jour 531 (DB) \* (Vol 18) 1931 Lah 196 (199) : 32 Cri L Jour 579 (DB) \* (11) 12 Cri L Jour 562 (562) (Mad) \* (Vol 13) 1926 Nag 119 (122) : 26 Cri L Jour 1380 : 23 Nag L R 62 \* (Vol 16) 1929 Nag 350 (353) : 31 Cri L Jour 15 \* (Vol 17) 1930 Oudh 502 (503) (DB) \* (Vol 16) 1929 Pat 275 (279) : 8 Pat 289 : 30 Cri L Jour 675 (DB) \* (Vol 2) 1915 Low Bur 115 (117) : 16 Cri L Jour 25 (DB) \* (Vol 16) 1929 Sind 250 (252) : 30 Cri L Jour 1121 \* (Vol 18) 1931 Sind 154 (155, 156) : 33 Cri L Jour 106 (DB).

[11] A statement, which is not a confession, may be admissible to prove a relevant fact. (Vol 32) 1945 Bom 152 (154, 155) : I L R (1945) Bom 278 : 46 Cri L Jour 541 (DB) \* (Vol 28) 1941 Sind 129 (131, 132) : I L R (1941) Kar 257 : 42 Cri L Jour 741 (DB) \* (Vol 27) 1940 Sind 53 (55) : I L R (1939) Kar 800 : 41 Cri L Jour 477 (DB) \* (Vol 23) 1936 Pat 358 (359) : 37 Cri L Jour 862 (DB) \* (Vol 12) 1925 Pat 536 (539) : 4 Pat 327 : 26 Cri L Jour 878 (DB).

[12] Before making a confession, accused took Magistrate to the scene of occurrence, and pointed out to him various spots—Magistrate marked them on certain plans, and made some notes—*Held* that, in producing the plans and giving evidence as to what they purported to show, Magistrate was, in effect, deposing to what accused had told him, and as there was no record of accused's statement under this section, it could not be proved. (Vol 32) 1945 Lah 105 (108) : I L R (1945) Lah 290 : 47 Cri L Jour 4 (FB). (Per Division Bench in Order of Reference.) \* (Vol 16) 1929 Lah 794 (796) : 31 Cri L Jour 269.

[13] An accused can be convicted on the strength of confession made under this section. (Vol 32) 1945 Lah 43 (45) : 46 Cri L Jour 786 (DB) \* (Vol 31) 1944 Lah 472 (473) : I L R (1944) Lah 468 : 46 Cri L Jour 152 (DB).

[See also (Vol 32) 1945 P C 181 (184) (PO).]

[14] Where confession is the only evidence in the case, it must be accepted, in its entirety, but where there is other evidence also upon record whereby truth or falsity of a part of a confession can be tested Court should test it and reject part which is false. (Vol 31) 1944 Sind 137 (141) : I L R (1914) Kar 114 : 46 Cri L Jour 19 (DB) \* (Vol 29) 1942 Lah 271 (273) : 44 Cri L Jour 77 (DB) \* (Vol 32) 1945 Lah 91 (94) (DB).

[15] A statement recorded under this section cannot be admitted as substantive evidence against an accused, but it can only be used for contradicting the maker of the statement. (Vol 31) 1944 Sind 38 (42) : 45 Cri L Jour 393 : I L R (1944) Kar 86 (DB) \* (Vol 33) 1946 P C 45 (45) (PC). (Statement under S. 161 by witness can be used only to discredit his evidence in Court.) \* (Vol 33) 1946 P C 38 (41) (PC) \* (Vol 31) 1944 Nag 105 (109) : I L R (1944) Nag 274 : 45 Cri L Jour 673 (FB). (Per Bose J., in Order of Reference.) \* (Vol 29) 1942 Cal 277 (279) : 43 Cri L Jour 693 (DB) \* (Vol 29) 1942 Cal 26 (37) : 43 Cri L Jour 277 (DB).

[16] A statement recorded under this section can be used for corroborating the maker of it. (Vol 31) 1944 Nag 105 (109) : I L R (1944) Nag 274 : 45 Cri L Jour 673 (FB). (Per Bose J., in Order of Reference.) \* (Vol 31) 1944 Sind 38 (42) : 45 Cri L Jour 393 : I L R (1944) Kar 86 (DB) \* (Vol 28) 1941 Oudh 517 (523) : 42 Cri L Jour 758 (DB) \* (Vol 29) 1942 Cal 36 (37) : 43 Cri L Jour 277 (DB) \* (Vol 13) 1926 Lah 122 (124) : 26 Cri L Jour 1425 (DB).

[See also (Vol 31) 1944 F C 38 (39) : 46 Cri L Jour 317 : I L R (1944) Kar F C 158 (FC).]

[17] A statement recorded under this section cannot be used for the purpose of contradicting the statements made by other witnesses at the trial. (Vol 18) 1926 Lah 122 (124) : 26 Cri L Jour 1425 (DB).

[18] Statements recorded under this section should, under S. 80 of the Evidence Act, be presumed to be genuine and need not be formally proved. (Vol 25) 1938 Lah 477 (477) : 39 Cri L Jour 864 \* (Vol 23) 1936 Pat 11 (13) : 36 Cri L Jour 235 (DB) \* (Vol 4) 1917 Pat 247 (248) : 2 Pat L Jour 80 : 18 Cri L Jour 445 (DB).

[See (Vol 27) 1940 Pat 163 (166) : 19 Pat 301 : 41 Cri L Jour 533 (DB) \* (Vol 23) 1936 Lah 247 (249) : 16 Lah 912 : 37 Cri L Jour 432 (DB).]

[See also (Vol 18) 1931 Lah 59 (60, 61) : 32 Cri L Jour 253.]

[19] Statements recorded under this section are public documents and the public servant, in whose custody those documents are, is bound to issue copies thereof and allow inspection of the same by the accused person. (Vol 32) 1945 Mad 85 (86) : 46 Cri L Jour 417 \* (Vol 24) 1937 Sind 303 (304) : 39 Cri L Jour 57 (DB) \* (Vol 19) 1932 All 327 (329) : 33 Cri L Jour 752 \* (Vol 16) 1929 Lah 429 (430) : 30 Cri L Jour 760 \* (Vol 18) 1931 Lah 59 (60, 61) : 32 Cri L Jour 253 \* (Vol 25) 1938 Rang 442 (445) : 40 Cri L Jour 265 (DB).

[But see ('07) 6 Cri L Jour 346 (347) : 30 Mad 466 (DB).]

7. Verification proceedings. — [1] Verification of confessions—Verification proceedings are not wholly illegal—Statements made by accused to verifying Magistrate should be recorded in the manner provided by this section—If not such statements are not admissible in evidence. (Vol 24) 1937 Cal 99 (110, 111) : 38 Cri L Jour 818 (SB) \* (Vol 5) 1918 Cal 88 (91) : 45 Cal 557 : 19 Cri L Jour 305 (DB).

8. "May record." — [1] When a confession or statement is alleged to have been made to a Magistrate it cannot be proved otherwise than by the record prepared under this section. Although the section uses the expression "may record" the rule applicable is that where a power is given to do a certain thing in a certain



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way, the thing must be done in that way or not at all. (Vol 23) 1936 P C 253 (257) : 17 Lah 629 : 37 Cri L Jour 397 : 63 Ind App 372 (20) \* (Vol 30) 1943 Sind 166 (169, 170) : I L R (1943) Kar 285 : 45 Cri L Jour 118 (DB) \* (Vol 31) 1944 Sind 113 (120) : 45 Cri L Jour 704 : I L R (1943) Kar 371 (DB) \* (Vol 27) 1940 Nag 218 (220) : I L R (1941) Nag 372 : 41 Cri L Jour 438 (DB) \* (Vol 30) 1943 Oudh 269 (270) : 44 Cri L Jour 389 (DB) \* (Vol 32) 1945 Lah 105 (108) : I L R (1945) Lah 290 : 47 Cri L Jour 4 (FB).

9. "In the course of an investigation . . . inquiry or trial. — [1] A confession, in order to come within this section, must be made either in the course of an investigation under Chapter XIV of the Code, or at any time afterwards and before the commencement of the enquiry or trial. (Vol 32) 1945 Nag 72 (73) : ILR (1945) Nag 515 : 46 Cri L Jour 731 \* (10) 11 Cri L Jour 453 (462, 470) : 37 Cal 467 (FB).

[2] Statement made at a time when there is no investigation under Chapter XIV of the Code is not made under this section. (Vol 28) 1941 Rang 301 (302) : 43 Cri L Jour 123 : 1941 Rang L R 258 \* (Vol 27) 1940 Mad 138 (139) : I L R (1940) Mad 428 : 41 Cri L Jour 322 (DB) \* (Vol 22) 1935 Oudh 477 (481) : 36 Cri L Jour 1007 : 11 Luck 327 \* (Vol 22) 1935 Oudh 416 (419) : 36 Cri L Jour 977 \* (Vol 14) 1927 Bom 501 (504) : 28 Cri L Jour 1012.

[3] An investigation held by the police of a foreign State is not one under Chapter XIV of the Code and a statement taken by a Magistrate of a foreign State in the course of such investigation is not one under this section. (Vol 12) 1925 Bom 529 (530) : 49 Bom 642 : 26 Cri L Jour 1478.

[4] Accused person arrested at Calcutta, and produced by Calcutta police before Calcutta Magistrate in pursuance of a request made by the police of Burdwan holding investigation under Chapter XIV of the Code—*Held* that, arrest and production of accused must be considered as something done in the course of the investigation in Burdwan and S. 164 would apply. (Vol 13) 1926 Cal 742 (743) : 27 Cri L Jour 621.

[5] A statement or confession recorded after the commencement of the inquiry or trial is not within this section. (Vol 9) 1922 Lah 189 (191) : 23 Cri L Jour 617 \* (Vol 17) 1930 Lah 454 (456) : 31 Cri L Jour 533.

[See also ('83) 1883 All W N 238 (238).]

[6] Charge laid against two persons one of whom is absconding — Inquiry or trial commencing as regards accused apprehended — Investigation continuing against absconding accused — In the course of such investigation absconding accused apprehended — Confession by him recorded — Such confession is properly one within this section. (Vol 19) 1932 Lah 103 (108) : 33 Cri L Jour 97.

[See also (Vol 15) 1928 Cal 500 (501, 502) : 29 Cri L Jour 497.]

[7] A statement made at an inquiry held before any investigation is held is not within this section. ('06) 3 Cri L Jour 138 (140) : 32 Cal 1085.

10. Mode of recording and procedure. — [1] The provision as regards recording of statements and confessions as laid down in sub-s. (2) should be strictly followed. (Vol 21) 1934 All 81 (83) : 56 All 302 : 35 Cri L Jour 385 (FB) \* (Vol 20) 1933 All 356 (357, 358) : 55 All 426 : 34 Cri L Jour 574 \* (Vol 21) 1934 Oudh 151 (153) : 35 Cri L Jour 915 : 9 Luck 546 (DB).

[2] Mere filing of a confession already written and signed and handed over to the Magistrate does not amount to recording a confession. (Vol 20) 1933 All 356 (357) : 55 All 426 : 34 Cri L Jour 574.

[3] The writing of the confession must be made a

part of the judicial record. ('06) 5 Cri L Jour 4 (5) (DB) (Bom).

[4] Magistrate writing out a confession, but refusing to make the memorandum under sub-s. (3)—Such confession cannot form part of judicial record and is inadmissible in evidence. (Vol 5) 1918 Oudh 295 (296) : 19 Cri L Jour 507 (DB).

[5] Confession not signed by accused, nor his thumb impression affixed to it — Magistrate also did not sign English version of it—*Held* that no reliance should be placed on the confession as being voluntarily made. (Vol 32) 1945 Bom 484 (485) : 47 Cri L Jour 252 (DB).

[6] Omission to take signature of accused is not necessarily fatal to its admissibility in every case—Defect can be cured under S. 533 in proper cases. (Vol 28) 1941 Nag 17 (18, 19) : 42 Cri L Jour 117 : ILR (1941) Nag 104 (DB).

[7] If an accused is able to write his name, his thumb impression is not a signature within S. 364. ('05) 2 Cri L Jour 405 (405, 406) : 32 Cal 550 (DB).

[8] An accused person who refuses to sign a statement or a confession is not liable for punishment under S. 180, Penal Code. ('77) 4 Bom 15 (19).

[9] The record of a confession should be in plain and legible writing. ('96) 1896 Rat Un Re Cr Cas 837 (838) (DB).

[10] Magistrate is not forbidden by law from recording a confession on a Sunday or any other holiday and at a place other than the open court-house. (Vol 22) 1935 Rang 491 (492) : 37 Cri L Jour 280 \* (Vol 17) 1930 Lah 171 (172) : 31 Cri L Jour 759 (DB) \* (Vol 13) 1926 Pat 279 (283) : 5 Pat 171 : 27 Cri L Jour 957 (DB) \* (Vol 18) 1931 Lah 763 (766) : 32 Cri L Jour 985 (DB).

[11] It is not, ordinarily, proper to record a confession at night in a police-station or in the Magistrate's house. (Vol 19) 1932 Lah 204 (208) : 33 Cri L Jour 242 (DB) \* (Vol 25) 1938 Pesh 5 (8) : 39 Cri L Jour 448 (DB) \* (Vol 7) 1920 Cal 78 (79, 80) : 21 Cri L Jour 266 (DB) \* (Vol 21) 1934 Lah 675 (676) : 36 Cri L Jour 392.

[12] Confessional statements should be recorded in the court-room. Where they are not so recorded during ordinary court hours, some explanation should be furnished by the prosecution. (Vol 24) 1937 Lah 98 (99) : 38 Cri L Jour 338 (DB) \* (Vol 24) 1937 Lah 746 (747) : 39 Cri L Jour 262.

[13] If the matter is urgent and surroundings have to be accepted as unavoidable, exceptional care should be taken to observe, very strictly, directions, prescribed by rules for recording confessions. (Vol 19) 1932 Lah 204 (208) : 33 Cri L Jour 242 (DB).

[14] Mere fact that a confession was not recorded at the court-house, or in daytime is not sufficient to show that it was not made voluntarily. (Vol 14) 1927 Cal 398 (400, 401) : 28 Cri L Jour 485 (DB) \* (Vol 12) 1925 Cal 587 (594, 595) : 52 Cal 67 : 26 Cri L Jour 782 \* (Vol 9) 1922 Cal 107 (113) : 49 Cal 573 : 23 Cri L Jour 657 (DB).

[15] Accused person making a confession — A third party should not be allowed to put or suggest questions to be put to the accused person. ('09) 10 Cri L Jour 125 (133) (DB) (Cal).

[See also (Vol 32) 1945 Bom 484 (487) : 47 Cri L Jour 252 (DB) \* (Vol 21) 1934 All 903 (913) : 57 All 267 : 36 Cri L Jour 152 (DB).]

11. "Shall then be forwarded."—[1] Provision in sub-s. (2) regarding forwarding of statements and confessions to the Magistrate by whom the case is to be inquired into or tried, is imperative. (Vol 27) 1940 Rang 33 (34) : 41 Cri L Jour 392 \* (Vol 18) 1931 Lah 59 (60) : 32 Cri L Jour 233.

[2] Magistrate, after recording a confession, made it over to the police-officer—*Held* that, procedure adopted

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was objectionable. (Vol 18) 1931 Lah 408 (414) : 32 Cri L Jour 818.

[See (Vol 23) 1936 Lah 341 (343) : 16 Lah 345 : 37 Cri L Jour 504 (DB).]

12. Warning to the accused. — [1] It is illegal for a Magistrate, recording a confession to warn the accused not to expect any advantage or disadvantage therefrom. ('06) 3 Cri L Jour 324 (325, 326) (DB) (All).

[2] It is illegal for a Magistrate to say to the accused that everything he may say will go as evidence against him, and so he had better tell the truth. ('84) 10 Cal 775 (776, 777) (DB).

[3] Under the section as amended in 1923 a Magistrate is required, before recording a confession to explain to the accused that he is not bound to make a confession and that if he does so, it may be used as evidence against him. (Vol 12) 1925 Lah 367 (367, 368) : 26 Cri L Jour 1175 (DB).

[4] A record of memorandum by the Magistrate under sub-s. (3) is conclusive, in the absence of anything to the contrary, as to the fact that a warning was given before the confession was recorded. (Vol 20) 1932 Bom 145 (146) : 57 Bom 336 : 34 Cri L Jour 555 (FB).

[See also ('71) 8 Bom H C R Crown Cas 126 (136) (DB).]

[5] Accused not told that he need not make a confession — His confession is inadmissible in evidence — S. 533 will not cure defect. (Vol 8) 1921 Pat 306 (306) : 22 Cri L Jour 119 (DB) \* (Vol 12) 1925 Lah 432 (433) : 6 Lah 183 : 26 Cri L Jour 1238 (DB) \* (Vol 12) 1925 Lah 367 (367, 368) : 26 Cri L Jour 1175 (DB) \* (Vol 33) 1946 Pat 169 (172) : 24 Pat 646 (DB) \* (Vol 19) 1932 Bom 553 (556) : 56 Bom 542 : 34 Cri L Jour 73 (DB). (Overruled by (Vol 20) 1933 Bom 145 : 57 Bom 336 : 34 Cri L Jour 555 (FB) on other points.)

[See (Vol 24) 1937 Mad 321 (324) : 38 Cri L Jour 753.]

[6] Warning actually given but record not showing it — Defect can be cured under S. 533, by evidence of the Magistrate that he did give the warning. (Vol 29) 1942 Pat 283 (285) : 43 Cri L Jour 301 (DB) \* ('37) 1937 Mad W N 562 (564) \* ('36) 37 Cri L Jour 1101 (1103) (DB) (Cal) \* (Vol 20) 1933 Oudh 404 (406, 407) : 35 Cri L Jour 192 \* (Vol 20) 1933 Bom 145 (146) : 57 Bom 336 : 34 Cri L Jour 555 (FB) \* (Vol 12) 1925 Lah 448 (449) : 26 Cri L Jour 1458 (DB) \* (Vol 20) 1933 Lah 311 (312) : 34 Cri L Jour 712 (DB) \* (Vol 12) 1925 Pat 191 (192) : 3 Pat 872 : 26 Cri L Jour 314 (DB).

[See (Vol 19) 1932 Mad 431 (432) : 55 Mad 711 : 33 Cri L Jour 526 (DB).]

[7] In the following cases it has been held that in view of S. 29, Evidence Act, a confession may be admitted in evidence although accused was not warned as required by this section. (Vol 28) 1941 All 145 (147) : 42 Cri L Jour 485 : I L R (1941) All 280 (DB) \* ('37) 1937 Mad W N 1325 (1327) \* (Vol 19) 1932 Mad 431 (432) : 33 Cri L Jour 536 : 55 Mad 711 (DB).

[8] Exact words of warning are not material, provided, Magistrate recording confession explains and person, making it, clearly understands that he need not make a confession. (Vol 12) 1925 Lah 448 (449) : 26 Cri L Jour 1458 (DB).

[9] It is not enough for the Magistrate to merely tell the person making the statement that he should think over the matter and state what really happened, as otherwise the statement would be used against him. (Vol 27) 1940 Mad 562 (563) : 42 Cri L Jour 64 (DB).

[10] It is not necessary that there should be any note of the warning at the beginning of the confession. It is sufficient if that is recorded in the memorandum which is required to be made at the foot. (Vol 20) 1933

Bom 145 (145, 147) : 57 Bom 336 : 34 Cri L Jour 555 (FB). (Overruling (Vol 19) 1932 Bom 553 : 56 Bom 542 : 34 Cri L Jour 73 (DB).)

[11] A Magistrate recording a confession should inform the accused that he is a Magistrate. (Vol 17) 1930 Oudh 449 (451) : 32 Cri L Jour 97 (DB).

[12] Accused aware of fact that Magistrate recording confession is Magistrate — There is no illegality in omission to warn the accused of the fact. (Vol 19) 1932 Lah 103 (109) : 33 Cri L Jour 97 (DB) \* ('09) 10 Cri L Jour 325 (335) (DB) (Cal).

[See (Vol 23) 1936 Lah 707 (708) : 37 Cri L Jour 940.]

[But see ('32) 33 Cri L Jour 567 (569) (DB) (Lah).]

[13] Warning to accused — Accused must be given sufficient time to reflect whether he should make confession or not. (Vol 33) 1946 Pat 169 (173) : 24 Pat 646 (DB).

[14] After recording part of confession on previous day, accused produced next day — Fresh warning to accused that he was not bound to confess is necessary. (Vol 33) 1946 Pat 169 (173, 174) : 24 Pat 646 (DB).

13. Confession must be voluntary. — [1] A Magistrate should not record any confession unless he has reason to believe that it is made voluntarily. (Vol 25) 1938 Mad 490 (491) : 39 Cri L Jour 585 (DB) \* (Vol 24) 1937 Lah 399 (400) : 38 Cri L Jour 879 : I L R (1937) Lah 481 (DB) \* (Vol 23) 1936 Rang 453 (454, 455) : 37 Cri L Jour 1112 (DB) \* (Vol 22) 1935 Mad 479 (481) : 36 Cri L Jour 1107 (DB).

[2] Magistrate should make inquiry into the point whether the confession is made voluntarily before recording it. (Vol 32) 1945 Bom 484 (487) : 47 Cri L Jour 252 (DB) \* (Vol 23) 1936 Cal 101 (103) : 37 Cri L Jour 445 (DB) \* (Vol 5) 1918 Pat 179 (183) : 3 Pat L Jour 291 : 19 Cri L Jour 135 (SB) \* (Vol 12) 1925 Cal 587 (592) : 52 Cal 67 : 26 Cri L Jour 782 \* (Vol 12) 1925 Lah 605 (610) : 6 Lah 415 : 27 Cri L Jour 514 (DB) \* ('85) 2 Weir 136 (136) (DB) \* ('86) 2 Weir 140 (140, 141) (DB) \* (Vol 1) 1914 Oudh 194 (198) : 15 Cri L Jour 633 (DB) \* (Vol 17) 1930 Oudh 449 (451) : 32 Cri L Jour 97 (DB) \* (Vol 4) 1917 Pat 322 (325) : 18 Cri L Jour 721 (DB) \* ('06) 4 Cri L Jour 385 (387) : 3 Low Bur Rul 213 \* ('04) 2 Low Bur Rul 317 (318) (DB) \* (Vol 8) 1921 Bom 70 (71) : 45 Bom 1086 : 22 Cri L Jour 318 (DB) \* (Vol 22) 1935 Lah 230 (244) : 35 Cri L Jour 1180 (DB).

[See also (Vol 32) 1945 Bom 292 (295) : 47 Cri L Jour 51 (DB).]

[3] Confession recorded without asking questions as to its voluntariness is inadmissible in evidence and cannot be acted upon. (Vol 29) 1942 Pat 283 (285) : 43 Cri L Jour 301 (DB) \* (Vol 27) 1940 Pat 163 (166) : 19 Pat 301 : 41 Cri L Jour 533 (DB) \* (Vol 26) 1939 Rang 219 (222) : 1939 Rang L R 97 : 40 Cri L Jour 691 \* ('37) 1937 Mad W N 1325 (1327) \* (Vol 7) 1920 All 108 (109, 110) : 21 Cri L Jour 638 (DB) \* (Vol 12) 1925 Cal 587 (592, 593) : 52 Cal 67 : 26 Cri L Jour 782 \* (Vol 13) 1926 Cal 742 (743) : 27 Cri L Jour 621 (DB) \* (Vol 9) 1922 Lah 237 (239) : 2 Lah 325 : 23 Cri L Jour 149 (DB) \* (Vol 19) 1932 Lah 204 (208, 209) : 33 Cri L Jour 242 (DB) \* ('32) 1932 Mad W N 714 (716, 717) (DB) \* (Vol 20) 1933 Oudh 315 (319) : 8 Luck 518 : 35 Cri L Jour 10 (DB) \* ('06) 4 Cri L Jour 198 (199, 200) : 3 Low Bur Rul 173 (DB).

[See also (Vol 24) 1937 Mad 321 (324) : 38 Cri L Jour 753.]

[See however ('36) 37 Cri L Jour 1101 (1104) (DB) (Cal).]

[4] The Magistrate should record circumstances under which confessions are made, showing in whose custody the prisoners were and how far they were free agents. (Vol 31) 1944 Bom 338 (341) (DB) \* (Vol 33) 1946 Pat 169 (173) : 24 Pat 646 (DB) \* ('66) 5 Suth W R Cr 6 (6) (DB) \* ('88) 1 O P L R Cr 115 (117).

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[5] Magistrate, after questioning accused, not satisfied that a confession is voluntary and made without any pressure—It is not admissible in evidence. (118) 14 Cri L Jour 211 (212) : 35 All 260 (DB) \* (Vol 12) 1925 Cal 587 (597, 598) : 52 Cal 67 : 26 Cri L Jour 782 \* (10) 11 Cri L Jour 694 (695) : 37 Cal 735.

[6] If the Court sees any ground of exclusion mentioned in S. 24 of the Evidence Act, such as inducement, threat or promise, it may reject the confession as not voluntary. (Vol 31) 1944 Nag 105 (107, 115) : I L R (1944) Nag 274 : 45 Cri L Jour 673 (FB) \* (Vol 27) 1940 Nag 218 (220) : I L R (1941) Nag 372 : 41 Cri L Jour 433 (DB) \* (Vol 30) 1943 Sind 166 (169, 170) : I L R (1943) Kar 285 : 45 Cri L Jour 118 (DB) \* (Vol 29) 1942 All 47 (48) : 43 Cri L Jour 880 : I L R (1941) All 912 \* (Vol 23) 1936 Lah 855 (856) : 38 Cri L Jour 27 (DB) \* (Vol 21) 1934 All 81 (85) : 56 All 302 : 35 Cri L Jour 385 (FB) \* (1900) 25 Bom 168 (174) (DB) \* (Vol 8) 1921 Bom 70 (71) : 45 Bom 1086 : 22 Cri L Jour 318 (DB) \* (Vol 12) 1925 Cal 587 (591) : 52 Cal 67 : 26 Cri L Jour 782 \* (Vol 20) 1933 Cal 747 (748) : 34 Cri L Jour 1222 (SB) \* (Vol 19) 1932 Lah 73 (77, 78) : 32 Cri L Jour 1036 (DB) \* (Vol 20) 1933 Lah 388 (391) : 34 Cri L Jour 598 (DB) \* ('33) 1933 Mad W N 723 (724, 725) (DB) \* (Vol 12) 1925 Oudh 1 (5, 6) : 27 Oudh Cas 40 : 25 Cri L Jour 49 \* (Vol 20) 1933 Oudh 192 (195) : 8 Luck 410 : 34 Cri L Jour 653 (DB) \* (Vol 14) 1927 Pat 429 (432) : 28 Cri L Jour 447 (DB) \* (Vol 16) 1929 Pat 275 (277) : 8 Pat 289 : 30 Cri L Jour 675 (DB) \* ('97-01) 1 Upp Bur Rul 152 (153, 154) \* (Vol 3) 1916 Upp Rur 1 (1) : 17 Cri L Jour 402 : 2 Upp Bur Rul 113 \* (Vol 16) 1929 Sind 245 (248) : 31 Cri L Jour 775 (DB) \* (Vol 22) 1935 Mad 479 (480) : 36 Cri L Jour 1107 (DB).

[See also (Vol 30) 1943 Oudh 269 (271) : 44 Cri L Jour 389 (DB) \* (Vol 20) 1933 Cal 644 (646) : 60 Cal 719 : 34 Cri L Jour 1187 (DB).]

[7] Magistrate is not justified in refusing to record the confession of an accused person on a mere suspicion of insanity. ('94) 1894 Pun Re No. 3 Cr. p. 5 (6, 7) (DB).

[See also ('32) 1932 Mad W N 714 (717).]

[8] Confession duly certified by Magistrate—It may fairly be assumed that he did his best to assure himself that the statements were voluntary and that if he had any suspicion he would not have placed them on the record, though it is no conclusive proof. (Vol 28) 1941 Pat 303 (305) : 42 Cri L Jour 343 : 20 Pat 547 (DB) \* (Vol 29) 1935 Rang 491 (493) : 37 Cri L Jour 280 \* (Vol 18) 1931 Mad 42 (43) : 32 Cri L Jour 262 \* (Vol 19) 1932 Sind 201 (203, 204) : 26 Sind L R 302 : 34 Cri L Jour 147 (DB) \* (Vol 9) 1922 Oudh 302 (303) : 25 Oudh Cas 229 : 24 Cri L Jour 561 (DB) \* (Vol 12) 1925 Lah 605 (611) : 6 Lah 415 : 27 Cri L Jour 514 (DB) \* ('23) 24 Cri L Jour 904 (906) (Pesh) \* (Vol 21) 1934 Oudh 418 (423) : 35 Cri L Jour 1290 : 10 Luck 150 (DB) \* ('09) 10 Cri L Jour 125 (129) (DB) (Cal).

[9] Accused handed back to police after his confession has been recorded — Court must look very carefully at the confessions and the surrounding circumstances to satisfy itself that the confessions were, in fact, voluntary. (Vol 25) 1938 Lah 292 (293) : 39 Cri L Jour 475 : I L R (1937) Lah 740 (DB).

[10] Certificate of the Magistrate stating that the confession is not voluntary — It cannot be acted upon — Defect not curable under S. 533. (Vol 2) 1915 Bom 140 (141) : 16 Cri L Jour 740 (DB).

[11] Mere omission to comply with rules issued by Government under this section, for the recording of confessions is not sufficient to rule out the confession if there has been no breach of the provisions of this section. (Vol 25) 1938 All 625 (630) : I L R (1938) All 875 : 40 Cri L Jour 132 (DB) \* (Vol 25) 1938 Mad 490 (491) : 39 Cri L Jour 585 (DB) \* (Vol 24) 1937 Mad 755

(757) : I L R (1938) Mad 348 : 39 Cri L Jour 390 (DB) \* (Vol 20) 1933 Oudh 299 (302) : 34 Cri L Jour 838 (DB) \* (Vol 20) 1933 Oudh 313 (314, 315) : 35 Cri L Jour 7 (DB) \* (Vol 8) 1921 Nag 39 (40) : 17 Nag L R 113 : 23 Cri L Jour 673 (DB).

[12] Request made to a Magistrate by police to record the confession of an accused under this section — It is the duty of the Magistrate to remove the accused from all police influence, to warn him that his statement will be used against him, to give him time to think over the consequences of such a confession and to satisfy himself that the statement made was a voluntary one — Where this is done, the mere fact that some police-officer, at or soon after the arrest of the accused, told him to make a confession to the Magistrate is no proof that he was forced to make the statement. (Vol 24) 1937 Mad 755 (758) : I L R (1938) Mad 348 : 39 Cri L Jour 390 (DB).

[13] Accused retracting a confession and alleging that it was extorted from him by torture resulting in injuries to him — It is the duty of the trying Magistrate to take immediate steps to have the accused examined by a competent doctor. (Vol 26) 1939 Lah 66 (68) : I L R (1939) Lah 216 : 40 Cri L Jour 614 (DB).

## 14. Statement of witness to be voluntary. —

[1] It has been held in the following cases that it is improper for a police-officer to send a person practically under custody, who is in the position of a witness, to have his statement recorded by a Magistrate under this section with the view of fixing him to that statement at the time when judicial proceedings are subsequently taken and that the voluntary character of such a statement cannot but be doubted. (Vol 25) 1938 Pat 290 (295) : 39 Cri L Jour 635 (DB) \* (1900) 27 Cal 295 (300) (DB).

[2] Where the accused is a police-officer, or where the accused are at large, and there is every possibility that the witnesses may be tampered with, it is proper to have the statements of the witnesses recorded under this section. (Vol 27) 1940 Nag 340 (346) : 42 Cri L Jour 17 : I L R (1941) Nag 110 (DB) \* (Vol 28) 1941 Oudh 517 (523) : 42 Cri L Jour 758 (DB).

15. "Upon questioning the person." — [1] Magistrate asked to record a confession under this section — He should, before doing so, question the person making it with a view to find out whether it is made voluntarily. (Vol 32) 1945 Bom 484 (486) : 47 Cri L Jour 252 (DB) \* (Vol 29) 1942 Pat 113 (117) : 43 Cri L Jour 90 : 21 Pat 153 (DB) \* (Vol 25) 1938 Pat 60 (63) : 39 Cri L Jour 302 (DB) \* (Vol 24) 1937 Nag 257 (258) : I L R (1937) Nag 416 : 38 Cri L Jour 987 (DB) \* ('86) 2 Weir 136 (136) (DB) \* (Vol 1) 1914 Oudh 194 (198) : 15 Cri L Jour 633 (DB) \* ('99) 1 Bom L R 357 (358) (DB) \* ('06) 4 Cri L Jour 477 (479) : 3 Low Bur Rul 213.

[2] Magistrate recording confession must also record a brief statement of the reasons for his believing that the statement was voluntarily made. (Vol 25) 1938 Pat 352 (357) : 39 Cri L Jour 725 (DB).

[3] Magistrate should question the accused as to his motive in making the confession and as to the circumstances under which the question of confession and the willingness of the accused to confess first arose. (Vol 29) 1942 Pat 90 (95) : 43 Cri L Jour 36 (DB) \* (Vol 20) 1933 All 31 (38) : 55 All 91 : 34 Cri L Jour 489 (DB) \* (Vol 18) 1931 All 609 (614, 615) : 32 Cri L Jour 1052 (DB) \* (Vol 4) 1917 Pat 322 (325) : 18 Cri L Jour 721 (DB) \* (Vol 4) 1917 Pat 475 (477) : 18 Cri L Jour 623 (DB).

[4] Rule as to the necessity of questioning as to the motive of the accused in making confession is one of prudence. (Vol 10) 1923 Pat 13 (17, 18) : 24 Cri L Jour 497 (DB). (Distinguishing (Vol 4) 1917 Pat 475 : 18

Section 164—Note 15 (*contd.*)

Cri L Jour 623 (DE). (Vol 12) 1925 Cal 587 (594) : 52 Cal 67 : 26 Cri L Jour 782 (86) : 2 Weir 136 (136) (DB).

[5] The Court must in each case satisfy itself that the Magistrate honestly believed and took steps to ascertain that the confession was a voluntary one. (Vol 29) 1942 Pat 113 (116) : 43 Cri L Jour 90 : 21 Pat 153 (DB) (Vol 25) 1938 Lah 200 (201) : I L R (1937) Lah 658 : 39 Cri L Jour 488 (DB) (Vol 24) 1937 Nag 257 (258) : I L R (1937) Nag 416 : 38 Cri L Jour 987 (DB) (Vol 10) 1923 Pat 356 (360) : 24 Cri L Jour 649 (DB) (Vol 18) 1931 All 809 (614, 615) : 32 Cri L Jour 1052 (DB) (Vol 14) 1927 Lah 682 (685) : 28 Cri L Jour 807 (DB) (Vol 17) 1930 Oudh 449 (451, 454, 455) : 32 Cri L Jour 97 (DB).

[Sec ('32) 1932 Mad W N 714 (717) (DB) (Vol 14) 1927 Mad 974 (975) : 51 Mad 167 : 28 Cri L Jour 955 (DB).]

[6] The question put must be in pursuance of a real endeavour to find out the object of the confession and must be directed to eliciting facts which will enable the Magistrate to Judge of the character of the confession that the accused is about to make. (Vol 23) 1936 Lah 855 (856) : 38 Cri L Jour 27 (DB) (Vol 12) 1925 Cal 587 (591, 592, 593, 594) : 52 Cal 67 : 26 Cri L Jour 782 (86) : 5 C P L R Cr 13 (14, 15) (Vol 19) 1932 All 228 (231) : 54 All 350 : 33 Cri L Jour 201 (DB) (Vol 4) 1917 Pat 322 (325) : 18 Cri L Jour 721 (DB) (Vol 10) 1923 Oudh 39 (41).

[See also (Vol 22) 1935 Lah 230 (244) : 35 Cri L Jour 1180 (DB).]

[7] The Magistrate would be justified, in the ordinary performance of his duties, in clearing up any matter which is ambiguous on the face of the statement; he will be wholly unjustified in extracting, by putting questions by way of cross-examination, facts which the deponent has not spoken to before him or which tend to incriminate him. (Vol 13) 1926 All 22 (25) : 26 Cri L Jour 1209 (DB) (Vol 17) 1930 All 746 (750) : 32 Cri L Jour 152 (DB) (Vol 19) 1932 Lah 180 (182) : 33 Cri L Jour 414 (DB) (92) 5 C P L R Cr 13 (14, 15) (Vol 4) 1917 Oudh 362 (368) : 20 Oudh Cas 136 : 18 Cri L Jour 742 (DB) (Vol 17) 1930 Lah 454 (456) : 31 Cri L Jour 533 (DB).

[8] Whether the questions put are such as may properly be put to the accused depends on the nature of the questions and the object of it, and the mere fact that an answer was elicited by a question does not make the proceedings improper or the confession inadmissible. (Vol 13) 1926 All 22 (25) : 26 Cri L Jour 1209 (DB) (Vol 2) 1 Low Bur Rul 340 (342, 343, 344) (FB) (Vol 10) 11 Cri L Jour 453 (463, 470) : 37 Cri L Jour 467 (DB).

[9] It is advisable to record the questions and answers by means of which a Magistrate satisfies himself that a confession is voluntary. (Vol 25) 1938 Pat 352 (357) : 39 Cri L Jour 725 (DB) (Vol 19) 1932 All 228 (231, 232) : 54 All 350 : 33 Cri L Jour 201 (DB) (Vol 13) 1926 All 22 (25) : 26 Cri L Jour 1209 (DB) (Vol 17) 1930 Oudh 449 (451) : 32 Cri L Jour 97 (DB).

[10] Omission to record questions and answers or recording them at the end instead of at the beginning of the confession is not a fatal defect but only an irregularity cured by S. 533. (Vol 29) 1942 Pat 113 (117) : 43 Cri L Jour 90 : 21 Pat 153 (DB) (Vol 27) 1940 Pat 163 (169) : 19 Pat 301 : 41 Cri L Jour 533 (DB) (Vol 25) 1938 Lah 200 (200) : I L R (1937) Lah 658 : 39 Cri L Jour 488 (DB) (Vol 24) 1937 Nag 257 (259) : I L R (1937) Nag 416 : 38 Cri L Jour 987 (DB) (Vol 21) 1934 All 81 (84, 85) : 56 All 802 : 35 Cri L Jour 385 (FB) (Vol 25) 25 Bom 543 (546) : 2 Bom L R 122 (Vol 19) 1932 Lah 204 (209) : 33 Cri L Jour 242 (DB) (Vol 7) 5 Cri L Jour 4 (5) (DB) (Bom).

[11] Accused questioned after confession is recorded

— Defect is one of mere form and does not alter the character of the confession. (Vol 1) 1914 Cal 600 (601) : 40 Cal 873 : 15 Cri L Jour 25 (DB) (Vol 10) 10 Cri L Jour 325 (337) (DB) (Cal).

[12] Accused refusing to make a statement—Magistrate should record that also. (Vol 20) 1933 All 31 (37) : 51 All 91 : 34 Cri L Jour 489.

16. Memorandum at the foot of the confession. — [1] Memorandum required in the case of a confession need not be appended in the case of a record of a statement of a witness under this section. (1900) 27 Cal 295 (300) (DB).

[2] A confession without the memorandum or with defective memorandum is inadmissible in evidence. (Vol 30) 1943 Oudh 269 (270) : 44 Cri L Jour 389 (DB) (Vol 37) 1937 Oudh W N 296 (297) (Vol 22) 1935 Oudh 477 (481) : 36 Cri L Jour 1007 : 11 Luck 327 (Vol 12) 1925 Lah 605 (610, 611) : 6 Lah 415 : 27 Cri L Jour 514 (DB).

[3] Confession without memorandum or with defective memorandum — Defects curable under S. 533 by the examination of the Magistrate who recorded it — Confession is admissible. (Vol 27) 1940 Nag 230 (231) : 41 Cri L Jour 553 (DB) (Vol 26) 1939 Nag 295 (299) : 40 Cri L Jour 937 (DB) (Vol 25) 1938 Lah 556 (557) : 39 Cri L Jour 769 (DB) (Vol 12) 1925 Lah 605 (610, 611) : 6 Lah 415 : 27 Cri L Jour 514 (DB) (Vol 12) 1925 Lah 315 (316, 317) : 6 Lah 58 : 26 Cri L Jour 1074 (DB) (Vol 31) 3 All 338 (339).

[See also ('82) 2 Weir 436 (437) (DB) (Vol 33) 1946 Pat 169 (171) : 24 Pat 646 (DB).]

[4] The memorandum need not be written by the Magistrate himself in his own hand. It is enough if it is signed by him. (Vol 20) 1933 Bom 145 (146, 147, 148) : 34 Cri L Jour 555 : 57 Bom 336 (FB). (Overruling (Vol 19) 1932 Bom 553 : 56 Bom 542 : 34 Cri L Jour 73 (DB).) (Vol 20) 1933 Sind 166 (167) : 34 Cri L Jour 808 (DB).

[See also ('73) 20 Suth W R Cr L 7 (7).]

[But see (Vol 32) 1945 Bom 292 (295) : 47 Cri L Jour 51 (DB).]

[5] The Magistrate should use his own handwriting for his signature and not a lithographed stamp thereof. ('07) 14 Suth W R Cr 81 (81) (DB).

[6] Memorandum made in accordance with this subsection attached to the English translation of the confession and not to the original vernacular confession itself — Confession is not inadmissible. (Vol 20) 1933 Bom 145 (147) : 34 Cri L Jour 808 : 57 Bom 336 (FB).

[7] Addition of a note to the certificate attached to the confession stating what the Magistrate did after the accused was produced before him — Note not part of the certificate — Confession is not invalid. (Vol 32) 1945 Bom 292 (295) : 47 Cri L Jour 51 (DB).

17. Accused, when should be produced before Magistrate. — [1] On general principles it is necessary and desirable that accused should be produced before the Magistrate for making a confession as soon as he expresses his desire to make a confession, because, in all cases where the investigation by the police is either conducted or continued after the accused expresses his desire to confess, and if ultimately, after the investigation is over, the accused does make a confession, there would not be an unreasonable ground for apprehension that the confession was made to fit in with the result of the investigation so that it may be regarded as having been corroborated. (Vol 31) 1944 Bom 338 (340, 341) (DB).

18. Confession immediately after police custody. — [1] Under S. 26 of the Evidence Act, a confession made to a Magistrate even while the accused is in the custody of the police-officer, is not inadmissible in evidence. ('09) 10 Cri L Jour 584 (587, 588) (DB) (Lah).

Section 164.—Note 18 (*contd.*)

[2] Confession made by an accused person, after he has been in police custody for some time cannot be rejected on that sole ground. ('87) 9 All 528 (566) (SB) \* (Vol 6) 1919 Cal 11 (12) : 20 Cri L Jour 833 (DB) \* (Vol 7) 1920 Cal 78 (79, 80) : 21 Cri L Jour 266 (DB) \* (Vol 1) 1914 Lah 380 (381) : 1914 Pun Re No. 10 Cr : 15 Cri L Jour 613 \* (Vol 18) 1931 Lah 408 (414) : 32 Cri L Jour 818 \* (Vol 7) 1920 Pat 451 (453) : 21 Cri L Jour 177 (DB) \* (Vol 14) 1927 Pat 429 (432) : 28 Cri L Jour 447 (DB).

[3] Confession made by accused after he has been in police custody for some time must be always viewed with great suspicion. (Vol 27) 1940 All 46 (51) : 41 Cri L Jour 258 (DB) \* ('94) 1894 Rat 720 (721) (DB) \* ('07) 5 Cri L Jour 120 (121) (Lah).

[4] Magistrate must be careful to ascertain how long accused person has been under the influence of the police. ('85) 1885 All W N 59 (60) (FB) \* ('01) 25 Bom 543 (546) (DB).

[5] In recording a confession of a prisoner fresh from the hands of the police, the Magistrate would exercise a sound discretion, if before recording it he gives the accused short time to enable him to think over the question independent of the influence of the police and to decide whether he would make a confession or not. (Vol 32) 1945 Bom 292 (295) : 47 Cri L Jour 51 (DB) \* ('82) 1882 All W N 166 (166) (DB) \* ('84) 1884 All W N 84 (84). (Confession recorded during trial.) \* (Vol 12) 1925 Cal 587 (594) : 52 Cal 67 : 26 Cri L Jour 782 \* (Vol 17) 1930 Sind 305 (306) : 32 Cri L Jour 178 \* (Vol 22) 1935 Lah 230 (244) : 35 Cri L Jour 1180 (DB).

[See (Vol 32) 1945 Bom 484 (486) : 47 Cri L Jour 252 (DB).]

[See also (Vol 12) 1925 All 606 (607) : 26 Cri L Jour 937 (DB).]

[6] Magistrate taking necessary precautions to satisfy himself that confession is voluntary — Mere fact that a police-officer at or soon after the arrest of the accused told him to make a confession to the Magistrate is no proof that he was forced to make the statement. (Vol 24) 1937 Mad 755 (758) : I L R (1938) Mad 348 : 39 Cri L Jour 390 (DB).

[7] Accused never out of police custody — There being reason to apprehend that influence of police is still continuing on the mind of accused — Confession would have little weight — There being no such apprehension, it may have greater weight. (Vol 21) 1934 All 81 (85) : 56 All 302 : 35 Cri L Jour 385 (FB) \* (Vol 21) 1934 Oudh 151 (153, 154) : 35 Cri L Jour 915 : 9 Luck 546 (DB) \* (Vol 20) 1933 Oudh 192 (195) : 8 Luck 410 : 34 Cri L Jour 653 \* ('69) 1869 Pun Re No. 21 Cr, p. 39 (41).

[See (Vol 31) 1944 Bom 338 (341) (DB). (Delay in producing prisoners, who are willing to have their confessions recorded, affects the value of the confessions.)]

[See however (Vol 31) 1944 Sind 178 (183) : I L R (1944) Kar 75 : 46 Cri L Jour 848 (DB).]

[8] The same principle applies to statements written and signed by the accused while in the control of the police. ('37) 39 Pun L R 663 (664) (DB) \* (Vol 20) 1933 All 356 (357) : 55 All 426 : 34 Cri L Jour 574 \* (Vol 12) 1925 Cal 587 (597) : 52 Cal 67 : 26 Cri L Jour 782.

[9] Failure of Magistrate to question a prisoner as to how long he was in custody or omission to record the fact that he was not in police custody at the time of making the confession, will not invalidate the confession otherwise duly made. (Vol 10) 1923 Pat 13 (17) : 24 Cri L Jour 497 (DB) \* (Vol 18) 1931 Lah 763 (766) : 32 Cri L Jour 985 \* ('91) 1891 Rat 534 (535) (DB).

[10] A confession recorded in the presence of the

police-officer having the custody of the prisoner cannot safely be relied upon. (Vol 11) 1924 Lah 624 (626) : 25 Cri L Jour 116 (DB) \* (Vol 21) 1934 Pat 586 (587) : 36 Cri L Jour 12 (DB) \* (1865) 3 Suth W R Cr 6 (8) (DB) \* (Vol 7) 1920 Lah 144 (159) : 21 Cri L Jour 418 \* (Vol 4) 1917 Pat 475 (477) : 18 Cri L Jour 623 (DB).

[See also (Vol 31) 1944 Bom 338 (340) (DB).]

[But see ('75) 24 Suth W R Cr 33 (36) (DB).]

[11] Confession recorded after allowing the police-officer to put questions or by using a police-officer as a scribe, or after the perusal of statements alleged to have been made by the accused to the police and recorded by them, cannot safely be relied upon. ('98) 2 Cal W N 702 (709, 717) (DB) \* (Vol 7) 1920 Lah 144 (159) : 21 Cri L Jour 418 \* ('09) 10 Cri L Jour 125 (133) (DB) (Cal) \* ('09) 10 Cri L Jour 325 (336) (DB) (Cal) \* (Vol 10) 1923 Pat 13 (17) : 24 Cri L Jour 497 (DB).

[12] The presence of police-man not investigating the case, but in charge of sub-jail and accompanying the prisoner, will not invalidate the confession recorded in his presence. ('31) 1931 Mad W N 723 (724, 725) (DB).

[See however (Vol 29) 1942 Pat 90 (94, 95) : 43 Cri L Jour 36 (DB).]

[13] Prisoner in police custody brought before a Magistrate for the purpose of having his confession recorded—He does not cease to be in the custody of the police merely because the police officer waits outside the room or in the next room. ('96) 1896 Rat 855 (856) (DB) \* ('10) 11 Cri L Jour 247 (248) (DB) (Cal) \* (Vol 18) 1931 Lah 408 (414) : 32 Cri L Jour 818.

[14] Principle of sub-s. (3) would apply to cases of statements by witnesses also. (Vol 5) 1918 Lah 171 (175) : 1918 Pun Re No. 16 Cr : 19 Cri L Jour 517 (DB).

[15] This section is not intended to enable the police to obtain an incriminating statement from some person and as it were to put a seal on that statement by sending that person in custody to a Magistrate to be examined. (1900) 27 Cal 295 (300) (DB) \* ('02) 29 Cal 483 (487) (DB) \* ('86) 2 Weir 414 (415) (DB).

[16] Magistrates have the power to exclude the police or any other person from Court, when recording a confession, for the purpose of ensuring the voluntary character thereof. They should, however, not do so when such exclusion tends to render the statements of witnesses incomplete without their presence. ('32) 1932 Mad W N 625 (623) (DB).

19. Contessing accused sent back to police custody. — [1] The practice of sending the accused after the confession to the custody of the police is very improper. Where the accused is sent back to the police custody instead of to the judicial lock-up after his confession has been recorded, the confession must necessarily be suspected to be not voluntary. (Vol 25) 1938 Lah 292 (293) : I L R (1937) Lah 740 : 39 Cri L Jour 475 (DB) \* (Vol 25) 1938 Pesh 5 (8) : 39 Cri L Jour 448 (DB) \* (Vol 23) 1936 Lah 278 (279) : 17 Lah 460 : 37 Cri L Jour 493 (DB).

[See however (Vol 31) 1944 Bom 338 (341) (DB).]

20. Retracted confessions. — [1] A retracted confession is always open to suspicion and cannot be acted upon unless corroborated by credible independent evidence. (Vol 32) 1945 Lah 91 (97) (DB) \* (Vol 30) 1943 Sind 166 (170) : I L R (1943) Kar 285 : 45 Cri L Jour 118 (DB) \* (Vol 29) 1942 Lah 271 (274) : 44 Cri L Jour 77 (DB) \* (Vol 29) 1942 Mad 450 (451) : 43 Cri L Jour 810 (DB) \* (Vol 29) 1942 Pat 427 (428) : 43 Cri L Jour 544 (DB) \* (Vol 18) 1931 Oudh 83 (84) : 32 Cri L Jour 630 : 6 Luck 582 (DB) \* (Vol 26) 1939 Cal 65 (74) : 40 Cri L Jour 199 : I L R (1939) 1 Cal 1 (FB) \* (Vol 25) 1938 Pat 290 (293) : 39 Cri L Jour 635 (DB) \* (Vol 23) 1936 All 388 (390) (DB) \* (Vol 19) 1932 Oudh 317 (319) :

**165.** <sup>a</sup>[(1) Whenever an officer in charge of a police-station or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police-station of which he is in

**Section 164—Note 20 (contd.)**

7 Luck 511 : 33 Cri L Jour 920 (DB) \* (Vol 19) 1932 All 228 (232) : 54 All 350 : 33 Cri L Jour 201 (DB) \* (Vol 7) 1920 Mad 109 (109, 110) : 21 Cri L Jour 79 (DB) \* (1900) 13 C P L R Cr 107 (109) \* ('95) 1895 Rat 762 (762) (DB) \* ('93-1900) 1893-1900 Low Bur Rul 70 (71) \* (Vol 21) 1934 Sind 172 (175) : 29 Sind L R 1 : 36 Cri L Jour 223 (DB) \* (Vol 22) 1935 Cal 561 (566) : 62 Cal 433 : 36 Cri L Jour 1275 (SB).

[2] The rule that a retracted confession cannot be acted upon unless corroborated is one more of prudence than of law. (Vol 32) 1945 Bom 484 (488) : 47 Cri L Jour 252 (DB) \* (Vol 29) 1942 Lah 271 (273) : 44 Cri L Jour 77 (DB) \* (Vol 29) 1942 Pat 90 (92) : 43 Cri L Jour 36 (DB) \* (Vol 19) 1932 Bom 553 (556) : 56 Bom 542 : 34 Cri L Jour 73 (DB) \* (Vol 17) 1930 Cal 633 (635) : 57 Cal 488 (DB) \* (Vol 20) 1933 Cal 747 (750) : 34 Cri L Jour 1222 (SB) \* ('23) 24 Cri L Jour 904 (905) (Pesh) \* (Vol 12) 1925 Lah 605 (609) : 6 Lah 415 : 27 Cri L Jour 514 (DB) \* ('98) 21 Mad 83 (88) (DB) \* (Vol 16) 1929 Mad 837 (839) : 53 Mad 160 : 31 Cri L Jour 768 (DB) \* (Vol 5) 1918 Nag 174 (176) : 19 Cri L Jour 861 \* (Vol 12) 1925 Oudh 1 (5) : 27 Oudh Cas 40 : 25 Cri L Jour 49 \* (Vol 14) 1927 Oudh 17 (17, 18) : 27 Cri L Jour 1258 (DB) \* (Vol 16) 1929 Pat 275 (277, 278) : 8 Pat 289 : 30 Cri L Jour 675 (DB) \* (1900-02) 1 Low Bur Rul 238 (245, 246) (DB) \* (Vol 21) 1934 Sind 172 (175) : 29 Sind L R 1 : 36 Cri L Jour 223 (DB).

[3] Each case must be determined on its own circumstances. ('97) 20 All 133 (134) (DB) \* (Vol 20) 1933 Bom 230 (231) : 34 Cri L Jour 896 (DB) \* (Vol 10) 1923 Cal 217 (219) : 24 Cri L Jour 145 (DB) \* ('23) 24 Cri L Jour 904 (905) (Pesh) \* (Vol 12) 1925 Lah 605 (608, 609) : 6 Lah 415 : 27 Cri L Jour 514 (DB) \* (Vol 20) 1933 Lah 388 (391) : 34 Cri L Jour 598 (DB) \* (Vol 12) 1925 Oudh 1 (5) : 27 Oudh Cas 40 : 25 Cri L Jour 49 \* (Vol 18) 1931 Oudh 412 (414) : 33 Cri L Jour 16 (DB) \* (Vol 9) 1922 Pat 492 (493) : 22 Cri L Jour 293 (DB).

[4] A conviction based upon a retracted confession even if uncorroborated, is not illegal if the Court believes that it is voluntary and true. (Vol 31) 1944 Mad 117 (120) : I L R (1944) Mad 308 : 45 Cri L Jour 373 (FB) \* (Vol 30) 1943 Mad 527 (529) : 44 Cri L Jour 766 \* (Vol 29) 1942 Lah 271 (273) : 44 Cri L Jour 77 (DB) \* (Vol 29) 1942 Pat 90 (92) : 43 Cri L Jour 36 (DB) \* (Vol 28) 1941 Nag 145 (149, 150) : 42 Cri L Jour 363 : I L R (1941) Nag 169 \* (Vol 28) 1941 Pat 303 (306) : 20 Pat 547 : 42 Cri L Jour 343 (DB) \* (Vol 27) 1940 Nag 230 (231) : 41 Cri L Jour 553 (DB) \* (Vol 24) 1937 Lah 208 (210) : 38 Cri L Jour 583 (DB) \* (Vol 24) 1937 Rang 264 (265) : 38 Cri L Jour 948 \* ('23) 24 Cri L Jour 904 (905) (Pesh) \* (Vol 17) 1930 All 29 (32) : 31 Cri L Jour 26 (DB) \* (Vol 20) 1933 Sind 313 (316) : 35 Cri L Jour 17 \* ('95) 19 Bom 728 (730, 731) (DB) \* (Vol 18) 1929 Bom 327 (329, 333) : 31 Cri L Jour 97 (DB) \* (Vol 12) 1925 Cal 587 (589) : 52 Cal 67 : 26 Cri L Jour 782 \* (Vol 6) 1919 All 386 (386) : 20 Cri L Jour 721 (DB) \* (Vol 17) 1930 Cal 633 (635) : 57 Cal 488 (DB) \* (Vol 13) 1926 Rang 127 (127) : 4 Rang 45 : 27 Cri L Jour 743 \* (Vol 21) 1934 Oudh 418 (422) : 35 Cri L Jour 1290 : 10 Luck 150 (DB) \* (Vol 21) 1934 Oudh 368 (392) : 10 Luck 131 : 35 Cri L Jour 1154 (DB).

[5] Retracted confession, not liable to suspicion that it was due to any undue influence referred to in S. 24 of the Evidence Act — Conviction based upon it is not illegal. (Vol 30) 1943 Oudh 289 (271) : 44 Cri L Jour

389 (DB) \* (Vol 21) 1934 Lah 89 (90) : 35 Cri L Jour 1453 \* ('90) 1890 All W N 173 (174) \* (Vol 12) 1925 All 627 (630) : 26 Cri L Jour 1431 (FB) \* ('01) 25 Bom 163 (171) (DB) \* (Vol 1) 1914 Bom 305 (305) : 38 Bom 156 : 14 Cri L Jour 625 (DB) \* ('75) 24 Suth W R Cr 80 (80, 81) (DB) \* ('98) 2 Cal W N 637 (638, 639) (DB) \* ('33) 1933 Mad W N 723 (724, 725) (DB).

[See also (Vol 9) 1922 Cal 409 (410, 411) : 49 Cal 600 : 25 Cri L Jour 529 (DB).]

[6] Confession retracted—Court ought to inquire and ascertain before acting upon it, whether the confession was not the result of undue influence. ('85) 1885 All W N 59 (59) (FB) \* (Vol 20) 1933 All 31 (38) : 55 All 91 : 34 Cri L Jour 489 (DB) \* ('71) 8 Bom H C R Cr 126 (136, 137) (FB) \* ('06) 4 Cri L Jour 332 (333) (DB) (Bom) \* (Vol 16) 1929 Cal 726 (727, 728) : 57 Cal 649 : 31 Cri L Jour 909 (DB) \* (Vol 20) 1933 Cal 835 (837, 839) : 34 Cri L Jour 1087 (SB) \* (Vol 11) 1924 Lah 624 (626) : 25 Cri L Jour 116 (DB) \* (Vol 12) 1925 Lah 605 (608) : 6 Lah 415 : 27 Cri L Jour 514 (DB) \* (Vol 17) 1930 Oudh 449 (451) : 6 Luck 335 : 32 Cri L Jour 97 (DB) \* ('02) 1 Low Bur Rul 238 (246) (DB) \* ('93-1900) 1893-1900 Low Bur Rul 145 (146).

[See (Vol 8) 1921 Bom 70 (70) : 45 Bom 1086 : 22 Cri L Jour 318 (DB) \* (Vol 26) 1939 Cal 65 (74) : I L R (1939) 1 Cal 1 : 40 Cri L Jour 199 (FB).]

[See also ('96) 19 Mad 482 (482) (DB).]

[7] Confession subsequently retracted may be used to corroborate an approver, but Court ought to scrutinize such corroboration with great care. (Vol 30) 1943 Sind 166 (170) : I L R (1943) Kar 285 : 45 Cri L Jour 118 (DB) \* (Vol 24) 1937 Rang 218 (218) : 38 Cri L Jour 774.

[8] A retracted confession may be taken into consideration as against a co-accused and may form the basis of conviction if there is substantial and independent corroboration both as to the crime and the criminal. (Vol 29) 1942 Lah 271 (273) : 44 Cri L Jour 77 (DB) \* (Vol 28) 1941 Nag 145 (149, 150) : I L R (1941) Nag 169 : 42 Cri L Jour 363.

[9] By itself a retracted confession is a very slight evidence against co-accused. (Vol 29) 1942 Pat 90 (92) : 43 Cri L Jour 36 (DB).

[10] A retracted confession attributing the major part of the crime to the co-accused is of no value at all against him. (Vol 31) 1944 Cal 249 (252) : 46 Cri L Jour 131 (DB).

[11] Confession retracted—When it was made, some police-men were personally interested in the investigation of the case—There are good grounds for not relying upon the confession. (Vol 25) 1938 Lah 101 (102) : 39 Cri L Jour 290 (DB).

[12] A confession made by an accused person before a Magistrate, but retracted at once, when it was being read over to him or while the certificate was being written, does not amount to a confession at all. ('72) 9 Bom H C R 344 (345) (DB) \* (Vol 17) 1930 Lah 257 (258) : 11 Lah 106 : 30 Cri L Jour 1046 (DB).

**SECTION 165 — SYNOPSIS.**

1. Scope and applicability of the section.
2. "Police-officer making any investigation."
3. "Any offence which he is authorised to investigate."
4. "Anything necessary for the purposes of an investigation."
5. "In any place within the limits of the police-station of which he is in charge."



charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police-officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.]

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may <sup>b</sup>[after recording in writing his reasons for so doing] require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing <sup>c</sup>[specifying the place to be searched and, so far as possible, the thing for which search is to be made]; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Code as to search-warrants <sup>b</sup>[and the general provisions as to searches contained in section 102 and section 103] shall, so far as may be, apply to a search made under this section.

<sup>b</sup>[(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate :

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.]

[1882 — S. 165 ; 1872 — S. 379 ; 1861 — S. 142.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 36, for the original sub-sections (1) and (2). [b] *Inserted, ibid.* [c] *Substituted, ibid.*, for "Specifying the document or thing for which search is to be made and the place to be searched."

#### SECTION 165 — SYNOPSIS (*contd.*)

6. "Any place" if includes the house of the accused.
7. "After recording in writing the grounds of his belief."
8. Nature of search.
9. Who can conduct the search.
10. Conduct of search—Sub-section (4).
11. Inspection of things seized in search.
12. Resistance to illegal search.
13. Damages for illegal search.
14. "In person"—Sub-section (2).
15. "An order in writing"—Sub-section (3).
16. "Copies of any record"—Sub-section (5).

##### 1. Scope and applicability of the section. —

[1] A Magistrate cannot make a search under this section but can only act under S. 105. ('09) 36 Cal 433 (448) (SB). (Overruled by 13 Cri L Jour 693 (PC) on another point.)

[2] The safeguards in S. 165 are mandatory and unless they are carried out immediately or as nearly as they can be in the exigencies of each case the search is without jurisdiction. (Vol 33) 1946 Lah 456 (458, 459).

##### 2. "Police-officer making an investigation." —

[1] A police constable deputed by his superior can conduct a search under this section. ('80) 1880 Pun Re No. 24 Cr, p. 41 (41) (DB).

3. "Any offence which he is authorized to investigate." — [1] Before the section can be brought into operation, there must have been an offence committed which the police officer is authorized to investigate. ('03) 27 Bom 590 (595) (DB).

[See also (Vol 12) 1925 Cal 831 (833) : 52 Cal 499 : 26 Cri L Jour 1213 (DB) \* (Vol 20) 1938 Sind 325 (326) : 35 Cri L Jour 129 (DB).]

[2] A police officer cannot make a search under this section in a non-cognizable case which he has not been

authorized by a competent Magistrate to investigate. (Vol 30) 1943 Lah 28 (30) : 44 Cri L Jour 301 : I L R (1943) Lah 805 (DB) \* ('97) 24 Cal 691 (696) (DB).

[3] A police officer cannot make a search for stolen property where he has no information at all of the theft of the same. (Vol 10) 1923 Cal 108 (110) : 24 Cri L Jour 674 (DB).

4. "Anything necessary for the purposes of an investigation." — [1] The section includes a search for some document or for some tangible object summoned to be produced by a Court under S. 94, but does not include the inspection of any place inside a house or the configuration of a wall. (Vol 15) 1928 All 185 (186) : 29 Cri L Jour 272.

[2] When a search is for a person committing an offence the section does not apply. (Vol 29) 1942 Pat 281 (282) : 43 Cri L Jour 279.

5. "In any place within the limits of the police-station of which he is in charge." — [1] A police officer has no power to make a search under this section beyond the local limits of his own jurisdiction. (Vol 10) 1923 All 433 (433) : 24 Cri L Jour 276 \* (Vol 6) 1919 Mad 353 (356, 357) : 20 Cri L Jour 145 (DB) \* (Vol 1) 1914 Sind 160 (162) : 8 Sind L R 1 : 16 Cri L Jour 15 (DB).

6. "Any place" if includes the house of the accused. — [1] A search under this section can be made of the house of an accused person. (Vol 1) 1914 Cal 256 (258, 259) : 41 Cal 261 : 14 Cri L Jour 405 (DB) \* (Vol 14) 1927 Cal 93 (95) : 27 Cri L Jour 1195 (DB).

7. "After recording in writing the grounds of his belief." — [1] A police officer is bound to record in writing the grounds of his belief that the search was necessary. (Vol 22) 1935 Nag 237 (239) : 31 Nag L R Sup 66 \* (Vol 13) 1926 All 147 (150, 151) : 27 Cri L Jour 11 (DB) \* (Vol 15) 1928 All 185 (186) : 29 Cri L Jour

166. (1) An officer in charge of a police-station <sup>a</sup>[or a police-officer not being below the rank of Sub-Inspector making an investigation] may require an officer <sup>When officer in charge of police-station may require another to issue search warrant.</sup> in charge of another police-station, whether in the same or a different district, to cause a search to be made in any place, in any case in which the former officer might cause such search to be made, within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

<sup>b</sup>[(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police-station to cause a search to be made under sub-section (1) might

Section 165—Note 7 (*contd.*)

1272 \* (Vol 20) 1933 Oudh 305 (307) : 9 Luck 1 : 34 Cri L Jour 568 \* (Vol 19) 1932 Pat 66 (68) : 10 Pat 821 : 33 Cri L Jour 233 (DB).

[But see (Vol 26) 1939 Lah 280 (283, 284).]

[2] The recording of grounds can be done at any place or at any time prior to the actual search. (Vol 20) 1933 Sind 240 (243).

8. Nature of search. — [1] The section does not authorize a search for stolen property or for property generally, but only a search for specified stolen articles. (Vol 31) 1944 Pat 228 (230) : 45 Cri L Jour 802 : 23 Pat 328 (DB) \* (Vol 14) 1927 Cal 93 (94) : 27 Cri L Jour 1195 (DB).

9. Who can conduct the search. — [1] A Circle Inspector of Police, is competent to conduct the search under this section. (Vol 14) 1927 All 516 (516) : 28 Cri L Jour 652.

10. Conduct of search — Sub-section (4). — [1] A police officer is bound to call upon two or more respectable witnesses as provided in S. 103, to attend and witness the search. (Vol 13) 1926 All 147 (150, 151) : 27 Cri L Jour 11 (DB) \* (Vol 20) 1933 Sind 220 (222) : 34 Cri L Jour 848 (DB) \* (Vol 22) 1935 All 520 (520) : 36 Cri L Jour 551.

[2] The fact that the police took two independent witnesses and did not call upon two witnesses from the locality does not make the search illegal. (Vol 14) 1927 All 516 (517) : 28 Cri L Jour 652.

[3] Failure by the police to call witnesses does not make the search illegal. (12) 13 Cri L Jour 763 (764) (DB) (Mad).

[4] Attendance of witnesses at the search is not always essential to enable evidence as to the search to be given. (Vol 33) 1946 P C 16 (19) : 72 Ind App 305 (PC). (Witnesses at search need not be called to give evidence of recovery of articles.)

11. Inspection of things seized in search. — [1] Prosecutor must have an opportunity of inspection of document or other thing seized and sent to the Magistrate under S. 170. (87) 15 Cal 109 (142).

12. Resistance to illegal search. — [1] Resistance to illegal search will not be an offence under S. 353 or S. 332, Penal Code. (Vol 31) 1944 Pat 228 (231) : 45 Cri L Jour 802 : 23 Pat 328 (DB) \* (Vol 10) 1923 All 433 (438) : 24 Cri L Jour 276 \* (Vol 6) 1919 Mad 353 (357) : 20 Cri L Jour 145 (DB) \* (Vol 1) 1914 Sind 160 (162, 163) : 8 Sind L R 1 : 16 Cri L Jour 15 (DB) \* (Vol 15) 1928 All 185 (186) : 29 Cri L Jour 272. (Non-recording of grounds of belief.) \* (Vol 19) 1932 Pat 66 (69) : 10 Pat 821 : 33 Cri L Jour 233 (DB) \* (Vol 20) 1933 Sind 174 (175, 176) : 27 Sind L R 209 : 34 Cri L Jour 1147 (DB) \* (07) 6 Cri L Jour 105 (106) (Mad) \* (97) 6 Cri L Jour 439 (439, 440) (DB) (Cal).

[See (Vol 30) 1943 Lah 28 (31) : 44 Cri L Jour 301 : I L R (1943) Lah 805 (DB).]

[But see (92) 1892 All W N 1 (2).]

13. Damages for illegal search. — [1] A search

in a non-cognizable case without an order from the Magistrate will make the police-officer liable for damages in a suit. (97) 24 Cal 691 (696) (DB).

[2] A police officer is not liable for damages if the search is *bona fide*. (Vol 6) 1919 Mad 751 (752) : 19 Cri L Jour 901 (DB) \* (Vol 20) 1933 Sind 240 (242; 243).

[3] A police officer without jurisdiction over the place searched helping another police officer is not liable for damages. (Vol 6) 1919 Mad 226 (228) : 42 Mad 446 : 20 Cri L Jour 422 (DB).

[4] A police officer is liable for damages if he fails to record the grounds of his belief. (Vol 22) 1935 Nag 237 (239) : 31 Nag L R Sup 66.

[But see (Vol 26) 1939 Lah 280 (282).]

14. "In person." — Sub-section (2). — [1] Sub-section (2) does not lay down that a police officer should conduct himself the search. (12) 13 Cri L Jour 763 (764) (DB) (Mad) \* (Vol 6) 1919 Mad 226 (228) : 42 Mad 446 : 20 Cri L Jour 422 (DB) \* (Vol 14) 1927 All 516 (516, 517) : 28 Cri L Jour 652.

[But see (07) 6 Cri L Jour 105 (106) (Mad).]

[2] Where two houses have to be searched simultaneously and the Sub-Inspector searches one house and orders his constable to search the other, the procedure is not illegal. (Vol 19) 1932 Oudh 249 (250) : 33 Cri L Jour 492.

15. "An order in writing" — Sub-section (3). — [1] An oral order requiring a subordinate officer to make a search is illegal. (Vol 22) 1935 Nag 237 (239) : 31 Nag L R Sup 66.

[2] When an officer has a part of the search to be done under his direction and in his presence by one of his subordinates sub-s. (3) does not apply. (Vol 28) 1941 Lah 297 (298) : 42 Cri L Jour 812 : I L R (1941) Lah 370 (DB).

[3] The words "and such subordinate officer may, thereupon, search for such thing in such place" mean that he is to search only for the thing which he is instructed to search for and that he is to search for it only in the place specified in his authority. (Vol 31) 1944 Pat 228 (230) : 45 Cri L Jour 802 : 23 Pat 328 (DB).

[4] A subordinate police officer can enter a house without any warrant or order in writing in search of a person who is charged with a cognizable offence. (07) 7 Bom H C R Cr 50 (52).

16. "Copies of any record" — Sub-section (5). — [1] An order refusing or passing an order tantamount to the refusal of copies of records made under sub-s. (1) or sub-s. (3) is illegal and will be set aside. (Vol 15) 1928 All 402 (402) : 29 Cri L Jour 663.

#### Section 166 — Note 1

[1] The omission to comply with the provisions of sub-s. (4) will render a conviction for resistance to the search liable to be set aside. (Vol 18) 1926 Cal 663 (668) : 27 Cri L Jour 542 (DB).



result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of a police-station or a police-officer making an investigation under this Chapter to search, or cause to be searched, any place in the limits of another police-station, in accordance with the provisions of section 165, as if such place were within the limits of his own station.

(4) Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer in charge of the police-station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 103, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in section 165, sub-sections (1) and (3).

(5) The owner or occupier of the place searched shall, on application, be furnished with a copy of any record sent to the Magistrate under sub-section (4) :

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.]

[1882 — S. 166 ; 1872 — S. 390 ; 1861 — S. 143.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 37. [b] Sub-sections (3) to (5) were added, *ibid*.

167. (1) Whenever <sup>a</sup>[any person is arrested and detained in custody, and it appears that the investigation <sup>b</sup>[\* \* \*] cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station <sup>c</sup>[or the police-officer making the investigation if he is not below the rank of Sub-Inspector] shall forthwith transmit to the nearest Magistrate a copy of the entries

#### SECTION 167 — SYNOPSIS.

1. Scope and object.
2. "Or the police-officer making the investigation if he is not below the rank of Sub-Inspector."
3. Shall forthwith forward the accused.
4. "A copy of the entries in the diary."
5. To any Magistrate having jurisdiction or not.
6. "Fifteen days in the whole."
7. Reasons to be recorded.
8. Effect of detention in contravention of this section.
9. Nature of proceedings under this section.
10. If approvers can be detained in police custody under this section.
11. Admissibility of statements reduced to writing during police investigation.

1. Scope and object.—[1] The provisions of this section are to be read as supplementary to those contained in S. 61. (Vol 18) 1931 Lah 353 (355) : 12 Lah 604 : 32 Cri L Jour 785 (DB).

[2] The object is to see that persons arrested by the police are brought before a Magistrate with the least possible delay. ('88) 11 Mad 98 (102) (DB) (Vol 11) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732 (DB) ('88) 6 Mad 63 (66) (DB).

[3] This section enables Magistrate to judge if a person has to be further kept in police custody and also enable such person to make any representation he may wish to make in the matter. (Vol 18) 1931 Lah 99 (100) : 12 Lah 435 : 33 Cri L Jour 180 (Vol 19) 1932 Oudh 11 (17) : 33 Cri L Jour 287 (DB).

[4] It is intended to prevent the possible abuse by the police of their powers in trying to make discoveries of crime by means of duress, terror and wrongful confinement. (Vol 30) 1943 Nag 36 (70) : 44 Cri L Jour 237 : 1 I L R (1943) Nag 73 (DB).

[5] In certain cases detention in police custody of the arrested person may be permitted so that the police

may complete the investigation and decide whether to proceed under S. 169 or under S. 170. (Vol 13) 1926 Bom 551 (554) : 50 Bom 741 : 27 Cr L J 1169 (DB).

2. "Or the police officer making the investigation if he is not below the rank of Sub-Inspector." —[1] Magistrate making an investigation under S. 202 cannot keep the accused person in custody. (Vol 17) 1930 All 259 (260) : 52 All 457 : 31 Cri L Jour 998.

[2] An officer attached to the criminal investigation or intelligence department cannot be taken to be an investigating officer ; he is asked to do only particular acts, e. g., to make a search. ('12) 13 Cri L Jour 305 (350) : 35 Mad 247 (SB).

3. Shall forthwith forward the accused. — [1] The word "accused" denotes the supposed offender who in Chap. V is called "person arrested." ('92) 16 Bom 661 (668) (DB).

[2] Detention of accused for more than twenty-four hours without the special leave of a Magistrate is absolutely unlawful. ('80) 6 Cal L Rep 289 (293) (DB).

[3] The accused should actually be sent to the Magistrate. The police cannot have the accused in their custody and merely write for and obtain the special leave for such detention. ('12) 13 Cri L Jour 65 (106) (Cal) ('67) 1867 Pun Re No. 39 Cr. p. 72 (76) (DB).

[4] Person becomes accused immediately he is arrested by the police for an offence which forms subject-matter of their investigation. (Vol 34) 1947 Lah 92 (96) (DB).

4. "A copy of the entries in the diary." — [1] The object in making it imperative for the police officer to send along with the accused a copy of the entries in the diary is to afford to the Magistrate the necessary information upon which he can decide whether he should authorize the detention of the accused in custody or whether further detention is necessary. ('97) 19 All 390 (404) ('82) 6 Mad 69 (70) (DB).

5. To any Magistrate having jurisdiction or not. — [1] The police must take the accused to the

in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused <sup>d</sup>[\* \*] to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

<sup>e</sup>[Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the <sup>e</sup>[Provincial Government] shall authorise detention in the custody of the police.]

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

[1882 — S. 167 ; 1872 — S. 124, paras. 2, 3, 4 ; 1861 — S. 152.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 38, for "it appears that any". [b] The words "under this Chapter" were *repealed, ibid.* [c] *Inserted, ibid.* [d] The words and brackets "(if any)" were *repealed, ibid.* [e] *Substituted* by A. O., for "Local Government".

#### Objects and Reasons.

"Clause 167. — It has been held by the High Court of Madras [See (1887) 11 Mad. 98 (101)] that the clause does not contemplate remands for successive periods of

fifteen days. We think this decision is right and have put in words to make the point clear. Any further proceedings should be taken under section 344."

— S. C. R., 1898.

#### Section 167—Note 5 (*conid.*)

nearest Magistrate whether he has or has not jurisdiction to try the case. ('11) 12 Cri L Jour 15 (17) (DB) (All) (Vol 9) 1922 Mad 215 (217) : 45 Mad 14 : 23 Cri L Jour 490 (DB) (Vol 33) 1946 Sind 43 (48) : ILR (1945) Kar 419 (DB).

[2] The practice of obtaining an order of detention from any Magistrate at the choice of the police is open to objection. (Vol 18) 1931 Lah 99 (101) : 12 Lah 435 : 33 Cri L Jour 180.

[3] Deputy Commissioner of Police, Calcutta, cannot order the detention of the arrested person in police custody. (Vol 13) 1926 Cal 1121 (1130) : 54 Cal 218 : 27 Cri L Jour 1201 (FB). (Overruling 27 Cri L Jour 1185.)

6. "Fifteen days in the whole."—[1] Investigation not complete within fifteen days — Police sending accused to Magistrate — Magistrate may remand the accused under S. 344. (Vol 11) 1924 Cal 614 (616) : 26 Cri L Jour 68 (DB) (Vol 18) 1931 All 617 (619, 620) : 53 All 720 : 32 Cri L Jour 1045.

[2] A detention in the police custody for more than fifteen days is illegal. (Vol 18) 1931 Lah 99 (101) : 12 Lah 435 : 33 Cri L Jour 180.

[3] Where a Magistrate having ordered the accused to be detained for a period of less than fifteen days, thinks no further detention is necessary and sends him to a Magistrate having jurisdiction, then the Magistrate to whom the accused is sent cannot remand the accused to the custody again even to the extent of a remand for such period as will bring the total period of detention in the police custody to fifteen days. (Vol 24) 1937 Sind 251 (252) : 31 Sind L R 494 : 39 Cri L Jour 10.

7. Reasons to be recorded. — [1] The object of sub-s. (8) is to see that the Magistrate takes the trouble to study the police diaries and ascertain the actual conditions under which detention is asked for. (1900) 2

Bom LR 1902 (1903) (DB) (Vol 18) 1931 Lah 99 (101) : 12 Lah 435 : 33 Cri L Jour 180.

[2] The law is jealous of the liberty of the subject and does not allow detention unless there is a legal sanction for it. (Vol 18) 1931 Lah 476 (478) : 12 Lah 635 : 32 Cri L Jour 913 (DB).

[3] Where a detention in police custody is ordered, the Magistrate should state his reasons clearly. (Vol 18) 1931 Lah 200 (200) : 32 Cri L Jour 464 (99) 23 Bom. 32 (34) (DB) (Vol 12) 13 Cri L Jour 65 (106) (Cal) (Vol 18) 1931 Lah 476 (478) : 12 Lah 635 : 32 Cri L Jour 913 (DB) (Vol 1) 1914 All 466 (467) : 36 All 262 : 15 Cri L Jour 288.

[4] The Magistrate should satisfy himself that the accusation is well founded. ('86) 1886 Rat 245 (250).

[5] The presence of the accused should have been considered necessary while the police investigation is being held. ('07) 6 Cri L Jour 86 (89) (DB) (Cal) (Vol 12) 1925 Bom 387 (389) : 49 Bom 623 : 26 Cri L Jour 1181 (DB) (Vol 18) 1931 Lah 200 (200) : 32 Cri L Jour 464.

[6] The mere fact that the police state that the presence of the accused is necessary to finish the investigation is not sufficient. ('08) 7 Cal W N 457 (459) (DB).

[7] To order a detention of the accused in order to get from him a confessional statement or to force him to give a clue to stolen property is most objectionable. ('86) 2 Weir 414 (415) (71) 3 N W P H C R 275 (280) (DB).

[8] It is improper to order detention in police custody:

(a) On a mere expectation that time will show his guilt. ('72) 1872 Pun Re No. 17 Cr p, 21 (24) (DB).

(b) for the reason that the accused promised to tell the truth. (Vol 19) 1932 Oudh 11 (17) : 33 Cri L Jour 287 (DB).

*Report of investigation by subordinate police-officer.*

**168.** When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police-station.

[1882—S. 168; 1872—S. 123; 1861—S. 151.]

**169.** If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station <sup>a</sup>[or to the police-officer making the investigation] that *Release of accused when evidence deficient.* there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody,

**Section 167 — Note 7 (contd.)**

[c] for: verifying a confession recorded under S. 164. ('03) 17 Cal W N 220 (224) (DB).

(d) for the reason that though repeatedly asked the accused did not give any clue to the property. ('71) 3 N W P H C R 275 (279, 280) (DB).

[9] It is improper for a Magistrate to authorize detention in police custody without recording special reasons. ('93) 21 Cal 642 (661) (DB)\* (Vol 20) 1933 Oudh 315 (319) : 8 Luck 518 : 35 Cri L Jour 10 (DB).

[10] Mere omission to record reasons, where it appears that the Magistrate has made the order after due consideration, does not make detention illegal. (Vol 19) 1932 Lah 13 (14) : 12 Lah 211 : 32 Cri L Jour 1022.

[11] Detention will not be illegal within the meaning of S. 491 where Magistrate has not stated any reasons but has made order of detention after due consideration. (Vol 17) 1930 Lah 945 (945) : 12 Lah 16 : 32 Cri L Jour 339.

[12] Magistrates ordering detention should always be careful to ascertain how long the persons have been in police custody and under police influence. ('85) 1835 All W N 59 (60) (FB).

[18] Where there are good reasons for remand Magistrate should invariably limit the term of detention as much as possible to what may be necessary for the object in view. ('07) 6 Cri L Jour 86 (89) (DB) (Cal).

8. Effect of detention in contravention of this section. — [1] Where a police officer detains a person for a period longer than that fixed in S. 61 the detention is illegal. (Vol 6) 1919 All 160 (161) : 41 All 483 : 20 Cri L Jour 381.

[2] Illegal detention is punishable under S. 29, Police Act [5 [V] of 1861]. (1864) 1 Suth W R Cr 5 (5) (DB)\* ('70) 1870 Pun Re No. 36 Cr p. 56 (58) (DB).

[3] It is not necessary to prove that the police officer detained the accused with any guilty knowledge. ('73) 19 Suth W R Cr 36 (36) (DB).

[4] Police officer may render himself liable to be punished under Ss. 347 and 348, Penal Code for detention of a person for wrongfully obtaining confession or some property from the accused. ('86) 1886 Rat 254 (272, 273) (DB).

[5] Where an order of release has been conveyed to the police officer, any further detention will be illegal. (Vol 25) 1938 All 534 (535) : 39 Cri L Jour 971.

**9. Nature of proceedings under this section. —**

[1] A Magistrate ordering detention acts in his judicial and not executive capacity. (Vol 17) 1930 Lah 945 (946) : 12 Lah 16 : 32 Cri L Jour 339.

[2] The accused is entitled to be represented by counsel. (Vol 13) 1926 Bom 551 (554) : 50 Bom 741 : 27 Cri L Jour 1169 (DB)\* (Vol 18) 1931 Lah 99 (100) : 12 Lah 435 : 33 Cri L Jour 180\* (Vol 19) 1932 Lah 13 (14) : 12 Lah 211 : 32 Cri L Jour 1022.

[3] The police should not refuse to allow a legal adviser of the accused to have an interview or to allow the relatives of the accused to supply him with food and clothing. (Vol 17) 1930 Lah 945 (946, 947) : 12 Lah 16 : 32 Cri L Jour 339.

[4] The production of the accused before the Magis-

trate does not amount to taking cognizance or commencement of judicial proceedings. (Vol 30) 1943 Nag 36 (70) : 44 Cri L Jour 237 : I L R (1943) Nag 73 (DB) \*('42) 23 Pat L Tim 684 (687).

10. If approvers can be detained in police custody under this section. — [1] An approver cannot be detained in police custody. He can be kept only in magisterial custody. (Vol 18) 1931 Lah 480 (480) : 33 Cri L Jour 162 (DE)\* (Vol 18) 1931 Lah 476 (479, 480) : 12 Lah 635 : 32 Cri L Jour 913 (DB).

11. Admissibility of statements reduced to writing during police investigation. — [1] Statements recorded during an investigation is admissible in evidence. ('12) 13 Cri L Jour 244 (245) (DB).

**SECTION 169 — SYNOPSIS.**

1. Scope.
2. Insufficiency of evidence.
3. Surety bond to appear before a Magistrate.
4. Re-arrest of the person released under this section.
5. Power of police-officer to allow withdrawal of complaint.

1. Scope. — [1] This section is applicable while the case is still under investigation of the police. It cannot be applied to a case where the accused has appeared before the Magistrate. (Vol 20) 1933 All 582 (585) : 35 Cri L Jour 203 (DB).

2. Insufficiency of evidence. — [1] Where after the completion of investigation it is found that there is no sufficient evidence or reasonable ground of suspicion to justify the sending up of the accused, the accused must be released. (Vol 8) 1921 All 278 (280) : 43 All 186 : 22 Cri L Jour 115.

[See (Vol 26) 1939 Lah 523 (524) : I L R (1939) Lah 307 : 41 Cri L Jour 146.]

[2] When an investigating officer reports to a Magistrate that there is no sufficient evidence against an accused, the Magistrate cannot order his further detention to enable the police to institute proceedings under S. 110. (Vol 8) 1921 All 278 (280) : 43 All 186 : 22 Cri L Jour 115.

3. Surety bond to appear before a Magistrate. — [1] A bond taken for the appearance of an accused before the police is void *ab initio*. (Vol 12) 1925 Lah 152 (152) : 25 Cri L Jour 712.

[2] A police officer cannot, except in the case of a minor, take a third party's bond for the appearance of the accused without taking a bond from the accused himself for his appearance. (Vol 15) 1928 Lah 318 (319) : 29 Cri L Jour 491.

4. Re-arrest of the person released under this section. — [1] If the Magistrate believes that there is a *prima facie* case of non-bailable offence, the police should re-arrest the accused and forward him in custody to the Magistrate. ('77) 1877 Rat 121 (121).

[2] Person apprehended along with others and released by the police under this section — *Held*, it is unfair to launch a prosecution against such person based upon facts, disclosed in the evidence which he

release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or commit him for trial.

[1882—S. 169; 1872—S. 125; 1861—S. 153.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 39.*

#### Objects and Reasons.

"We see no cogent reason for the first amendment of Sections 169 and 170, which substitutes the words 'upon the completion of an investigation' for 'upon an investigation.' In the case of Section 169, we agree that the power contemplated by the Section should be exercisable by investigating officers, and we see no reason in this case to restrict the power to officers not below the rank of Sub-Inspector. With regard to Section 170, however, we consider that the direct responsibility for sending up a case should rest with the officer in charge

of the police station. Section 168 undoubtedly contemplates that the officer in charge is to assume responsibility, and to enable all investigating officers to send up cases under Section 170 without reference to the officer in charge would tend to make Section 168 of no effect.

We consider whether the power to admit to bail in bailable cases should not be extended to investigating officers, but, on the whole, we are inclined to confine this power also to the officer in charge of the police station."—S. C. R. [XVIII of 1923].

**170. (1)** If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or commit him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

**(2)** When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to

Section 169—Note 4 (*contd.*)

gives against the accused. (Vol 20) 1933 All 399 (401) : 34 Cri L Jour 761.

try or commit accused for trial. ('02) 29 Cal 483 (487) (DB).

5. Power of police-officer to allow withdrawal of complaint. — [1] The police have no authority to entertain an application for withdrawal of complaint. ('75) 1875 Rat 91 (91).

[2] A Magistrate could not authorise a police constable to admit to bail persons sent up to him by police patels under the provisions of Bombay Act, (8 [VIII] of 1867), for offences for which bail might be allowed by this Code. ('69) 1869 Rat 26 (26).

#### SECTION 170 — SYNOPSIS.

1. Scope and applicability.
2. Accused must be forwarded to a Magistrate having jurisdiction.
3. Powers and duties of the police under this section.
4. "Accused," meaning of.
5. Bond by the complainant and witnesses.

1. Scope and applicability. — [1] The procedure prescribed under this section applies to :—

(a) Investigations conducted in a non-cognizable case under the orders of a Magistrate. (Vol 18) 1931 All 263 (264) : 53 All 407 : 32 Cri L Jour 485.

(b) Arrests made under Ss. 37 and 41 of the Excise Act [12 [XII] of 1896]. ('03) 1903 Pun Re No. 9 Cr p. 25 (26).

(c) Reports in respect of investigations conducted by the police under the Madras Salt Act. (Vol 18) 1931 Mad 769 (769, 770) : 32 Cri L Jour 1035 : 55 Mad 86.

2. Accused must be forwarded to a Magistrate having jurisdiction. — [1] It is irregular to send the accused and the witnesses before another Magistrate who is not empowered to take cognizance of the offence and

3. Powers and duties of the police under this section. — [1] It is for the officer-in-charge of a police-station to decide whether there is sufficient evidence or not, to justify the forwarding of the accused. (Vol 26) 1939 Lah 523 (524) : I L R (1939) Lah 307 : 41 Cri L Jour 146 \* (Vol 18) 1931 Lah 99 (101) : 12 Lah 435 : 33 Cri L Jour 180.

[2] The power cannot be exercised by a subordinate officer and proceedings instituted at his instance will be void under S. 530, Cl. (p). See (Vol 5) 1918 Cal 50 (51) : 19 Cri L Jour 961 (DB). (Case under Excise Act.)

[3] The power cannot be controlled by the Superintendent of Police, especially after it has been exercised. (Vol 5) 1918 Cal 485 (485) : 18 Cri L Jour 886 (DB).

[4] When the police-officer considers that there is sufficient evidence, he is bound to forward the accused in custody or, if the offence is bailable, to take bail for his appearance before the Magistrate. (Vol 7) 1920 Nag 255 (259, 260) : 16 Nag L R 9 : 21 Cri L Jour 769. (Overruled on another point in (Vol 24) 1937 Nag 17 : I L R (1937) Nag 315 : 38 Cr L J 237 and 251 (FB).)

[5] The police-officer cannot discharge the accused nor entertain an application to withdraw the complaint. ('75) 1875 Rat 91 (91).

[6] Where an investigating officer is not satisfied

such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

a[\* \* \* \* \*

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

[1882—S. 170; 1872—Ss. 123 Para. 1, 127, Para. 1, 128 Para. 2, 130 Paras. 1 to 4; 1861—Ss. 151, 155 156, 158.]

[a] Sub-section (4) was *repealed* by the Code of Criminal Procedure (Amendment) Act, 1926 (2 [II] of 1926), Section 2.

Objects and Reasons.

See under Section 169.

*Complainants and witnesses not to be required to accompany police-officer.*

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police-officer,

*Complainants and witnesses not to be subjected to restraint.*

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond :

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the police-station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

*Recusant complainant or witness may be forwarded in custody.*

[1882—S. 171; 1872—Ss. 130 Para. 5, 131; 1861—Ss. 158, 159.]

#### Section 170—Note 3 (*contd.*)

with the evidence against some of the accused and feels that they have been falsely implicated, he will be quite justified in not sending up such accused for trial. (Vol 26) 1939 Lah 523 (524) : 1 L R (1939) Lah 307 : 41 Cri L Jour 146.

[7] Investigating officer is bound to send all persons acquainted with the facts of the case as witnesses at the trial and cannot omit to do so on the ground that some of the witnesses are relations of the accused. (Vol 20) 1933 All 582 (586) : 35 Cri L Jour 208 (DB).

[8] It is not the duty of the officer to intimate to the accused the offence with which he is charged. But he is bound to intimate to him whether the warrant is bailable or not. (Vol 18) 1931 All 263 (265) : 53 All 407 : 32 Cri L Jour 465.

4. "Accused," meaning of. — [1] The word "accused" as used in this Chapter relating to investigations, means a person against whom there has been an accusation and evidence is being collected by an executive officer. (Vol 24) 1937 Nag 17 (21) : 1 L R (1937) Nag 315 : 38 Cri L Jour 237 and 251 (FB).

#### 5. Bond by the complainant and witnesses.—

[1] To send up an accused without bonds being taken is illegal. ('69) 11 Suth W R Cr 47 (48) (DB).

[2] The stage when the bond is to be taken comes in only when the accused is arrested and is either forwarded under custody or is released on security. ('93-1900) 1893-1900 Low Bur Rul 478 (479).

[3] The bond should specify the particular day on which appearance before the Magistrate is required. ('66) 6 Suth W R Cr 52 (52) (DB) & ('69) 11 Suth W R Cr 47 (47) (DB).

[4] The date must be one on which the accused is expected to appear before the Magistrate or if a security for his appearance has been taken, the date of his appearance. ('93-1900) 1893-1900 Low Bur Rul 478 (479).

#### Section 171—Note 1

[1] If a police-officer detains any witness against his will, his act is illegal and he may become liable to punishment under the Penal Code. ('92-96) 1 Upp Bur Rul 221 (225).

172. (1) Every police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.

[1882—S. 172; 1872—S. 126; 1861—S. 154.]

#### Section 171—Note 1 (*contd.*)

[2] Statements obtained from a witness subjected to restraint cannot be regarded as voluntary. (1900) 4 Cal W N 49 (54) (DB).

#### SECTION 172—SYNOPSIS.

1. Scope and object.
2. "Day by day."
3. Contents of diary.
4. Admissibility of a diary in evidence.
5. Inspection by accused.
6. Use of the diary.
7. Refreshing memory.
8. "May send for the police diaries."

1. Scope and object — [1] The object of the section is to enable the Magistrate to know the information from day to day obtained by the police officer as also his lines of investigation. ('97) 19 All 390 (397) (FB) \* (Vol 21) 1934 Cal 458 (459) : 35 Cri L Jour 904 (DB). (Reference to S. 162 seems to be a mistake.)

[2] It is essential that the diary should be kept strictly in accordance with the provisions of the Code in enabling the Court to judge of the weight to be attached to the evidence. ('67) 1867 Pun Re No. 39 Cr p. 72 (76) (DB).

[3] The police-officer is charged with the duty of maintaining a diary in investigation of cognizable as also of non-cognizable cases. ('99) 27 Cal 144 (150, 151) (Vol 29) 1942 Cal 593 (597) : 44 Cri L Jour 145 : ILR (1942) 1 Cal 486 (DB).

[4] The omission to maintain diaries deprives the Court of a very valuable aid which such diaries can give, if legitimately used. (Vol 5) 1918 Lah 171 (175) : 1918 Pun Re No. 16 Cr : 19 Cri L Jour 517 (DB).

[5] The section does not apply to personal diaries maintained by a police-officer, not conducting any investigation. (Vol 12) 1925 Cal 959 (960) : 26 Cri L Jour 579 (DB).

[6] The section does not apply to a departmental enquiry. (Vol 22) 1935 Sind 13 (14) : 36 Cri L Jour 581 : 29 Sind L R 92 (FB).

[7] The section applies to all police-officers, making

an investigation. (Vol 22) 1935 Lah 230 (243) : 35 Cri L Jour 1180 (DB).

[8] A diary prepared by the police under S. 47A, Calcutta Suburban Police Act, does not fall either under S. 172 or S. 162, Criminal P. C., and is not privileged. (Vol 11) 1924 Cal 542 (542) : 24 Cri L Jour 757 (DB).

[9] Sections 172 and 162 do not apply to the Calcutta police and there is nothing in the Calcutta Police Act, relating to any confidential diary which cannot be reached by any party in a criminal case. (Vol 16) 1929 Cal 257 (257) : 30 Cri L Jour 577 \* (Vol 27) 1940 Cal 97 (103) : 41 Cri L Jour 329 : ILR (1940) 1 Cal 231 (DB).

[10] Panchanamas may be read by witnesses while under examination to refresh their memory. (Vol 20) 1933 Sind 220 (222) : 34 Cri L Jour 848 (DB).

2. "Day by day." — [1] Police-officers are required to enter proceedings in a diary day to day. (Vol 22) 1935 Lah 230 (243) : 35 Cri L Jour 1180 (DB).

[2] Delay in making the entry is calculated to throw suspicion on the diary. (Vol 22) 1935 Nag 69 (75) (DB).

3. Contents of diary. — [1] The section does not contain an exhaustive list of the matters which may, with propriety, be entered in the diary. ('97) 19 All 390 (414) (FB).

4. Admissibility of a diary in evidence. — [1] Entries in the diary are only notes of secondary evidence of witnesses. (1900) 1900 All W N 130 (131) (DB).

[2] Entries in the police diary cannot be used as substantive or as corroborative evidence in the case. (Vol 20) 1933 P C 124 (132) : 34 Cri L Jour 322 (PC).

[3] Entries in the diary cannot be read to the jury. (1900) 27 Cal 295 (305) (DB) \* ('68) 8 Suth W R Cr 68 (68, 69) (DB).

[4] The Court cannot look into the entries in the diaries and take the facts and statements written therein as materials which would help it to come to a finding on the evidence in the case. ('11) 15 Cal W N 47n (47n) (DB) \* (Vol 13) 1926 Lah 54 (59) : 26 Cri L Jour 1308 (DB) \* (Vol 15) 1928 Lah 820 (823) : 29 Cri L Jour 493 (DB) \* (Vol 13) 1926 Lan 363 (363, 364) : 27 Cri L Jour 614.

[5] To reject the story of the defence on the ground that it is nowhere mentioned in the diary, is an im-

Section 172—Note 4 (*contd.*)

proper use thereof. (Vol 13) 1926 Lah 485 (486) : 27 Cri L Jour 572\* ('83) 1883 All W N 37 (37).

[6] What the Court can do is to discover out of the diary any matter that is important and then by calling for the necessary witnesses or documents to have the matter properly proved in evidence. ('06) 3 Cri L Jour 408 (408, 409) (DB) (Cal)\* (Vol 20) 1933 Pat 440 (441): 34 Cri L Jour 948 \* (Vol 14) 1927 Oudh 64 (65) : 28 Cri L Jour 134 (DB).

[7] If the police-officer, on being questioned, is unable to say that a particular statement was not made to him, mere diary will not be a proof of the absence of the statement. (Vol 29) 1942 Mad 288 (289) : 43 Cri L Jour 582 \* (Vol 29) 1942 Mad 58 (60) (DB). (To allow the police-officer to be asked whether certain copies of the case diary are true copies of the statements recorded from the witness, and then to permit the filing and making free use of the whole of the entry in the case diary relating to the statement of the witness, whether it is strictly relevant or not to the alleged contradiction, is to make an improper use of the diary.)

[8] Consent cannot legalise the use of diaries as evidence. (Vol 12) 1925 Oudh 1 (8) : 27 Oudh Cas 40 : 25 Cri L Jour 49.

[9] Diary referred to by a Magistrate as corroborative evidence — Legal evidence to help him to come to the same finding available — Interference declined. (Vol 8) 1921 Pat 331 (333) : 22 Cri L Jour 374 \* (Vol 2) 1915 Mad 11 (11) : 15 Cri L Jour 256 \* (Vol 12) 1925 Pat 165 (167) : 25 Cri L Jour 1266 \* ('70) 13 Suth W R Cr 22 (22) (SB) \* (Vol 4) 1917 P C 25 (28, 30) : 44 Cal 876 : 44 Ind App 137 : 18 Cri L Jour 471 : 13 Nag L R 100 (P C). (In this case, their Lordships of the Privy Council declined to interfere because substantial justice had been done.)

[10] Portions of the diary admitted in evidence—Police-officer, held, entitled to file other portions which explained those admitted. ('67) 8 Suth W R Cr 87 (90).

[11] A police-officer charged with an offence cannot use as evidence in his favour any entries made by him in a special diary. ('83) 6 All 42 (44).

[12] A police diary could be referred to by the prosecution, not to substantiate the offence against the accused, but to see whether a witness has turned hostile. (Vol 5) 1918 Pat 459 (459) : 3 Pat L Jour 568 : 19 Cr L Jour 512 (DB).

[13] Whether the record of a statement be proved and used under S. 162 or used under S. 172, sub-s. (2), without being proved, it is necessary for the Court to be astute and avoid using it otherwise than as provided by law. (Vol 20) 1933 Pat 589 (595) : 35 Cri L Jour 379 (DB).

[14] The entries in the general diary of a police station do not differ from any other record in writings of a statement or event and should be proved as such. (Vol 28) 1941 Rang 209 (212) : 43 Cri L Jour 157 : 1941 Rang L R 346 (DB).

5. Inspection by accused. — [1] The Court and not the accused or his agent can use the special diary for the purpose of contradicting the police-officer who prepared it. ('97) 19 All 390 (394) (FB).

[2] The Court cannot delegate this power to the counsel for the defence. (Vol 20) 1933 Lah 498 (500) : 34 Cri L Jour 464 (DB).

[3] If the diary is used by the police-officer to refresh his memory, the provisions of S. 161 of the Evidence Act will apply and the adverse party must be shown the entry and he may cross-examine the witness on it. ('06) 4 Cri L Jour 79 (82) : 33 Cal 1023 (DB).

[4] The defence is entitled to an inspection of only that portion of the diary from which the witness refreshed his memory and not the entire diary. (Vol 9) 1922 Pat 562 (562) : 2 Pat 74 : 23 Cri L Jour 591 (DB) \* ('97) 19 All 390 (393, 394) (FB) \* ('82) 8 Cal 739 (744) (DB).

[5] If the accused does not exercise his right as soon as the witness refreshes his memory, he does not continue to retain it during the whole of the subsequent examination of the witness. ('82) 8 Cal 739 (744) (DB).

[6] Copies of the statements entered in a diary cannot, as a matter of course, be granted to the accused. (Vol 23) 1936 Lah 359 (360) : 17 Lah 472 : 38 Cri L Jour 246\* ('94) 16 All 207 (208) (DB).

[7] The sole right conceded to the accused is the limited right of inspection and not to have copies. ('97) 19 All 390 (406) (FB).

[8] The accused cannot be prejudiced if no diary is maintained. (Vol 18) 1931 Pat 150 (151) : 32 Cri L Jour 638 (DB).

[9] The diaries should be liable to be inspected as well as called for by the party who desires their inspection in any enquiry or trial, civil or criminal, wherein that party is not the accused. (Vol 23) 1936 Lah 359 (360) : 17 Lah 472 : 38 Cri L Jour 246 \* ('94) 1894 Pun Re No. 17 Cr. p. 55 (62) (DB).

[10] The police diary is a privileged document coming under the provisions of S. 123 of the Evidence Act. (Vol 23) 1936 Lah 359 (360) : 17 Lah 472 : 38 Cri L Jour 246.

[See however (Vol 27) 1940 Lah 217 (224) : 41 Cri L Jour 667 (DB). (Diary of constable shadowing movements of suspect does not relate to affairs of State.)]

6. Use of the diary. — [1] The diary cannot be used for anything other than to assist the presiding Judge in the inquiry or trial. (Vol 13) 1926 Pat 20 (23) : 27 Cri L Jour 362 (DB) \* (Vol 15) 1928 All 25 (28) : 29 Cri L Jour 26 (DB).

[2] The diary can be used for the suggestion of questions to witnesses when the Court considers there is reasonable ground for so doing. (Vol 4) 1917 P C 25 (28) : 44 Cal 876 : 13 Nag L R 100 : 44 Ind App 137 : 18 Cri L Jour 471 (PC).

[3] The diary must be used to suggest means for further elucidating, by legal evidence, points that need clearing up. (Vol 31) 1944 Cal 243 (244) : 1 L R (1944) 1 Cal 133 : 46 Cri L Jour 28 (DB) \* (Vol 29) 1942 Pat 90 (94) : 43 Cri L Jour 36 (DB) \* (Vol 12) 1925 Pat 165 (167) : 25 Cri L Jour 1266\* (Vol 13) 1926 Lah 54 (59) : 26 Cri L Jour 1308 (DB).

[4] The Judge should bring on record by evidence

173. <sup>a</sup>[(1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall —

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the <sup>b</sup>[Provincial Government], setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the <sup>b</sup>[Provincial Government], the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.]

(2) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the <sup>b</sup>[Provincial Government] by general or special order so directs, be sub-

#### Section 172—Note 6 (contd.)

any material facts that may come to his knowledge and it is for that purpose he can and should use the diary. (Vol 15) 1928 All 25 (28) : 29 Cri L Jour 26 (DB).

[5] The Court may use the diary as containing indications of sources and lines of enquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice. ('97) 19 All 390 (395) (FB) & (Vol 17) 1930 Lah 318 (319, 320) : 10 Lah 794 : 31 Cri L Jour 343.

[6] The Judge can refer to the diary even after delivery of a verdict by the jury or of the opinions by the assessors. (Vol 16) 1929 Cal 57 (58) : 56 Cal 150 : 30 Cri L Jour 435 (DB).

[7] The power given to the Court under S. 172 should be sparingly exercised. ('29) 1929 Mad W N 587 (591).

[8] The Court can make use of the police diary of the case other than one under trial in the manner laid down in sub-s. (2). (Vol 31) 1944 Cal 243 (244) : I L R (1944) 1 Cal 133 : 46 Cri L Jour 28 (DB).

7. Refreshing memory.—[1] Persons other than police-officers cannot use it for the purpose of refreshing their memory. ('97) 19 All 390 (394) (FB).

[2] The accused cannot insist on the police-officer's referring to his diary to refresh his memory. ('82) 8 Cal 154 (156) & (Vol 19) 1932 Lah 103 (112) : 33 Cri L Jour 97 (DB).

[3] It was held in proceedings under S. 110 that though it may be within the right of the police-officers not to refer to a diary the accused is entitled to the benefit of the witness's refusal to disclose the source of his information. (Vol 12) 1925 Pat 131 (132) : 26 Cri L Jour 788.

[4] Court cannot compel the police officer to refresh his memory. ('26) 27 Cri L Jour 757 (760) (Nag).

[But see (Vol 8) 1921 All 86 (86) : 23 Cri L Jour 143 (DB) & (Vol 29) 1942 Lah 89 (91) : 43 Cri L Jour 588 : I L R (1942) Lah 470 (DB) & (Vol 11) 1924 Pat 829 (830).]

[5] A Judge is not bound to compel a witness to refresh his memory. ('82) 8 Cal 739 (745).

8. May send for the police diaries. — [1] The order for the production of the diaries must be made in and confined to each particular case. ('97) 19 All 390 (415) (FB) & ('94) 1894 All W N 181 (181) (DB). (Court not empowered to draw any presumption for or against the prisoner from the non-production of the diaries.)

#### SECTION 173 — SYNOPSIS.

1. Scope and object.
2. "Every investigation under this chapter."
3. "As soon as it is completed."
4. "The officer in charge of the police-station shall."
5. Report, to whom to be sent.
6. What the report should contain.
7. How the report can be used.
8. Penalty for submitting an incorrect or false report.
9. Nature of order by Magistrate striking off case reported by police.

1. Scope and object.—[1] This section provides for a final report after completion of the investigation and showing the results of such investigation. ('99) 1899 All W N 87 (89) & ('03) 7 Cri L Jour 414 (415) : 4 Low Bur Rul 137 & ('04) 1 Cri L Jour 539 (540) : 1904 Upp Bur Rul 1st Qr Cr P C 4.

[2] Till the final report under this section is made the investigation must be deemed to be pending and an informant cannot be prosecuted under S. 211 of the Penal Code. (Vol 2) 1915 Bom 80 (81) : 16 Cri L Jour 161 (DB) & ('10) 11 Cri L Jour 199 (200) : 3 Sind L R 189.

[3] The report sent when the accused is not sent up is called the "final report" or "referred charge sheet." (Vol 19) 1932 Pat 72 (76) : 33 Cri L Jour 349 & ('97) 20 Mad 189 (194, 198, 205) (FB) & (Vol 19) 1932 Mad 673 (675) : 33 Cri L Jour 785.

[4] Information received by police officer against several persons—Final charge sheet filed without laying any charge against one of them — Further charge sheet can be filed against that person. (Vol 33) 1946 Mad 502 (503).

2. "Every investigation under this chapter."—  
[1] The words "every investigation under this chapter"



mitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

“(4) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial :

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.]

[1882—S. 173; 1872—Ss. 125, 127; 1861—Ss. 153, 155.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 40, for the original sub-section (1). [b] *Substituted* by A. O. for “Local Government.” [c] *Inserted* by Act (18 [XVIII] of 1923), S. 40.

#### Objects and Reasons.

“... we think that the functions contemplated by Section 173 should be exercised by the officer in charge only. We have considered the objections raised to Clause (b) which the Bill adds to Section 173 (1). On

the whole, we are in favour of retaining it. But we have introduced the words ‘if any,’ to meet the case where there is no informant.”

— S. C. R. [XVIII of 1923.]

#### Section 173 — Note 2 (*contd.*)

will include investigation started on information under S. 154 as well as investigation into a non-cognizable case under orders of the Court under S. 155, sub-section (2). (‘13) 14 Cri L Jour 218 (218, 219) (All) (Vol 2) 1915 Bom 80 (80) : 16 Cri L Jour 161 (DB).

[2] Police investigating into non-cognizable case under S. 155 (2) — Complaint filed, instead of making a report under this section — Procedure, held, irregular — Irregularity not material so as to vitiate trial. (Vol 16) 1929 Mad 115 (117) : 30 Cri L Jour 469.

[3] The Calcutta police have no power to conduct proceedings under the Code for the collection of evidence. (Vol 27) 1940 Cal 97 (103) : 41 Cri L Jour 329 : I L R (1946) 1 Cal 231 (DB).

3. “As soon as it is completed.” — [1] An investigating officer should not delay his final report under this section till the proceedings under S. 202 before the Magistrate terminate. (Vol 20) 1933 All 582 (585) : 35 Cri L Jour 208 (DB).

[2] The fact of considerable delay in the preparation of the report is not by itself a sufficient reason for discrediting the evidence against the accused. (Vol 31) 1944 Pat 211 (213) : 23 Pat 139 : 46 Cri L Jour 129 (DB).

4. “The officer in charge of the police-station shall.” — [1] The duty of the police-officer is to “investigate” and find the real culprit and bring him to justice, he ought not to try to get a confession from the alleged offender. (‘84) 6 All 509 (542) (FB).

[2] The police-officer should not adjudicate on the guilt or innocence of the alleged offenders and especially in cases of rioting it is not the duty of the police-officer to decide as to which of the parties was in the wrong. (‘12) 13 Cri L Jour 737 (738) : 1913 Pun Re No. 2 Cr (DB).

[3] The railway police can also submit a report to the Magistrate under this section. (Vol 15) 1928 Bom 162 (164) : 52 Bom 238 : 29 Cri L Jour 551 (DB).

5. Report, to whom to be sent. — The final report under this section should be sent to the Magis-

trate who is empowered to take cognizance of the offence on a police-report as provided in S. 190, sub-s. (1) (b). (Vol 15) 1928 Pat 585 (586) : 7 Pat 561 : 29 Cri L Jour 942.

[2] The Magistrate cannot direct a further investigation and call for a fresh report. (Vol 19) 1932 Lah 611 (612) : 33 Cri L Jour 912 (Vol 19) 1932 Mad 673 (673) : 33 Cri L Jour 785.

[3] The Magistrate cannot direct the police to prefer a charge sheet against the accused. (Vol 19) 1932 Mad 673 (673) : 33 Cri L Jour 785.

[But see (Vol 19) 1932 Pat 72 (77) : 33 Cri L Jour 349 (Vol 20) 1933 Pat 242 (244) : 12 Pat 234 : 34 Cri L Jour 1198 (DB). (Dissenting from (Vol 15) 1928 Pat 585 : 7 Pat 561 : 29 Cri L Jour 942.) (‘08) 7 Cri L Jour 414 (415) : 7 Low Bur Rul 137.]

[4] The Magistrate has no power under the section to order proceedings against the informant. (‘04) 1 Cri L Jour 539 (540) : 1904 Upp Bul Rul 1st Qr Cr P C 4.

[5] Magistrate accepting a report by the police that case is false — No sufficient material — Magistrate cannot direct the police to charge-sheet the accused subsequently. (Vol 28) 1941 Pat 395 (398) : 42 Cri L Jour 504 (‘07) 6 Cri L Jour 34 (36) (DB) (Cal).

[6] No police report against a person — Magistrate cannot issue warrant against that person for trial before him unless empowered under S. 190, sub-s. (1) (c). (‘11) 12 Cri L Jour 92 (93) : 5 Sind L R 1 (DB).

6. What the report should contain. — [1] A report under this section includes both a “charge-sheet” and a “referred charge-sheet.” (Vol 19) 1932 Mad 673 (675) : 33 Cri L Jour 785.

[2] The report should contain the names of the parties, the nature of the information received, the names of persons who appear to be acquainted with the facts of the case and state whether the accused (if arrested) have been forwarded in custody or have been released on bail. (‘97) 20 Mad 189 (205) (FB) (Vol 17) 1930 Bom 372 (372) : 31 Cri L Jour 1142 (DB) (Vol 11) 1924 Sind 71 (72) : 17 Sind L R 150 : 26 Cri L Jour 181 (FB) (‘10) 11 Cri L Jour 145 (146) : 37 Cal 49 (DB).

<sup>a</sup>174. (1) The officer in charge of a police-station or some other police-officer special Police to inquire and empowered by the <sup>b</sup>[Provincial Government] in that behalf, on receiving report on suicide, etc. information that a person —

- (a) has committed suicide, or
- (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquest and, unless otherwise directed by any rule prescribed by the <sup>b</sup>[Provincial Government], or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the

Section 173 — Note 6 (*contd.*)

[3] Nature of information and facts constituting offences not given — Section of Penal Code mentioned — Report held did not comply with provisions of this section. (Vol 17) 1930 Bom 372(373); 31 Cr L J 1142(DB).

[4] The abstract of the evidence taken by the police during the investigation need not be given in the report. (Vol 17) 1930 Mad 191 (191) : 31 Cr L J 387.

[5] It is also not necessary to produce along with the report all the documents on which reliance is to be placed at the trial and the accused is not entitled to insist on the production of such documents before the trial starts. (Vol 24) 1937 Lah 411 (415) : 1 L R (1937) Lah 114 : 38 Cr L J 955.

[6] The section contemplates a report after an investigation of a case. ('71) 8 Bom H C R Cr 113 (115) & ('12) 13 Cr L J 752 (753) : 6 Sind L R 82 (DB).

7. How the report can be used. — [1] The report of the police-officer is not *per se* legal evidence of the facts stated therein. ('71) 15 Suth W R Cr 42 (43) (DB) & (Vol 2) 1915 All 177 (177): 16 Cr L J 445 & ('69) 12 Suth W R Cr 60 (63) (FB) & ('78) 3 Cal 754 (755) (DB) & ('71) 16 Suth W R Cr 17 (17) (DB) & (1900) 1900 Pun L R Cr 71 (73) (DB).

[2] The report can be used to suggest means of further elucidating points which need clearing up. (Vol 12) 1925 Pat 165 (167) : 25 Cr L J 1266.

[3] Investigating officer not examined as a witness — Magistrate drawing material for conviction from his report is improper and illegal. (Vol 14) 1927 Pat 37 (38): 27 Cr L J 1112.

[4] The police-report can be used by the Magistrate "as credible information" under S. 5 of the Gambling Act (3 [III] of 1867) for issuing a warrant of arrest. ('18) 14 Cr L J 293 (295) : 9 Nag L R 68.

[5] The police-report can be used as the basis for issuing a search warrant. ('97) 1897 Cr Rg 40.

[6] Police reporting that information regarding alleged theft was groundless—No formal complaint made — Informant cannot be prosecuted under S. 182 of the Penal Code. ('02) 6 Oudh Cas 1 (7) (DB).

8. Penalty for submitting an incorrect or false report. — [1] A police-officer, who, either negligently or improperly, files an incorrect or false report can be

proceeded against under S. 29 of the Police Act (5 [I of 1861]). ('71) 15 Suth W R Cr 17 (17) (DB).

[2] A police-officer cannot be prosecuted under S. 2 of the Penal Code for making a coloured or false report (1900) 4 Cal W N 347 (348) (DB).

9. Nature of order by Magistrate striking case reported by police.—[1] An order of the Magistrate, directing a case, reported to him by the police under this section to be struck off, is not a judicial order dismissing a complaint but an administrative order (Vol 25) 1938 Lan 469 (469) : 39 Cr L J 646 & (Vol 20) 1933 Pat 242 (243) : 12 Pat 234 : 34 Cr L J 1198 (DB).

[2] An order of the Magistrate directing a case reported to him by the police under this section to be struck off, cannot be revised by the Sessions Judge under S. 436. ('90) 1890 Rat 521 (522).

SECTION 174 — SYNOPSIS.

1. Object of the section.
2. Some other officer specially empowered.
3. "Shall proceed to the place where the body of such deceased person is."
4. "In the presence of two or more respectable inhabitants."
5. "Draw up a report."
6. Form of inquest reports.
7. Inquest report — Admissibility of.
8. When there is any doubt, etc. — Sub-section (3).
9. "Forward the body."
10. Post mortem examination.
11. Confessions by the accused at the inquest.
12. False statement by witness at inquest.
13. Inquest by Magistrate—Sub-section (5).
14. Coroners' inquest in the presidency towns.

1. Object of the section.—[1] The inquiry under this section should be confined to the ascertainment of the cause of death only and should not be intended for finding out who caused it. (Vol 27) 1940 I 210 (214) : 1 L R (1940) Lah 521 : 41 Cr L J 6

2. Some other officer specially empowered. [1] The following are the notifications specially empowering officers under this section:

(a) Bengal Rules and Orders.

(b) Bombay Gazette, 1909, part 1, page 1135.

apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the <sup>b</sup>[Provincial Government] may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the <sup>b</sup>[Provincial Government], if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) In the Presidencies of Fort St. George and Bombay, investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorized to hold inquests.

(5) The following Magistrates are empowered to hold inquests, namely, any District Magistrate, <sup>c</sup>[Sub-divisional Magistrate or Magistrate of the first class], and any Magistrate especially empowered in this behalf by the <sup>b</sup>[Provincial Government] or the District Magistrate.

[1882 — S. 174; 1872 — S. 133; 1861 — S. 161.]

[a] For Provincial Amendments, see the Coroners (Madras) Act, 1889 (5 [V] of 1889), S. 4 (2) (re : this and Ss. 175 and 176), and the Bengal Act, (7 [VII] of 1944), S. 4, [8-2-1945] which adds a proviso to S. 174 (1). [b] Substituted by A.O., for "Local Government". [c] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 41, for "or Sub-divisional Magistrate".

#### Provincial Amendment.

#### BENGAL.

To sub-section (1) of Section 174 the following proviso was *added*, viz :

"Provided that, unless the Provincial Government otherwise directs, it shall not be necessary under this sub-section, in any case where the death of any person has been caused by enemy action, to make any investigation or to draw up any report or to send any intimation to a Magistrate empowered to hold inquests."

— Bengal Act (7 [VII] of 1944), S. 4. [8-2-1945.]

#### Section 174—Note 2 (*contd.*)

(c) Madras Rules and orders.

(d) Rules 34 and 35 of Rules under S. 75 of U. P. Village Panchayat Act, VI of 1920, (Vol 20) 1933 All 939 (939) : 35 Cri L Jour 464 (DB).

(e) Act VIII of 1867 of Bombay relating to police patels. ('95) 19 Bom 612 (613) (DB). (Police patel can hold inquest and report to the police officer in charge of District Police-station.) \*('95) 1895 Rat 792 (792) (DB). (Police patel can send corpse for medical examination where murder is suspected.)

[2] A police constable in Bombay cannot hold the inquest as a police patel but has to proceed under this section. ('95) 1895 Rat 771 (772) (DB).

3. "Shall proceed to the place where the body of such deceased person is." — [1] Where the dead body has been burnt or disposed of already, there is no necessity to go to the place where the dead body was. ('09) 9 Cri L Jour 105 (106) : 1908 Pun Re No. 27 Or (DB).

4. "In the presence of two or more respectable inhabitants." — [1] Police officer under this section can summon persons for the purpose of holding the investigation. The persons so witnessing investigation should be examined at trial as otherwise the prosecution evidence may be criticised on this ground. ('09) 10 Cri L Jour 321 (323) (DB) (Lab).

5. "Draw up a report". — [1] Report made under this section must contain statements made by persons at the inquest which may even be recorded in full. ('11) 12 Cri L Jour 124 (125) (DB) (Mad).

[2] A Magistrate holding an inquest under sub-s. (5) need not report to anybody — Even where he reports, it is not a judicial finding open to revision. ('78) 3 Cal 742 (752, 753) (DB).

[But see (Vol 27) 1940 Rang 68 (70) : 1940 Rang L R 188 : 41 Cri L Jour 470 (DB).]

[3] A refusal by a person examined at the inquest to sign his recorded statement is not an offence. ('10) 11 Cri L Jour 500 (500) (Mad).

[4] The village headman acting under sub-s. (4) has only the powers of a police-officer specified herein. ('10) 11 Cri L Jour 500 (500) (Mad).

6. Form of inquest reports. — [1] A statement need not be entered in the form as to who killed the deceased person. ('96) 1896 Rat 843 (843, 844) (DB).

7. Inquest report — Admissibility of. — [1] The report requires to be legally proved for it does not prove itself. ('06) 3 Cri L Jour 41 (42) (DB) (Bom).

8. When there is any doubt, etc. — Sub-section (3). — [1] Doubt as to cause of death or other

<sup>a</sup>175. (1) A police-officer proceeding under section 174 may, by order in writing sum-  
*Power to summon* two or more persons as aforesaid for the purpose of the said investigat-  
*persons.* and any other person who appears to be acquainted with the facts of the  
 case. Every person so summoned shall be bound to attend and to answer truly all questions other  
 than questions the answers to which would have a tendency to expose him to a criminal charge  
 or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which section 170 applies, such person  
 shall not be required by the police-officer to attend a Magistrate's Court.

[1882 — S. 175 ; 1872 — S. 134.]

[a] For Madras Provincial Amendment, see foot-remark [a] to S. 174.

<sup>a</sup>176. (1) When any person dies while in the custody of the police, the nearest Magistrate  
*Inquiry by Magistrate* empowered to hold inquests shall, and, in any other case mentioned  
*into cause of death.* section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate  
 empowered may hold an inquiry into the cause of death either instead of, or in addition to, it

#### Section 174—Note 8 (contd.)

reasons existing for sending the corpse for post mortem  
 examination — Police officer knowing that somebody  
 would escape punishment by not doing so commits an  
 offence under S. 217 or 218, I. P. C. (Vol 19) 1932  
 Cal 850 (855) : 33 Cri L Jour 657 (DB).

9. "Forward the body." — [1] In a trial for  
 murder it should be proved that the same body over  
 which the inquest was held was forwarded and examin-  
 ed by the medical officer. ('74) 11 Bom H C R 242  
 (243) (DB).

10. Post mortem examination.—[1] The medical  
 officer must note the time when he conducted the exa-  
 mination. (Vol 13) 1931 Oudh 119 (120) : 6 Luck 475 :  
 32 Cri L Jour 697 (DB).

[2] The result of the observation external and internal  
 should be fully recorded. ('11) 12 Cri L Jour 124 (125)  
 (DB) (Mad).

[3] The report of the medical officer is not admissible  
 in evidence except for the purpose of contradicting the  
 officer who made it or to refresh his memory under the  
 provisions of Ss. 159 to 161 of the Evidence Act.  
 (Vol 17) 1930 Sind 225(236) : 31 Cr L J 1026(DB)\*('01)  
 6 Cal W N 98 (101) (DB)\*('99) 27 Cal 295 (303) (DB).

[4] When the medical officer is not examined at the  
 beginning of the enquiry, a copy of the post mortem  
 certificate ought to be given to the accused. (Vol 14)  
 1927 Mad 512 (512) : 50 Mad 750 : 28 Cri L Jour 463.

11. Confessions by the accused at the inquest.—  
 [1] Confessions by accused recorded in the *panchnamas*  
 in the presence of the police-officers must be excluded  
 as inadmissible. ('11) 12 Cri L Jour 429 (429, 430) (DB)  
 (Bom)\* (Vol 33) 1946 Nag 321 (323) : I L R (1946) Nag  
 946 : 47 Cr L J 918 (DB).

[See (Vol 19) 1932 Mad 24 (24) : 33 Cri L Jour 173.]

[2] See also S. 27, Evidence Act.

12. False statement by witness at inquest. —  
 [1] False accusation of murder made against a person  
 during the course of investigation under this section is  
 not an offence. (Vol 19) 1932 Mad 24 (24) : 33 Cri L  
 Jour 173 \* (Vol 9) 1922 Lah 133 (133, 134) : 23 Cri L  
 Jour 82.

[2] Statement before police-officer in investigation

and before Magistrate in enquiry contradicting — 1  
 person making such statements is guilty of offence un-  
 S. 193, I. P. C. ('09) 9 Cri L Jour 304 (305) (DB) (Me)

13. Inquest by Magistrate—Sub-section (5)  
 [1] The investigation by Magistrate under this sect  
 is distinct from an enquiry under S. 202. (Vol 14) 1  
 Lah 30 (31) : 28 Cri L Jour 26.

14. Coroners' inquest in the presidency towns  
 [1] Presidency Magistrate is not barred from inve-  
 gating the crime independently because Act 4 [IV]  
 1871 empowers the Coroner to hold the inquest. ('  
 16 Bom 159 (161) (DB).

#### Section 175 — Note 1

[1] The words "investigation under this Chapter"  
 Ss. 160 and 161 refer to all investigations into offen-  
 ('05) 2 Cri L Jour 590 (592) (Kathiawar).

[2] When death is due to homicide the investiga-  
 becomes an investigation under S. 161. ('05) 2 Cr  
 Jour 590 (592) (Kathiawar).

[3] The person examined is bound to answer the  
 questions put to him. (Vol 9) 1922 Lah 133 (13  
 23 Cri L Jour 82.

[4] A person, who comes forward without be  
 summoned by an order in writing to attend before  
 police-officer and volunteers information, is not bo  
 to give true answers to questions. (Vol 9) 1922 Lah  
 (134) : 23 Cri L Jour 82.

[5] Statements of witnesses examined at the inq  
 can be recorded in full and may often be of great  
 to a Court in testing the value of the evidence g  
 subsequently. ('11) 12 Cri L Jour 124 (125) (DB) (N

#### Section 176 — Note 1

[1] An enquiry into a suspicious death should  
 depend merely upon the opinion the police may f  
 There should be a further check by enabling a M  
 trate to hold an independent enquiry. (Vol 15)  
 Bom 390 (398) : 29 Cri L Jour 1063 (DB).

[2] The omission to hold an enquiry is curable u  
 S. 537 where it has not occasioned any failure of ju  
 (Vol 32) 1945 Nag 143 (145) : I L R (1945) Nag  
 47 Cri L Jour 196 (DB).

[3] Proceeding under this section is both an "inq  
 and a "judicial proceeding". (Vol 27) 1940 Rang 68

investigation held by the police-officer, and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may, cause the body to be disinterred and examined.<sup>b</sup>

[1882 — S. 176 ; 1872 — S. 135.]

[a] For Madras Provincial Amendment see foot-remark [a] to S. 174. [b] A like power is given to the Coroners of Bombay and Calcutta. See the Coroners Act, 1871 (4 [IV] of 1871), S. 11.

## PART VI.

### PROCEEDINGS IN PROSECUTIONS.

## CHAPTER XV.

### OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

#### A.—Place of Inquiry or Trial.

*Ordinary place of inquiry and trial.* 177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

[1882 — S. 177 ; 1872 — S. 63, para. 1; 1861 — S. 26.]

Section 176—Note 1 (*contd.*)

1940 Rang L R 188 : 41 Cri L Jour 470 (DB)\* (Vol 15) 1928 Bom 390 (393) : 29 Cri L Jour 1063 (DB). ('78) 3 Cal 742 (DB) and (Vol 8) 1921 Bom 3:45 Bom 834 : 22 Cri L Jour 241 (FB), distinguished.)

[4] A report or finding under this section is not necessary; and if there is one, it does not form part of the proceeding. ('78) 3 Cal 742 (752, 753) (DB).

[But see (Vol 27) 1940 Rang 68 (70) : 1940 Rang L R 188 : 41 Cri L Jour 470 (DB). (Magistrate holding an inquiry is a "Court" for the purpose of the Contempt of Courts Act.)]

[5] An accused is entitled to get copies of the inquest report and of the statements made by witnesses at the inquest. If they are not available, the Court has power under S. 94 to call upon the police to produce them. (Vol 12) 1925 Mad 424 (425) : 26 Cri L Jour 426.

[See also (Vol 32) 1945 Mad 64 (65) : 46 Cri L Jour 412.]

[6] A District Magistrate has no power to end the inquiry or interfere with it, beyond calling for a report under S. 435 and reporting for the orders of High Court under S. 433. (Vol 15) 1928 Bom 390 (399) : 29 Cri L Jour 1063 (DB).

#### SECTION 177 — SYNOPSIS.

1. Scope of the section.
2. "Ordinarily."
3. Several offences : venue.
4. "Within the local limits . . ."

5. Cheating and criminal misappropriation.
6. Defamation, giving false information, etc.
7. Irregular arrest — Effect.
8. Transfer of territory to Native State.
9. Transfer of territory to another district.
10. Effect of trial at wrong places.
11. Committal by or to wrong Court.

1. Scope of the section. — [1] All crime is local and jurisdiction does not depend upon the nationality of the offender. (Vol 17) 1930 Bom 490 (491) : 55 Bom 59 (FB).

[2] Jurisdiction to try a person for an offence depends upon the crime having been committed within the area of such jurisdiction. (Vol 17) 1930 Bom 490 (491) : 55 Bom 59 (FB)\* (Vol 5) 1918 Sind 22 (23) : 11 Sind L R 128 : 19 Cri L Jour 591 (DB)\* ('12) 13 Cri L Jour 575 (576) : 34 All 451\* ('94) 1894 Pun Re No. 30 Cr, p. 99 (101) (DB)\* (Vol 21) 1934 All 829 (829) : 57 All 83 : 35 Cri L Jour 1175\* ('76) 25 Suth W R Cr 14 (14) (DB).

[See (Vol 20) 1933 Bom 148 (150) : 34 Cri L Jour 771 (DB).]

[3] Jurisdiction does not depend upon the place where the offender is found. (Vol 9) 1922 Mad 215 (216) : 45 Mad 14 : 23 Cri L Jour 490 (DB).

[4] An act committed on land outside British territory by a foreigner is not an offence triable by British Courts under their Criminal Codes. ('45) 1 L R (1945) Nag 130 (134)\* ('80) 5 Mad 23 (25) (DB)\* ('87) 9 All 523 (525) (DB)\* ('84) 7 Mad 354 (355)\* (Vol 5) 1918 Lah 49 (50) : 1918 Pun Re No. 23 Cr : 19 Cri L Jour 931\* (Vol 1)

Section 177—Note 1 (*contd.*)

1914 Cal 725 (725) : 15 Cri L Jour 537 (DB) (1922) 23 Cri L Jour 560 (560) (Lah) (06) 3 Cri L Jour 247 (248) : 28 All 372 (DB) (80) 5 Bom 333 (346) (SB) (Vol 1) 1914 Sind 80 (80) : 15 Cri L Jour 511 : 7 Sind L R 128 (DB) (13) 14 Cri L Jour 439 (440) : 7 Sind L R 17 (Vol 4) 1917 Cal 612 (612, 613) : 17 Cri L Jour 128 (DB) (Vol 10) 1923 Rang 209 (210) : 1 Rang 56 : 24 Cri L Jour 746.

[5] A foreigner, staying in foreign territory shoots *B* who is in British territory — British Courts have no jurisdiction to try him even if he is subsequently found in British territory. ('80) 1880 Pun Re No. 35 Cr, p. 84 (86) (DB).

[But see ('12) 13 Cri L Jour 426 (427, 428) : 35 Bom 524 (DB).]

[6] A question of jurisdiction should be determined by reference to the provisions of the Code. (Vol 20) 1933 Nag 33 (34) : 34 Cri L Jour 1038.

[7] Question of jurisdiction should not be left to be determined after the Court has made up its mind whether to acquit or convict. (Vol 8) 1921 All 12 (12) : 22 Cri L Jour 308 (FB).

[8] Jurisdiction is not removed if the evidence discloses that the offence was committed in another district. ('84) 1884 All W N 31 (31).

[9] A question of jurisdiction should be determined by the Court before which the offender is placed for trial and should not be referred to some superior officer to decide. ('12) 13 Cri L Jour 786 (786) : 37 Bom 144 (DB).

[10] This section applies to the trial of offences. ('96) 1896 Pun Re No. 17 Cr, p. 39 (41) (DB).

[11] This section does not apply in determining the jurisdiction of a Court competent to entertain an application under S. 488. ('95) 1893 Pun Re No. 3 Cr, p. 30 (31) (DB) (85) 1885 Pun Re No. 13 Cr, p. 26 (27) (DB).

[12] Jurisdiction of High Court to punish a person for contempt of Court is not ousted if the accused has removed himself beyond the jurisdiction of that Court. (Vol 21) 1934 Mad 423 (424) : 57 Mad 831 : 35 Cri L Jour 962 (DB).

2. "Ordinarily". — [1] The word "ordinarily" must be taken to mean except in the cases provided hereinafter to the contrary. (Vol 24) 1937 Bom 186 (190) : 1 I L R (1937) Bom 244 : 38 Cri L Jour 769 (DB) (Vol 15) 1928 Bom 140 (140) : 29 Cri L Jour 533 (DB).

[2] The rule in this section should be read subject to Workmen's Breach of Contract Act, 1859. ('10) 11 Cri L Jour 380 (381) : 1910 Pun Re No. 12 Cr. (DB) (Vol 3) 1916 Sind 86 (86) : 17 Cri L Jour 308 : 10 Sind L R 56.

[3] Courts in India have jurisdiction over offences committed on the high seas by virtue of the Merchant Shipping Act, S. 684, 12 and 13 Vict., C. 96; 25 and 24 Vict., C. 88. (Vol 23) 1936 Sind 3 (4, 5) : 29 Sind L R 281 : 37 Cri L Jour 314 (DB) (70) 7 Bom H C R Cr 89 (125, 128) (FB) (94) 21 Cal 782 (784) (DB) (12) 13 Cri L Jour 246 (247) : 39 Cal 487 (Merchant Shipping Act.) (Vol 20) 1933 Cal 145 (145) : 60 Cal 44 : 34 Cri L Jour 631 (DB). (Do.) (Vol 5) 1918 Bom 249 (250) : 42 Bom 234 : 19 Cri L Jour 237 (DB). (No jurisdiction over offences committed in non-British ships.)

3. Several offences: venue. — [1] When an accused is charged with several offences over one or some of which only the Court has jurisdiction, it should try only such offence or offences. (Vol 15) 1928 Bom 476 (476) : 30 Cri L Jour 191.

[2] Conspiracy entered into in district *A* — Act committed in district *B* — Magistrate of district *A* can try the conspiracy but cannot try the accused for act committed outside his district. (Vol 25) 1938 Sind 101 (111, 112) : 39 Cri L Jour 630 : 1 I L R (1939) Kar 4 (DB) (Vol 23) 1936 Mad 317 (317) : 37 Cri L Jour 634 (Vol 11) 1924 Cal 1034 (1035) : 26 Cri L Jour 207 (DB).

[3] There can be no joint trial unless the Magistrate has jurisdiction over all the offences charged. (Vol 13) 1926 Mad 839 (840) : 52 Mad 991 : 30 Cri L Jour 1161.

[4] Two different offences committed in the same transaction — Case should be tried by the Magistrate who has jurisdiction to try both the offences and not by a Magistrate having jurisdiction over only one of them. ('97) 2 Weir 144 (144) (DB).

4. "Within the local limits . . . ." — [1] A Magistrate of a division whose powers are not limited to portion of the division has jurisdiction over all offences committed in the division. ('80) 2 Weir 11 (13).

[2] An offence of bigamy, or of abetment thereof can be tried only in the place where the bigamy or abetment took place and in the place from where the woman was enticed away. (Vol 11) 1924 Lah 732 (732) : 26 Cri L Jour 525.

[3] Offence of enticing away a married woman — Court within whose limits the enticement took place would have jurisdiction and not the Court within whose limits the woman was detained. (Vol 24) 1937 Bom 186 (189, 190) : 1 I L R (1937) Bom 244 : 38 Cri L Jour 769 (DB) (80) 3 All 251 (253) (DB).

[4] The offence of holding out false pretences to labourers and of inducing them to enter into a contract must be tried in the place where such inducement was made. ('68) 4 Mad H C R App 4 (5) (10) 11 Cri L Jour 143 (144) : 37 Cal 27 (DB).

[5] The offence of murder should be committed for trial to the Sessions Court within the local limits of whose jurisdiction it was committed. (Vol 19) 1932 Cal 487 (488) : 59 Cal 856 : 33 Cri L Jour 645 (DB).

[6] The offence under S. 134 of the Companies Act may be tried by the Court within whose jurisdiction the office of the Registrar is situate, even though the company itself be located outside its jurisdiction. (Vol 4) 1917 Cal 1 (1) : 45 Cal 486 : 18 Cri L Jour 787 (DB).

[7] The place where only the preparation for an offence is made has no jurisdiction. (Vol 14) 1927 Mad 77 (78) : 28 Cri L Jour 95 (1900) 24 Bom 287 (291) (DB).

[8] Excessive sale of beer entered in registers of a company at *R* — Liquor then sent to *M* — Offence of illegal sale and transport committed at *R* — Court at *M* cannot try them. (Vol 29) 1942 Lah 134 (134) : 43 Cri L Jour 703 (02) 1902 Pun Re No. 32 Cr, p. 84 (86) (DB).

[9] A Magistrate holding powers within local limits cannot exercise those powers while he is beyond such local limits. ('10) 11 Cri L Jour 570 (571) : 1910 Pun Re No. 23 Cr. (DB).

## 5. Cheating and criminal misappropriation. —

[1] Offence of cheating should be tried at the place where deception was practised and not where fraud was discovered. (Vol 2) 1915 All 428 (428) : 16 Cri L Jour 825.

[2] Offence of misappropriation or breach of trust is triable at the place where it is committed. ('99) 26 Cal 746 (747) (DB) (Vol 12) 1925 Cal 107 (108) : 25 Cri L Jour 1186 (DB).

*Power to order cases to be tried in different sessions divisions.*

178. Notwithstanding anything contained in section 177, the <sup>a</sup>[Provincial Government] may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division :

Provided that such direction is not repugnant to any direction previously issued by the High Court under section 15 of the Indian High Courts Act, 1861, <sup>b</sup>[or section 107 of the Government of India Act, 1915], <sup>c</sup>[or section 224 of the Government of India Act, 1935], or under this Code, section 526.

[1882 — S. 178 ; 1872 — S. 63.]

[a] *Substituted* by A. O., for "Local Government". [b] *Inserted* by the Amending Act 1916 (18 [XIII] of 1916), S. 2 and Schedule. [c] *Inserted* by A. O.

#### Section 177—Note 5 (*contd.*)

[See also (Vol 24) 1937 Bom 371 (372) : 38 Cri L Jour 977 : 1 L R (1937) Bom 743 (DB).]

[3] Offence of misappropriation or breach of trust cannot be tried at the place where the complainant first acquired evidence that the offence was committed. (Vol 24) 1937 Sind 68 (72) : 38 Cri L Jour 512 : 31 Sind L R 123 (FB) & (Vol 17) 1930 Bom 490 (494) : 55 Bom 59 (FB).

[4] A Magistrate can try an offence under S. 486, Penal Code. ('98) 25 Cal 639 (641) (DB).

#### 6. Defamation, giving false information, etc. —

[1] The offence of sending newspaper or letter containing defamatory matter by post to another place can be tried by a Magistrate at the latter place. (Vol 30) 1943 Sind 196 (197) : 45 Cri L Jour 105 & ('80) 3 All 342 (346, 347) & ('08) 8 Cri L Jour 272 (276) : 33 Bom 77 (DB) & ('66) 5 Suth W R Cr 44 (44) (DB).

[2] The offence of sending defamatory newspaper or letter to another place may be tried at the place of posting. (Vol 11) 1924 Mad 340 (343) : 25 Cri L Jour 941 (DB) & (Vol 10) 1923 Mad 666 (666) : 24 Cri L Jour 309.

[3] Defamatory petition presented to a superior officer who sends it to a subordinate officer for inquiry publication takes place where the latter officer is. ('89) 1889 Pun Re No. 14 Cr, p. 59 (80).

[4] Offence of abetment is completed as soon as the contents of letter meant to instigate become known to the addressee and is triable at the place where the letter is received. ('94) 16 All 389 (390) (DB).

[5] The receipt at *M* of a parcel or a letter by which a person is deceived gives the Magistrate at *M* jurisdiction over the offence. (Vol 1) 1914 All 373 (374) : 15 Cri L Jour 719. (Offence can be tried where the letter is posted.) & ('31) 32 Cri L Jour 996 (996) (Lah) & (Vol 11) 1924 Pat 708 (708) : 35 Cri L J 81.

[6] Accused charged with trying to cheat the currency officer of Bombay by claiming payment of halves of currency notes—Declaration of the claim made and posted in Calcutta — Case was triable in Calcutta. (Vol 10) 1923 Cal 401 (402) : 25 Cri L Jour 184 (DB).

[7] It is the place of the delivery of a letter containing information so as to cause the public servant to act on it and not the place of posting that gives jurisdiction over the offence. (Vol 30) 1943 Mad 500 (500) : 44 Cri L Jour 660 & (Vol 19) 1932 Mad 427 (427) : 33 Cri L Jour 452.

[But see (Vol 23) 1936 All 105 (107) : 37 Cri L Jour 157 (DB). (Court at the place of posting can also try the case).]

[8] Printing of seditious matter at a place confers jurisdiction on Courts of that place though publication has been elsewhere. (Vol 15) 1928 Rang 276 (276) : 30 Cri L Jour 707.

[9] Where there is no evidence that the printing of papers with the object of deceiving was done in a district, Courts of such district have no jurisdiction over the offence. (Vol 6) 1919 Pat 407 (409) : 20 Cri L Jour 142 : 4 Pat L Jour 16 (DB).

[10] An offence under S. 7 (a) of the Copyright Act can be tried only at the place where the printing for sale of the offending copies of the book was done. (Vol 4) 1917 Lah 335 (336) : 1916 Pun Re No. 28 Cr : 18 Cri L Jour 353.

7. Irregular arrest—Effect. — [1] Irregularity of arrest does not affect the jurisdiction of a Court to try the offender. ('06) 5 Cri L Jour 89 (90, 91) : 1906 Pun Re No. 17 Cr. (DB) & ('04) 1 Cri L Jour 535 (537) : 31 Cal 557 (DB) & ('03) 26 Mad 124 (125) (DB) & ('99) 1899 Pun Re No. 6 Cr, p. 17 (18).

[See however (Vol 12) 1925 Bom 131 (133, 134) : 49 Bom 212 : 26 Cri L Jour 441 (DB).]

[2] An accused who has submitted to the jurisdiction of a Court must be regarded as having waived any irregularity affecting the manner in which his appearance before the Magistrate has been enforced. ('03) 16 C P L R 9 (10).

#### 8. Transfer of territory to Native State. —

[1] Appeal from conviction for offence within British India — Territory including place of offence transferred to Native State — *Held* Sessions Judge can hear appeal. ('11) 12 Cri L Jour 470 (471) (All) & ('12) 13 Cri L Jour 169 (170) : 34 All 118 (DB) & ('12) 13 Cri L Jour 575 (576) : 34 All 451.

#### 9. Transfer of territory to another district. —

[1] The fact that the locality in which the offence was committed was subsequently transferred to another district will not oust the jurisdiction of the Magistrate to try the case or to commit it to the Sessions Court. (Vol 26) 1939 Cal 159 (160) : 40 Cri L Jour 270 : 1 L R (1938) 2 Cal 357 (DB).

10. Effect of trial at wrong places. — [1] When an offence is being tried in a wrong Court, the want of jurisdiction may be cured by an order of the High Court under S. 526. (Vol 15) 1928 Bom 140 (140) : 29 Cri L Jour 533 (DB) & (Vol 12) 1925 Oudh 490 (490) : 26 Cri L Jour 577 & (Vol 16) 1929 Sind 250 (253) : 30 Cri L Jour 1121.

[But see (Vol 10) 1923 Mad 326 (326) : 24 Cri L Jour 351 (DB) & ('86) 10 Bom 274 (280) (DB).]

11. Committal by or to wrong Court. — [1] A committal erroneously made to the High Court may be validated under S. 526. (Vol 7) 1920 Mad 824 (825) : 42 Mad 791 : 20 Cri L Jour 484 (DB).

#### Section 178 — Note 1

[1] Provincial Government has no power under the section to direct that a case should be tried by a particular Court in Sessions Division. ('72-92) 1872-1892 Low Bur Rul 263 (267) (DB) & ('84) 10 Cal 643 (648) (DB).

[2] On an order for transfer being made by the Provincial Government under this section the Sessions Court in the new division has full jurisdiction to try the case notwithstanding that the offence was not committed within the local limits of its jurisdiction. ('72-92) 1872-1892 Low Bur Rul 263 (268).

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

*Illustrations.*

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is, during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y, or Court Z, to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in the Native State of Baroda, and dies of his wounds in Poona. The offence of causing A's death may be inquired into and tried in Poona.

[1882 — S. 179 ; 1872 — S. 65 ; 1861 — S. 27.]

Section 179 — Note 1

[1] The section applies only to cases in which the offender is accused of the offence by reason of some act done by him and some consequence that has ensued from such act. (Vol 25) 1938 All 632 (634) : 40 Cri L Jour 128 \* (Vol 17) 1930 Bom 490 (492) : 55 Bom 59 (FB).

[2] Consequence must be an ingredient or part of the offence charged. (Vol 21) 1934 All 499 (503) : 56 All 1047 : 35 Cri L Jour 982 (FB) \* (Vol 17) 1930 Bom 490 (492, 493, 495, 496) : 55 Bom 59 (FB). (Overruling (Vol 9) 1922 Bom 39 : 46 Bom 641 : 23 Cri L Jour 173 (DB), (Vol 17) 1930 Bom 358 : 31 Cri L Jour 1155 (DB).) \* (Vol 29) 1942 Cal 575 (576) : 44 Cri L Jour 132 : I L R (1942) 2 Cal 507 (DB) \* (Vol 12) 1925 Lah 171 (172) : 26 Cri L Jour 136 \* (Vol 20) 1933 Lah 559 (560) : 34 Cri L Jour 902.

[But see ('08) 8 Cri L Jour 75 (80, 82) (SB) (Lah) \* (Vol 22) 1935 Mad 189 (190) : 36 Cri L Jour 467 \* (Vol 1) 1914 Mad 330 (331) : 38 Mad 779 : 15 Cri L Jour 207 (DB) \* (Vol 16) 1929 Pat 640 (642) : 30 Cri L Jour 765 \* (Vol 24) 1937 Sind 68 (70) : 31 Sind L R 123 : 38 Cri L Jour 512 (FB). (Overruled (Vol 16) 1929 Sind 30 : 22 Sind L R 404 : 30 Cri L Jour 249 (DB).) \* (Vol 31) 1944 Pesh 25 (27) : 45 Cri L Jour 749 \* ('01) 4 Oudh Cas 376 (377, 378) \* (Vol 23) 1936 Nag 55 (63) : 37 Cri L Jour 474 (DB) \* (Vol 20) 1933 Nag 33 (34, 35) : 34 Cri L Jour 1038 \* (Vol 20) 1933 Oudh 215 (221) : 8 Luck 381 : 34 Cri L Jour 785.]

*Criminal breach of trust and criminal misappropriation.* — [3] A, in X, commits criminal breach of trust of moneys belonging to B, in Y. Court in Y, cannot try the offence. (Vol 29) 1942 Cal 575 (577) : 44 Cri L Jour 132 : I L R (1942) 2 Cal 507 (DB) \* (Vol 3) 1916 Mad 438 (439, 440) : 16 Cri L Jour 491 : 39 Mad 576 (DB) \* ('12) 13 Cri L Jour 856 (857, 858) : 35 All 29.

[4] Criminal breach of trust by A in X, of money belonging to B, in Y. Failure by A to render account to B in Y is not a consequence forming part of the offence. (Vol 31) 1944 Pesh 25 (27) : 45 Cri L Jour 749 \* (Vol 2) 1915 Mad 600 (601) : 38 Mad 639 : 15 Cri L Jour 698 (DB) \* (Vol 17) 1930 Bom 490 (494) : 55 Bom 59 (FB) \* (Vol 12) 1925 Cal 613 (614) : 26 Cri L Jour 725 (DB) \* (Vol 8) 1921 All 12 (13) : 22 Cri L Jour 308 (FB).

[5] Criminal breach of trust by A in X of money belonging to B in Y — Failure by A to make the pay-

ment to B in Y is not a consequence forming part of the offence. (Vol 8) 1921 Pat 85 (87) : 21 Cri L Jour 519.

*Cheating.* — [6] A, cheats B, in X—C, in Y, suffers a loss in consequence—Loss to C is an integral part of the offence. ('08) 8 Cri L Jour 75 (80, 82) (DB) (Lah) \* (1900) 1900 Pun Re No. 7 Cr, p. 17 (18) \* (Vol 20) 1933 Oudh 215 (219, 221) : 8 Luck 381 : 34 Cri L Jour 785.

[But see ('08) 7 Cri L Jour 394 (396) (All) \* (Vol 10) 1923 Lah 90 (91) : 23 Cri L Jour 447 \* (Vol 18) 1931 Sind 94 (96) : 27 Sind L R 201 : 32 Cri L Jour 924 (DB).]

[7] A, in X cheats B in Y—B parts with money in Y—A can be tried in X or Y. ('31) 32 Cri L Jour 996 (996) (Lah) \* (Vol 17) 1930 Bom 358 (360) : 31 Cri L Jour 1155 (DB) \* (Vol 17) 1930 All 449 (450) : 52 All 894 : 31 Cri L Jour 865 \* (Vol 2) 1915 Bom 46 (46) : 16 Cri L Jour 433 (DB) \* ('99) 26 Cal 746 (747) (DB) \* (Vol 21) 1934 All 846 (847) : 36 Cri L Jour 490 \* (Vol 14) 1927 Mad 544 (544) : 28 Cri L Jour 452.

*Defamation.* — [8] Defamatory petition presented to a public officer who forwarded it to a subordinate officer at a different place — Accused can be tried at the latter place. ('85) 1885 Pun Re No. 44 Cr, p. 92 (101) (DB) \* ('89) 1889 Pun Re No. 14 Cr, p. 59 (60).

[9] Defamatory letter posted by accused at M to another person at T — Accused can be tried at T. (Vol 30) 1943 Sind 196 (197) : 45 Cri L Jour 105 \* (Vol 10) 1923 Mad 666 (666) : 24 Cri L Jour 309.

[10] A files a complaint against B for cheating in X Court and on issue of summons B is arrested at Y — Complaint by B for defamation will not lie in Court at Y. (Vol 25) 1938 All 632 (634, 635) : 40 Cri L Jour 128.

[11] Section 181, sub s. (2) excludes the application of this section to offences of criminal misappropriation and criminal breach of trust. (Vol 27) 1940 Cal 367 (368) : 41 Cri L Jour 812 (DB) \* (Vol 24) 1937 Sind 68 (72, 76) : 31 Sind L R 123 : 38 Cri L Jour 512 (FB) \* (Vol 27) 1940 All 92 (93) : I L R (1940) All 43 : 41 Cri L Jour 325 \* (Vol 20) 1933 Lah 559 (560) : 34 Cri L Jour 902 \* (Vol 11) 1924 All 77 (78) : 24 Cri L Jour 929 \* (Vol 17) 1930 Bom 490 (492) : 55 Bom 59 : 32 Cri L Jour 831 (FB) \* (Vol 3) 1916 Mad 438 (439, 440) : 16 Cri L Jour 491 : 39 Mad 576 (DB).

[But see (Vol 21) 1934 All 499 (503) : 35 Cri L Jour 982 : 56 All 1047 (FB) \* (Vol 9) 1922 Bom 39 (40) : 46 Bom 641 : 23 Cri L Jour 173 (DB) \* (Vol 17) 1930 Bom 490 (495) : 55 Bom 59 : 32 Cri L Jour 331 (FB).]



180. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Place of trial where act is offence by reason of relation to other offence.

#### Illustrations.

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits or whose jurisdiction the kidnapping, took place.

[1832—S. 180; 1872—S. 66; 1861—Ss. 23, 31.]

S. 179 (contd.)

[12] Accused entrusted with money at A, failed to account for it—He may be tried at A. (Vol. 8) 1921 Pat 85 (87) : 21 Cri L Jour 519 & (Vol. 19) 1932 All 26 (27, 28) : 33 Cri L Jour 127.

[13] Where there is no evidence as to the place of the actual commission of the offence, it may be presumed to have been committed at the place where the accused was bound to render accounts touching the subject matter of the offence. (Vol. 23) 1936 All 133 (197) : 58 All 644 : 37 Cri L Jour 234 (DB) & (Vol. 18) 1931 Cal 528 (530, 531) : 59 Cal 92 : 32 Cri L Jour 1167 (D B) & (Vol. 21) 1934 Cal 392 (393) : 35 Cri L Jour 734 (DB) & (Vol. 15) 1928 Mad 1136 (1138) 52 Mad 61 : 30 Cri L Jour 245 & (Vol. 17) 1930 Bom 490 (495) : 55 Bom 59 : 32 Cri L Jour 331 (FB) & (Vol. 29) 1942 Cal 575 (576, 577) : 44 Cri L Jour 132 : I L R (1942) 2 Cal 507 (DB).

[14] Where the place of the actual misappropriation or conversion with dishonest intent is known, the offence can be regarded as having been committed at the place where the accused was bound to submit his accounts. (Vol. 23) 1936 Oudh 329 (330) : 37 Cri L Jour 322 : 12 Luck 77 & (Vol. 12) 1925 Cal 613 (615, 616) : 26 Cri L Jour 725 (DB) & (Vol. 13) 1926 Lah 119 (120) : 27 Cri L Jour 900 & (Vol. 15) 1928 Rang 217 (219) : 6 Rang 330 : 29 Cri L Jour 940 & (Vol. 15) 1928 Sind 166 (167) : 29 Cri L Jour 1033 (D B) & (Vol. 9) 1922 Cal 46 (46) : 24 Cri L Jour 113 (DB) & (Vol. 8) 1921 All 12 (13) : 22 Cri L Jour 308 (FB) & (Vol. 27) 1940 All 92 (94, 95) : I L R (1940) All 43 : 41 Cri L Jour 325.

[But see (Vol. 25) 1938 Rang 94 (95, 96) : 39 Cri L Jour 529 : 1938 Rang L R 1 & (Vol. 13) 1931 Cal 528 (530, 531) : 59 Cal 92 : 32 Cri L Jour 1167 (DB) & (Vol. 2) 1915 Mad 600 (601) : 38 Mad 639 : 15 Cri L Jour 688 (D B) & (Vol. 17) 1930 Bom 490 (494) : 55 Bom 59 : 32 Cri L Jour 331 (F B) & (Vol. 18) 1931 Cal 532 (533) : 32 Cri L Jour 1249 (DB) & ('10) 11 Cri L Jour 635 (635, 636) (Low Bur) & ('28) 29 Cri L Jour 453 (453) (Lah) ].

[15] Accused bound to pay at a place balance due on taking accounts—*Held*, there was dishonest retention of the money within S. 181, sub-s. (2). ('02) 1902 Pun Re No. 2 Cr p. 4, (8) (DB).

[But See ('01) 1901 Pun L R No. 67 p. 223 (224).]

[16] Where it is uncertain whether the offence was committed at A, where the accounts were to be rendered or at some other place, the offence could under S. 182 be

inquired into or tried at A. (Vol. 24) 1937 Bom 371 (372) : I L R (1937) Bom 743 : 38 Cri L Jour 977 (DB) & ('19) 11 Cri L Jour 372 (373) : 32 All 397.

[17] A, a subject of a Native State, kidnaps a minor girl in P, a Native State—He takes the girl to Q, another Native State—While going to Q with the girl, he is apprehended at a railway station on the way which is in British India—A cannot be tried in British India. ('01) 1901 Pun Re No. 1 Cr p. 1 (3) (DB).

[18] A, a subject of a Native State, assaults B in Q, a Native State—One of the legs of B is broken—B remains in the hospital for more than twenty days—A cannot be tried in British India. ('06) 4 Cri L Jour 54 (56) (DB).

[19] A, the subject of a Native State, enters into a criminal conspiracy in P, a native State—Offence of cheating committed in British India—A cannot be tried in British India for criminal conspiracy. (Vol. 20) 1933 Sind 333 (334, 335, 336) : 27 Sind L R 392 : 35 Cri L Jour 535 (DB) & (Vol. 33) 1946 Nag 128 (129, 130) : I L R (1945) Nag 130 (134).

[20] This section will not apply if the act of the accused was committed beyond the limits of British India under circumstances not coming within S. 158. (Vol. 32) 1945 Oudh 231 (232) : 20 Luck 370 : 46 Cri L Jour 650 & (Vol. 20) 1933 Sind 333 (334, 335, 336) : 27 Sind L R 392 : 35 Cri L Jour 535 (DB) & (Vol. 22) 1935 Mad 326 (327) : 37 Cri L Jour 195 (DB) & (Vol. 22) 1935 Mad 189 (190) : 36 Cri L Jour 467 & (Vol. 13) 1926 All 466 (467) : 27 Cri L Jour 992.

[21] If the act has produced results in British India within the meaning of this section, the offender may be tried in British India or at the place where the consequence of his act has ensued. (Vol. 1) 1914 Mad 336 (331, 332) : 38 Mad 779 : 15 Cri L Jour 207 (DB).

[22] Before a person can be tried in British India under the provisions of this section, read with S. 188 of the Code the certificate of the Political Agent or the sanction of the Provincial Government must be obtained. (Vol. 19) 1932 Cal 465 (467) : 59 Cal 1065 : 33 Cri L Jour 267 (D B) & (Vol. 32) 1945 Oudh 231 (232).

#### SECTION 180—Note 1

[1] A abets, at X the commission of an offence at Y and the offence abetted is committed at Y. The offence of abetment can be tried either at X or Y. (Vol. 18) 1931 All 55 (56) : 59 All 140 : 32 Cri L Jour

Being a thug or belonging to a gang of dacoits, escape from custody, etc. charged is.

131. (1) The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, or having belonged to a gang of dacoits or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person

Criminal misappropriation and criminal breach of trust.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was

committed.

(3) The offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.]

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.

[1882—S. 181; 1872—Ss. 67, 68; 1861—Ss. 32, 33.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 42.

S. 180 (contd.)

390 (DB) & ('03) 1 Weir 155 (155) & (Vol. 4) 1917 Lah 237 (240) : 18 Cr L Jour 514 : 1917 Pun Re No 24 Cr & ('72) 17 Suth W R Cr 15 (15) (DB) & ('94) 16 All 389 (390) (DB).

[See ('77) 1 Bom 610 (612) (DB). {Abetment cannot be tried at a place where neither the abetment nor the offence abetted was committed}.]

[2] A commits theft at X, and the stolen property is dishonestly received, and retained by B, at Y. B can be tried for the latter offence, either at X or Y. (Vol. 13) 1926 All 167 (167, 168) : 27 Cri L Jour 21 & ('66) 5 Suth W R Cr 49 (49) (DB).

[3] A kidnaps at X, a minor, from lawful guardianship. B wrongfully conceals the kidnapped person, at Y, knowing him to have been kidnapped. B can be tried at X or Y. ('83) 1883 All WN 164 (164) (DB) & (Vol. 20) 1933 Oudh 45 (47, 48) : 34 Cri L Jour 220 (DB) & ('96) 18 All 350 (352).

[4] This section does not apply to the offence of conspiracy. (Vol. 25) 1938 Sind 108 (109) : 39 Cri L Jour 630 : 31 Sind L R 14 (DB).

[5] This section is applicable to an abetment of an offence. (Vol. 33) 1946 Sind 1 (4) : 1 L R (1945) Kar 275.

## SECTION 181—SYNOPSIS.

1. Applicability of the section.
2. "The person charged is"—Sub-section (1).
3. Offence of escape from lawful custody.
4. Sub-section (2).
5. Property which is the subject of the offence.
6. "Received or retained."
7. Sub-section (3)—Theft.
8. Sub-section (4)—Kidnapping and abduction.
9. Effect of a trial in a Court contrary to the provision of the section.

1 Applicability of the section.—[1] The section has no application to an offence committed in a Native State and a Magistrate cannot take cognizance of such an offence except under section 188 (Vol. 4) 1917 Cal 612 (612) : 17 Cri L Jour 128 (DB) & ('12) 13 Cri L Jour 530 (531) : 5 Sind L R 266 (DB) & ('88) 1888 Pun Re No. 22 Cr p 42 (42) (DB) & ('88) 1888 Pun Re No. 16 Cr p 28 (28, 29) (DB).

[See also (Vol. 10) 1923 Lah 487 (487) : 24 Cri L Jour 579.]

2. "The person charged is" Sub-section (1).—[1] The section will apply if the person charged is physically present within jurisdiction, even though he has been brought under arrest. (Vol. 15) 1928 Sind 161 (163) : 29 Cri L Jour 1089 (DB) & ('11) 12 Cri L Jour 356 (356, 357) : 35 Bom 225 (SB) & ('82) 6 Bom 632 (625) (DB) & ('11) 12 Cri L Jour 113 (115, 116) : 1911 Pun Re No. 1 Cr (DB).

3. Offence of escape from lawful custody.—[1] Where the arrest is made in good faith on reasonable suspicion that the person arrested is concerned in a cognizable offence, the custody is lawful. ('75) 24 Suth W R Cr 45 (46) (DB).

[2] Custody under civil arrest is not lawful custody within the meaning S. 223, I. P. C. ('86) 12 Cal 190 (191) (DB).

4 Sub-section (2).—[1] An offence of criminal misappropriation or criminal breach of trust can be tried or inquired into at any place where the offence was committed or the property was received or retained. (Vol. 27) 1940 All 92 (94, 95) : 1 L R (1940) All 43 : 41 Cri L Jour 325. (Can be tried at the place where property is received or retained.) & (Vol. 26) 1939 All 602 (605) : 1 L R (1939) All 851 : 40 Cri L Jour 917. (Complainant sending postal order through post office at M to be accused at B—Accused misappropriating the amount at B—Court at B and M has jurisdiction to entertain the complaint.) & V 24) 1937 Bom 371 (372) : 1 L R (1937) Bom 743 : 4 Cri L Jour 877 (DB) & (Vol. 23) 1936 Oudh 329 (330) : 37

182. When it is uncertain in which of several local areas an offence

Place of inquiry or trial where scene of offence is uncertain or not in one district only or where offence is continuing or consists of several acts.

was committed, or

where an offence is committed partly in one local area and partly in another, or

where an offence is a continuing one, and continues to be committed in more local areas than one, or

where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

[1882—S. 182; 1872—S. 67; 1861—S. 29.]

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Cri L Jour 322; 12 Luck 77. (Can be tried at the place where property is received or retained) \* (Vol. 22) 1935 Oidh 4 (5); 36 Cri L Jour 112 (Money withdrawn from bank at A but converted at T. Court at T has jurisdiction as offence is committed there) \* (Vol. 27) 1940 Cal 367 (368); 41 Cri L Jour 512 (Can be tried at the place where property was received or retained) \* (Vol. 24) 1937 Lah 65 (86, 87); 1 L R (1937) Lah 299; 48 Cri L Jour 1100 (Do).

5. Property which is the subject of the offence.—The receipt of the property, which is the subject of the offence, that determines the venue of trial. (Vol. 4) 1917 Law Bur 10 (11); 18 Cri L Jour 645.

6. "Received or retained".—[1] Dishonest intention to misappropriate or commit criminal breach of trust in respect of it at the time it is received, is not necessary to try at the Court at the place where it was received with jurisdiction. (Vol. 14) 1927 Bom 38 (39); 31 Bom 101; 28 Cri L Jour 44 (DB).

7. Sub-section (3) Theft.—[1] Possessor of stolen property can be tried either at the place of theft or at the place where he was in possession of it. (Vol. 13) 1926 All 167 (168); 27 Cri L Jour 21 \* (Vol. 21) 1934 All 456 (456); 35 Cri L Jour 1092.

[2] Offence committed outside British India.—Conviction in British India held legal. (86) 10 Bom 186 (188); (Vol. 13) 1926 Bom 71 (74, 76); 27 Cri L Jour 114; 49 Bom 878 (DB).

[3] Conspiracy to commit theft entered into one district.—Theft actually in another. Court of former district can try only the offence of conspiracy. (Vol. 11) 1924 Cal 1034 (1035); 26 Cri L Jour 207 (DB).

[4] Property stolen in one district found in possession of another person in another district.—The thief can be tried in the latter district. (71) 1871 Pun Re No. 4 Cr p 5 (5) (DB).

8. Sub-section (4)—Kidnapping and abduction.—[1] The words "kidnapping or abduction" in the section do not include offence of wrongfully concealing or keeping in confinement a kidnapped person. (Vol. 11) 1924 All 454 (455); 46 All 138; 25 Cri L Jour 552 \* (Vol. 34) 1947 Pat 17 (20); 25 Pat 241 (DB).

[2] The offence of enticing away a married woman can be tried only at the place where the offence was committed. (Vol. 5) 1918 Lah 357 (357); 19 Cri L Jour 438 \* (81) 3 All 251 (252, 253) (DB).

[3] Abduction can be tried not only at the place where the person was abducted but also at the places where the offence continued. (Vol. 20) 1933 Oidh 45 (47); 34 Cri L Jour 220 \* (Vol. 34) 1947 Pat 17 (20); 25 Pat 241 (DB).

[4] Complainant's wife enticed away from district N and sold to accused in District P.—No knowledge on the part of accused that she was kidnapped or abducted.—*Held*, Magistrate of N had no jurisdiction to try the case. (Vol. 38) 1942 Cal 459 (460) (DB).

9. Effect of a trial in a Court contrary to the provisions of the section.—[1] Conviction by a wrong Court will not be set aside unless there has been a failure of justice. (Vol. 11) 1924 All 154 (155); 46 All 138; 35 Cri L Jour 552 \* (10) 11 Cri L Jour 372 (373); 32 All 1297 (DB) \* (Vol. 5) 1918 Cal 305 (306); 19 Cri L Jour 638 (DB) \* (19) 1903 Pun Re No 2 Cr p 4 (6) \* (103) 4 Cri L Jour 500 501; 30 Mad 9 \* (DB) \* (Vol. 18) 1931 Rang Lah (168 169); 9 Rang 338; 32 Cri L Jour 1120 (DB).

#### SECTION 182—SYNOPSIS.

1. Scope and applicability.
2. Uncertainty as to local area in which offence is committed.
3. Offences committed partly in one local area and partly in another.
4. Continuing offence.
5. Offences consisting of several acts.

1. Scope and applicability.—1. The section has no application where an offence is committed only in one place and there is no question of any other local area giving rise to jurisdiction. (88) 16 Cal 607 (676) (DB).

[2] In the case of a continuing offence, though it is beyond doubt that the place where initially the offence was committed would be a proper place of trial under the law, the offence can be tried either at each place or at any other place where it continues to be committed. (Vol. 9) 1922 Nag 40 (42); 23 Cri L Jour 210 (DB).

[3] The section has no application where one of the local areas in question is outside British India. (Vol. 33) 1946 Nag 128 (129 130) \* (745) 1 L R (1945) Nag 130 (144) \* (89) 16 Cal 667 (675 676) (DB). \* (76) 1 Mad 171 (171, 172) (SB) \* (82) 5 Mad 23 (24, 25) (DB).

[4] Where it is doubtful whether an offence was committed within British India or outside British India this section does not apply so as to give jurisdiction to a British Indian Court. (Vol. 10) 1923 Lah. 487 (487); 24 Cri L Jour 579.

[5] Where the offence is a continuing one and the initial offence was committed outside British India the fact that the offence was continued in British India does not confer jurisdiction on a Court in British India to inquire into or try the offence. (76) 1 Mad 171 (171, 172) (SB).

[6] Offence initiated outside British India but completed in British India—*Held*, the offence can

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be tried or inquired into in British India. ('12) 13 Cri L Jour 426 (427, 428, 429) : 36 Bom 524 (DB) & (Vol. 15) 1935 All 498 (500) : 35 Cri L Jour 738.

[7] The Courts having jurisdiction over the several areas in question have concurrent jurisdiction. When a question arises as to which of the Courts ought to try the case, it can be decided by the High Court under S. 185. ('13) 14 Cri L Jour 398 (399) (DB) & ('09) 9 Cri L Jour 581 (582, 583) : 5 Low Bur Rul 17 & (Vol. 20) 1938 Lah 852 (853, 854) : 14 Lah 820 : 35 Cri L Jour 171.

2. Uncertainty as to local area in which offence is committed. [1] A person is charged with the offence of criminal breach of trust. When it is clear that he must have committed the embezzlement either at Calcutta, Burdwan or Murshidabad, it is uncertain at which particular place he actually committed the offence. He may be tried at any of these places. ('45) 1945 All L Jour 468 (469) & (Vol. 5) 1918 Cal 110 (110) : 13 Cri L Jour 679 (DB) & (Vol. 24) 1937 Bom 371 (372) : 1 L R (1937) Bom 743 : 38 Cri L Jour 977 (DB) & (Vol. 21) 1944 All 499 (505) : 56 All 1047 : 35 Cri L Jour 382 (FB).

[2] Where there is no doubt that the occurrence in question, took place at a particular locality A, but it is uncertain whether A is in district B or C — Provisions of this section apply. ('98) 25 Cal 858 (859, 860) (DB) & (Vol. 16) 1929 Cal 204 (205) : 30 Cri L Jour 401 (DB).

[3] Where there is a doubt as to whether an offence is committed at B, where the accused's act is done, or at X, where the consequence of his act ensued, the offence can be tried at either place. (Vol. 20) 1933 Nag 33 (35) : 34 Cri L Jour 1038.

3. Offences committed partly in one local area and partly in another. — [1] A at P posts certain value payable articles at the post office at P to B at H. B at H takes delivery of the parcels on paying for them. The parcels on being opened are found to contain nothing but waste paper. A can be prosecuted for cheating at P or H. (Vol. 17) 1930 Bom 358 (359, 360) : 31 Cri L Jour 1155 (DB).

[See also (Vol. 1) 1914 All 373 (373, 374) : 15 Cri L Jour 719 & ('99) 26 Cal 746 (747) (DB).]

[2] A defamatory letter is posted at A to be read at B. The offence of defamation can be tried at A or B. (Vol. 10) 1923 Mad 666 (666) : 24 Cri L Jour 309.

[3] A at C enters into a conspiracy with X, Y, and Z who are at P for the commission of an offence; and the further act in pursuance of the conspiracy which is necessary under S. 107 of the Penal Code to complete the offence of abetment by conspiracy is committed at P. A can be tried at C or P. ('72) 17 Suth W R Cr 15 (16, 17) : 9 Beng L R 36 (DB).

[See also (Vol. 11) 1924 Cal 1134 (1034, 1035) : 36 Cri L Jour 207 & ('12) 13 Cri L Jour 426 (427) : 36 Bom 524 (DB) & (Vol. 20) 1933 All 498 (500) : 35 Cri L Jour 768.]

[4] N sends a false complaint to the Inspector-General of Police from H and it is received by the addressee at A. N is prosecuted for an offence under S. 182, Penal Code. N can be tried at H or A. (Vol. 23) 1936 All 105 (107) : 37 Cri L Jour 157 (DB) & Vol. 19) 1932 Mad 427 (427, 428) : 33 Cri L Jour 452. (Offence is committed when information reaches the addressee — So Court at place, where letter is posted, has no jurisdiction.)

[5] Accused at N ordering by letters goods from merchants at B and after receiving the goods, absconding without paying for them as promised in his letter — He can be tried at N for cheating. (Vol. 30) 194 Bom 183 (184) : 44 Cri L Jour 664 (DB).

[6] Accused B and accused No. 4, alleged to have cheated complainant by giving spurious gold pieces in return for money, in District R — Accused No 5 getting amount from complainant in District T — Transaction though completed only in District R, as complainant parted with money in T, Court at T held had jurisdiction to try case. (Vol. 27) 1940 Mad 649 (649) (DB).

[7] Accused convicted under S. 32 (4), Companies Act for default, punishable under Section 32 — Default taking place in Calcutta — Accused residing at Darjeeling and office of company situated there — Held, that even if that was so, the accused was triable in Calcutta. (Vol. 4) 1917 Cal 2 (2) : 18 Cr L Jour 787 : 45 Cal 490 (491) (DB).

[8] Presidency Magistrate, Calcutta, has jurisdiction to try charge under S. 134, Companies Act, even though company is situated outside Calcutta as office of Registrar with whom balance sheet should be filed is in Calcutta. (Vol. 4) 1917 Cal 2 (2) : 18 Cr L Jour 787 : 45 Cal 490 (DB).

[9] Criminal breach of trust — Offence is complete where the dishonest misappropriation takes place — No part of the offence takes place at the place where the loss to the principal occurs in consequence. (Vol. 1) 1914 All 373 (374) : 15 Cri L Jour 719 (DB).

[10] Offence of criminal breach of trust alleged to have been committed partly if not wholly in Calcutta — Held, it was triable in Calcutta. ('74) 22 Suth W R 6 (7, 8) (DB).

[11] The section does not apply to cases where the whole offence is committed within one jurisdiction. ('65) 4 Suth W R P C 109 (110, 111) (P C).

4. Continuing offence. — [1] The offence of abduction can be tried or inquired into by any Court having jurisdiction in any of the local areas through which the abducted person has been taken. (Vol. 20) 1933 Oudh 45 (47, 48) : 34 Cr L Jour 220 (DB) & (Vol. 18) 1931 All 55 (55, 56) : 53 All 140 : 33 Cr L Jour 690 (DB).

[2] Possession of goods with counterfeit trade mark, for purposes of trade — Goods on their way to another destination where they were to be sold — Possession of goods, at any place on the way, is also offence, and offence can be tried there and not only at the place where the goods were ultimately intended to be sold. ('98) 25 Cal 639 (640, 641) (DB).

[3] Accused charged with offence of abetment of waging war against the Queen — Abetment by aiding with sending money from C to P — Sending is continuing offence and can be tried at P, where the money is received. ('72) 17 Suth W R 15 (17) (DB).

[4] Enticing and detaining married woman is a continuing offence. ('09) 9 Cr L Jour 581 : 5 Low Bur Rul 17 (DB).

[5] Kidnapping from lawful guardianship is not a continuing offence. ('93) 1893 Pun Re No. 13 Cr p. 61 (63) (DB) & ('94) 1894 Pun Re No 8 Cr p. 27 (29) & ('23) 24 Cri L Jour 921 (922) (Pesh) & (Vol. 3) 1916 All 210 (212) : 17 Cri L Jour 498 : 38 All 664 & ('13) 14 Cri L Jour 93 (94) : 15 Oudh Cas 351 & (Vol. 8) 1921 Oudh 226 (226) : 24 Oudh Cas 329 : 23 Cri L

**183.** An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

[1882—S. 183 ; 1872—S. 67, Illustration (a) ; 1861—S. 30]

Offences against 184. All offences against the provisions of any law for the time being in force relating to Railways<sup>a</sup> Telegraphs,<sup>b</sup> the Post office<sup>c</sup> or Arms and Ammunition<sup>d</sup> may be inquired into or tried in a presidency town, whether the offence is stated to have been committed within such town or not :

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

[1882—S. 184.]

[a] See the Indian Railways Act, 1890 (9 [IX] of 1890).

[b] See the Indian Telegraphs Act, 1885 (13 [XIII] of 1885).

[c] See the Indian Post Office Act, 1898 (6 [VI] of 1898).

[d] See the Indian Arms Act, 1878 (11 [XI] of 1878).

High Court to decide in case of doubt, district where inquiry or trial shall take place. <sup>a</sup>[185. (1) Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court.

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Jour 58 & ('03) 26 Mad 454 (455, 456) (DB) & (Vol 18) 1931 All 55 (55) : 53 All 140 : 32 Cr L Jour 690 (DB).

[See also (Vol 15) 1928 Bom 530 (530, 531) : 53 Bom 69 : 30 Cr L Jour 54 (DB). (Offence of adultery is not a continuing offence).]

[6] Theft is not a continuing offence and does not continue to be committed so long as the thief is in possession of the stolen goods. ('06) 3 Cr L Jour 247 (248, 249) : 28 All 372 : 3 All L Jour 146 (DB) & ('07) 7 Cr L Jour 188 (190) : 35 Cal 361 (DB).

[7] Circumstances may arise in which a conspiracy is a continuing offence while it is in the process of being hatched, and any agreement to participate in the object of the conspiracy of each conspirator whose assistance is subsequently invoked is an integral part of the conspiracy itself. (Vol 33) 1946 Sind 1 (7) : 1 L R (1945) Kar 275. (Case must depend on its own facts.).

5. Offences consisting of several acts.—[1] A at H obtained a false railway receipt and sent it, through an agent, to K at B. The agent presented it to K, and the latter was thereby deceived and induced to part with money—*Held*, the Court at H had jurisdiction to try A for cheating. (Vol 9) 1922 Nag 40 (41, 42) : 23 Cr L Jour 210 (DB).

[2] Where the acts, alleged, do not amount to one offence but to several distinct offences, some of which are committed outside the jurisdiction, the mere fact that, if they had been committed within jurisdiction they could have been tried jointly under S. 230, does not make this clause applicable to the case. (Vol 11) 1924 Cal 1034 (1034, 1035) : 26 Cr L Jour 207 (DB).

#### SECTION 183—Note 1.

[1] A, who performing a railway journey from Delhi to Bhatinda, commits an offence, can be tried for the offence in Ferozepore District as the train passes through it. (Vol 11) 1924 Lah 351 (351, 352) : 24 Cri L Jour 253.

[2] A, while performing a railway journey from

Shikarpur to Jacobabad, commits an offence at some place between Sultan Kot and Hamsyun. A can be tried for the offence at Jacobabad though the Court there has no jurisdiction over the area in which the offence was committed. (Vol 12) 1925 Sind 177 (177) : 25 Cr L Jour 439 (DB) & ('22) 1882 Rat 181 (181, 182) (DB) & (1863) 1 Mad H C R 193 (196) (DB).

[3] The journey or voyage must be continuous, subject to all the ordinary incidents affecting the journeys or voyages of the particular kind under consideration. ('74) 21 Suth W R Cr 66 (67) : 13 Beng L R App 4 (DB).

[4] An offence committed during a halt incidental to the journey itself can be inquired into or tried at the place of destination. ('76) 25 Suth W R Cr 45 (45) (DB).

[5] A Court has no jurisdiction to inquire into or try an offence unless the parties or the subject-matter of the offence passed within its jurisdiction in the course of the journey or voyage, which the offender was making at the time of committing the offence. ('05) 2 Cr L Jour 411 (412, 413) (DB).

[6] An offence committed outside British India in the course of a journey cannot be tried or inquired into in British India although a part of the journey was made in British India. (Vol. 10) 1923 Lah 487 (488) : 24 Cr L Jour 579 & ('82) 5 Mad 23 (25) : 1 Weir 1 (DB) & (Vol 15) 1928 Mad 1136 (1137) : 52 Mad 61 : 30 Cr L Jour 245.

#### SECTION 185—Note 1.

[1] One of two Courts having concurrent jurisdiction to try a case taking cognisance. The other Court can also take cognisance of the same offence. (Vol 20) 1933 Lah 852 (858) : 14 Lah 820 : 35 Cr L Jour 171.

[2] The section applies only to cases of offences and hence it does not apply to a proceeding under chapter XII. (Vol 1) 1914 All 473 (473, 474) : 15 Cr L Jour 520.

[3] Where only one Court has taken cognisance of an offence, the High Court has no jurisdiction to interfere under this sub-section. (Vol. 20) 1933 Oudh 45 (48) : 34 Cr L Jour 220 (D B).

(2) Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decide all other proceedings against such person in respect of such offence shall be discontinued. If such High Court, upon the matter having been brought to its notice, does not so decide, any other High Court, within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction, and upon its so doing all other such proceedings shall be discontinued.]

[1882—S. 185 ; 1872—S. 69 ; 1861—S. 34.]

[a]. *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923, S. 43.

186. (1) When a Presidency Magistrate, a District Magistrate or a Sub-divisional Magistrate or if he is specially empowered in this behalf by the [Provincial Government] a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), at the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate's procedure on arrest. Magistrate may inquire into the offence as if it had been committed within such local limits and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence or if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

(2) When there are more Magistrates than one having such jurisdiction, and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

[1882—S. 186 ; 1872 Ss. 157, 174 ; 1861—Ss. 74, 88]

[a] *Substituted* by A. O. for "Local Government."

187. (1) If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate such warrant issued by subordinate Magistrate. Magistrate shall send the person arrested to the District or Sub-divisional Magistrate to whom he is subordinate unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the police officer executing such warrant or shall be sent to the Magistrate by whom such warrant was issued.

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

[1882—S. 187 ; 1872—S. 175 ; 1861—S. 89.]

#### SECTION 186—Note 1.

[1] In order that this section may apply the Magistrate must have reason to believe that an offence has been committed outside the local limits of his jurisdiction, whether within or without British India. (Vol 10) 1923 Cal 401 (401, 402) : 25 Cr L Jour 184 (DB).

[2] Where an offence is triable within the local limits of the Magistrate's jurisdiction though committed outside such limits this section does not apply. See (75) 1875 Rat 97 (98) (DB).

[3] The powers conferred by this section are conferred only on certain specified Magistrates and not on all Magistrates. See (96) 1896 Rat 849 (849) (DB).

[4] This section does not override the provisions of Ss. 75 to 86. (Vol 27) 1940 Bom 397 (398) : 1 L R (1941) Bom 16 : 42 Cr L Jour 205 (DB).

[5] It is not necessary that a Magistrate, issuing a warrant, should be present within the local limits of his jurisdiction at the time of issuing it. It is enough that at such time the offender is found within such limits though the Magistrate himself is outside such limits. (76) 1 Bom 340 (341) (DB) : (10) 11 Cr L Jour 570 (571) : 1910 Pun Re No. 23 Cr (DB).

[6] Facts of case falling within the section—Though Magistrate can follow procedure laid down therein, High Court can also direct Magistrate to hold a preliminary inquiry and commit case to sessions if *prima facie* case made out. But ordinarily the Magistrate must be allowed to follow the normal procedure laid down in this section. (01) 2 Weir 146 (146, 147) (DB).

Liability of British subjects for offences committed out of British India.

188. When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or

when any British subject commits an offence in the territories of any Native Prince or Chief in India or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India, <sup>a</sup> [or,

when any person commits an offence on any ship or aircraft registered in British India wherever it may be,]

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found:

Provided that <sup>b</sup> [notwithstanding anything in any of the preceding sections of the Political Agents to Chapter] no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India; and where there is no Political Agent, the sanction of the <sup>c</sup> [Provincial Government] shall be required:

Provided, also, that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India shall be a bar to further proceedings against him under <sup>d</sup> [the Indian Extradition Act, 1903], in respect of the same offence in any territory beyond the limits of British India.

[1882—S. 188.]

[a] *Inserted by the Offences on Ships and Aircraft Act, 1940 (4 [IV] of 1940), S. 3.*

[b] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 44.*

[c] *Substituted by A. O. for "Local Government."*

[d] *Substituted by the Repealing and Amending Act, 1927 (10 [X] of 1927) S. 2 and Sch. I, for "the Foreign Jurisdiction and Extradition Act, 1879."*

#### SECTION 188 - SYNOPSIS.

1. Scope and applicability.
2. Liability of Native Indian subject.
3. Liability of British subject.
4. "At which he may be found."
5. Certificate of Political Agent or sanction of Provincial Government—Proviso 1.
6. Jurisdiction over railway lines in Native States.
7. Offences committed on the high seas.
8. Offences under the Child Marriage Restraint Act, 19 [XIX] of 1929.

1. Scope and applicability. —[1] The section deals with the Procedure only, and has its counterpart, so far as the substantive law is concerned in S. 4 of the Penal Code. (Vol. 22) 1935 Bom 437 (437, 438) 59 Bom 745: 37 Cri L Jour 211 (DB).

[2] The object of the proviso (1) is to prevent the accused being tried over again for the same offence in two different places. (Vol. 21) 1934 Sind 98 (99): 28 Sind L R 27: 36 Cri L Jour 240 (DB).

[3] The section applies only to offences committed outside British India. Where an offence is committed within British India, the mere fact, that it is connected with other criminal acts done outside British India does not make the section applicable. (Vol. 19) 1932 Cal 465 (467): 33 Cr L Jour 267: 59 Cal 1065 (DB) & (Vol. 20) 1933 Lar. 977 (984): 15 Lab 84: 35 Cri L Jour 322 (DB) & (Vol. 20) 1933 Mad 461 (461):

34 Cri Jour 545 & (Vol. 20) 1933 All 498 (500): 35 Cri L Jour 76 & ('95) 19 Bom 105 (109) (DB).

[See also (Vol. 25) 1938 Mad 858 (861): 40 Cri L Jour 355.

[4] Offences committed outside British India by persons or in places not covered by the section cannot be tried in British India under the section. ('97) 25 Cal 20 (30): 24 Ind App 137: 1897 Pun Re No. 6 (P.C.) & (Vol. 14) 1927 Al. 80 (81): 43 All 687: 27 Cri L Jour 991 & (Vol. 20) 1933 Sind 333 (334, 335): 27 Sind L R 392: 35 Cri L Jour 585 (DB).

[5] Where an objection is raised as to the jurisdiction of the Court on the grounds that the offence was committed outside British India, the question must be investigated by the Court and a decision arrived at on the facts. ('68) 9 Suth W R 29 (29) (DB).

[6] Where an offence is committed within British India it can be tried in British India notwithstanding that the offender is a foreigner. ('36) 37 Cri L Jour 757 (757) (DB) (Cal) & ('80) 6 Cal 307 (308) (DB) & ('94) 1894 Pun Re No. 30 Cr. p. 99 (101) (DB) & ('86) 10 Bom 186 (188): 1886 Rat 218 (DB).

[7] Though the section empowers British Indian Courts to try offences committed outside British India in the cases specified therein, it does not affect the liability of the offender in such cases to be dealt with in the State wherein the offence was committed. (10, 11 Cri L Jour 390 (391): (1910) Pun Re No. 14 Cr (DB).

[8] A judgment of acquittal or conviction passed by a foreign Court—*Haïd*, would be a bar to proceedings

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being started against the alleged offender under this section in British India. (Vol. 11) 1924 Lah 238 (239); 24 Cri L Jour 715.

[9] Provision of this section must be taken in *pari materia* with the Extradition Act. ('06) 4 Cri L Jour 49 (52) (DB) (Bom).

[10] Extradition is controlled by treaty and statute following it. (Vol. 7) 1920 Cal 636 (638); 47 Cal 37; 20 Cri L Jour 739 (DB).

2. Liability of Native Indian subject.—[1] Native Indian subject of His Majesty committing an offence in any part of the world are liable to be dealt with in British India. (Vol. 14) 1927 Oudh 627 (628); 29 Cri L Jour 68 (DB) & ('88) 13 Bom 147 (149) (DB) & ('94) 1894 Pun Re No. 7 Cr. p. 22 (25) & (Vol. 6) 1919 All 44 (45); 42 All 89; 20 Cri L Jour 700 & (Vol. 6) 1919 All 370 (370); 41 All 452; 20 Cri L Jour 276 & ('82) 6 Bom 622 (626) (DB) & ('82) 8 Cal 985 (990, 991) (FB).

[2] The judicial power of every independent State extends to the punishment of all offences against the municipal laws of the State by whomsoever committed within the territory and also to the punishment of all such offences by its subjects whosoever committed. ('12) 13 Cri L Jour 575 (576); 34 All 451.

[3] The points to be considered in deciding if a person is a Native Indian subject, are his parentage, the place and time of his birth and his habits as to residence within and without the territory. ('83) 1883 Pun Re No. 22 Cr. p. 49 (53) (DB).

[4] The mere fact that a person owns property in British India is not sufficient to make a person a Native Indian subject. ('83) 1883 Pun Re No. 22 Cri. p. 49 (50, 52, 53) (DB) & ('85) 1885 Pun Re No. 1 Cr. p. 1 (3) (DB).

[5] "Native Indian subject" must be held to refer to a *de jure* and not merely a *de facto* Native Indian subject of his Majesty. ('85) 1885 Pun Re No. 1 Cr. p. 1 (3, 4) (DB).

[6] Son of an alien, born in British India, is a Native Indian subject of His Majesty, ('93) 1893 Pun Re No. 9 Cr. p. 47 (50) (DB).

[7] Ahmedabad, the home of the accused's parents—Accused born and educated there and occasionally residing outside British India.—*Held*, accused was a Native Indian subject, ('82) 6 Bom 622 (626) (DB).

[8] Merely being in British Indian Government service is not enough to make a person a Native Indian subject. ('91) 16 Bom 178 (181, 183) (DB).

[9] A subject of His Majesty, by choosing to reside beyond the limits of British India for ten or twelve years, does not divest himself of his allegiance to His Majesty or of his liability to be tried as a British subject. ('80) 2 Shome L R 7.

3. Liability of British subject.—[1] Where an European British subject committing an offence, outside British India, is brought to trial in British India, the question in respect of his claim to be tried as an European British subject does not arise, until after the certificate has been furnished. (Vol. 23) 1936 Nag 152 (153); 37 Cri L Jour 979.

4. "At which he may be found."—[1] The expression includes cases where the accused is brought by the police to a place in British India from a place outside. (Vol. 23) 1936 Nag 152 (153); 37 Cri L Jour 979 & ('82) 6 Bom 622 (625) (DB).

[2] The illegality of the arrest under which the

accused is brought into India from a foreign place does not affect the jurisdiction of British Indian Courts under this section. ('11) 12 Cri L Jour 356 (357, 359); 35 Bom 225 (SB).

5. Certificate of a Political Agent or sanction of Provincial Government.—Proviso 1. [1] The word "charge" means "accusation" and is not limited to a formal charge as in a warrant case. (Vol. 27) 1940 Nag 245 (246); I L R (1942) Nag 193; 41 Cri L Jour 645.

[2] An inquiry or trial, held without sanction or certificate, is void. (Vol. 32) 1945 Oudh 231 (232); 20 Luck 370; 46 Cr L Jour 650. (Section 537 cannot be used to cure the defect) & (Vol. 27) 1940 Pesh 4 (5); 41 Cri L Jour 565 (DB) & ('99) 24 Bom 287 (290, 281, 292) (DB) & (Vol. 17) 1930 Pat 501 (503); 31 Cri L Jour 364 (DB) & (Vol. 20) 1933 Mad 461 (461); 34 Cri L Jour 545 & ('72 92) 1872 92 Low Bur Rul 334 (334) & (Vol. 19) 1932 Cal 229 (231); 33 Cri L Jour 322 (DB) & (Vol. 6) 1919 All 370 (371); 41 All 452; 20 Cri L Jour 276 & (Vol. 6) 1919 All 44 (45); 42 All 89; 20 Cri L Jour 700 & (Vol. 12) 1925 Lah 185 (186); 5 Lah 416; 27 Cri L Jour 218 & ('90) 13 Mad 423 (426) (DB) & (Vol. 12) 1925 Sind 88 (88); 19 Sind L R 122; 23 Cri L Jour 620 (DB).

[But see ('02) 1902 Pun Re No. 4 Cr. p. 10 (13, 14) (FB) & (Vol. 21) 1934 Lah 827 (829); 18 Lah 73; 36 Cri L Jour 430.]

[3] Court is not debarred from taking cognizance of an offence, in the absence of a certificate, even though the further progress of the case depends upon the production of the certificate. (Vol. 27) 1940 Nag 245 (246, 247); I L R (1942) Nag 193; 41 Cri L Jour 645.

[4] The requirement of the certificate or sanction applies to preliminary inquiries with a view to commitment to the sessions. ('02) 2 Weir 148 (148) (DB) & ('96) 19 All 109 (110) (DB) & (Vol. 13) 1926 Lah 582 (582); 7 Lah 396; 27 Cri L Jour 1168 (DB) & (Vol. 12) 1925 Lah 185 (186); 5 Lah 416; 27 Cri L Jour 218 & ('02) 24 All 256 (257) & ('90) 13 Mad 423 (425) (DB).

[5] The obtaining of sanction *ex post facto* after the commitment has been made does not validate the commitment. ('90) 13 Mad 423 (425, 426) (DB).

[See also (Vol. 13) 1926 Lah 609 (611); 27 Cri L Jour 942; 7 Lah 463.]

[6] Certificate obtained pending an inquiry—Such a certificate is sufficient. (Vol. 11) 1924 Bom 51 (52); 47 Bom 907; 25 Cri L Jour 333 (DB) & (Vol. 12) 1925 Sind 88 (88, 89); 25 Cri L Jour 620; 19 Sind L R 122 (DB).

[But see ('02) 24 All 256 (257).]

[7] The fact that an offence committed outside British India falls also within the purview of any of the previous sections of the chapter does not dispense with the certificate or sanction prescribed by this proviso. (Vol. 19) 1932 Cal 465 (467); 59 Cal 1065; 33 Cri L Jour 267 & (Vol. 12) 1925 Sind 88 (89); 19 Sind L R 122; 25 Cri L Jour 620 (DB) & (Vol. 22) 1935 Mad 326 (327); 37 Cri L Jour 195 (DB) & (Vol. 22) 1935 Mad 189 (190); 36 Cri L Jour 467 & (Vol. 17) 1960 Bom 155 (157); 54 Bom 171; 31 Cri L Jour 833 (DB).

[8] Native Indian subject committing offence in Spain.—He cannot be tried in British India without the sanction of the Provincial Government. ('13) 14 Cri L Jour 298 (300); 6 Sind L R 260 (DB).



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necessary in order to take cognizance. (Vol. 31) 1944 Sind 103 (105); I L R 194; Kar 524; 45 Cri L Jour 510 (DB) \* (Vol. 30) 1943 Pat 245 (251); 45 Cri L Jour 177; 22 Pat 433 (SB) \* (Vol. 27) 1940 Nag 245 (247); I L R (1942) Nag 193; 41 Cri L Jour 645 \* (Vol. 21) 1934 Pat 467 (468); 36 Cri L Jour 641 (DB).

[2] The date on which the judicial proceedings are actually commenced against the offender need not necessarily be the date on which the cognizance is taken. (Vol. 11) 1924 Pat 597 (599); 26 Cri L Jour 241 (DB).

[3] A Magistrate who takes cognizance of an offence may without doing anything further transfer the case under S. 192 to another Magistrate. (Vol. 13) 1926 Cal 470 (477); 53 Cal 350; 27 Cri L Jour 355 (FE).

[4] The examination of the complainant, in cases where cognizance is taken on a complaint, is not necessary to complete the taking of cognizance. (Vol. 27) 1940 Nag 245 (247); I L R (1942) Nag 193; 41 Cri L Jour 645 \* (Vol. 11) 1924 Mad 587 (587); 25 Cri L Jour 730 (DB).

[But see (Vol. 7) 1920 Pat 670 (672); 20 Cri L Jour 481.]

[5] Magistrate ordered preliminary inquiry without examining the complainant—*Held*, he did not take cognizance of the offence on the complaint. (Vol. 16) 1929 Pat 473 (475); 30 Cri L Jour 1056; 9 Pat 707 (FB) \* (Vol. 1) 1914 Lah 165 (166); 15 Cr L Jour 261.

[6] The Magistrate would be deemed to have taken cognizance if he does any of the following acts which can be done only after taking cognizance—

(a) Transfer of case under S. 192. ('05) 2 Cri L Jour 582 (583) (DB).

(b) Examining complainant on oath on receipt of complaint. (Vol. 18) 1931 Oudh 392 (393); 32 Cri L Jour 991.

(c) Holding inquiry under S. 202 on complaint from public servant. (Vol. 17) 1930 Pat 80 (31, 32); 30 Cri L Jour 554 \* (Vol. 8) 1921 Cal 719 (720); 22 Cri L Jour 599 (DB).

(d) District Magistrate directing prosecution of a person on coming to the conclusion in an enquiry under Land Revenue Code that he had committed an offence and transferring the case. ('05) Cri L Jour 582 (583) (DB).

[See however ('10) 11 Cri L Jour 602 (603) (Lah). (Where the District Magistrate did not actually apply his mind he cannot be deemed to have taken cognizance.)]

[7] In the following cases it was held that the Magistrate did not take cognizance as the acts were merely taken to verify and confirm the information:—

(a) Examining a person simply to obtain information upon which a case might be started against another. (1900) 27 Cal 455 (456, 457) (DB).

(b) District Magistrate directing subordinate Magistrate to enquire and report on a charge of bribery against a juror in a Sessions case. ('99) 3 Cal W Noolxii (colxiii).

(c) Magistrate receiving information by post directing police to enquire and report and issuing process on receipt of it takes cognizance only on the report and not on the information received by post. ('13) 14 Cri L Jour 691 (692) \* ('19) 13 Cri L Jour 691 (692)

(d) Magistrate suspecting the commission of an offence directing police to charge-sheet a man does not take cognizance on his own knowledge. (Vol. 8) 1921 Bom 355 (355); 22 Cri L Jour 603 (D.).

(e) Magistrate, while on camp, making search on information, taking proceedings the next day on a formal complaint does not take cognizance even from the time of search. (Vol. 13) 1927 All 101 (101, 102); 27 Cri L Jour 1496.

(f) Order by which accused is remanded to custody to enable police investigation to be completed does not amount to taking cognizance. (Vol. 11) 1924 Cal 476 (479); 51 Cal 402; 25 Cri L Jour 732.

(g) Departmental enquiry by District Magistrate into allegation against public servants is not taking cognizance. ('95) 19 Bom 51 (60).

(h) Information to police about commission of offence—Police reporting case to be one of accident—Magistrate ordering entry to be made regarding the case as mistake of fact—*Held*, Magistrate did not take cognizance on police report. (Vol. 3) 1921 Pat 302 (303); 22 Cri L Jour 735.

(i) Action of the Magistrate by which he again refers the matter to the police for a fresh final report does not amount to "taking cognizance." (Vol. 19) 1932 Mad 673 (675); 33 Cri L Jour 785.

[8] Where there is doubt as to under which of the clauses cognizance is taken the test is to see whether the Magistrate was empowered to take cognizance under a particular clause. (Vol. 1) 1914 Sind 121 (121); S Sind L R 66; 15 Cri L Jour 637 (DB) \* (97-01) 1 Upp Bur Rul 55 (55) \* ('08) 8 Cri L Jour 505 (510); 4 Low Bur Rul 300 \* ('05) 1905 Pan Re No. 8 Cr. p. 16 (17).

#### 4. Taking cognizance, if refers to the particular individual who is charged for the time being.—

[1] The following views are held as to what is meant by taking cognizance:

(a) It refers to the particular person who is charged at the time. ('92) 15 Mad 352 (353) (DB) \* ('95) 22 Cal 50 (71) (DB) \* ('84) 1884 Pan Re No. 42 Cr. p. 92 (95) (DB).

(b) Means taking cognizance of an offence and not the offender. (Vol. 32) 1945 Sind 1 (3); 46 Cri L Jour 192; I L R (1944) Kar 300 (DB) (Vol. 27) 1940 Sind 97; I L R (1940) Kar 287; 41 Cri L Jour 750 followed.) \* (Vol. 31) 1944 Pat 210 (211); 46 Cri L Jour 168 \* (Vol. 29) 1942 Sind 161 (162); 44 Cri L Jour 137; I L R (1942) Kar 323 (DB) \* (Vol. 28) 1941 Rang 30 (31); 42 Cri L Jour 244; (1940) Rang L R 676 \* (Vol. 27) 1940 Sind 100 (102); I L R (1940) Kar 435; 41 Cri L Jour 861 (DB) \* (Vol. 27) 1940 Sind 97 (98); I L R (1940) Kar 287; 41 Cri L Jour 750 (DB) \* (Vol. 4) 1917 Cal 121 (122); 18 Cri L Jour 901 (DB) \* (Vol. 11) 1924 Sind 71 (72, 73, 74); 17 Sind L R 150; 26 Cri L Jour 181 (FB) \* (Vol. 12) 1925 Oudh 739 (740); 23 Cri L Jour 1619 \* (Vol. 10) 1923 Rang 31 (35, 37); 24 Cri L Jour 519; 11 Low Bur Rul 398 (FB).

5. Taking cognizance refers to the particular offence charged for the time being.—[1] When a Court takes cognizance of an offence it does so with reference to the particular offence then charged, and not also with reference to other offences that may subsequently appear in the course of the proceedings. ('98) 1 Weir 720 (720) (DB) \* ('33) 5 All 253 (255) (In proceeding for rape Court finding it to be adultery—

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cannot do so in respect of adultery in the absence of complaint by the husband) \* ('87) 10 All 39 (43) (Cognizance of offences of assault and insult—Subsequently found it to be one of defamation—Cognizance cannot be taken unless on a complaint) \* (Vol. 12) 1925 All 129 (130) : 47 All 114 : 26 Cri L Jour 448 (Prosecution commencing under S. 225, I.P.C.—Offence committed found to be one under S. 173, I.P.C.—Taking cognizance is precluded under S. 195 in absence of a complaint from the authority specified in that section)

**6. Initiation of proceedings with reference to one offence—Some other offence appearing to be involved in the transaction—Action with reference to such offence is not under this section.**—[1] The Court has power to take cognizance of a different offence or additional offence that appears subsequently to have been committed in the course of the same transaction. (Vol. 14) 1927 P O 44 (46) : 5 Rang 53 : 28 Cri L Jour 259 : 54 Ind App 96 (PC).

[2] In taking cognizance of a different offence or additional offence the Court takes cognizance of such offence by virtue of its being seised of the case and not under sub-s. (1), clause (c) of this section. (Vol. 25) 1938 Mad 815 (816) : 39 Cri L Jour 958 : 1 L R (1938) Mad 814 ((Vol. 23) 1938 Mad 341 : 59 Mad 442 : 37 Cri L Jour 501 dissented from) \* (Vol. 23) 1936 Bom 379 (381) : 38 Cri L Jour 9 (DB) \* (Vol. 23) 1936 Mad 341 (341, 342) : 59 Mad 442 : 37 Cri L Jour 501.

[See however (Vol. 13) 1926 Rang 53 (57) : 27 Cri L Jour 669 (DB). (Cognizance of such offences is taken under the particular clause under which original proceedings were started).]

[3] Power to take cognizance of additional or different offence is vested in every Court having seisin of the case relating to a criminal transaction and is not confined to the Magistrate mentioned in this section. (Vol. 23) 1936 Bom 379 (381) : 38 Cri L Jour 9 (DB) \* (Vol. 20) 1933 Pat 297 (299, 301, 302) : 12 Pat 758 : 34 Cri L Jour 942 (DB).

[4] New offence disclosed in the proceedings where a person not originally accused is implicated—Court can proceed against him also for that offence. ('99) 26 Cal 786 (789) (DB) \* (Vol. 1) 1914 Cal 801 (804) : 15 Cri L Jour 546 : 41 Cal 1013 (DB). (In addition to the offences already the subject matter of proceedings new offence disclosed—Person originally accused found not to have committed any offence—Person who is found implicated can be proceeded against for all the offences.)

[5] Offence subsequently disclosed pertaining to a distinct transaction—Cognizance of such offence to be taken only under this section. ('02) 6 Cal W N 202 (203) (DB).

**7. Initiation of proceedings against one person—Another person found implicated in the criminal transaction under inquiry—Action against such person.**—[1] Proceedings against a certain person—In the course of it another found to be implicated—He can be added or substituted and the case proceeded with. (Vol. 20) 1933 Pat 244 (246) : 12 Pat 341 : 35 Cri L Jour 533 (DB) \* (Vol. 19) 1932 Pat 65 (65, 66) : 10 Pat 347 : 35 Cri L Jour 232 \* (Vol. 25) 1938 Nag

137 \* ('04) 1 Cri L Jour 511 (512) : 1904 F No. 32 Cr \* (1900) 4 Cal W N 367 (369) (1900) 4 Cal W N 560 (562) (DB).

[2] Power to add or substitute a person exercised only when it is otherwise open to the Court to do so. (Vol. 29) 1942 Sind 161 (162) : 44 Cri 137 : 1 L R (1942) Kar 323 (DB) \* ('92) 15 M (353) (DB) \* ('95) 22 Cal 50 (71) (DB) \* ('8 Pan Re No. 42 Cr. p. 95 (DB).

[3] The fact that another person is implicated appear from the evidence in the case or other (Vol. 20) 1933 Pat 244 (246) : 12 Pat 341 : 1 L Jour 533 (DB). (May be learnt by a police diary) \* (Vol. 18) 1931 All 273 (274, 32 Cri L Jour 370 (Do) \* ('04) 1 Cri L Jour 84 Cal (Do) \* (Vol. 11) 1924 Sind 71 (72) : 17 Sind 150 : 26 Cri L Jour 181 (FB) \* (1900) 27 C (980) (DB) (Facts brought to notice in an app for issue of warrant for arrest.)

[See however ('33) 1933 Mad W N 916 (917).

[4] Court can proceed against a person under when he is present in the Court and if it appears the evidence against the accused that such other also is implicated. (Vol. 29) 1942 Sind 161 I L R (1942) Kar 323 : 44 Cri L Jour 137 (Vol. 28) 1941 Rang 30 (31) : 1940 Rang L 42 Cri L Jour 244 \* ('09) 10 Cri L Jour 303 5 Nag L R 113 \* ('11) 12 Cri L Jour 399 (Sind L R 258 (DB) \* (Vol. 10) 1923 Rang 11 Low Bar Ral 398 : 24 Cri L Jour 519 (FB).

[5] Immediate proceedings against witnesses present the Court is inadvisable as it would frighten witnesses. ('05) 2 Cri L Jour 448 (449) (DB) 8 Bom H C R Cr Cas 126 (154, 155) (DB).

[6] Where the person who appears to be implicated is not present in Court the Court may come to appearance. ('13) 14 Cri L Jour 290 (291) : 9 Sind 65 \* (Vol. 11) 1924 Sind 71 (72, 73) : 17 Sind 150 : 26 Cri L Jour 181 (FB) \* (Vol. 23) 1936 30 (31) : 42 Cri L Jour 244 : 1940 Rang L R 67

[7] This section does not apply to a case where the Magistrate proceeds against a person who is in the course of the original proceedings, implicated in the offence. (Vol. 28) 1941 R (31) : 42 Cri L Jour 244 : 1940 Rang L R (Vol. 10) 1923 Rang 31 (35) : 11 Low Bar Ral : Cri L Jour 519 (FB) \* (Vol. 11) 1924 Sind 73 : 17 Sind L R 150 : 36 Cri L Jour 181 (Vol. 12) 1925 Oadh 739 (740) : 26 Cri L Jour (Vol. 4) 1917 Cal 121 (122) : 18 Cri L Jour 901 ('13) 14 Cri L Jour 290 (291) : 9 Nag L R 65 (Vol. 1) 1914 Cal 801 (804) : 41 Cal 1013 : L Jour 546 (DB) \* (Vol. 16) 1929 Sind 130 Cri L Jour 459 (DB) \* ('09) 10 Cri L Jour (305) : 5 Nag L R 113.

[But see ('97) 1 Cal W N 105 (105) \* ('97) 1934 Lah 210 (211) : 35 Cri L Jour 1407 \* ('10 L Jour 64 (65) \* (Vol. 18) 1931 All 273 (27, 32 Cri L Jour 370)]

[8] Power to proceed against person not implicated with the offence originally vests in every Court having seisin of a case and is not confined to the Magistrate empowered to proceed under this section. (1933 Pat 244 (246) : 12 Pat 341 : 35 Cri L Jour

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[9] No Court other than the one which already has seisin of the case relating to the transaction can proceed against a person who has been found implicated in the offence. (1900) 27 Cal 979 (980) (DB) \* ('03) 30 Cal 449 (452) (DB) \* (Vol. 20) 1935 Pat 244 (246): 12 Pat 341: 35 Cri L Jour 533 (DB).

[10] Where the offence imputed to such person relates to a distinct criminal transaction the same Court which is seised with the case need not act. Vol. 22) 1935 Pat 91 (93): 36 Cri L Jour 500 (DB) \* Vol. 20) 1933 Pat 244 (246): 12 Pat 341: 35 Cri L Jour 533 (DB).

8. Cognizance in cases where the facts disclose a graver as well as a minor offence.—[1] Where the same facts disclose a graver offence as well as a minor offence, the prosecution must ordinarily be for the graver offence. (Vol. 18) 1931 Rang 12 (14): 8 Rang 499: 32 Cri L Jour 202 (DB) \* ('01) 5 Cal W N 252 (253) (DB) \* (Vol. 18) 1931 Mad 702 (703): 54 Mad 1018: 32 Cri L Jour 1215 (DB) \* (Vol. 16) 1929 Mad 21 (23): 30 Cri L Jour 322 \* ('01) 5 Cal W N 727 (728) (DB) \* (Vol. 15) 1928 Rang 254 (255): 6 Rang 578: 30 Cri L Jour 342 \* (Vol. 15) 1928 Rang 243 (244): 29 Cri L Jour 1044.

[2] Same facts disclosing a graver offence as well as minor offence—Conviction for the minor offence—Conviction for the minor offence in such cases will not be illegal. (Vol. 31) 1944 Mad 166 (168): 45 Cri L Jour 508 \* (Vol. 18) 1931 Rang 12 (14): 8 Rang 499: 32 Cri L Jour 202 (DB).

9. Cognizance in cases where previous sanction or complaint of particular person or Court is necessary for prosecution of offence.—[1] There is a conflict as to whether Court can take cognizance of an offence under S. 182 I P C which is disclosed from the facts of a case under S. 211 I P C the cognizance of which cannot be taken in the absence of a complaint.

(a) The offence under S. 182 can be taken cognizance of. (Vol. 12) 1925 Pat 717 (719): 5 Pat 33: 26 Cri L Jour 1269 (DB) \* (Vol. 15) 1928 All 765 (766): 51 All 382: 29 Cri L Jour 938.

[See also ('80) 5 Cal 184 (187) (DB) \* (Vol. 25) 1938 P C 130 (135): 65 Ind App 158: 32 Sind L R 476: I L R (1938) 2 Cal 295: 39 Cri L Jour 452 (PC).]

(b) The offence under S. 182 cannot be taken cognizance of. (Vol. 15) 1928 Rang 254 (255): 6 Rang 578: 30 Cri L Jour 342 \* (Vol. 15) 1928 Rang 243 (244): 29 Cri L Jour 1044 \* ('01) 5 Cal W N 727 (728) (DB).

(c) If the proceedings have been completed and the accused has been convicted of the offence, the conviction cannot be set aside as illegal. (Vol. 18) 1931 Rang 12 (44): 8 Rang 499: 32 Cri L Jour 202 (DB).

(d) The offence under S. 182 cannot be taken cognizance of where the complaint specially charges an offence under S. 211. (Vol. 18) 1931 Mad 702 (703): 54 Mad 1018: 32 Cri L Jour 1215 (DB).

[See also (Vol. 16) 1929 Mad 21 (23): 30 Cri L Jour 322 \* ('83) 7 Bom 184 (185).]

10. Taking cognizance, a judicial act.—[1] Taking cognizance of an offence is a judicial act though it may be only with a view to initiate such proceedings. It is

also clear that acts of Magistrate before taking cognizance of an offence would fall outside the provincial of judicial proceedings with reference to the offence. (Vol. 28) 1941 Pat 395 (397): 42 Cri L Jour 504 \* (Vol. 11) 1924 Cal 476 (479): 51 Cal 402: 25 Cri L Jour 752 (DB) \* ('68) 5 Bom H C R Cr 29 (80, 31) (DB).

[But see (Vol. 13) 1926 Cal 470 (479): 53 Cal 560: 27 Cri L Jour 385 (FB).]

[2] Acts of a Magistrate before taking cognizance would not be judicial acts with reference to the offence. (Vol. 19) 1932 Mad 673 (675): 33 Cri L Jour 785 \* ('12) 13 Cri L Jour 480 (480) (DB) (Mad) \* ('13) 14 Cri L Jour 600 (601): 7 Sind L R 75 (DB) \* (Vol. 15) 1928 Pat 585 (586): 7 Pat 561: 29 Cri L Jour 942.

11. Except as hereinafter provided.—[1] The provisions of this section are subject to any special enactment in force which regulates the institution of proceedings for an offence under it. ('88) 1883 Pan Re No. 28 Cr p. 75 (DB). (Case under Excise Act).

[2] Complaint against receiver appointed by High Court—Leave asked for but not granted—*Held*, entertaining the complaint was not proper. (Vol. 26) 1939 Cal 701 (702, 703): I L R (1939) 1 Cal 587: 41 Cri L Jour 52 (DB).

12. Who can take cognizance under this section.—[1] Proceedings initiated by a Magistrate who is not duly empowered to take cognizance under this section are liable to be set aside. ('06) 3 Cal L Jour 87 (89): 3 Cri L Jour 209 (DB).

[2] Magistrate's want of authority is no ground for setting aside the proceedings take cognizance of under cl. (a) and (b) where he acts in good faith. (Vol. 18) 1931 Bom 517 (519): 33 Cri L Jour 68 (DB) \* (Vol. 13) 1926 Cal 470 (473): 53 Cal 350: 27 Cri L Jour 385 (FB).

[3] Proceeding of Magistrate taking cognizance under cl. (c) without authority is void. ('91) 1891 Rat 554 (554) (DB) \* ('95) 22 Cal 131 (135) (DB).

[4] Power can be conferred on a Magistrate under sub-s (2) or (3) only in respect of offences which the Magistrate in question can try or commit for trial. (Vol. 13) 1926 Pat 400 (400): 5 Pat (447): 27 Cri L Jour 704 (DB).

[5] A third class Magistrate cannot be empowered to take cognizance under cl. (c) of the section. ('02) 26 Bom 150 (155) (FB).

[6] Powers conferred upon a Magistrate remains personal to him until withdrawn and is exercisable in any local area in which he may be serving for the time being. (Vol. 18) 1931 Bom 517 (520): 33 Cri L Jour 68 (DB).

[7] A power to take cognizance on information does not extend to taking cognizance on the Magistrate's own knowledge or suspicion. ('01) 1901 Pan Re No. 20 Cr. p. 51.

[8] Special power to take cognizance on complaint is enough to take cognizance of complaints under S. 20 Cattle Trespass Act without any further authorization. (Vol. 7) 1920 Bom 85 (85): 44 Bom 42: 21 Cri L Jour 95 (DB).

[9] Special power to try a case would include power to take cognizance. (Vol. 18) 1931 Bom 517 (518): 33 Cri L Jour 68 (DB).

13. May take cognizance.—[1] Complaints showing *prima facie* case—Magistrate has no option but to take cognizance and examine complaint on oath. ('87) 14

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Cal 707 (711) (FB) \* (Vol. 13) 1926 Cal 470 (479): 53 Cal 350: 27 Cri L Jour 385 (FB) \* ('04) 1 Cri L Jour 980 (981, 982) \* (Vol. 10) 1923 Pat 539 (540): 24 Cri L Jour 845 \* ('99) 1899 All W N 201 (202) \* ('01) 4 Oudh Cas 127 (131) \* ('73) 7 Mad H C R App xxxi (xxxi) \* ('71) 3 N W P H C R 272 (273).

[But see (Vol. 16) 1929 Pat 473 (475): 9 Pat 707: 30 Cri L Jour 1056 (FB) \* (Vol. 26) 1939 Cal 701 (703): 1 I L R (1939) 1 Cal 587: 41 Cri L Jour 52 (DB) (Assumed).]

[2] A Magistrate is not bound to take cognizance on the report of a Police-officer. ('04) 1 Cri L Jour 980 (982) \* ('13) 14 Cri L Jour 218 (218, 219) (All).

[But see ('88) 1888 Rat 375 (375) (DB).]

[3] The Magistrate is not bound to take cognizance on his own knowledge or suspicion or on information not amounting to a complaint. (Vol. 1) 1914 Cal 456 (464): 41 Cal 350: 15 Cri L Jour 335 (DB) \* ('99) 1899 All W N 201 (202) \* ('02) 6 Cal W N 926 (926, 927) (DB) \* ('01) 4 Oudh Cas 127 (131).

[See also ('87) 14 Cal 707 (712) (FB).]

[4] Initiation of proceedings against a person for an offence or in respect of an offence—Subsequent discovery that another person is implicated or proceedings for a different offence has to be started—Only the Court which has seisin on the case can start such proceedings. (Vol. 16) 1929 Pat 710 (712): 31 Cri L Jour 472.

[See however (Vol. 10) 1923 Cal 652 (653): 50 Cal 482: 24 Cri L Jour 710 (DB). (Though multiplicity of proceedings should be avoided by a suitable order of transfer) \* (Vol. 13) 1923 Pat 50 (52): 32 Cri L Jour 548 \* (Vol. 20) 1933 Lah 852 (853): 14 Lah 820: 35 Cri L Jour 171.]

[5] The Court to which a case is transferred can take cognizance of any offence involved in the case and proceed against any person implicated therein. ('01) 5 Cal W N 488 (489) (DB).

[See also ('07) 5 Cri L Jour 104 (105): 30 Mad 228.]

[6] The order of a Magistrate declining to take cognizance of an offence does not operate as *autre fois acquit*. (Vol. 20) 1933 Pat 242 (243): 12 Pat 234: 34 Cri L Jour 1198 (DB).

[See also (Vol. 28) 1941 Pat 395 (397): 42 Cri L Jour 504].

[But see (Vol. 15) 1928 Pat 585 (586): 7 Pat 561: 29 Cri L Jour 942.]

[7] The pendency of civil proceedings concerning the matter is no bar to the criminal proceedings. ('68) 8 Suth W R Cr 22 (22) (DB).

[8] Unless the dispute is of purely a civil nature the fact that civil remedy is also available is no bar. ('88) 10 Suth W R Cr 40 (40) (DB).

[9] Illegalities or irregularities in regard to the arrest of the accused person do not affect the jurisdiction of the Court to take cognizance of the case against him. (Vol. 26) 1941 Nag 338 (339): 1 I L R (1942) Nag 428: 43 Cal L Jour 89 \* ('93) 26 Mad 124 (125): 1 Weir 630 (DB) \* ('14) 12 Cri L Jour 356: 35 Bom 225 (SB) \* (Vol. 19) 1932 Bom 610 (612, 613): 33 Cri L Jour 733 (DB) \* ('97-01) 1 Upp Bar Rul 182 (183).

[But see (Vol. 12) 1925 Bom 131 (133, 134): 40 Pat.

[10] A Magistrate is entitled to drop proceedings if he finds that he ought not to have taken cognizance of an offence. (Vol. 29) 1942 Mad 283 (284): 43 Jour 785. (Complainant not having *locus standi*)

14. "Upon receiving a complaint of facts which constitute such offence."—[1] A Magistrate can take cognizance of an offence on a complaint by whom the complaint may be presented. (Vol. 29) 1942 Mad 283 (284): 43 Cri L Jour 785.

[2] Magistrate can prefer a complaint to himself. (Vol. 13) 1926 Cal 470 (477, 479): 53 Cal 350: 15 Cri L Jour 385 (FB) (Per B. B. Ghose, and Qamir Rankin and Chakravarthi JJ Contra; Walms. Irregular though not illegal.)

[3] A Magistrate can take cognizance on a complaint though it is vindictive. ('92) 15 Mad 63 (64) (DB)

[4] A complaint must state the facts which constitute the offence charged. (1900) 27 Cal 985 (988): \* (Vol. 17) 1930 Bom 372 (373): 31 Cri L Jour (DB) \* (Vol. 12) 1925 Mad 1157 (1157): 26 C Jour 1589 (DB) \* (Vol. 20) 1933 Sind 393 (394): 31 Cri L Jour 266 (DB) \* ('12) 13 Cri L Jour 691 (DB) (Cal) \* ('91) 1891 Pan Re No. 8 Cr p. 21 (D)

[5] If the facts stated in a complaint do not constitute any offence, the Magistrate cannot take cognizance on such complaint. ('84) 1884 Rat 206 (DB).

[6] The complaint need not state all the facts which the accused is to be charged. ('09) 9 Cri L 108 (111): 32 Mad 3 (DB).

[7] Any defect in the complaint due to the insufficiency of facts stated is curable under S. 529 (e). (19) 1932 Bom 610 (612): 53 Cri L Jour 733 (DB).

[8] A Magistrate is not confined to the facts mentioned in the complaint but can take cognizance of any offence which, in his opinion is constituted by facts stated in the complaint, of which he is competent to do so. (Vol. 25) 1938 Sind 209 (212): 40 C Jour 122: 1 I L R (1939) Kar 230 (DB) \* ('03) 25 209 (211) \* ('99) 26 Cal 786 (789, 790) (DB) \* (1895 Pan Re No. 23 Cr p. 65 (66) (DB).

[9] Magistrate's jurisdiction to take cognizance of an offence on a complaint not affected by any illegal which may have been previously committed by complainant. (Vol. 30) 1943 Lah 208 (209): 44 C Jour 686.

[10] Court making enquiry not competent to file a complaint as a Court—Proceedings taken on a complaint filed by it is illegal. (Vol. 32) 1945 Mad (459).

15. Report of police-officer—Clause (b).—[1] words "report in writing of such facts made by a police officer" would include the report by the police of a cognizable case or in a non-cognizable case which have been ordered by a Magistrate to be investigated. (Vol. 25) 1938 Rang 257 (258): 1938 Rang L R 1 39 Cri L Jour 776 \* (Vol. 17) 1930 Bom 372 (372): 31 Cri L Jour 1142 (DB) \* (Vol. 14) 1927 Bom 440 (444): 51 Bom 498: 28 Cri L Jour 939 (DB).

[2] "Police Report," would include the reports of police made in non-cognizable cases also even though they have not been ordered to investigate. (Vol. 19) 1932 Bom 610 (612): 53 Cri L Jour 733 (DB).

## S. 190 (contd.)

{371}: 49 Mad 525: 27 Cri L Jour 1031 (FB) \* (Overruling (Vol. 12) 1925 Mad 672: 26 Cri L Jour 1550 (DB)) \* (Vol. 15) 1923 All 765 (766): 51 All 382: 29 Cri L Jour 933 \* (Vol. 11) 1924 Cal 476 (479): 51 Cal 402: 25 Cri L Jour 732 (DB) \* (Vol. 15) 1923 Lah 66 (67, 68): 29 Cri L Jour 65 (DB) \* (Vol. 14) 1927 Lah 702 (703): 28 Cri L Jour 821: 9 Lah 280 \* (Vol. 20) 1933 Sind 188 (190): 34 Cri L Jour 256 (DB).

[See also (Vol. 23) 1936 Nag 86 (86): 1 L R (1936) Nag 50: 37 Cri L Jour 587.]

[But see ('33) 1933 Mad W N 376 (378) \* (Vol. 25) 1933 Rang 257 (258): 1933 Rang L R 150: 39 Cri L Jour 776 \* (Vol. 14) 1927 Bom 440 (443, 444): 51 Bom 498: 28 Cri L Jour 939 (DB) (Per Fawcett, J) \* (Vol. 12) 1925 Bom 131 (134): 49 Bom 212: 26 Cri L Jour 441 (DB) \* (Vol. 12) 1925 Lah 237 (238): 25 Cri L Jour 1361 (DB).]

[3] "Police report" in cases in which the police can investigate under Chapter XIV includes not only the final report under S. 173 but also the other reports made by them. (Vol. 11) 1924 Cal 614 (616): 26 Cri L Jour 68 (DB) \* (Vol. 20) 1933 All 399 (400): 34 Cri L Jour 761 \* (Vol. 11) 1924 Pat 597 (601): 26 Cri L Jour 241 (DB).

[4] In order to constitute a report of a police-officer the allegation must be made by a police-officer as such and not as a private person. ('04) 1 Cri L Jour 193 (199): 2 Low Bur Kul 146 (SB) (Per Berks, J.)

[5] A report of a police-officer on which cognizance can be taken under this clause must give the facts constituting the offence charged. (Vol. 24) 1927 Pat 160 (163): 33 Cri L Jour 94 \* ('10) 11 Cri L Jour 145 (146): 37 Cal 49 (DB) \* (Vol. 17) 1930 Bom 372 (372, 373): 31 Cri L Jour 1142 (DB) \* (Vol. 11) 1924 Cal 476 (479): 51 Cal 402: 25 Cri L Jour 732 (DB).

[6] If the facts recited in the police report do not constitute any offence, the Magistrate cannot take cognizance on it. (Vol. 9) 1922 Cal 533 (539): 24 Cri L Jour 1 (DB) \* ('75) 2 Weir 246 (246) (DB).

[7] The report need not state what each prosecution witness named therein is going to depose. (Vol. 9) 1922 Pat 294 (296): 23 Cri L Jour 69 (DB).

[8] The offence of which cognizance is taken on a police report need not be the same as that to which the police investigation was originally directed. (Vol. 6) 1919 Pat 319 (320): 20 Cri L Jour 413 (Police report recommending prosecution of informer for bringing in a maliciously false charge) \* (Vol. 16) 1929 Pat 514 (515, 516): 31 Cri L Jour 55 (Do.)

[9] Magistrate can take cognizance of an offence on the facts in the police report even though the police officer opines that they do not amount to an offence. (Vol. 20) 1933 Pat 50 (51): 34 Cri L Jour 303 (Reporting officer's opinion not material)

[See also (Vol. 31) 1944 Mad 166 (167): 45 Cri L Jour 508 (Exaggerated story of assault—Police also saying that complainant was not anxious to proceed—Magistrate can take cognizance.)]

[10] Even though the police is of opinion that there is no sufficient evidence to take further action the Magistrate can take cognizance. ('78) 2 Weir 119 (119) (DB) \* (Vol. 11) 1924 Sind 71 (72): 17 Sind L R 150: 26 Cri L Jour 181 (FB) (Overruling 12 Cri L Jour 92 (DB)) \* ('07) 5 Cri L Jour 275 (276) \* (Vol. 4) 1927 All 133 (134): 13 Cri L Jour 425 \* ('37) 14 Cal 707 (722) (FB) (At any rate, cognizance can be taken

in such cases, on Magistrate's own suspicion). \* ('04) 1 Cri L Jour 589 (541): 1904 Upp Bur Ral 4 (Do) \* (Vol. 19) 1932 Mad 673 (674): 33 Cri L Jour 725.

[11] Proceedings initiated in good faith by a Magistrate on a statement of a police officer not amounting to a report in writing are not affected. (Vol. 15) 1928 Lah 66 (68): 29 Cri L Jour 65 (DB) \* (Vol. 13) 1926 Mad 865 (871): 49 Mad 525: 27 Cri L Jour 1031 (FB).

[12] Magistrate taking cognizance on preliminary report—Final report of charge-sheet, omitting the names of some of the accused—Omission amounts to merely an advice which the Magistrate need not follow—Generally not desirable to disregard it without giving reasons. (Vol. 11) 1924 Pat 597 (602): 26 Cri L Jour 241 (DB).

[13] Under special statutory provisions, the report of any other officer also may be treated as the report of a police-officer for the purposes of this section. (Vol. 14) 1927 Cal 405 (406): 54 Cal 371: 28 Cri L Jour 316 (DB).

[14] Prosecution ought to be launched with previous sanction—Subsequent sanction cannot validate proceedings instituted without it. (Vol. 32) 1945 Oudh 130 (182).

[15] Police-reports are not in themselves evidence and ought not to be treated as such. (1900) 1900 Pun L R Cr, p. 71 (73) (DB).

**16. Complaint by police-officer.**—[1] The report of a police-officer whether in a cognizable or non-cognizable case does not amount to a complaint. (Vol. 23) 1936 Nag 86 (87): 1 L R (1936) Nag 50: 37 Cri L Jour 587.

[2] The section does not deprive a police-officer of his right to make a complaint instead of a report. (Vol. 20) 1933 Sind 188 (190): 34 Cri L Jour 256 (DB).

[3] The police-officer can make a complaint in respect of any offence whether he can investigate into it or not. (Vol. 16) 1929 Pat 514 (516): 31 Cri L Jour 55.

[4] Allegation of police-officer, held, is not a report; it can be treated as a complaint where it satisfies other requirements. ('02) 26 Bom 150 (156, 157) (FB) \* (Vol. 14) 1927 Bom 440 (443, 444): 51 Bom 498: 28 Cri L Jour 939 (DB) \* ('09) 9 Cri L Jour 108 (110, 111): 32 Mad 3 (DB) \* (Vol. 6) 1919 Cal 383 (384): 20 Cri L Jour 675 (DB) \* (Vol. 6) 1919 Cal 433 (434): 46 Cri L Jour 807: 20 Cri L Jour 794 (DB) \* (Vol. 12) 1925 Lah 237 (238): 25 Cri L Jour 1361 (DB) \* (Vol. 14) 1927 Lah 702 (703): 28 Cri L Jour 821: 9 Lah 280 \* ('12) 13 Cri L Jour 691 (692) (DB) (Cal).

[See also (Vol. 26) 1939 Mad 839 (839): 41 Cri L Jour 20 (Where a charge-sheet filed by the police under S. 379, Penal Code, sets out facts which constitute an offence under S. 163 (a) (2), Madras Local Boards Act, that amounts to a complaint as defined in S. 4 (1) (b), Criminal Procedure Code)]

[5] Letter by Sub-Inspector to the District Superintendent praying for permission to file a complaint under S. 177 I P C forwarded to Magistrate—Held letter was only a report and not a complaint. (Vol. 23) 1936 All 788 (799): 1 L R (1937) All 162: 38 Cri L Jour 57 (DB).

**17. Power of Magistrate to order police to charge-sheet any person.**—[1] The Magistrate cannot order them to put in a charge-sheet when the police-officers investigating are of the opinion that the case is not true. (Vol. 19) 1932 Mad 673 (673): 33 Cri L Jour 735.

**192.** (1) Any Chief Presidency Magistrate, District Magistrate or Sub-District Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial, to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the first class taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and a Magistrate may dispose of the case accordingly.

[1882—S. 192; 1872—Ss. 44, 141; 1861—S. 273.]

#### Section 191 (contd.)

[But see ('04) 1 Cri L Jour 807 (809): 27 All 172 \* (Vol. 29) 1942 Sind 122 (128): 44 Cri L Jour 367: I L R (1942) Kar 252 (DB) (Per Weston J) \* (Vol. 14) 1927 Sind 77 (77): 20 Sind L R 291: 27 Cri L Jour 1280.]

[17] Where a Magistrate has taken cognizance on his own knowledge or information and started proceedings under S. 133, the person proceeded against is entitled to have the case inquired into and disposed of by another Magistrate. (Vol. 23) 1936 Pat 633 (640): 38 Cri L Jour 29.

#### SECTION 192—Synopsis.

1. Scope.
2. "Taken cognizance."
3. Stage at which transfer should be ordered.
  4. Transfer of a transferred case.
  5. Transfer of a case remanded for further inquiry.
6. "Case", meaning of.
7. Transfer of proceedings under other acts.
8. Effect of transfer under the section.
9. Erroneous order of transfer—Effect of.
10. Notice of transfer.

11. Case triable by first class Magistrate—Transfer to second class Magistrate with direction to commit to sessions—Legality.

1. Scope.—[1] The Magistrate should first have taken cognizance of the case before he can make an order of transfer. ('02) 5 Oudh Cas 164 (167) (DB) \* (Vol. 5) 1918 Mad 555 (557): 41 Mad 246: 18 Cri L Jour 878 (DB) (Overruled on another point in (Vol. 27) 1940 Mad 25: I L R (1940) Mad 335: 41 Cri L Jour 238 (FB).)

[2] The transfer should be made to a Magistrate subordinate to him. (1900-02) 1 Low Bur Rul 59 (59).

[3] Where a subordinate Magistrate wants to refer a case to a superior Magistrate for giving enhanced punishment to the accused he should proceed under S. 349 of the Code. ('90) 12 All 66 (68) \* ('06) 4 Cri L Jour 213 (214) (DB) (Cal).

[4] The transfer to the subordinate Magistrate should be for disposal by him. (Vol. 28) 1941 Cal 185 (189): 42 Cri L Jour 490: I L R (1941) 1 Cal 67 \* (Vol. 3) 1916 Cal 867 (869): 17 Cri L Jour 146: 43 Cal 173 (DB) \* (Vol. 7) 1920 Pat 563 (565, 566): 21 Cri L Jour 594: 5 Pat L Jour 47.

[5] The transfer should not be:—

(a) For mere investigation and report. ('10) 11 Cri L Jour 525 (526): 36 Cal 58 (DB) \* (Vol. 3) 1916 Cal 867 (869): 17 Cri L Jour 146: 43 Cal 173 (DB) \* ('89) 1 N W P H C R 306 (307) (DB).

under S. 202. (Vol. 27) 1940 Lah 61 (63): Jour 344 \* (Vol. 12) 1925 Cal 742 (743): 26 C. 990 (DB).

[6] The term "inquiry" is used with respect to such inquiries as are held under Chapt XII or XVIII and does not mean an inquiry under S. 202. (Vol. 28) 1941 Cal 185 (190): 42 Cri L Jour 490: I L R (1941) 1 Cal 67. (When once a case is validly transferred to a subordinate Magistrate the Magistrate has no authority to return the case transferring Magistrate in order that the law issue process under S. 204, and his duty is to the trial according to law).

[7] The transfer of a case to a subordinate Magistrate is for the purpose that he may complete or inquiry to be held in connexion with the case, take all the requisite steps to that end. (Vol. 28) 1941 Cal 185 (190): 42 Cri L Jour 490: I L R (1941) 1 Cal 67.

[8] The provisions of this section and S. 202 are distinct and separate and the powers conferred by this section do not curtail the powers conferred by S. 202. (Vol. 6) 1919 Cal 59 (60): 46 Cal 854: 20 Cr 508 (DB) \* (Vol. 23) 1941 Cal 185 (190): 42 Cri L Jour 490: I L R (1941) 1 Cal 67.

[9] An order under S. 202 to a subordinate Magistrate to investigate and report does not operate as an order for transfer under this section. (Vol. 28) 1941 Cal 185 (190): 42 Cri L Jour 490: I L R (1941) 1 Cal 67.

[10] The Magistrate, to whom the case is transferred, should be otherwise competent to inquire into the case transferred. (Vol. 28) 1941 Cal 185 (190): 42 Cri L Jour 490: I L R (1941) 1 Cal 67 \* (Vol. 27) 1940 Oudh 244 (245): 41 Cri L Jour 469: 1 468 \* ('07) 6 Cri L Jour 363 (364): 34 Cal 9: \* ('96) 1896 Rat 838 (838) (DB).

[11] Proceedings under S. 145 cannot be transferred to a second or third class Magistrate. ('78) 3 Cal 755 (DB).

[12] Where the allegations in the complaint are of a graver offence not triable by a certain Magistrate, the transfer of the case to such Magistrate will be illegal and a conviction by such Magistrate even of a lesser offence which is within his competence to try will be illegal. (Vol. 27) 1940 Oudh 244 (245): 42 Cri L Jour 469: 15 Luck 468.

[But see (Vol. 26) 1939 Lah 122 (123): I L R (1939) Lah 619: 40 Cri L Jour 515.]

[13] Where from the facts of the case it was clear that the complaint contained an exaggeration of the facts, the District Magistrate could direct the transfer of the complaint under S. 326, Penal Code, from a first class Magistrate to a second class Magistrate.

Section 192—Note 1 (*contd.*)

[14] An order of transfer need not be in writing. (Vol. 25) 1938 Cal 195 (197): 39 Cri L Jour 417 (DB).

[15] A transfer by a District Magistrate of a complaint against a near relation of his to a Magistrate subordinate to such Magistrate or a transfer of a complaint against an officer of the rank of a District Superintendent of Police in respect of acts done in his official capacity, to a subordinate Magistrate and not to a senior Magistrate, has been held to be improper, though not illegal. (Vol. 23) 1936 Rang 242 (243): 37 Cri L Jour 723 (DB).

[16] Where a complaint against a near relation of a District Magistrate was transferred to a Magistrate subordinate to him for disposal and the complainant objected to the trial by the latter Magistrate on the ground that he (i.e., the latter Magistrate) would have to be called as a witness in the case and prayed for a transfer, it was held that, the order of the Magistrate discharging the accused on the ground that he could not take cognizance of the offence for want of the sanction of the local Government was improper though not illegal. The proper order would be one asking for a transfer of the case to another Magistrate to be dealt with finally. (Vol. 23) 1936 Rang 242 (244): 37 Cri L Jour 723 (DB).

2 "Taken cognizance".—[1] A District Magistrate cannot pass an order for a judicial inquiry by a subordinate Magistrate in a case taken cognizance of not by himself, but by a Joint Magistrate, without withdrawing the case to his own file. (1900) 27 Cal 798 (799, 800) (DB).

[2] A Magistrate can take cognizance of a case upon a complaint preferred to him. (Vol. 1) 1914 Cal 479 (479): 15 Cri L Jour 343: 42 Cal 19 (DB).

[3] The complaint may be in the form of a report submitted by a subordinate Magistrate. (Vol. 11) 1924 All 190 (191): 25 Cri L Jour 947 \* ('04) 1 Cri L Jour 335 (336, 337): 26 All 514.

[4] A Chief Presidency Magistrate can prefer a complaint to himself against a person for giving false evidence before him, and then transfer the case for inquiry or trial by a subordinate Magistrate. (Vol. 13) 1926 Cal 470 (472, 473, 477, 478): 53 Cal 350: 27 Cri L Jour 385 (FB).

[5] A case can be taken cognizance of, even without a formal complaint under clause (c) of S. 190 (1) and it is competent for a Magistrate acting under that section to transfer such cases. ('09) 3 Cri L Jour 374 (376): 1 Sind L R 119 (DB) \* ('10) 11 Cri L Jour 786 (786) (Low Bur).

[6] Complaint dismissed under S. 203—Sessions Judge while ordering a further inquiry directing that case should be sent to another Magistrate—District Magistrate accordingly transferring case to another Magistrate—*Held*, District Magistrate while doing so had taken cognizance of the case and the transfer was under this section. (Vol. 23) 1936 Sind 146 (147): 30 Sind L R 217: 37 Cri L Jour 1036 (DB).

[See however ('07) 5 Cri L Jour 112 (115, 116) (DB) (Cal) (Remand of case dismissed under S. 202—Case cannot be transferred under this section).]

[7] The act of a Magistrate in taking cognizance of a case and transferring it to another Magistrate is a judicial act. (Vol. 23) 1941 Pat 395 (397): 42 Cri L Jour 504.

## 3. Stage at which transfer should be ordered.—

[1] The Magistrate need not judicially consider the case before making the transfer. (Vol. 13) 1926 Cal 470 (477, 478, 479): 53 Cal 350: 27 Cri L Jour 385 (FB).

[2] The Magistrate is not bound to examine the complainant on oath where the complaint is in writing, or issue process before transfer. (Vol. 13) 1926 Pat 358 (359): 27 Cri L Jour 555 \* (Vol. 13) 1926 Cal 470 (479): 53 Cal 350: 27 Cri L Jour 385 (FB)

[But see ('71) 4 N. W. P. H. C. R. 88 (89, 90).]

[3] The Magistrate can transfer the case at any stage after taking cognizance. (Vol. 28) 1941 Cal 185 (190): 42 Cri L Jour 490: 1 L. R. (1941) 1 Cal 67 \* (Vol. 21) 1934 Mad 435 (436): 57 Mad 827: 35 Cri L Jour 1055 (He can transfer a case after framing a charge.) \* (Vol. 6) 1919 Pat 319 (320): 20 Cri L Jour 413 (He can transfer case after issuing process to the witnesses for the prosecution).

[4] A transfer cannot be ordered by a Magistrate after discharging the accused. (Vol. 8) 1921 Pat 205 (205).

[5] Where after hearing evidence Magistrate finds that an offence triable by a subordinate Magistrate has been committed, the case should not be transferred on that ground, but should, if possible, be finished by himself. (1900) 2 Weir 152 (152, 153) (DB) \* (Vol. 10) 1923 Cal 196 (197): 50 Cal 223: 24 Cri L Jour 198 (DB).

[See (Vol. 24) 1937 Nag 103 (103): 1 L. R. (1937) Nag 163: 38 Cri L Jour 719].

[6] Part-heard case transferred—*Held*, transferee Magistrate should re-hear the evidence and frame a fresh charge. (1900-02) 1 Low Bur Rul 301 (302) (FB) \* (1900) 2 Weir 152 (152, 153) (DB).

4. Transfer of a transferred case.—[1] A Magistrate has no power to transfer a case, which has itself been transferred to him for disposal. (Vol. 1) 1914 All 48 (48): 15 Cri L Jour 357 \* (Vol. 1) 1914 All 150 (150): 36 All 166: 15 Cri L Jour 406 (DB) \* ('71-74) 7 Mad H. C. R. App xxxiii (xxxiii, xxxiv) \* (1900-02) 1 Low Bur Rul 86 (87).

[2] The transfer by a transferee Magistrate is only irregular and is cured by the provisions of S. 529, clause (f). (Vol. 7) 1920 Pat 518 (519): 21 Cri L Jour 96 (DB).

[3] Where a case has been transferred by an order of the High Court, from a Court subordinate to a District Magistrate to that of a District Magistrate, *held* unless a contrary intention is expressed by the High Court, the District Magistrate should himself try the case, and he has no power to transfer it to another subordinate Magistrate. ('97) 19 All 249 (251) (SB).

[4] Where a case is transferred from the Court of one District Magistrate to another District Magistrate, the transferee Magistrate has, in the absence of any contrary direction by the High Court, power to transfer the case to any Magistrate subordinate to him, who is competent to try the same. ('97) 19 All 249 (251) (SB) \* (Vol. 4) 1917 Lah 329 (330, 331): 18 Cri L Jour 881: 1917 Pun Be No. 30 Cr. (DB).

5. Transfer of a case remanded for further inquiry.—[1] Case remanded for further inquiry by a Sessions Judge to a District Magistrate, or Sub-divisional Magistrate, *held*, the latter has power to transfer the proceedings to a subordinate Magistrate. (Vol. 7) 1920 Pat 563 (564, 565): 21 Cri L Jour 594: 5 Pat L Jour 47 \* ('07) 5 Cri L Jour 112 (115, 116) (DB).



## Section 192—Note 5 (contd.)

[See however ('70) 2 N W P H C R 132 (133) (SB)].

[2] Case dismissed under S. 203—Remanded for further proceedings—*Held*, the case could not again be transferred. ('07) 5 Cri L Jour 112 (115, 116) (DB) (Cal).

[See however (Vol. 23) 1936 Sind 146 (147) : 30 Sind L R 217 : 37 Cri L Jour 1086 (DB) (Complainant applying to Sessions Judge for further inquiry, on dismissal of complaint—Sessions Judge directing that case should be sent to another Magistrate—District Magistrate transferring case to another Magistrate—Transfer is one under S. 192—Magistrate to whom case is transferred can act on evidence previously recorded).]

6. "Case", meaning of.—[1] The word "case", *held*, is comprehensive enough to include proceedings under S. 107 of the Code. (Vol. 28) 1941 Cal 185 (189) : 42 Cri L Jour 490 : 1 L R (1941) 1 Cal 67.

[See however ('06) 10 Cal W N xlvii (xlvii) (Question left open).]

[2] Where a District Magistrate initiates proceedings under sub-s. (2) of S. 107, such proceedings *held*, can be transferred to a subordinate Magistrate of the first class, who is competent to complete the proceedings, although the latter Magistrate is not competent to institute the same himself. ('01) 24 All 151 (152) \* (Vol. 5) 1918 Cal 892 (892) : 19 Cri L Jour 496 (DB).

[See however ('09) 9 Cri L Jour 148 (149) (DB) (Cal).]

[3] District Magistrate, to whom the police reported for action under S. 107, without stating opinion that there was likelihood of breach of peace and without issuing preliminary notice, merely transferring case to the Head-quarter Magistrate, within whose jurisdiction neither the accused resided nor the place where there was a likelihood of a breach of the peace was situated—*Held* that the District Magistrate had not taken cognizance of the case and that the proceedings before the Head-quarter Magistrate were without jurisdiction. (Vol. 5) 1918 Mad 555 (557) : 18 Cri L Jour 878 : 41 Mad 246 (DB) (Overruled on another point in (Vol. 27) 1940 Mad 28 : 1 L R (1940) Mad 335 : 41 Cri L Jour 238 (FB).)

[4] District Magistrate making order that proceedings were "sanctioned" and sending the same to a Sub-divisional Magistrate—*Held*, he had taken cognizance of the case and the transfer was valid. (Vol. 6) 1919 Cal 469 (470) : 19 Cri L Jour 266 (DB).

[5] Proceedings under S. 110 can be transferred by a District Magistrate or a Sub-divisional Magistrate, after taking cognizance of the same, to a subordinate Magistrate who is otherwise competent to complete the proceedings. (Vol. 28) 1941 Cal 185 (189) : 42 Cri L Jour 430 : 1 L R (1941) 1 Cal 67 \* (Vol. 9) 1922 Pat 586 (587) : 1 Pat 621 : 24 Cri L Jour 31 (DB) \* ('03-04) 2 Low Bur Rul 80 (82) (DB) \* ('09) 2 Cri L Jour 246 (246, 247) : 1 Sind L R 2 (DB) \* ('70) 2 N W P H C R 401 (403) (DB).

[6] First class Magistrate, specially empowered under sub-s. (2) can transfer proceedings under S. 110. (Vol. 9) 1922 Pat 586 (587) : 1 Pat 621 : 24 Cri L Jour 31 (DB).

[See also ('01) 1908 Rat 336 (336) (DB).]

[7] An enquiry as to the fitness of a surety S. 122 can be transferred to a subordinate Magistrate. ('10) 11 Cri L Jour 23 (25, 26) : 37 Cal 91 (Ryves, J., Contra).

[8] An application made to a District Magistrate under S. 144 (4) of the Code, to rescind passed by a subordinate Magistrate under S. cannot be transferred by the District Magistrate to another Magistrate subordinate (Vol. 24) 1937 Mad 167 (169) : 1 L R (1937) M 38 Cri L Jour 125.

[9] Proceedings under S. 145 of the Code transferred. (Vol. 28) 1941 Cal 185 (189) : 4 Jour 490 : 1 L R (1941) 1 Cal 67 \* (Vol. 20) : 264 (266) : 55 All 301 : 34 Cri L Jour 41 (Vol. 10) 1923 Pat 366 (367) : 24 Cri L Jour 48

[10] Where on an application being made to District Magistrate, praying for action under S. transferred it to a Sub-divisional Magistrate him for disposal without taking any action under sub-s. (1) of S. 145, and the land case was also not within the local jurisdiction Sub-divisional Magistrate, it was *held* transfer was not valid. (Vol. 15) 1928 Mad 123 52 Mad 241 : 30 Cri L Jour 340.

[See also (Vol. 6) 1919 All 311 (313) L Jour 410.]

[11] Where a petition was presented under S. 107 to a City Magistrate and he examined the petition, ordered a police-enquiry and on receipt of Police-report, came to the conclusion that there was some basis for the complaint and then transferred the complaint to a subordinate Magistrate, *held* that the transfer was valid. (Vol. 15) 1928 Mad 123 52 Mad 241 : 30 Cri L Jour 340.

[12] Proceedings referred to a superior Magistrate by a subordinate Magistrate, under S. 549 of the Code cannot be transferred. ('69-70) 5 Mad App xliii (xliii).

[13] Complaint under S. 552 is not transferable. ('98) 1898 Rat 963 (963) (DB).

[14] A complaint under S. 20 of the Code of Criminal Procedure Act, 1871, can be transferred to a subordinate Magistrate. ('10) 11 Cri L Jour 363 (364, 365) : 34 Cal 92 (1879) 1879 Pun Be No. 26 Gr. p. 75 (SB).

7. Transfer of proceedings under other Acts.—Proceedings under Ordinance 2 [II] of 1932 by a special Magistrate, after taking cognizance of the case, to another Magistrate, because he had taken cognizance, was, *held*, proper and valid. 1933 Cal 124 (127) : 60 Cal 571 : 34 Cri L Jour 266 (DB).

[2] Proceedings under the Bengal Regulation of 1925—Case arising under S. 2 cannot be transferred to a Joint Magistrate. ('10) 11 Cri L Jour 476 (477) : 33 All 84.

[3] Proceedings under the Bengal Tenancy Act can be transferred to a subordinate Magistrate. ('13) 14 Cri L Jour 465.

8. Effect of transfer under the section.—[1] A Magistrate cannot take any steps or order relating to the case transferred unless the case is withdrawn to his file under S. 192. (Vol. 28) 1941 Cal 185 (190) : 42 Cri L Jour 490



**193.** (1) Except as otherwise expressly provided by this Code or by any other law<sup>a</sup> for the time being in force, no Court of Session<sup>aa</sup> shall take cognizance of any offence by Courts of offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the<sup>b</sup> [Provincial Government] by general or special order may direct them to try, or<sup>c</sup> [\* \* \*] as the Sessions Judge of the division, by general or special order, may make over to them for trial.

[1892—S. 193; 1872—Ss. 17, 18, 231; 1861—Ss. 22, 359.]

[a] For an exception to this section, see section 6 of the Criminal Law (Amendment) Ordinance, 1943 (No. 29 of 1943).

[aa] See the British Baluchistan Criminal Justice Regulation, 1896 (8 [VIII] of 1896) for different procedure obtaining there but not affecting the code in its application to European British subjects.

[b] Substituted by A. O. for "Local Government."

[c] The words "in the case of Assistant Sessions Judges" were repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 46.

#### Section 192—Note 8 (contd.)

490 : I L R (1941) 1 Cal 67 \* (Vol. 6) 1919 Cal 59 (60) : 46 Cal 854 \* (Vol. 17) 1930 Mad 705 (706) : 31 Cri L Jour 895 \* ('22) 23 Cri L Jour 89 (90) (All).

[2] The transferee Magistrate is vested with full seisin of the case and has power to continue the enquiry up to the necessary stage of discharge, acquittal or conviction, as the case may be. (Vol. 13) 1926 Pat 525 (527) : 26 Cri L Jour 1585. \* ('12) 13 Cri L Jour 484 (485) : 39 Cal 1041 (DB).

[3] Transferee Magistrate has full authority to deal with the case as if he had taken cognizance of it. (Vol. 28) 1941 Cal 185 (191) : 42 Cri L Jour 490 : I L R (1941) 1 Cal 67 \* (Vol. 16) 1929 Cal 192 (193) : 55 Cal 1274 : 30 Cri L Jour 852 (DB) \* (Vol. 13) 1926 Pat 358 (359) : 27 Cri L Jour 855.

[4] Objection as to the competency of the Court to try him without the sanction of the Provincial Government, where such sanction is required by law can be raised by the accused before transferee Magistrate. ('13) 14 Cri L Jour 298 (298) : 6 Sind L R 260 (DB).

[5] Where a police charge-sheet contained the names of twenty-two persons as accused but only nine of them were sent up for trial, it was held that the transferring Magistrate had no power to pass any order with regard to the trial of the other thirteen accused not sent up for trial. (Vol. 20) 1933 Pat 244 (245, 246) : 12 Pat 341 : 35 Cri L Jour 533.

[See however ('06) 3 Cri L Jour 209 (210) (DB) (Cal) (The case of some accused only held transferred).]

[6] Sub divisional Magistrate examining complainant—Complaint against several accused but summons issued only against one of the accused—Held the transferee Magistrate was competent to issue summons against the other accused persons also. (Vol. 28) 1941 Cal 185 (191, 192) : 42 Cri L Jour 490 : I L R (1941) 1 Cal 67 \* ('08) 7 Cri L Jour 318 (318, 319) (DB) (Cal) \* (Vol. 4) 1917 Pat 8 (9) : 19 Cri L Jour 96 \* (Vol. 21) 1934 Pat 467 (467, 468, 469) : 36 Cri L Jour 641 (DB).

[7] The legality of piecemeal transfer of a case is open to considerable doubt. (Vol. 28) 1941 Cal

185 (192) : 42 Cri L Jour 490 : I L R (1941) 1 Cal 67 \* ('08) 7 Cri L Jour 318 (319) (DB) (Cal).

[8] In the absence of any clear indication to the contrary it must be taken that the whole case has been transferred. (Vol. 28) 1941 Cal 185 (192) : 42 Cri L Jour 490 : I L R (1941) 1 Cal 67.

[9] A transfer, with directions to commit if the evidence is sufficient and to disallow bail—Transfer held erroneous. (1900) 27 Cal 820 (823, 825) (DB).

[10] Where a Magistrate summons only one of the accused and transfers the case, the death of that accused after the transfer does not terminate the proceedings against the other accused, unless the Magistrate, to whom the case is transferred, thinks fit to conclude the proceedings against them. (Vol. 28) 1941 Cal 185 (192) : 42 Cri L Jour 490 : I L R (1941) 1 Cal 67.

**9. Erroneous order of transfer—Effect of.—**[1] Magistrate, not empowered to transfer making an order of transfer erroneously, in good faith believing that he has power to do so—Transfer, *held*, is a mere irregularity cured by S. 529. (Vol. 25) 1938 Cal 195 (198) : 39 Cri L Jour 417 (DB) \* ('09) 10 Cri L Jour 557 (559) : 36 Cal 869 (DB).

**10. Notice of transfer.—**[1] No notice of transfer is necessary to the accused except where the transfer is made under S. 528. (Vol. 15) 1928 Mad 560 (560) : 51 Mad 610 : 29 Cri L Jour 734.

**11. Case triable by first class Magistrate—Transfer to second class Magistrate with direction to commit to sessions—Legality.—**[1] A first class Magistrate transferring a case triable by himself to a second class Magistrate subordinate to him with directions to treat the case as one for committal to the sessions—*Held*, the first class Magistrate had no power to do so. (Vol. 25) 1938 Mad 529 (529, 530) : 39 Cri L Jour 715.

#### Section 193—Note 1.

[1] The object of restriction on Court of Sessions in taking cognizance, in sub-s. (1), is two fold :

(a) The person charged should have opportunity in the preliminary enquiry to know the circumstances of the offence and to defend himself. ('81) 3 Mad 361 (352, 353) (DB) \* (Vol. 14) 1927 Sind 28 (34) : 21 Sind L R 55 : 27 Cri L Jour 1217 (DB).

Cognizance of offences by High Court. 194. (1) The High Court may take cognizance of any offence upon commitment made to it in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any letters patent granted under the Indian High Courts Act, 1861, <sup>a</sup> [or the Government of India Act, 1915] <sup>b</sup> [the Government of India Act, 1935], or any other provision of this Code.

(2) (a) Notwithstanding anything in this Code contained, the Advocate-General may exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

(c) All fines, penalties, forfeitures, debts and sums of money recovered or levied under or by virtue of any such information <sup>c</sup> [shall form part of the revenues of the Province].

(d) The High Court may make rules for carrying into effect the provisions of this section.

[1882—S. 194.]

[a] Inserted by the Amending Act, 1916 (13 [XIII] of 1916), S. 2 and Sch.

[b] Inserted by A. O.

[c] The words "the Governor-General in Council or" were repealed by A. O.

[d] Substituted by A. O. for "Local Government."

[e] Substituted by A. O. for "shall belong to the Government of India."

#### Section 193 (contd.)

(b) The Court of Sessions may not waste time over cases in which the charge is not supported by evidence to justify conviction. ('82) 5 All 161 (162) \* ('05) 2 Cri L Jour 534 (541) (SB).

[2] A Sessions Judge has no power to join a person as a co-accused in a case before him when no inquiry has been held by any Magistrate into the charges against him. (Vol. 29) 1942 Sind 161 (162) : 1 L R (1942) Kar 328 : 44 Cri L Jour 137 (DB).

[3] In a case not triable by the Court of Sessions exclusively, the Sessions Judge should send the case for inquiry to any Magistrate empowered to try or commit for trial the accused person. ('79) 4 Cal 570 (571) : 3 Cal L Rep. 599 (DB).

[4] The absence of a commitment is a defect which effects the jurisdiction or competency of the Sessions Court to take cognizance of the case and cannot be cured by the provisions of Section 537. ('95) 22 Cal 50 (71) (DB) \* ('92) 15 Mad 352 (353) (DB) \* ('13) 1913 Pun L R No. 260, p. 880 (881, 882) \* ('93-1900) 1893-1900 Low Bur Rul 7 (8) \* (Vol. 21) 1934 All 963 (969) : 36 Cri L Jour 137 : 57 All 412 (FB).

[5] The commitment must be by a competent Magistrate. ('07) 6 Cri L Jour 7 (7, 8).

[6] Under S. 437, a Court of Session can commit an accused person itself and try him without the intervention of a Magistrate. ('86) 10 Bom 319 (323, 324) (DB).

[7] Magistrate in disregard of S. 254 committing accused to Sessions, whom he was competent to try—Accused tried by Sessions Court and convicted—Sessions Court not incompetent for jurisdiction to try the case—Irregularity curable under S. 537. (Vol. 32) 1945 All 340 (342) : 1 L R (1945) All 422.

[8] Applications under Chapter XXXII of the Code are not cases for trial and cannot be transferred under the provisions of this section to Additional Sessions Judge. ('85) 9 Bom 352 (353, 354) (DB) \* ('85) 9 Bom 164 (165) (DB).

[9] A Sessions Judge cannot transfer an appeal under this section to an Assistant Sessions Judge. (Vol. 2) 1915 All 101 (102) : 37 All 286 : 16 Cri L Jour 316.

[10] But independently of the provisions of the section a Sessions Judge can under S. 409 transfer an appeal to an Additional Sessions Judge. (Vol. 29) 1942 Oudh 50 (54) : 43 Cri L Jour 50.

[11] Proceedings are held to be cases within the meaning of this section. (Vol. 10) 1923 Cal 649 (649) : 50 Cal 229 : 25 Cri L Jour 661 (DB).

[12] The Sessions Judge should arrange that difficult cases should be tried by himself and not be made over to a less experienced Additional Sessions Judge. (Vol. 22) 1935 Rang 406 (407) : 37 Cri L Jour 196 (DB).

#### SECTION 194—Note 1.

[1] The High Court has no jurisdiction to try an accused on an application made under S. 85 of the Companies Act. (Vol. 23) 1936 All 830 (832) : 38 Cri L Jour 111 : 1 L R (1937) All 220 (FB).

[2] The High Court takes cognizance of a case, not on a complaint or police report or on information as in the case of Magistrates under S. 190, but upon a commitment. ('97) 22 Bom 112 (124).

[3] In Calcutta and Bombay, where the Coroners Act is in force, an inquisition drawn up by the Coroner has the effect of commitment to the High Court, when it has been accepted by the High Court and the officers of the Crown have drawn up a charge in accordance therewith. ('04) 1 Cri L Jour 13 (19) : 31 Cal 1 (DB).

## Objects and Reasons.

"*Clause 194 (2)*—The practice and procedure relating to criminal information differs in many respects from the ordinary procedure laid down by this Code, as, for example, by dispensing with the preliminary inquiry before Magistrates. Now that the provisions of Section 144 of Act X of 1875 [The Advocate-

General's (Powers) Act] are included in the Code instead of being contained in a separate Act, it is desirable to show that they are not subject to the general provisions of this Code. We have therefore prefixed the words "Notwithstanding anything in this Code contained" to this sub-section,"—*S.C.R. 1898.*

## 195. a[(1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate ;  
*Prosecution for contempt of lawful authority of public servants.*

(b) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate ; or  
*Prosecution for certain offences against public justice.*

(c) of any offence described in section 468 or punishable under section 471, section 475 or section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate.]  
*Prosecution for certain offences relating to documents given in evidence.*

(2) In clauses (b) and (c) of sub-section (1), the term " Court " <sup>b</sup>[includes] a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877 <sup>c</sup> III of 1877.

d[(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate.

Provided that—

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate ; and

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.]

## Section 194 (contd.)

[4] The High Court has always got the power to try and punish a person for contempt committed out of Court. (Vol. 22) 1935 All 1 (2, 3) (DB).

[5] The information to be exhibited by the Advocate-General to the High Court against a person under sub-s. (2) (a) should contain a statement of the charge as definite and detailed as an indictment. (Vol. 20) 1933 P C 124 (128) : 34 Ori L Jour 322 : 32 Sind L R 716 (PO) (i). Allegations as to the opinion of the Executive should never be included in such information (ii)—Where ordinary procedure can be adopted, procedure under sub-s. (2) (a) should not be resorted to as in cases of perjury and conspiracy for it will be prejudicial to the accused.

## SECTION 195—Synopsis.

1. Scope and object of the section.
2. " Complaint ".
3. Offences concerning public servants—Sub-section (1), clause (a).
4. Subordination of public servants.
5. Complaint in cases of offences mentioned in clause (a).
6. " Any proceeding "—Clauses (b) and (c).
7. " In relation to any proceeding ".
8. Offence under S. 211, Indian Penal Code, when committed in relation to a proceeding in Court.
9. Prosecution for giving or fabricating false evidence.

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L Jour 780 (DB) \*(Vol. 29) 1942 Lah 76 (78) : 43 Cri L Jour 572 \*(Vol. 25) 1938 Rang 232 (235) : 39 Cri L Jour 663 : 1938 Rang L R 404 (FB) (Vol. 22) 1935 Rang 163 : 36 Cri L Jour 970 overruled).

[21] The Nagpur High Court holds that in such cases if the person defamed was a party to the proceeding in the course of which the statement was made, the offence primarily committed would be one of perjury for which a complaint would be necessary under this section, while if the person defamed was a third party, he can complain of an offence under S. 500. (Vol. 24) 1937 Nag 138 (139) : I L R (1937) Nag 425 : 38 Cri L Jour 775.

[22] The Judicial Commissioner's Court of Sind has held that where a defamatory statement is made in an affidavit in the course of judicial proceeding but it is doubtful whether the facts constitute an offence under section 193, Penal Code, the party defamed can file a complaint under section 500 Penal Code. (Vol. 25) 1938 Sind 129 (129) : 39 Cri L Jour 736 (DB).

[23] The Patna High Court has held that where more than five persons join together and resist the execution of legal process, they can be prosecuted both under Ss. 143 and 186 of the Penal Code and that although the latter section falls under this section and the complaint, required by this section is not present, offence under section 143, Penal Code, can be taken cognizance of. (Vol. 25) 1938 Pat 548 (549) : 17 Pat 680 : 40 Cri L Jour 71 (DB).

[24] Complainant combining complaint of an offence to which the section applies with a complaint of an offence to which the section does not apply—Court must investigate the latter complaint but refuse to investigate the former if it is not in accordance with the section. (Vol. 32) 1945 Nag 210 (211, 212) : I L R (1945) Nag 685 : 47 Cri L Jour 175 \*(Vol. 24) 1937 Lah 802 (803) : 39 Cri L Jour 122 \*(Vol. 11) 1924 All 296 (297) : 25 Cri L Jour 638 \*(Vol. 16) 1929 Cal 633 (635) : 56 Cal 1041 : 31 Cri L Jour 125 (DB).

[See also (Vol. 28) 1941 Mad 576 (576) : 42 Cri L Jour 800 \*(Vol. 7) 1931 Cal 435 (435) : 31 Mad 435].

[See however (Vol. 26) 1939 Bom 129 (137) : 40 Cri L Jour 679 (DB).]

[25] This section and section 476 should be read together. (Vol. 32) 1945 Pat 362 (363, 366) : 24 Pat 174 : 47 Cri L Jour 183 (DB) \*(Vol. 18) 1931 All 443 (446) : 32 Cri L Jour 1105 : 53 All 804 (SB) \*(Vol. 13) 1926 All 21 (22) : 26 Cri L Jour 1506.

[26] Offence alleged to have been committed by a person referred to in Section 197 in the discharge of his official duty—Sanction of the Government is necessary for taking cognizance of offence—If offence is one which also falls under this section complaint referred to in this section will also be necessary for taking cognizance of the offence. (Vol. 25) 1938 Pat 83 (88) : 16 Pat 571 : 39 Cri L Jour 314 (DB).

[27] Where a Magistrate takes cognizance of an offence on a complaint purporting to be made under this section read with S. 476 and convicts the accused but the case is one to which neither this section nor S. 476 applies and therefore the complaint is invalid as a complaint, the entire proceedings are not vitiated and the conviction need not be set aside. (Vol. 25) 1938 Pat 83 (89) : 16 Pat 571 : 39 Cri L Jour 314 (DB).

[28] It has been held that where a complaint under this section is made with reference to some persons,

regard to other persons who may be involved in the offence. (Vol. 23) 1936 Pat 346 (347) : 15 Pat 26 : 42 Cri L Jour 893 (DB) \*(Vol. 27) 1940 Sind 209 (212) : 42 Cri L Jour 141 : I L R (1940) Kar 414 (DI) \*(Vol. 27) 1940 Sind 97 (99) : 41 Cri L Jour 75 : I L R (1940) Kar 287 (DB) \*(Vol. 23) 1936 Cal 14 (149) : 37 Cri L Jour 521 : 63 Cal 819 (DB).

[29] Where a Court makes a complaint only under S. 193, Penal Code, the accused can be tried for an offence under section 471, Penal Code, where the facts stated in the complaint support such a charge. (Vol. 23) 1936 Mad 280 (281, 282) : 37 Cri L Jour 421.

[But see (Vol. 32) 1945 All 397 (399) : I L R (1945) All 668 : 47 Cri L Jour 200.]

2. "Complaint".—[1] Sub-divisional Magistrate acting on information that there was a breach of an order passed by him under S. 144, Cr. P. C. set up a report to the District Magistrate and suggested prosecution of the persons who had committed the breach—District Magistrate passed order sanctioning prosecution of persons concerned—Held that report sent to District Magistrate could not be treated as complaint under S. 195 (1), Cr. P. C. (Vol. 2) 1940 Oudh 241 (242) : 41 Cri L Jour 228 : 15 Luc 344.

[2] Tahsildar proposing prosecution under section 186, Penal Code—Sub-divisional Officer recommending complaint under section 183—Papers forwarded to Tahsildar to Naib-tahsildar with endorsement "In favour of action"—Held, no complaint. (Vol. 2) 1938 Nag 106 (106) : 39 Cri L Jour 58 : I L R (1938) Nag 116.

[3] Communication by Sub-Inspector of Police to Superintendent of Police that a person has committed an offence and praying for permission to file complaint—Communication forwarded by latter to Magistrate "for information any necessary action"—Held, it was not a complaint. (Vol. 23) 1936 All 788 (798, 799) : I L R (1937) All 162 : 38 Cri L Jour 57 (DB).

[4] Complaint need not specify the particular section of the Penal Code—Complaint by Court stating facts constituting offence under S. 471, I.P.C.—Such offence can be taken cognizance of though complaint mentions S. 193, I.P.C. and not S. 471. (Vol. 2) 1936 Mad 280 (281, 282) : 37 Cri L Jour 421.

[5] Information of an offence, given by public servant, to officer in charge of an outpost is not complaint. (Vol. 22) 1935 Pat 214 (216) : 36 Cri L Jour 714 (DB).

[6] It has been held in the following case, that the term "complaint" in cl. (a) of sub-s. (1) is not used in the technical sense in which it is defined in S. 4 (1) (h), under which the report of a police officer is not a complaint. (Vol. 30) 1943 All 6 (7) : 4 Cri L Jour 165 : I L R (1943) All 29.

3. Offences concerning public servants—Sub-section (1) clause (a).—[1] Offences mentioned in cl. (a) of sub-s. (1)—It is the public servant concerned or some other authority to which he is subordinate that is competent to make a complaint. (Vol. 29) 1942 Cal 434 (435) : I L R (1942) 2 Cal 108 : 43 Cri L Jour 410 (DB) \*(Vol. 28) 1941 All 100 (100) : 42 Cri L Jour 823 \*(Vol. 14) 1928 All 342 (342) : 30 Cri L Jour 272 (DB) \*(Vol. 11) 1924 Lah 827 (828) : 29 Cri L Jour 645 \*(Vol. 11) 1924 Mad 780 (780) : 25 Cri L Jour 221 (Complaint by Village Munsif). \*(Vol. 3) 1916 Mad 639 (639) : 3

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423 : 25 Cri L Jour 31 (DB) \*('86) 13 Cal 270 (271) (DB) \*('87) 1887 Rat 342 (343) (DB) \* (Vol. 1) 1914 Sind 19 (19) : 8 Sind L R 41 : 15 Cri L Jour 649 (DB).

[2] A complaint by a private person in respect of any of the offences mentioned in cl. (a) of sub-s. (1) is barred. (Vol. 14) 1927 Rang 61 (66) : 4 Rang 437 : 28 Cri L Jour 145 (DB).

[3] Court cannot take cognizance of any such offence *suo moto*. (Vol. 12) 1925 Mad 400 (400) : 26 Cri L Jour 962 (DB) \* (Vol. 22) 1935 Pat 356 (356) : 36 Cri L Jour 904.

[See also (Vol. 27) 1940 Oudh 424 (425) : 41 Cri L Jour 787.]

[4] Offence under S. 182, Penal Code—Complaint of the public servant, to whom false information was given, and not that of the public servant sought to be injured by such information, is necessary. (Vol. 28) 1941 Mad 764 (765) \* (Vol. 24) 1937 Lah 624 (626) : 38 Cri L Jour 1070 \* (Vol. 3) 1916 Upp Bur 15 (15) : 2 Upp Bur Rul 91 : 17 Cri L Jour 59.

[See (Vol. 3) 1916 Mad 639 (639) : 16 Cri L Jour 423].

[5] Offence under S. 182, Penal Code, alleged to have been committed in respect of a letter written to Collector of the District — Sub-divisional Magistrate who is not concerned in the offence is not competent to prefer a complaint. (Vol. 6) 1919 All 175 (175) : 20 Cri L Jour 702.

[6] Complaint filed before Sub-divisional Magistrate — Sub-Inspector of Police to whom the complaint is sent by Magistrate for inquiry and report cannot make a complaint under S. 182, Penal Code. (Vol. 23) 1936 Pat 56 (56) : 37 Cri L Jour 324 \* (Vol. 16) 1929 Pat 92 (92) : 30 Cri L Jour 545.

[See also ('38) 67 Cal L Jour 593 (596) (DB).]

[7] Offence under S. 188, Penal Code—Complaint of public servant whose order has been disobeyed is necessary. ('43) 9 Cal L Tim 95 (97) \* (Vol. 26) 1939 Mad 496 (496) : 40 Cri L Jour 752 \* ('21) 22 Cri L Jour 705 (706) (DB) (Lah).

[8] A person summoned as a prosecution witness in a case under S. 110, Criminal Procedure Code, refusing to attend Court—Complaint of an offence under section 174, Penal Code, must be by Magistrate in whose Court the case under S. 110, Criminal Procedure Code, was pending and who summoned the accused. (Vol. 29) 1942 Oudh 425 (426) : 43 Cri L Jour 641.

[9] Where no public servant is concerned in the offence, the clause does not apply. ('87) 1887 Rat 315 (316) (DB) \* ('01) 24 Mad 70 (72).

[10] The successor in office of the public servant concerned can make a complaint under the section. (Vol. 26) 1939 Oudh 160 (161) : 40 Cri L Jour 508 \* (Vol. 26) 1939 Sind 164 (165) : 40 Cri L Jour 659 : I L R (1939) Kar 656 (DB) \* (Vol. 25) 1938 Pat 83 (88) : 16 Pat 571 : 39 Cri L Jour 314 (DB).

[11] A complaint under the section cannot be made by a public servant who is himself subordinate to the public servant concerned. (Vol. 27) 1940 Lah 15 (15) : 41 Cri L Jour 383 : I L R (1940) Lah 296.

[12] Complaint given to a village Magistrate and sent by him to Sub-Inspector of Police in the usual course is tantamount to sending of information to police through village Magistrate—Information false—Complaint of an offence under S. 182, Penal Code by Sub-Inspector of Police is valid under this section. (Vol. 29) 1942 Mad 513 (514) : 43 Cri L Jour 574.

[13] In considering whether a complaint is to be made or not by a public servant under this section, the public servant should have regard to the interests of public justice rather than to the gratification of private spite. (Vol. 24) 1937 Pat 31 (33) : 38 Cri L Jour 292.

[14] The following persons have been held to be public servants, in connection with the offences mentioned in this clause.

(a) A peon of a Court of Justice whose duty is to execute any judicial process. (Vol. 29) 1942 Cal 434 (435) : 43 Cri L Jour 410 : I L R (1942) 2 Cal 108 (DB) \* ('95) 22 Cal 759 (761) (DB).

(b) The Collector acting in management of a *khas mahal*, and a surveyor employed by him in such department. (1899) 26 Cal 158 (160) (DB).

(c) A municipal sanitary inspector. ('98) 21 Mad 428 (429) (DB).

[15] The following persons have been held not to be public servants.

(a) A person nominated by Collector under S. 69 of the Bengal Tenancy Act for making a division of the crops between the landlord and the tenant. ('91) 18 Cal 518 (519) (DB).

(b) A local Board sircar. ('07) 6 Cri L Jour 593 (594) (DB) (Cal).

(c) A municipal water-tax collector. ('04) 1 All L Jour 125 (125).

[16] District Judge, to whom false information is given in respect of an insolvency proceeding pending before him, can make a complaint in his capacity as a public servant. In such a case the public servant, though he is the presiding officer of a Court, acts only as an ordinary public servant. (Vol. 1) 1914 All 397 (398) : 36 All 212 : 15 Cri L Jour 860 (DB) \* ('08) 7 Cri L Jour 208 (210) : 1 Upp Bur Rul Cri P C 9 \* (Vol. 14) 1927 Oudh 326 (327) : 2 Luck 646 : 28 Cri L Jour 681 (DB).

[See also (Vol. 6) 1919 Pat 203 (206) : 20 Cri L Jour 247.]

[17] Public servant concerned declining to make a complaint—Public servant to whom he is subordinate cannot make a complaint under this section. (Vol. 21) 1934 Mad 473 (474) : 35 Cri L Jour 1134 : 57 Mad 1101.

4. Subordination of public servants.—[1] The subordination of one public servant to another may arise either from express enactment or from the fact that both belong to the same department one being superior in rank to the other. ('08) 8 Cri L Jour 400 (401) (DB) (Mad).

[See also ('71) 7 Mad H C R 58 (59) (DB) \* ('68) 9 Suth W R Cri 31 (32) (DB) \* ('69) 11 Suth W R Cr 22 (23) (DB).]

[2] Police-officers of the district including District Superintendent of Police are subordinate to District Magistrate (Vol. 10) 1923 All 149 (149, 150) : 45 All 135 : 24 Cri L Jour 597 (DB) \* ('04) 1 Cri L Jour 899.

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of the offence. Where on such date no proceedings have been started in Court but merely contemplated, the clause does not apply. (Vol. 33) 1946 Bom 7 (9): 47 Cri L Jour 321 (DB) \*(Vol. 26) 1939 Bom 129 (187): 40 Cri L Jour 579 (DB) \*(Vol. 19) 1932 Bom 185 (186, 187): 56 Bom 213: 33 Cri L Jour 388 (DB) \*(Vol. 10) 1923 Bom 105 (106, 107): 24 Cri L Jour 171 (DB) \*(Vol. 3) 1916 Mad 72 (73): 39 Mad 677: 16 Cri L Jour 721 (DB) \*(Vol. 30) 1943 Nag 327 (328): 45 Cri L Jour 175: I L R (1944) Nag 238.

[But see ('02) 5 Oudh Cas 46 (47, 48) \*(Vol. 8) 1921 Bom 366 (366): 45 Bom 663: 22 Cri L Jour 49 (DB) \*(Vol. 17) 1930 Bom 337 (339): 54 Bom 273: 32 Cri L Jour 391 (DB).]

[2] A files a complaint before a Magistrate alleging that B has fabricated false accounts for the purpose of filing false suits in Court but no suits are actually filed on the date of complaint—The fact that subsequent to the entertainment of the complaint the accused files a suit in the Civil Court will not deprive the Criminal Court of jurisdiction to try the complainant in accordance with law. (Vol. 30) 1943 Nag 327 (328): I L R (1944) Nag 238: 45 Cri L Jour 175 \*(Vol. 3) 1916 Mad 72 (73, 75): 39 Mad 677: 16 Cri L Jour 721 (DB).

[See also (Vol. 30) 1943 Lah 31 (33): I L R (1942) Lah 675: 44 Cri L Jour 305 (DB).]

[3] Where on the date, when the Criminal Court takes cognizance of a complaint, proceedings with reference to which the offence has been committed, have already been started in another Court, then clause (b) applies and the complaint of the latter Court is necessary, although the proceedings in Court are subsequent to the commission of the offence. (Vol. 30) 1943 Nag 327 (328): 45 Cri L Jour 175: I L R (1944) Nag 238 \*(Vol. 27) 1940 Sind 209 (210): I L R (1940) Kar 414: 42 Cri L Jour 141 (DB) \*(Vol. 26) 1939 Bom 129 (137): 40 Cri L Jour 579 (DB) \*(1937) 1937 Mad W N 870 (871).

[4] The mere fact that the proceedings in the Court are withdrawn by the parties without being heard by the Court is no ground for holding that the clause does not apply. (Vol. 19) 1932 Bom 185 (186, 187): 56 Bom 213: 33 Cri L Jour 386 (DB).

[See also ('13) 14 Cri L Jour 289 (290) (Cal).]

[5] Complaint made to police—Police putting up accused before Court—Accused discharged—Offence of laying false charge is committed in relation to a proceeding in Court. (Vol. 32) 1945 Mad 461 (462).

[6] A person charges another before police, accusing him of theft—Police put up accused for trial before Court of Session which tries and finds the case to be false—A subsequent complaint under S. 211, Penal Code, cannot be entertained unless it is by the Court of Session or by the Court to which it is subordinate. (Vol. 14) 1927 Cal 478 (478, 479): 28 Cri L Jour 324 (DB) \*(Vol. 11) 1924 Rang 211 (211): 26 Cri L Jour 353.

[7] A statement recorded under S. 164 of the Code is a statement made in relation to trial before another Magistrate. (Vol. 21) 1934 Lah 981 (982): 16 Lah 155: 36 Cri L Jour 402 \*(Vol. 20) 1933 Mad 767 (768): 35 Cri L Jour 501 (DB) \*(Vol. 20) 1933 Mad 125 (126): 34 Cri L Jour 92.

[See also ('12) 15 Cri L Jour 751 (752) (DB) (Bom).]

[8] A statement made in the inquiry before a

to the trial in the Court of Session. (Vol. 19) Mad 494 (494, 495): 55 Mad 536: 33 Cri L Jour (DB) \*(Vol. 18) 1931 Mad 778 (779): 33 Cri L Jour 55 Mad 178 \*(Vol. 4) 1917 Lah 303 (303): 191 Re No. 29 Cr: 18 Cri L Jour 337 (DB).

[See however ('69) 2 Beng L R App Cr 3 (DB).]

[9] It is indispensable under clause (b) the offence must have in some manner affected the proceedings in Court or designed to affect them, or at least light in the course of such proceedings, and an offence committed long after the termination of the proceedings is outside the scope of the clause. (Vol. 19) 1932 290 (291): 55 Mad 531: 33 Cri L Jour 788 \*(Vol. 19) 1931 Lah 105 (106): 32 Cri L Jour 647 \*(Vol. 19) 1933 Pat 83 (89): 16 Pat 575: 39 Cri L Jour (DB).

[10] Trial in a Court of Sessions—Doe exhibited on behalf of defence but executant of the indictment is neither a party nor a witness in the case—Is there anything to suggest that he intended that document in Court—Section does not apply—Court cannot order his prosecution for perjury or forgery. (Vol. 11) 1924 Cal 986 (987): 25 Cri L Jour 1095 (DB).

[11] An offence committed in trial Court is committed in relation to proceeding of appellate Court. (Vol. 18) 1931 All 706 (707): 53 All 799: 33 Jour 285 (DB) \*('13) 14 Cri L Jour 47 (47): 390 \*('13) 14 Cri L Jour 32 (32) (DB) (Cal) \*('13) 1916 Pat 97 (98): 1 Pat L Jour 298: 18 Cri L Jour 135 (DB) \*(Vol. 6) 1919 Pat 189 (191): 20 Cri L Jour 202 \*('81) 2 Weir 160 (168).

[See also (Vol. 24) 1937 Sind 198 (195): 38 Jour 1002 (DB).]

[See however (Vol. 6) 1919 Mad 1132 (1134) Mad 737: 19 Cri L Jour 483 (DB).]

8. Offence under Section 211, Penal Code, committed in relation to proceeding in Court—Sub-section (1), clause (b) applies only where the offence is committed in or in relation to proceeding in Court. (Vol. 26) 1939 Rang 148 (148): 40 Cri L Jour 432 \*(Vol. 26) 1939 Sind 65 (65, 66): I L R (1939) Kar 388: 40 Cri L Jour 461 (DB) \*(Vol. 25) 1938 Sind 213 (215): 40 Cri L Jour 12: I L R (1938) 241 (DB).

[2] Offence under S. 211 Penal Code—Where there is only a false charge of complaint to the police there are no further proceedings in Court clause does not apply. (Vol. 28) 1941 Mad 579 (580): 41 Cri L Jour 640 \*(Vol. 17) 1930 All 818 (819): 32 Cri L Jour 314 \*('07) 8 Cri L Jour 396 (397): 30 A \*('10) 11 Cri L Jour 37 (39): 37 Cal 250 (DB) \*('10) 6 Cal 592 (593) (DB) \*('05) 2 Cri L Jour 66: 1905 Pan Re No. 12 Cr \*('70) 1870 Pan Re No. 1 p. 30 (31) (FB) \*(Vol. 15) 1928 Nag 17 (19): 23 I L R 136: 28 Cri L Jour 934 \*('08) 8 Cri L Jour 350: 4 Nag L R 136 \*('97) 1 Weir 120 (120) \*(Vol. 4) 1917 Low Bur 65 (66): 8 Low Bur 584: 18 Cri L Jour 758 \*(Vol. 21) 1934 Rang 40 (41): 35 Cri L Jour 802.

[3] The fact that subsequent to the institution of the prosecution by the police, the accused repeats a charge made in a statement to the police before a Magistrate, cannot make the provisions of this section applicable so as to require the complaint of the Magistrate. (Vol. 26) 1939 Cal 273 (273): I

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1928 Bom 22 (23): 29 Cri L Jour 225 (DB) \* (Vol. 21) 1934 Pat 573 (574): 13 Pat 789: 86 Cri L Jour 200 (DB) \* (Vol. 19) 1932 Pat 152 (154): 11 Pat 155: 33 Cri L Jour 153 (DB) \* (Vol. 21) 1934 Rang 21 (23): 35 Cri L Jour 1259 \* ('94) 1894 Rat 704 (705) (DB).

[But see (Vol. 14) 1927 Cal 95 (96): 53 Cal 824: 28 Cri L Jour 86 (DB).]

[4] Where a person charges several persons before the Police, but the police put up for trial before the Court only some of them, the complaint of the Court is not necessary for prosecuting the complainant under S. 211, Penal Code, in respect of the other persons not sent up for trial. (Vol. 19) 1932 Mad 363 (368): 55 Mad 611: 33 Cri L Jour 479 (FB) \* (Vol. 15) 1928 Lah 259 (262): 9 Lah 408: 29 Cri L Jour 605 (DB) \* (Vol. 11) 1924 All 779 (780): 46 All 906: 25 Cri L Jour 1289 (DB).

[But see ('12) 13 Cri L Jour 702 (703) (DB) (All).]

[5] Person making a false report of dacoity to police—Police instead of proceeding on this report prosecuting certain persons under S. 324, Penal Code—This charge also failing—There is no objection to the informer being prosecuted under S. 182, Penal Code, on a complaint by Police in regard to his false report of dacoity—A complaint by Court is not necessary. (Vol. 17) 1930 Oudh 414 (415).

[6] Complaint preferred to police investigated and brought to notice of Magistrate by police who report it to be false under S. 173 of the Code—Clause (b) does not apply. (Vol. 26) 1939 Sind 65 (65): 1 L R (1939) Kar 388: 40 Cri L Jour 461 (DB) \* (Vol. 25) 1938 Sind 213 (215): 40 Cri L Jour 12: 1 L R (1939) Kar 241 (DB) \* ('84) 7 Mad 292 (294) (DB) \* ('81) 3 All 322 (327) (DB) \* (1900) 4 Cal W N 351 (352) (DB).

[7] Police finding on investigation that information or complaint made to it is false and bringing it to notice of Magistrate, who thereupon orders police to stop further investigation, or to remove the case from file, or makes enquiry into truth of police-report either himself or through another Magistrate—It is not necessary that complaint under S. 211 need be filed by Magistrate under clause (b). (Vol. 21) 1934 Mad 176 (176): 35 Cri L Jour 698 (DB) \* ('12) 13 Cri L Jour 480 (480) (DB) (Mad) \* ('12) 13 Cri L Jour 904 (905) (DB) (Bom) \* (Vol. 3) 1916 Cal 593 (594): 43 Cal 1152: 18 Cri L Jour 13 (DB) \* ('06) 3 Cri L Jour 125 (126): 33 Cal 30 (DB) \* ('08) 7 Cri L Jour 338 (339) (DB) (Cal) \* ('13) 14 Cri L Jour 387 (388) (DB) (Cal) \* (Vol. 11) 1924 Pat 789 (790): 25 Cri L Jour 670.

[But see (Vol. 23) 1936 Lah 233 (233): 37 Cri L Jour 426 \* (Vol. 33) 1946 Bom 7 (11): 47 Cri L Jour 321 (DB).]

[8] Accused person arrested by police on charge of cheating—Subsequently, after investigation, police reported the case to be false and asked Magistrate to discharge accused—Magistrate discharged accused—Held that Magistrate's order was a judicial order and Magistrate's complaint was necessary for prosecution of informant under S. 211, Penal Code. (Vol. 28) 1941 Bom 294 (296): 42 Cri L Jour 814 (DB).

[9] Offence under S. 211, Penal Code—No complaint as required by cl. (b) of S. 195—Magistrate cannot summon accused—Subsequent proceedings are void. (Vol. 34) 1947 Pat 64 (65).

[10] Magistrate taking cognizance of the offence upon police-report—He should not order prosecution of complainant under S. 211, Penal Code, without giving him an opportunity to substantiate the charge—But objection on the ground of failure to give such an opportunity should be taken before trial—After trial conviction will not be considered to be vitiated on that ground. (Vol. 12) 1925 Pat 708 (710): 26 Cri L Jour 893 (DB) \* (Vol. 16) 1929 Pat 650 (651): 8 Pat 734: 30 Cri L Jour 1144 (DB) \* (Vol. 17) 1930 Pat 622 (623): 9 Pat 126: 81 Cri L Jour 934 (DB) \* (Vol. 21) 1934 Rang 21 (23, 24): 35 Cri L Jour 1259.

[See ('96) 22 Bom 596 (600) (DB).]

[11] Person complaining to police and also repeating complaint in Court before police take action under S. 211, Penal Code—Clause (b) applies—Prosecution under S. 211 cannot be instituted without complaint of Court. (Vol. 33) 1946 Bom 7 (10): 47 Cri L Jour 321 (DB) \* (Vol. 26) 1939 Nag 226 (227): 40 Cri L Jour 638 \* (Vol. 4) 1917 Cal 593 (594): 43 Cal 1152: 18 Cri L Jour 13 (DB) \* (Vol. 14) 1927 Mad 851 (852): 28 Cri L Jour 849 \* (Vol. 12) 1925 Pat 483 (484): 4 Pat 323: 26 Cri L Jour 889 (DB) \* (Vol. 15) 1928 Rang 254 (255): 6 Rang 578: 30 Cri L Jour 342 \* (Vol. 3) 1916 Upp Bar 18 (19): 2 Upp Bar 95: 17 Cri L Jour 177 \* (Vol. 16) 1929 Sind 115 (117): 25 Sind L R 225: 35 Cri L Jour 399 (DB) \* (Vol. 16) 1929 Sind 132 (134, 135): 25 Sind L R 285: 30 Cri L Jour 732 (DB) \* (Vol. 19) 1932 Pat 152 (154): 11 Pat 155: 33 Cri L Jour 153 (DB) \* (Vol. 19) 1932 Cal 383 (383): 33 Cri L Jour 514 (DB).

[See however ('12) 13 Cri L Jour 576 (577): 1 Upp Bar 134 \* (Vol. 3) 1916 Cal 867 (869): 43 Cal 173: 17 Cri L Jour 146 (DB).]

[12] Complaint made to police by a certain person repeated in Court by some other person—Person making report to police can be regarded as having committed offence in relation to a proceeding in Court. (Vol. 27) 1940 Sind 209 (211): 42 Cri L Jour 141: 1 L R (1940) Kar 414 (DB).

[13] No complaint by Court should be made without disposing of complaint of person charged, in accordance with law, and giving him opportunity to substantiate complaint. (Vol. 19) 1932 Cal 383 (383): 33 Cri L Jour 514 (DB) \* ('87) 14 Cal 707 (711, 712, 716, 717, 720) (FB) \* (Vol. 8) 1919 Pat 530 (531): 20 Cri L Jour 339 \* ('02) 2 Weir 167 (168) (DB) \* (Vol. 19) 1932 Cal 287 (288): 33 Cri L Jour 406 (DB).

[14] The following cases hold that, where a complaint made to police is repeated before the Court, there is no bar to a prosecution for giving false information to the police, under S. 182, Penal Code, or for laying a false charge before the police. (Vol. 11) 1924 All 187 (187): 46 All 43: 25 Cri L Jour 729 \* (Vol. 15) 1928 All 765 (766): 51 All 332: 29 Cri L Jour 938 \* (Vol. 6) 1919 All 159 (159): 20 Cri L Jour 114 \* (Vol. 11) 1924 All 779 (780, 781): 46 All 906: 25 Cri L Jour 1289 (DB) \* (Vol. 19) 1932 Cal 511 (511): 59 Cal 334: 33 Cri L Jour 631 (DB) \* (Vol. 30) 1943 Lah 31 (38): 1 L R (1942) Lah 675: 44 Cri L Jour 305 (DB) \* ('12) 13 Cri L Jour 578 (579) (FB) (Low Bar) \* (Vol. 18) 1931 Rang 12 (14): 8 Rang 499: 32 Cri L Jour 202 (DB) \* (Vol. 8) 1921 Low Bar 43 (43, 44): 11 Low Bar 43.

[15] The following cases hold that, where a complaint made to police is repeated before the Court the prosecution should be for the graver offence under S. 211, Penal Code, and that complaint under S. 182;



mitted by a person, not a party to a proceeding in  
— The section does not apply— Complaint of a  
not necessary for taking cognizance of the offence.  
32) 1945 Pat 362 (363); 24 Pat 174; 47 Cri L Jour  
(DB) \* (Vol. 24) 1937 Bom 14 (14); 33 Cri L Jour  
(DP) \* (Vol. 28) 1936 Rang 369 (372, 373);  
L Jour 1008 \* (Vol. 2) 1915 Mad 1033 (1033);  
Mad 400; 16 Cri L Jour 797 (DB) \* (89) 10  
Jour 427 (427, 428); 32 All 74 (DB) \* (Vol. 22)  
New 104 (1911); 21 New 277; 36 Cri L Jour



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Cri L Jour 564 (DB) \* (Vol. 8) 1921 Sind 48 (49) : 15 Sind L R 149 (DB) \* (Vol. 4) 1917 Cal 35 (35) : 18 Cri L Jour 839 (DB) \* (Vol. 15) 1929 Lah 125 (126) : 29 Cri L Jour 1081 \* ('11) 12 Cri L Jour 87 (88) (Low Bur) \* (Vol. 16) 1929 Mad 115 (117) : 30 Cri L Jour 469 \* (Vol. 21) 1934 Bom 306 (306) : 35 Cri L Jour 1403 (DB) \* (Vol. 27) 1940 Lah 292 (297) : 41 Cri L Jour 843 (DB).

[See however ('93) 18 Bom 581 (585) (DB).]

[2] Offender not a party to the proceeding but abetting commission of offence by party—No complaint of Court is necessary. (Vol. 15) 1928 Lah 787 (791) : 10 Lah 442 : 30 Cri L Jour 485 (DB) \* (Vol. 21) 1934 Sind 78 (78) : 35 Cri L Jour 1251 (DB) \* (Vol. 21) 1934 Mad 316 (317) : 57 Mad 632 : 35 Cri L Jour 780 (DB).

[But see (Vol. 24) 1937 Sind 193 (195) : 38 Cri L Jour 1002 (DB) \* (Vol. 21) 1934 Mad 316 (317) : 57 Mad 632 : 35 Cri L Jour 780 (DB).]

[3] Offence mentioned in clause (c) committed by several persons, but only one of them is a party to proceeding in Court—There is no bar to the Court taking cognizance of the offence against non-parties otherwise than in the manner prescribed by this section. (Vol. 15) 1928 All 21 (22) : 28 Cri L Jour 986 \* (Vol. 4) 1917 Cal 121 (122) : 18 Cri L Jour 901 (DB) \* ('11) 12 Cri L Jour 101 (101) (DB) (Cal) \* (Vol. 15) 1928 Lah 787 (791) : 10 Lah 442 : 30 Cri L Jour 485 (DB) \* (Vol. 16) 1929 Lah 785 (786) : 31 Cri L Jour 589 \* (Vol. 16) 1929 Mad 115 (116 117) : 30 Cri L Jour 469 \* (1907) 6 Cri L Jour 131 (132) : 30 Mad 226 (DB) \* (Vol. 12) 1925 Rang 28 (29) : 2 Rang 374 : 26 Cri L Jour 295 (DB) \* (Vol. 12) 1925 Rang 195 (196) : 3 Rang 43 : 26 Cri L Jour 500 (DB) \* (Vol. 12) 1925 Rang 296 (298, 299) : 3 Rang 95 : 26 Cri L Jour 1329 (DB) \* (Vol. 21) 1934 Sind 78 (78) : 35 Cri L Jour 1251 (DB).

[See however (Vol. 16) 1929 Mad 21 (25) : 30 Cri L Jour 322 \* ('10) 11 Cri L Jour 558 (369, 370) (Bom).]

[4] Clause (c) applies also to a case where the commission of the offence is anterior to the offender becoming a party to a proceeding in Court. The proper test to be applied for the purpose of determining the applicability of the clause is to see whether the offender is or has been a party to a proceeding in any Court not on the date of the commission of the offence but on the date when the Criminal Court is invited to take cognizance of the offence. (Vol. 5) 1918 Cal 792 (793) : 44 Cal 1002 : 18 Cri L Jour 522 (DB) \* ('10) 11 Cri L Jour 280 (280) (DB) (Cal) \* (Vol. 12) 1925 Lah 266 (266) : 5 Lah 550 : 26 Cri L Jour 537 \* ('37) 1937 Mad W N 92 (93) \* ('37) 1937 Mad W N 887 (888) \* (Vol. 17) 1930 Mad 869 (870) : 32 Cri L Jour 219 \* (Vol. 19) 1932 Rang 139 (140, 141) : 33 Cri L Jour 919 \* (Vol. 19) 1932 Sind 90 (91) : 26 Sind L R 73 : 33 Cri L Jour 452 (DB) \* (Vol. 4) 1917 Nag 198 (199) : 18 Cri L Jour 1001 \* (Vol. 23) 1936 Bom 221 (222) : 37 Cri L Jour 814 : 60 Bom 756 (DB) \* (Vol. 24) 1937 Bom 14 (14) : 38 Cri L Jour 149 (DB).

[But see (Vol. 3) 1916 Cal 711 (712) : 16 Cri L Jour 617 (DB) \* (1902) 4 Bom L R 268 (270) (DB) \* (Vol. 24) 1937 All 714 (716) : 39 Cri L Jour 38 : I L R (1937) All 799 (DB) \* (Vol. 18) 1931 All 443 (447) : 32 Cri L Jour 1105 : 53 All 804 (SB) (Impliedly overruling (Vol. 3) 1916 All 299 (302) : 17 Cri L Jour 289 : 35 All 169 (DB) \* (Vol. 13) 1926 All 30 (33) : 26 Cri L Jour 1485 : 48 All 60 \* (1912) 13 Cri L Jour 863 (864) : 34 All 654 (DB).]

[5] The clause does not apply when offence is committed subsequent to termination of proceedings in Court, in which the offender has been a party) ('40) 1940 Mad W N 865 (867) \* (Vol. 19) 1932 Mad 290 (291) : 55 Mad 531 : 33 Cri L Jour 788 \* (Vol. 17) 1930 Cal 278 (280) : 31 Cri L Jour 1205 (DB).

[See also (Vol. 8) 1921 Cal 433 (433, 434) (DB).]

[6] A complainant in a criminal case being a prosecutor is a party to the proceeding in Court, and a complaint of the Court disposing of the case is necessary for prosecuting him for the offence of forgery under S. 467, Penal Code. (Vol. 13) 1926 All 30 (32, 33) : 48 All 60 : 26 Cri L Jour 1485.

[7] A claimant filing a claim in insolvency before Official Assignee is a party to insolvency proceedings—Complaint of Insolvency Court is necessary for taking cognizance of any of the offences referred to in the section—Complaint by Official Assignee is not enough. (Vol. 7) 1920 Mad 218 (219) : 43 Ma 11 : 20 Cri L Jour 193 \* (Vol. 1) 1914 Mad 474 (477) : 37 Mad 107 : 13 Cri L Jour 241.

[8] The guardian or next friend of a party to a proceeding is not himself a party to such proceeding. (Vol. 31) 1944 Mad 528 (528) : 46 Cri L Jour 161 : I L R (1945) Mad 157 \* (Vol. 24) 1937 Bom 14 (14) : 38 Cri L Jour 149 (DB).

13. "In respect of a document produced or given in evidence in such proceeding."—[1] Document in respect of which offence is committed not produced or given in evidence in a proceeding in Court—Clause (c) does not apply. (Vol. 7) 1920 Lah 89 (90) : 21 Cri L Jour 7.

[2] The word "or" between the words "produced" and "given in evidence" shows that the two things are disjunctive. (Vol. 29) 1942 Sind 62 (64) : 43 Cri L Jour 612 : I L R (1942) Kar 12 (DB) \* (Vol. 16) 1929 Pat 60 (63) : 30 Cri L Jour 236.

[3] The term "produced" has been held to mean produced for the purpose of being tendered in evidence or for some other purpose. ('07) 6 Cri L Jour 78 (79) (DB) \* ('12) 13 Cri L Jour 6 (7) (DB) (Cal) \* ('97) 1897 Pan Re No. 12 Cr. p. 29 (31, 32) (DB).

[4] Document handed over to Judge by party but Judge returns it without taking it on file, or rejects it as being inadmissible in evidence owing to want of stamp or registration—Document is produced within the meaning of the section. (Vol. 12) 1925 Bom 467 (469) : 49 Bom 799 : 27 Cri L Jour 251 (DB) \* ('86) 1886 Rat 242 (242) (DB) (Case under old Code).

[5] Document sent for from the file of another Court and used by pleader in arguments and referred to in judgment—Clause (c) applies to the case. (Vol. 5) 1918 Cal 792 (793) : 44 Cal 1002 : 18 Cri L Jour 522 (DB).

[6] Document produced in Court—Document need not be considered or acted upon by Court. ('02) 29 Cal 887 (888, 889) (DB) \* (Vol. 16) 1929 Cal 203 (204) : 30 Cri L Jour 656 (DB).

[7] Document produced before arbitrator in a reference made in a pending suit—Document filed in Court by arbitrator along with award and thus becoming part of the Court records—Document is produced within the meaning of the section although it is not considered by the Court. ('07) 6 Cri L Jour 331 (332) (DB) \* (Vol. 1) 1914 Lah 253 (253) : 15 Cri L Jour 353 : 1914 Pan Re No. 3 Cr. (DB).

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[3] Forged document used in an enquiry by a police-officer under S. 202 of the Code—Production of document is in, or in relation to, proceeding of Magistrate who has directed enquiry. (Vol. 21) 1934 Pat 156 (153) : 35 Cri L Jour 1309.

[9] Document, alleged to be forged, similarly mentioned in the affidavit as to documents, but not actually put into Court. Held that, provisions of this clause do not apply, notwithstanding further fact that document has been inspected by opposite party and has even been filed in the Court translator's office for translation in accordance with rules. (Vol. 10) 1923 Mad 136 (137) : 45 Mad 928 : 24 Cr. L Jour 310 (FB).

[10] Document not actually produced in Court because of its custody with Registrar but relied upon in the list of documents filed by party—Court has also called for its production from Registrar—Held, clause (c) applies to the clause. (Vol. 4) 1917 Nag 198 (199) : 18 Cri L Jour 1001.

[11] Production contemplated is that of original and not of a copy of the document—Prosecution under S. 471, Penal Code, started for having used forged entries in support of a claim in a Court by producing certified copies of such entries—Prosecution is not bad for want of complaint under this section. (Vol. 12) 1925 Oudh 413 (414) : 29 Oudh Cas 1 : 26 Cri L Jour 929 \* ('05) 2 Cri L Jour 653 (654, 655) : 8 Oudh Cas 313.

[12] Production of a certified copy of a forged document in Court is user of forged original, punishable under S. 471, Penal Code—Prosecution under S. 471 is bad if there be no complaint by Court. (Vol. 19) 1932 Sind 90 (91) : 26 Sind L R 73 : 33 Cri L Jour 452 (DB).

[13] Clause (c) applies to documents produced in Court whether by party who is alleged to have committed the offence or by any one else. (Vol. 12) 1925 Bom 433 (434) : 49 Bom 608 : 27 Cri L Jour 69 (DB) \* (Vol. 29) 1942 Sind 62 (64) : 43 Cri L Jour 612 : 1 L R (1942) Kar 12 (DB).

[But see (Vol. 7) 1920 Pat 147 (148, 149) : 5 Pat L Jour 135 : 21 Cri L Jour 272 (DB).]

[14] Where the criminal Court has taken cognizance of an offence, e.g., forgery, the production of the document alleged to be forged subsequent thereto in a Civil Court will not make the section applicable so as to necessitate a complaint of the Civil Court. (Vol. 24) 1937 Lah 238 (239) : 38 Cri L Jour 581 \* (Vol. 16) 1929 Cal 633 (634) : 56 Cal 1041 : 31 Cri L Jour 125 (DB).

[15] Document produced before committing Magistrate by accused in a prosecution relating to the document under S. 218, Penal Code—Complaint of Magistrate is not necessary for trying accused in the Court of Session on a charge of forgery under S. 465, Penal Code, in respect of the same document. (Vol. 19) 1932 Bom 545 (546, 549) : 56 Bom 488 : 34 Cri L Jour 357 (DB).

[16] Where the Magistrate has taken cognizance of the offences of cheating and criminal misappropriation, he is also entitled to take cognizance of the offence of forgery which is alleged to be part of the same transaction and which came to light during the proceedings before him, although the forgery is in respect of a document given in evidence in such proceedings. (Vol. 28) 1939 Sind 222 (224) : 1 L R (1940) Kar 95 : 40 Cri L Jour 818 (DB).

[17] Where a document alleged to be forged is not produced by a party in the civil suit filed on the basis of such document because the suit has been withdrawn, the subsequent production of the document, as per order of the Court, in a proceeding started after the disposal of the suit on an application for ordering a prosecution cannot be regarded as produced within the meaning of the section. (Vol. 10) 1923 Mad 136 (137, 140) : 45 Mad 928 : 24 Cri L Jour 340 (FB).

[18] Proceedings pending—Document alleged to be forged produced in the proceedings though only as an annexure to a report by a guardian—The clause applies. (Vol. 14) 1927 Nag 181 (188, 189) : 23 Cri L Jour 383.

14. "Of any offence described in S. 463"—Clause (c).—[1] Clause (c) will apply to an offence under Ss 465, 467 and 468 of the Penal Code as they are offences described in S. 463. (Vol. 6) 1919 Pat 551 (553, 554) : 20 Cri L Jour 630 \* ('74) 1874 Rat 83 (83) (DB) \* (Vol. 27) 1920 Sind 160 (101) : 1 L R (1910) Kar 435 : 41 Cri L Jour 561 (DB) \* ('37) 1937 Mad W N 92 (93) \* (Vol. 24) 1927 Pesh 67 (69) : 33 Cri L Jour 748 \* (Vol. 2) 1915 All 21 (22) : 16 Cri L Jour 203 \* (Vol. 3) 1916 Cal 711 (712) : 16 Cri L Jour 617 (DB) \* (Vol. 12) 1925 Lah 266 (266) : 5 Lah 550 : 26 Cri L Jour 537 \* (Vol. 12) 1925 Nag 337 (338) : 26 Cri L Jour 1115 \* (Vol. 13) 1926 Oudh 485 (486) : 1 Luck 523 : 27 Cri L Jour 969 \* ('12) 13 Cri L Jour 35 (36, 37) : 36 Mad 387 (DB) \* (Vol. 20) 1933 Cal 481 (481) : 34 Cri L Jour 526 (DB).

[2] Clause (c) does not apply to an offence under S. 474 as it is not an offence described in section 463. (Vol. 10) 1923 Mad 136 (140) : 45 Mad 928 : 24 Cri L Jour 340 (FB) \* (Vol. 2) 1915 Cal 596 (596) : 16 Cri L Jour 309 (DB).

[See however (Vol. 14) 1927 Mad 1060 (1060) : 28 Cri L Jour 225.]

15. Who can make a complaint under clauses (b) and (c).—[1] It is only the Court in or in relation to whose proceedings the offence is committed, or the Court to which such Court is subordinate within the meaning of sub-s. (3), that is competent to make a complaint in respect of the offences mentioned in clauses (b) and (c). No other Court can complain. (Vol. 7) 1920 Sind 49 (49) : 14 Sind L R 69 : 21 Cri L Jour 787 \* (1900-02) 1 Low Bar Ral 47 (48) \* ('78) 2 Bom 653 (653) (DB) \* ('70) 1870 Rat 31 (31) (DB) \* ('02) 1902 All W N 9 (9, 10) \* (Vol. 21) 1934 Oudh 344 (346) : 8 Luck 638 : 35 Cri L Jour 824 \* ('08) 9 Cri L Jour 180 (181) (All).

[2] District Judge exercising powers of a District Registrar. cannot, in his capacity as a Judge, make a complaint in respect of an offence committed before him in his capacity as Registrar. (Vol. 10) 1923 All 175 (175) : 24 Cri L Jour 747 \* (Vol. 5) 1918 All 329 (329) : 40 All 144 : 19 Cri L Jour 201 (District Magistrate cannot complain *qua* Magistrate for offence committed in his capacity as Collector).

[See however ('01) 23 All 249 (251).]

[3] Allegation against presiding officer of a Court of his having committed an offence in or in relation to a proceeding in his Court—Alleged offence being one which falls under clause (b) or clause (c) of this section—Complaint in the writing of Court, to which his Court is subordinate, would be necessary for taking cognizance of the offence. (Vol. 25) 1938 Pat 83 (86) : 16 Pat 571 : 39 Cri L Jour 314 (DB).

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[4] The complaint should be filed by the Court, i.e., the presiding Judge of the Court, and not by any other subordinate officer of the Court. ('07) 6 Cri L Jour 160 (161) (DB) (Cal) \* (Vol. 1) 1914 Mad 474 (476) : 37 Mad 107 : 13 Cri L Jour 241 \* (Vol. 7) 1920 Mad 218 (219) : 43 Mad 1 : 20 Cri L Jour 193 \* (Vol. 5) 1918 Mad 460 (461) : 18 Cri L Jour 592 \* (Vol. 22) 1935 Bom 158 (160) : 39 Bom 345 : 36 Cri L Jour 1065 (DB).

[5] Successor in office is competent to make a complaint in respect of offence committed before his predecessor. (Vol. 27) 1940 Lah 292 (297) : 41 Cri L Jour 843 (DB) \* (Vol. 8) 1921 All 210 (210) : 22 Cri L Jour 650 \* (Vol. 11) 1924 All 770 (771) : 46 All 351 : 25 Cri L Jour 1277 \* ('10) 11 Cri L Jour 407 (410) : 37 Cal 642 (SB) (Overruling 5 Cri L Jour 398 (FB)) : 35 Cal 114 and 4 Cri L Jour 209 \* ('12) 13 Cri L Jour 201 (202) : 39 Cal 463 (DB) \* (Vol. 18) 1926 Lah 305 (306) : 7 Lah 103 : 27 Cri L Jour 776 \* (Vol. 16) 1929 Mad 510 (511) : 30 Cri L Jour 966 \* (Vol. 4) 1917 Nag 136 (136) : 14 Nag L R 16 : 18 Cri L Jour 1015 \* (Vol. 14) 1927 Pat 327 (328) : 28 Cri L Jour 643 \* (Vol. 12) 1925 Rang 195 (197) : 3 Rang 48 : 26 Cri L Jour 500 (DB) \* ('11) 12 Cri L Jour 521 (523) (Upp Bar) \* (Vol. 22) 1935 Mad 673 (679) : 58 Mad 954 : 36 Cri L Jour 895 (DB).

[See (Vol. 25) 1933 Pat 83 (88) : 16 Pat 571 : 39 Cri L Jour 314 (DB).]

[6] Successor in office is competent to continue the proceedings for making a complaint under S. 476 which have been started by the predecessor. ('10) 11 Cri L Jour 438 (439) (Al) \* (Vol. 9) 1922 Lah 479 (480) : 23 Cri L Jour 451 \* (Vol. 6) 1919 Mad 896 (897) : 20 Cri L Jour 172.

[But see ('11) 12 Cri L Jour 68 (69) (DB) (Lah).]

[7] Presiding Judge cannot, after he ceases to hold office, make a complaint as he is no longer the Judge of the Court. (Vol. 14) 1927 Pat 327 (328) : 28 Cri L Jour 643 \* (Vol. 11) 1924 All 770 (771) : 46 All 351 : 25 Cri L Jour 1277 \* ('04) 1 Cri L Jour 596 (597).

[See however (Vol. 4) 1917 All 214 (215) : 39 All 297 : 18 Cri L Jour 303 (DB) \* (Vol. 7) 1920 All 177 (179) : 42 All 649 : 21 Cri L Jour 746.]

[8] Court, before which offence was committed, abolished, but reinstated, with modifications, in the territorial jurisdiction, two years later—*Held* that, there was no such continuity as to make the Court reinstated the same, as the one that ceased to exist. (Vol. 3) 1916 Mad 1007 (1007) : 16 Cri L Jour 787 (DB).

[9] Offence of perjury committed before Sessions Judge of Ahmedabad—Subsequently a portion of territory subject to his jurisdiction was transferred to newly constituted Sessions Judge of Kaira—*Held* that Judge of Kaira, though having territorial jurisdiction over the person accused of perjury, had no power to make a complaint regarding offence committed before Judge of Ahmedabad. (Vol. 14) 1927 Bom 47 (48) : 28 Cri L Jour 49 (DB).

[10] In the following case perjury was alleged to be committed before a first class Magistrate and pending proceedings for prosecution of the offender under S. 476 was transferred and was succeeded by a Magistrate of second class powers, it was held that, the District Magistrate was competent to make the complaint.

(Vol. 5) 1918 Bom 244 (245) : 42 Bom 190 : 19 Cri L Jour 332 (DB).

[11] High Court, in the exercise of its revisional jurisdiction, calling for the proceedings in the lower Court—High Court can make a complaint in respect of an offence committed in relation to such proceedings—In such a case the offence can be regarded as committed in or in relation to proceeding in the High Court. (Vol. 24) 1937 Sind 193 (195) : 38 Cri L Jour 1002 (DB).

[12] Offence committed in, or in relation to the proceeding in the High Court—Complaint made by Deputy Registrar is valid as he being the principal officer of the Judicial Branch of the High Court office is deemed to be an officer appointed to file complaints as contemplated in cl. (b) of sub-s. (1) of this section. (Vol. 27) 1940 Nag 410 (411) : 41 Cri L Jour 697.

[13] Several Judges presiding over the same Court—Any one of the Judges can order a complaint to be filed with regard to an offence, committed in relation to the proceedings of the Court (Vol. 24) 1937 Mad 716 (717) : 38 Cri L Jour 871 : I L R (1937) Mad 612 (DB) \* (Vol. 12) 1925 Bom 436 (438) : 49 Bom 710 : 26 Cri L Jour 1189.

[14] Sessions Judge can make a complaint in respect of an offence committed before the Additional Sessions Judge. (Vol. 18) 1931 Cal 190 (191, 192) : 58 Cal 1117 : 32 Cri L Jour 842 (DB).

[See however (Vol. 30) 1943 Cal 103 (104) : 44 Cri L Jour 332 : I L R (1942) 2 Cal 456 (DB).]

[15] It has been held that, the *sirpanch* of a *Panchayat* Court cannot make a complaint under this section when he has not been a member of the Bench of the *Panchayat* Court before which the offence was committed. (Vol. 23) 1936 Nag 275 (276) : I L R (1937) Nag 145 : 38 Cri L Jour 330.

[16] Case transferred for disposal from one Court to another—Transferee Court that tries and disposes of the case, is competent to complain for an offence committed in relation to proceedings in that Court. (Vol. 13) 1926 Cal 738 (739) : 53 Cal 488 : 27 Cri L Jour 648 (DB) \* ('12) 13 Cri L Jour 484 (485) : 39 Cal 1041 (DB) \* (Vol. 17) 1930 Mad 192 (192) : 31 Cri L Jour 986 \* (Vol. 13) 1926 Sind 215 (216) : 20 Sind L R 90 : 27 Cri L Jour 780 (DB) \* (Vol. 18) 1931 Oudh 417 (418) : 7 Luck 222 : 33 Cri L Jour 160.

[See however (Vol. 27) 1940 Lah 292 (297) : 41 Cri L Jour 843 (DB).]

[17] The transferring Court which merely takes cognizance of the case or issues process, cannot make the complaint. (1902) 5 Cal W N 35 (36) (DB).

[18] Attempt to fabricate false evidence made in a proceeding pending before Magistrate at C—Case transferred to Magistrate at S who tries and disposes of the case—It is the latter that should make the complaint although the offence was not actually committed before him. (Vol. 21) 1934 Bom 185 (186) : 35 Cri L Jour 848 (DB).

[But see (Vol. 9) 1922 All 233 (234) : 23 Cri L Jour 608.]

[19] District Magistrate withdrawing a case to his file and disposing of it himself—A complaint for an offence committed in relation to proceedings in that case should be filed by him and not by Magistrate, who originally took cognizance of the case. (Vol. 16) 1929 Cal 724 (726) : 31 Cri L Jour 430 (DB).

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[20] Plaintiff first instituted a suit in Court A and obtained a decree only for a portion claimed, and subsequently filed a fresh suit in Court B and obtained an *ex parte* decree fraudulently in respect of portion disallowed by Court A—Court B should complain for an offence under S. 210 Penal Code. (Vol. 12) 1925 Lah 524 (525): 6 Lah 445: 26 Cri L Jour 1588.

[21] A claim based on a sale deed was made before a subordinate Judge but the claim suit was disposed of by the Munsif, and by the District Judge on appeal—*Held* that subordinate Judge was competent to complain for an offence respecting the sale deed under S. 206, Penal Code, as the offence was committed in order to prevent a sale of the property attached by him and, therefore, was in relation to proceedings in his Court. (1904) 1 Cri L Jour 706 (707).

[22] Case is transferred to another Magistrate not for disposal, but for enquiry and report—Enquiring Magistrate is not competent to prefer a complaint with regard to the offence committed in the course of the enquiry. (Vol. 3) 1916 Cal 867 (869): 43 Cal 173: 17 Cri L Jour 146 (DB) \* (1900) 4 Cal W N 866 (867) (DB) \* (1909) 10 Cri L Jour 424 (426): 32 All 30 (DB).

[But see (1909) 9 Cri L Jour 295 (296) (DB) (Cal).]

16. "Court", meaning of—Sub-section (2).—  
[1] Two tests should be applied in order to see whether a particular officer is a Court:

(a) authority to take evidence on oath, and

(b) authority to give a final decision in the matter.

(Vol. 22) 1935 Mad 673 (677): 36 Cri L Jour 895: 58 Mad 954 (DB) \* (1912) 13 Cri L Jour 723 (730): 36 Mad 72 (DB) \* (Vol. 30) 1943 Cal 574 (577): 44 Cri L Jour 601: 1 I L R (1944) 1 Cal 192 (DB) \* (Vol. 27) 1940 Cal 286 (289): 1 I L R (1940) 2 Cal 14: 41 Cri L Jour 662 (DB) \* (1907) 6 Cri L Jour 160 (161) (DB) \* (Vol. 33) 1946 Bom 7 (11): 47 Cri L Jour 321 (DB) \* (1913) 14 Cri L Jour 72 (73, 74): 37 Bom 365 (DB) (Do.).

[2] According to the following cases for the purpose of deciding as to whether or not a particular officer is a Court within the meaning of the section it is not necessary to apply the test of having authority to give final decision in the matter. (Vol. 12) 1925 All 737 (740, 741): 47 All 934 (DB) \* (Vol. 18) 1931 Lah 862 (663): 12 Lah 391: 32 Cri L Jour 1252.

[3] Registrar or a Sub-Registrar under the Registration Act has no power to make a complaint under the section in respect of the offences mentioned. (Vol. 21) 1934 Mad 316 (317): 57 Mad 682: 35 Cri L Jour 780 \* (189) 12 Mad 201 (203) (DB) \* (193) 15 All 141 (143) \* (Vol. 1) 1914 Bom 202 (202): 16 Cri L Jour 106 (DB) \* (1912) 13 Cri L Jour 845 (845) (DB) (Bom) \* (1909) 9 Cri L Jour 54 (55): 11 Oudh Cas 358 \* (Vol. 11) 1924 Pat 128 (130): 2 Pat 459: 26 Cri L Jour 1432 (DB).

[4] The word "includes" was substituted in 1923 for the word "means" which occurred originally. Legislature must be taken thereby to have intended to widen the scope of the definition in this section, by including Courts other than Civil Criminal or Revenue Courts referred to in S. 476. (Vol. 12) 1925 All 737 (740): 47 All 934 (DB) (Per Sulaiman J.) \* (Vol. 13) 1926 All 30 (32): 48 All 60: 26 Cri L Jour 1435 \* (Vol. 27) 1940 Cal 286 (290): 1 I L R (1940) 2 Cal 14: 41 Cri L Jour 662 (DB) \* (Vol. 27) 1940 Nag 184 (184): 41 Cri L Jour 376 \* (Vol. 18) 1931 Lah 662 (663): 12 Lah 391: 32 Cri L Jour 1252.

[But see (Vol. 12) 1925 All 737 (741): 47 All 934 (DB) (Per Daniels J.).]

[5] A complaint was made under this section by an Honorary Magistrate, whose term of office had expired at the time of the complaint, though it had not expired when the proceedings under S. 476 had been started before him—*Held*, that, the defect was only an irregularity in the complaint curable under S. 537. (Vol. 23) 1936 Pat 316 (319): 15 Pat 26: 37 Cri L Jour 893 (DB).

[6] The following have been held to be Courts within the meaning of this section and S. 476:

(a) An Election Commissioner. (Vol. 22) 1935 Mad 673 (678, 679): 58 Mad 954: 36 Cri L Jour 895 (DB).

[See however (Vol. 12) 1925 All 737 (740): 47 All 934 (DB).]

(b) An Income-tax Collector. (Vol. 1) 1914 Bom 138 (141): 38 Bom 642: 15 Cri L Jour 581 (FB) (Overruling (1906) 4 Cri L Jour 34) \* (1906) 3 Cri L Jour 128 (130): 1905 Pun Re No. 44 Cr. (DB) \* (Vol. 1) 1914 Oudh 114 (114): 15 Cri L Jour 2 \* (Vol. 17) 1930 Rang 201 (202): 8 Rang 25: 31 Cri L Jour 793 \* (1909) 10 Cri L Jour 395 (397, 402): 3 Sind L R 66 (DB).

(c) Divisional officer, hearing an appeal under the Income-tax Act. (1912) 13 Cri L Jour 723 (730, 733): 36 Mad 72 (DB).

(d) A Collector, acting under S. 69 and S. 70, Bengal Tenancy Act. (Vol. 5) 1918 Cal 927 (928): 45 Cal 336: 19 Cri L Jour 273 (DB) \* (Vol. 8) 1921 Cal 260 (260): 48 Cal 1086 (DB).

(e) Sub-Divisional Officer acting under S. 58, Bengal Tenancy Act. (1913) 14 Cri L Jour 139 (140): 40 Cal 465.

(f) Settlement Officer proceeding under Chapter X, Bengal Tenancy Act. (1913) 14 Cri L Jour 197 (204): 40 Cal 477 (FB).

(g) Collector holding investigation under S. 14, Putni Regulation 8 [VIII] of 1819. (Vol. 21) 1934 Cal 457 (458): 61 Cal 792: 35 Cri L Jour 946 (DB).

(h) Deputy *Tahsildar* proceeding under Madras Act, 3 (III) of 1869 in connection with transfer of patta. (1901) 24 Mad 121 (123) (DB) \* (Vol. 10) 1923 Mad 87 (87): 24 Cri L Jour 15 (DB).

(i) Assistant Collector holding mutation proceedings. (Vol. 17) 1930 Oudh 58 (59): 5 Luck 435: 31 Cri L Jour 679.

[See however (Vol. 2) 1915 Lah 250 (250): 16 Cri L Jour 785: 1915 Pun Re No. 18 Cr.]

(j) Collector acting in pursuance of powers conferred under section 70 of the Code of Civil Procedure. (Vol. 4) 1917 All 59 (60): 39 All 91: 18 Cri L Jour 307.

[See however (Vol. 2) 1915 All 283 (284): 16 Cri L Jour 457: 37 All 334.]

(k) *Mamlatdar* in Bombay. (Vol. 23) 1936 Bom 221 (221): 37 Cri L Jour 814: 60 Bom 756 (DB) \* (Vol. 1) 1914 Bom 232 (232): 39 Bom 310: 16 Cri L Jour 99 (DB).

(l) Tribunal formed under the Calcutta Improvement Act, 1911. (Vol. 5) 1918 Cal 932 (933): 45 Cal 585: 19 Cri L Jour 315 (DB).

(m) District Judge acting under S. 22 of Bombay District Municipalities Act. (1913) 14 Cri L Jour 72 (73, 74): 37 Bom 365 (DB).

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(n) Deputy Commissioner deciding revision application under rules framed under S. 240, Punjab Municipal Act. (1921) 22 Cri L Jour 525 (526) (Lah.).

(p) Assistant Registrar acting under R. 14 of the rules framed under S. 43 of the Co-operative Societies Act, 2 [II] of 1912. (Vol. 17) 1930 Mad 869 (870) : 32 Cri L Jour 219.

(q) Registrar of a Court of Small Causes enquiring into the question of service of summons under the Presidency Small Cause Courts Act. (Vol. 2) 1915 Cal 105 (106) : 16 Cri L Jour 151.

[But see ('03) 27 Bom 130 (134) (DB).]

(q) Registrar is a Court only when he is trying suits of the value of Rs. 20 or less under the powers invested under S. 14, Presidency Small Cause Courts Act. He is not a Court when he is engaged on any other kind of duty. (Vol. 29) 1942 Mad 326 (327) : 43 Cri L Jour 738 \* (Vol. 29) 1942 Mad 737 (738) : 44 Cri L Jour 144 : I L R (1943) Mad 600.

(r) Magistrate recording a statement under S. 164 of the Code. (Vol. 22) 1935 All 341 (341) : 57 All 778 : 36 Cri L Jour 1505 (DB).

(s) Mukhtiarakar holding an enquiry in mutation proceedings is a revenue Court within the meaning of this section. (Vol. 27) 1940 Sind 100 (101) : I L R (1940) Kar 435 : 41 Cri L Jour 861 (DB).

[7] The following have been held not to be Courts within the meaning of this section and S. 476 :

(a) District Judge performing the functions under S. 55 of the rules made under the Burma Rural-Self-Government Act (4 [IV] of 1921). (Vol. 27) 1940 Rang 148 (149) : 41 Cri L Jour 687.

(b) Governor in Council or a Member of the Council disposing of an appeal from an order of the Conservator of Forests in a Forest Department case. (Vol. 19) 1932 Cal 390 (393) : 59 Cal 1235 : 33 Cri L Jour 685 (DB).

(c) Debt Settlement Board. (Vol. 27) 1940 Cal 286 (290) : I L R (1940) 2 Cal 14 : 41 Cri L Jour 662 (DB).

[See also (Vol. 27) 1940 Nag 184 (184) : 41 Cri L Jour 376.]

(d) Appellate Officer under Bengal Agricultural Debtors Act, 7 [VII] of 1936. (Vol. 27) 1940 Cal 454 (454) : I L R (1940) 2 Cal 158 : 41 Cri L Jour 951 (DB).

(e) Chairman of a Municipality, scrutinizing a nomination paper under R. 17 (4) of the rules under the Bengal Municipal Act (15 [XV] of 1932) and rejecting it, and the District Magistrate, who hears an appeal from his decision under R. 20, are not Courts. (Vol. 30) 1943 Cal 574 (577) : 44 Cri L Jour 601 : I L R (1944) 1 Cal 192 (DB).

(f) Sub-divisional Magistrate making an order under S. 144 of this Code acts as a public servant and not as a Court. (43) 9 Cal L Tim 95 (97).

[8] (For further information on the topic see A I R Commentaries on the Code of Criminal Procedure 3rd (1946) Edn.)

**17. Subordination of Courts—Sub-section (3).—**

[1] The subordination of Courts generally for the purposes of the Code is dealt with by S. 17 and is different from that dealt with here. (Vol. 17) 1930 Pat 550 (555) : 32 Cri L Jour 210 (DB).

[2] For purposes of Sub-s. (3) it is enough if an appeal lies from the decisions of the Court although the particular proceeding in respect of which the offence is committed is not appealable. (Vol. 17) 1930 All 407 (407) : 31 Cri L Jour 898.

[3] Where appeals lie from a decision of a Court to more Courts than one, the former is subordinate to the appellate Court of inferior jurisdiction. (Vol. 27) 1940 All 7 (7) : I L R (1939) All 975 : 41 Cri L Jour 227 \* (Vol. 26) 1939 All 79 (81) \* (Vol. 20) 1933 Cal 192 (194) : 60 Cal 596 : 34 Cri L Jour 628 (DB).

[4] In the case of a Civil Court from whose decree no appeal lies, it is subordinate to the principal Civil Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate. (Vol. 22) 1935 Mad 673 (679) : 58 Mad 954 : 36 Cri L Jour 895 (DB).

[See ('09) 10 Cri L Jour 454 (458) : 37 Cal 13 (DB).]

[See also (Vol. 22) 1935 All 573 (574) : 36 Cri L Jour 950.]

[5] According to the following cases when a public servant is a Court he is subordinate to the appellate Court as defined in sub-s. (3) only when the offences are those mentioned in cls. (b) and (c) but not in respect of offences mentioned in cl. (a) (Vol. 29) 1942 Oudh 50 (53) : 43 Cri L Jour 50 \* (Vol. 14) 1927 Pat 111 (112) : 6 Pat 39 : 28 Cri L Jour 353 (DB).

[See (Vol. 14) 1927 All 828 (828) : 28 Cri L Jour 547 (DB).]

[6] The following cases have held a different view. (Vol. 9) 1922 Bom 453 (454) : 47 Bom 102 : 23 Cri L Jour 576 (DB) \* (Vol. 6) 1919 Mad 810 (612) : 42 Mad 64 : 20 Cri L Jour 78 (DB).

[7] Order of a subordinate Judge declining to make a complaint under clause (a)—Revision application entertained by High Court against the Order. (Vol. 29) 1942 Cal 434 (435) : I L R (1942) 2 Cal 108 : 43 Cri L Jour 410 (DB).

[See also (Vol. 29) 1942 Cal 307 (308) : 43 Cri L Jour 636 (DB).]

18. "Court to which appeals ordinarily lie".—[1] The words "Court to which appeals ordinarily lie" in sub-s. (3) do not mean Court by which appeals are ordinarily heard. (Vol. 25) 1938 Lah 641 (642) : I L R (1938) Lah 188 : 40 Cri L Jour 140.

[2] Sub-section (3) does not speak of appeals which lie in the particular proceedings. (Vol. 29) 1942 Sind 98 (99) : 43 Cri L Jour 720 : I L R (1942) Kar 64 (DB).

[3] District Munsifs are subordinate to District Judge. (Vol. 20) 1933 Pat 179 (180) : 34 Cri L Jour 410 \* ('93) 1898 Pun Re No. 16 Cr. p. 36 (36) \* (1900) 1900 Pun Re No. 25 Cr. p. 54 (55) (DB) \* ('71) 15 Suth W R Cr. 352 (352) (DB).

[See also ('84) 1884 All W N 57 (57) \* (Vol. 3) 1916 Lah 236 (237) : 17 Cri L Jour 238.]

[See however ('86) 1886 Pun Re No. 34 Cr. p. 80 (81) (DB) \* ('91) 1891 Pun Re No. 10 Cr. p. 32 (34) \* ('79) 1879 Pun Re No. 9 Cr. p. 26 (26, 27) (DB).]

[4] Subordinate Judge, empowered to entertain appeals directly from decrees of Munsifs, by virtue of special notification under the sanction of the Provincial Government, as required by Civil Courts Act of the particular province—Munsif is subordinate to Subordinate Judge. (Vol. 26) 1939 All 79

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(81) \* (Vol. 3) 1914 Mad 1105 (1105, 1106): 16 Cri L Jour 439 (DB): (Vol. 24) 1935 All 693 (397): 54 All 85 (DB) \* (Vol. 5) 1923 Lah 400 (400): 19 Cri L Jour 975: 1918 Pun Re N. 29 Cr. \* (Vol. 13) 1929 Pat 367 (363): 8 Pat 428: 30 Cri L Jour 334 (DB).

[5] District Judge is subordinate to the High Court. (106) 4 Cri L Jour 164 (165): 29 Mad 122 (DB) \* (Vol. 10) 1923 Rang 12 (L): 11 Low Bur Rul 418: 24 Cri L Jour 511.

[6] The Court of Assistant Commissioner in Punjab is subordinate to Commissioner. (75) 1375 Pun Re No. 5 Cr, p. 7 (7) (SB).

[See also (86) 1886 Pun Re N. 7 Cr. p. 13 (14) (DB).]

[7] The Court of Deputy Commissioner, in Lower Burma is subordinate to Commissioner. (93-1900) 1893-1900 Low Bur Rul 529 (530).

[8] A Single Judge of High Court is subordinate to the Bench which hears appeals from his judgment under the Letters Patent. (Vol. 9) 1922 Bom 455 (456): 47 Bom 270: 23 Cri L Jour 497 (DB) \* (Vol. 5) 1918 Cal 850 (852, 853): 44 Cal 816: 18 Cri L Jour 497 (DB) \* (Vol. 31) 1944 Mad 181 (183): 45 Cri L Jour 464: I L R (1944) Mad 643 (DB) \* (Vol. 9) 1922 Mad 495 (496): 45 Mad 928: 24 Cri L Jour 78 (FB) \* (107) 5 Cri L Jour 288 (288, 289) (DB) \* (102) 12 Mad L Jour 408 (403) (SB).

[But see (Vol. 4) 1917 All 474 (475): 39 All 147: 17 Cri L Jour 537 \* (11) 12 Cri L Jour 469 (470) (DB) (Low Bur).]

[9] Revenue Courts are generally subordinate to the Board of Revenue to which appeals ordinarily lie. (1903) 26 Mad 139 (142).

[See also (102) 1902 Pun Re No. 8 Cr. p. 21 (21, 22) \* (91) 1891 All W N 82 (82).]

[10] Assistant Collector acting under the Tenancy Act is subordinate to the District Collector. (95) 1895 All W N 121 (121).

[See also (109) 9 Cri L Jour 180 (181) (All) \* (88) 6 All 98 (101).]

[11] *Tahsildar* holding mutation proceedings, is subordinate to Deputy Commissioner. (Vol. 22) 1935 Oudh 113 (114): 10 Luck 593: 36 Cri L Jour 319 \* (11) 12 Cri L Jour 109 (109) (All).

[12] Under Agra Tenancy Act, 3 [III] of 1926, an appeal lies under S. 243 from decree of a Collector to District Judge; and hence the former is subordinate to the latter within the meaning of this section. (Vol. 21) 1934 All 886 (887): 35 Cri L Jour 1136 \* (Vol. 17) 1930 All 407 (407): 31 Cri L Jour 898.

[13] A Sessions Judge or an Additional Sessions Judge is subordinate to High Court. (Vol. 19) 1932 Bom 551 (552): 34 Cri L Jour 33 (DB).

[14] Assistant Sessions Judge is subordinate to Court of Sessions. (Vol. 33) 1946 Pat 435 (436, 437).

[15] District Magistrate is subordinate to Sessions Judge. (Vol. 11) 1924 Mad 387 (388): 47 Mad 229: 25 Cri L Jour 215 (DB) \* (Vol. 1) 1914 Mad 50 (51): 15 Cri L Jour 409 (DB) \* (90) 1890 All W N 168 (169) \* (108) 8 Cri L Jour 457 (459) (DB) (Lah) \* (Vol. 4) 1917 Lah 91 (93): 1917 Pun Re No. 11 Cr: 13 Cri L Jour 298 \* (Vol. 16) 1929 Nag 97 (98): 25 Nag L R I: 30 Cri L Jour 550 (FB).

[See however (107) 6 Cri L Jour 454 (456): 30 All 109 \* (Vol. 4) 1917 Pat 342 (343): 18 Cri L Jour 759 \* (106) 3 Cri L Jour 121 (123): 1905 Pun Re No. 56 Cr.]

[16] City Magistrate is subordinate to Sessions Judge. (102) 4 Bom L R 750 (752, 753) (DB).

[17] A first class Magistrate is subordinate to Sessions Judge and not to District Magistrate. (Vol. 9) 1922 Bom 453 (454): 47 Bom 102: 23 Cri L Jour 576 (DB) \* (90) 1890 Rat 511 (514) (DB) \* (Vol. 2) 1915 Cal 674 (674): 16 Cri L Jour 640 (DB) \* (107) 7 Cri L Jour 304 (305) \* (11) 12 Cri L Jour 539 (541): 1912 Pun Re No. 2 Cr. \* (102) 1902 Pun Re No. 7 Cr, p. 19 (20) (DB) \* (1864) 1864 Suth W R Cr. 3 (4) \* (1923) 24 Cri L Jour 913 (914) (Pesh).

[18] First class Magistrate is subordinate also to an Additional Sessions Judge because under S. 409 of the Code the latter is empowered to hear appeals to the Court of Session. (Vol. 7) 1920 Bom 415 (416): 44 Bom 877: 21 Cri L Jour 382 (DB) \* (13) 14 Cri L Jour 195 (195, 196) (DB) (Cal) \* (Vol. 6) 1919 Pat 362 (363): 20 Cri L Jour 603: 4 Pat L Jour 374.

[19] First class Magistrate is not subordinate to a Commissioner appointed under the Defence of India Act. (Vol. 8) 1921 Bom 3 (16): 45 Bom 834: 22 Cri L Jour 241 (FB).

[20] A second class Magistrate is subordinate to District Magistrate and not to a first class Magistrate who is specially directed by the District Magistrate to hear appeals from second class Magistrates under S. 407 (2) of the Code. (Vol. 25) 1938 Lah 641 (642): I L R (1938) Lah 188: 40 Cri L Jour 140 \* (Vol. 24) 1937 Pat 176 (177): 38 Cri L Jour 97 \* (Vol. 11) 1924 Mad 387 (388): 47 Mad 229: 25 Cri L Jour 215 (DB) \* (Vol. 10) 1923 All 597 (597): 24 Cri L Jour 658 \* (103) 26 Mad 656 (659) (FB) (Impliedly overruling (1895) 18 Mad 487) \* (102) 1902 All W N 9 (10) \* (Vol. 16) 1929 Cal 172 (173, 174): 56 Cal 824: 30 Cri L Jour 658 (DB) \* (103) 30 Cal 394 (396) (DB) \* (Vol. 7) 1920 Lah 479 (479) \* (107) 5 Cri L Jour 432 (433): 3 Nag I R 50 \* (Vol. 11) 1924 Oudh 239 (239): 25 Oudh Cas 358: 26 Cri L Jour 423 \* (Vol. 17) 1930 Pat 550 (555): 32 Cri L Jour 210 (DB).

[See also (Vol. 25) 1938 Lah 641 (642): I L R (1938) Lah 188: 40 Cri L Jour 140.]

[See however (1900) 2 Bom L R 536 (540) (DB).]

[21] Second class Magistrate is not subordinate to Additional Magistrate. (Vol. 25) 1938 Lah 641 (642): I L R (1938) Lah 188: 40 Cri L Jour 140 \* (Vol. 24) 1937 Pat 176 (177): 38 Cri L Jour 97 \* (31) 1931 Mad W N 1194 (1195).

**19 Subordination where appeals lie to more than one Court—Proviso (a).—**[1] A Subordinate Judge is subordinate to the District Judge and the High Court does not, by virtue of having actually heard the appeal in the particular civil matter relating to the offence, become the superior Court within the meaning of the section. (Vol. 26) 1939 All 79 (81) \* (Vol. 23) 1936 Pat 122 (122): 37 Cri L Jour 413 \* (77) 2 Bom 481 (488) (DB) \* (1887) 11 Bom 438 (440) (DB) \* (Vol. 5) 1918 Cal 791 (791): 18 Cri L Jour 735 (DB) \* (Vol. 14) 1927 Mad 683 (684) (DB) \* (Vol. 6) 1919 Oudh 181 (181): 22 Oudh Cas 189: 23 Cri L Jour 766 (DB) \* (Vol. 5) 1918 Pat 312 (313): 19 Cri L Jour 651 \* (Vol. 18) 1931 Sind 163 (163): 25 Sind L R 196: 32 Cri L Jour 1012 (DB) \* (Vol. 6)

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1919 All 311 (311): 20 Cri L Jour 211 (DB) \* (Vol. 10) 1923 Mad 504 (505): 24 Cri L Jour 337 (DB) \* (Vol. 25) 1938 Pesh 83 (84) \* (Vol. 9) 1922 Lah 346 (347): 24 Cri L Jour 383 (DB).

[2] Subordinate Judge—Subordination is to the Court of District Judge and not to that of Additional District Judge. (Vol. 32) 1945 Pat 322 (325): 24 Pat 1 (DB) \* (Vol. 23) 1941 Pat 592 (593): 42 Cri L Jour 748.

[See however (Vol. 21) 1934 Nag 236 (237): 31 Nag L R 90.]

[3] District Munsif in Punjab is subordinate to the Court of the Subordinate Judge which is the appellate Court of inferior jurisdiction. (Vol. 8) 1921 Lah 28 (29, 30): 2 Lah 57: 22 Cri L Jour 325 (DB) \* ('26) 27 Cri L Jour 75 (76) (Lah) \* (Vol. 11) 1924 Lah 356 (356): 23 Cri L Jour 720.

[See also ('40) 42 Pan L R 25 (25).]

[See however (Vol. 7) 1920 Lah 29 (30): 21 Cri L Jour 485.]

[4] Deputy Commissioner of Santhal Parganas is subordinate to the Court of Commissioner of Bhagalpur. ('03) 30 Cal 916 (917) (DB) (And not to High Court.)

[5] North-West Frontier Province—Court of Judicial Extra Assistant Commissioner is subordinate to that of the District Judge for the purposes of this section. (Vol. 25) 1938 Pesh 83 (84).

[6] A Special Judge invested with special powers under the U. P. Incumbered Estates Act is subordinate to District Judge and not to High Court. (Vol. 27) 1940 All 7 (7): I L R (1939) All 975: 41 Cri L Jour 227.

**20. Subordination where appeals lie to a civil and also to a revenue Court—Proviso (b).—**[1] Assistant Collector acting in a suit for recovery of revenue is subordinate to District Judge. (Vol. 17) 1930 All 407 (407): 31 Cri L Jour 898.

[See (Vol. 21) 1934 All 886 (887): 35 Cri L Jour 1136.]

[2] Proceedings in execution in a suit for arrears of rent are not appealable to District Judge and the fact that the decree in the suit is appealable to District Judge does not make revenue Court acting in execution proceedings subordinate to District Court. ('12) 13 Cri L Jour 44 (46): 34 All 197 (DB).

**21. Subordination of Civil Courts from whose decree no appeal ordinarily lies.—**[1] A provincial Small Cause Court is subordinate to District Court. (Vol. 22) 1935 All 573 (574): 36 Cri L Jour 950 \* (Vol. 24) 1937 Rang 526 (527) \* (Vol. 4) 1917 All 405 (407): 39 All 657: 18 Cri L Jour 935 (FB) \* (Vol. 5) 1918 Cal 910 (910): 18 Cri L Jour 46 (DB) \* (Vol. 4) 1917 Mad 749 (749): 18 Cri L Jour 46 (DB) \* (Vol. 21) 1934 Nag 236 (236): 31 Nag L R 90: 36 Cri L Jour 851 \* (Vol. 6) 1919 Pat 350 (353, 356): 30 Cri L Jour 577 (FB) \* (Vol. 4) 1917 Low Bur 85 (86): 18 Cri L Jour 977.

[But see ('71) 6 Mad H C R 191 (192) (DB).]

[2] Munsif or Sub-Judge functioning as a Small Cause Court is subordinate to District Judge. (Vol. 9) 1922 Lah 401 (401): 23 Cri L Jour 480 \* (Vol. 4) 1917 Mad 749 (749): 18 Cri L Jour 46 (DB) \* (Vol. 12) 1925 Oudh 713 (713): 27 Cri L Jour 83 \* (Vol. 16) 1926 Oudh 515 (516): 31 Cri L Jour 205.

[See also (Vol. 21) 1934 Nag 236 (237): 31 Nag L R 90: 36 Cri L Jour 851.]

[3] Presidency Small Cause Court is subordinate to High Court. (Vol. 3) 1916 Cal 103 (104): 43 Cal 597: 17 Cri L Jour 504 \* (Vol. 12) 1925 Mad 606 (610): 26 Cri L Jour 801: 48 Mad 395 (DB).

[See ('10) 11 Cri L Jour 271 (273): 34 Bom 316 (DB).]

[4] According to prevailing practice of High Court of Calcutta appeal against order for prosecution by Small Cause Court lies to single Judge of High Court exercising original jurisdiction. ('10) 11 Cri L Jour 357 (359): 37 Cal 714.

[See also (Vol. 4) 1917 Cal 527 (529): 18 Cri L Jour 793 (DB).]

[5] According to High Court of Madras Bench of High Court exercising appellate jurisdiction is competent to entertain and dispose of appeal against order for prosecution by Small Cause Court. (Vol. 12) 1925 Mad 609 (610, 611): 26 Cri L Jour 801: 48 Mad 395 (DB) \* ('11) 12 Cri L Jour 545 (546) (DB) (Mad).

[6] Village Panchayat exercising jurisdiction in civil matters is subordinate to District Court. (Vol. 30) 1943 Mad 419 (420): I L R (1944) Mad 26 (DB) \* (Vol. 29) 1942 Oudh 439 (440): 43 Cri L Jour 668 \* (Vol. 18) 1931 All 141 (142): 52 All 1018: 32 Cri L Jour 558 \* (Vol. 21) 1934 All 216 (217): 35 Cri L Jour 1050.

[7] Village Munsif acting under the Village Courts Act, 3 [III] of 1892 is subordinate to District Judge. ('09) 10 Cri L Jour 437 (439) (All).

[8] Mamlatdar in Bombay is subordinate to District Judge. ('08) 5 Bom L R 206 (207) (DB) \* ('07) 6 Cri L Jour 225 (226) (DB).

**22. Abetment, conspiracy and attempt to commit offence—Sub-section (4).—**[1] The provisions of sub-s. (1) apply also to abetment, conspiracy and attempt to commit offences mentioned therein. (Vol. 27) 1940 Sind 100 (101): I L R (1940) Kar 435: 41 Cri L Jour 861 (DB).

[2] Prosecution in respect of a charge of conspiracy under S. 120 B read with S. 193, Penal Code, requires complaint of the Court in or in relation to whose proceedings the offence is alleged to have been committed. (Vol. 19) 1932 Cal 850 (856): 33 Cri L Jour 657 (DB).

[3] In the case of a conspiracy or attempt to commit forgery, it is essential that the offender should be a party to the proceeding in Court as required by clause (c) of sub-section (1). (Vol. 18) 1931 Cal 438 (441): 58 Cal 727: 32 Cri L Jour 883 (DB).

**23. Withdrawal of complaint filed by a public servant—Sub-section (3).—**[1] An appeal lies only against a complaint preferred by a Court under S. 476 in respect of offences falling within clause (b) and clause (c) of this section. (Vol. 14) 1927 All 571 (571): 49 All 752: 28 Cri L Jour 543.

[2] Where a public servant, whether he is a Court or not, files a complaint in respect of an offence falling under clause (a) of this section, there is no appeal. (Vol. 14) 1927 All 828 (828): 28 Cri L Jour 547 (DB) \* (Vol. 18) 1931 All 630 (630): 53 All 594 (DB).

[3] Sub-divisional Magistrate acting under clause (a) of sub-s. (1) is subordinate to District Magistrate—Application for withdrawal of complaint should be made to him and not to Court of Session to which



196. No Court shall take cognizance of any offence punishable under Chapter VI [for IXA] of the Indian Penal Code (except section 127), or punishable against the state, under section 108A, or section 153A, or section 291A, [for section 295A] or section 505 of the same Code, unless upon complaint made by order of, or under authority from, [the Provincial Government or some officer empowered by the Provincial Government] in this behalf.

[1882—S. 196; 1872—S. 465; 1861—S. 166.]

[a] *Inserted* by the Indian Elections Offences and Inquiries Act, 1920 (39 [XXXIX] of 1920), S. 3.

[b] *Inserted* by the Criminal Law (Amendment) Act, 1927 (25 [XXV] of 1927), S. 3.

[c] *Substituted* by A. O. for "the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council."

#### PROVINCIAL AMENDMENTS.

##### BOMBAY

In section 196, after the word and figures 'S. 127' the words and figures 'and S. 171 F so far as it relates to the offence of personation' shall be *inserted*.  
—*Bom. Act XXIX of 1935, S. 2.*

##### CENTRAL PROVINCES AND BERAR.

Same as that of Bombay.

—*C. P. and Berar Act XIX of 1936, S. 2.*

##### N.W.F.P.

Same as that of Bombay.

—*N.W.F.P. Act VIII of 1938, S. 2.*

##### ORISSA

Same as that of Bombay.

—*Regulation No. IV of 1937, S. 2.*

##### PUNJAB

Same as that of Bombay.

—*Punj. Act I of 1936, S. 2.*

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appeals ordinarily lie from his decisions as a Court, or to High Court. (Vol. 14) 1927 Pat 111 (112): 6 Pat 39: 28 Cri L Jour 353 (DB) \* (Vol. 21) 1934 Mad 473 (474, 475): 35 Cri L Jour 1134: 57 Mad 1101 \* (Vol. 29) 1942 Cal 307 (308): 43 Cri L Jour 636 (DB).

[4] The sub-section does not empower a superior authority to make a complaint when the subordinate public servant has declined to do it. (Vol. 21) 1934 Mad 473 (474): 35 Cri L Jour 1134: 57 Mad 1101.

24. "Authority to which such public servant is subordinate"—Sub-section (5).—[1] High Court, as being authority to which a District Judge or an Additional Sessions Judge is subordinate within the meaning of this sub-section, is competent to withdraw a complaint filed by the latter as public servant. (Vol. 14) 1927 All 828 (828): 28 Cri L Jour 547 (DB) \* (Vol. 11) 1924 Oudh 402 (403): 25 Cri L Jour 1127.

[2] District Magistrate directed a complaint to be filed under S. 174, Penal Code—High Court ordered the complaint to be withdrawn in exercise of its revisional jurisdiction. (Vol. 15) 1928 Rang 296 (296): 6 Rang 529: 29 Cri L Jour 912.

25. Appeal.—[1] No appeal lies from an order of a public servant under clause (a) of sub-s. (1) of this section refusing to file a complaint for an offence referred to in that clause. (Vol. 26) 1939 Mad 336 (336): 40 Cri L Jour 568.

26. Revision.—[1] Subordinate Judge declined to make a complaint under sub-s. (1) clause (a) of this section in respect of an offence under S. 186, Penal Code, alleged to have been committed against a peon of the Court while executing a process of the Court—High Court interfered in revision and set aside order of Subordinate Judge, directing him to dispose of the matter after taking into consideration observations of High Court. (Vol. 29) 1942 Cal 434 (435): 1 L R (1942) 2 Cal 108: 43 Cri L Jour 410 (DB).

27. Revision, whether lies against withdrawal of complaint under sub-section (5).—[1] A withdrawal of a complaint under sub-s. (5) is an administrative or executive act and hence not open to revision by the High Court. (Vol. 16) 1929 All 931 (932): 30 Cri L Jour 1159 \* (Vol. 17) 1920 Pat 93 (101): 30 Cri L Jour 710 \* (Vol. 25) 1938 Pesh. 9 (10): 39 Cri L Jour 445.

[2] District Magistrate summarily rejected application under sub-section (5) for withdrawal of a complaint preferred by joint Magistrate without giving notice or hearing applicant—*Held* that application was by way of a judicial revision, and order was open to revision under S. 439. (Vol. 21) 1934 Mad 473 (474) 57 Mad 1101: 35 Cri L Jour 1134.

[3] Where a Joint Magistrate has passed order withdrawing a complaint, the order of the District Magistrate in revision setting aside that order is passed as a Court and is open to revision by the High Court. (Vol. 32) 1945 Mad 58 (58): 46 Cri L Jour 421.

28. Dismissal of complaint for non-compliance with the section, whether bars a fresh and proper complaint.

—[1] Where the Court dismisses a complaint on ground that the complaint does not conform to the requirement of the section the dismissal does not operate as an acquittal by a Court of competent jurisdiction so as to bar a fresh and proper complaint in accordance with the section. (Vol. 15) 1928 Bom 143 (144): 52 Bom 257: 29 Cri L Jour 545 (DB) \* (Vol. 12) 1926 Pat 302 (304): 5 Pat 452: 27 Cri L Jour 849 (DB) \* (Vol. 14) 1927 Sind 10 (12, 15): 21 Sind L R 1: 27 Cri L Jour 1105 (DB).

[See also (Vol. 24) 1937 Mad 301 (302, 303): 38 Cri L Jour 457 (FB).]

#### SECTION 196—Synopsis.

1. Scope and object of the section.
2. Taking cognizance.
3. "Complaint made by order of, or under authority from. . ."



## S. 196 (contd.)

4. Signature on order of sanction.
5. Specification of section under which complaint is to be made.
6. Proof of sanction.
7. Who can sanction prosecution.
8. Sanction not judicial function.
9. Form and contents of complaint.
10. Want of sanction—Effect.
11. Want of complaint—Effect.
12. Facts of case amounting to offence requiring sanction as well as other offence—Effect.

1. **Scope and object of the section.**—[1] Cognizance in cases coming under this section can only be taken on a complaint sanctioned by the authorities mentioned in the section and cl. (b) and (c) of S. 190 have no application to such cases. (Vol. 6) 1919 Mad 968 (969): 42 Mad 180: 20 Cri L Jour 186 (DB) \* ('11) 12 Cri L Jour 2 (3) (SB) (Cal).

[2] Offence under R. 34 (6) (e) and (k) of Defence of India Act charged under R. 38 (1) (a) of that Act—Trial by Sub-divisional Magistrate on a report as required by R. 180 (1) of that Act—Objection that as the act constitutes seditious provisions of this section should be complied with cannot be taken. (Vol. 28) 1941 Mad 363 (364): 1 I L R (1941) Mad 169: 42 Cri L Jour 552.

[3] Offences enumerated under this section are all offences against state either in its external or internal relations. ('11) 12 Cri L Jour 217 (221, 222): 1911 Pan Re No. 11 Cr.

[4] Object of the section is to prevent the intrusion of unauthorized persons into state affairs and also to have such prosecutions instituted by the state itself. ('97) 22 Bom (125) \* (Vol. 10) 1925 Mad 328 (328): 24 Cri L Jour 538 (DB) \* ('11) 12 Cri L Jour 286 (289): 38 Cal 559 (DB).

[5] This section must be construed strictly. (Vol. 6) 1919 Mad 966 (969): 42 Mad 180: 20 Cri L Jour 186 (DB).

[6] Discretion vested in the Government to initiate proceedings cannot be delegated or exercised by any other body or persons. ('10) 11 Cri L Jour 453 (459): 37 Cal 467 (DB) \* (Vol. 9) 1922 Mad 126 (127): 23 Cri L Jour 203 (DB) \* (Vol. 5) 1918 Nag 248 (251).

[7] First prosecution failing or likely to fail owing to technical defect—Desirability of launching fresh prosecution may be decided on the same considerations of policy on which the first prosecution was instituted. (Vol. 7) 1920 Mad 928 (931, 932): 42 Mad 885: 20 Cri L Jour 455 (SB).

[8] Apprehension of the accused disseminating seditious literature no longer existing the accused should be prosecuted for an offence after obtaining sanction under this section. (Vol. 15) 1928 All 344 (344, 345): 50 All 854: 30 Cri L Jour 216.

[9] Cognizance under this section depends on complaint made under authority emanating from official sources while cognizance under S. 197 depends

on sanction. ('90) 1890 Pan Re No. 16 Cr. p. 33 (37) (DB) \* ('10) 11 Cri L Jour 453 (460): 37 Cal 467 (DB).

[10] Decisions bearing on the interpretation of S. 197 are not *ipso facto* applicable to the questions arising under this section as both are distinct from each other. ('10) 11 Cri L Jour 453 (460): 37 Cal 467 (DB) \* ('11) 12 Cri L Jour 217 (221, 222): 1911 Pan Re No. 11 Cr.

[But see ('97) 22 Bom 112 (125) (Decision on S. 197 was applied and followed in case under S. 196).]

[11] Provisions of Bengal Suppression of Terrorists Outrages Act, 1932, are controlled by S. 196, Cr. P.C.

2. **Taking cognizance.**—[1] A complaint made under the sanction of the Government is not necessary for ordering a preliminary investigation under S. 155 of the Code. (Vol. 19) 1932 Lah 581 (581): 33 Cri L Jour 678.

[2] A Magistrate can arrest a person under S. 64 even in respect of an offence mentioned in this section, and release him on bail, without a complaint made by order of the Government. (Vol. 26) 1939 All 682 (683): 1 I L R (1939) All 924: 41 Cri L Jour 85.

[3] Trial commenced on a sanction and complaint in respect of one offence—Facts proved amounting to a different offence—Fresh sanction and complaint specifically directed to the offence proved is necessary to proceed with the case. (Vol. 13) 1926 Rang 169 (171): 4 Rang 131: 27 Cri L Jour 1075 (DB) (Trial for offence under S. 121 A—Offence under S. 124 A proved).

3. **"Complaint made by order of, or under authority from. . ."**—[1] It is enough if the institution of the complaint has been sanctioned by the authorities and sanction of the very words of the complaint is not necessary. (Vol. 6) 1919 Mad 968 (968): 42 Mad 180: 20 Cri L Jour 186 (DB) \* ('09) 9 Cri L Jour 130 (132): 32 Mad 35 (DB) \* ('08) 7 Cri L Jour 10 (13): 35 Cal 141 (DB).

[2] Sanction must be given in each case specifying the person against whom the prosecution is to be instituted. (Vol. 19) 1930 Lah 81 (81): 31 Cri L Jour 692 (DB) \* ('08) 7 Cri L Jour 10 (14): 35 Cal 141 (DB).

[3] The sanction in each case must specify the matter in respect of which a prosecution should be launched. ('12) 13 Cri L Jour 609 (649) (SB) (Cal) \* (Vol. 13) 1926 Rang 169 (171): 4 Rang 131: 27 Cal L Jour 1075 (DB) (Sanction in respect of offence under S. 121 A cannot sustain prosecution under S. 124A).

[4] Prosecution in respect of distinct offence committed on one occasion cannot be made on the sanction in respect of a distinct offence committed in another occasion. (Vol. 11) 1924 Rang 371 (372): 26 Cri L Jour 245.

[5] The presumption that official acts are regularly done may be applied and that the official making the complaint is duly authorized to do so. (Vol. 25) 1938 Mad 758 (760, 761): 39 Cri L Jour 938 \* ('08) 7 Cri L Jour 10 (15): 35 Cal 141 (DB).

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[6] The defect in a sanction due to the failure to address it to some determinate person is only an irregularity which does not go to the root of the jurisdiction. (Vol. 10) 1923 Mad 329 (329): 24 Cri L Jour 539.

[7] An order sanctioning a prosecution under this section need not be in any particular form. (Vol. 5) 1918 Nag 248 (251) \* (Vol. 12) 1925 Mad 106 (107): 25 Cri L Jour 401 (DB) \* ('97) 22 Bom 112 (150) (FB) \* ('08) 7 Cri L Jour 10 (13): 35 Cal 141 (DB).

[8] A sanction of prosecution under the section must be expressed with sufficient particularity. ('08) 7 Cri L Jour 10 (13): 35 Cal 141 (DB) \* ('97) 22 Bom 112 (123) (FB) (*Held* a sanction for prosecution for "certain articles" appearing in a certain paper without specifying date was sufficient) \* (Vol. 12) 1925 Mad 106 (107): 25 Cri L Jour 401 (Do.) \* ('12) 13 Cri L Jour 609 (649) (SB) (Cal) (No rule as to degree of particularity but sanction should be clear as to the matter) \* (Vol. 6) 1919 Mad 969 (969): 42 Mad 180: 20 Cri L Jour 186 (DB) (Do.) \* (Vol. 10) 1923 Lah 333 (334): 25 Cri L Jour 279 (Do.) \* (Vol. 11) 1924 Rang 65 (66): 25 Cri L Jour 193 (Do.) \* (Vol. 5) 1918 Nag 248 (252) (Order for complaint under S. 124A in respect of a speech—Complaint filed in respect of certain passages occurring in the speech—*Held* that complaint was valid) \* (Vol. 33) 1946 Nag 173 (187, 188): 1 L R (1946) Nag 126 (DB) (Authority specifying offences under particular sections of I P C—Particulars of offences though not given, it is valid.)

[9] An order for prosecution under this section need not be in writing. ('97) 22 Bom 112 (124) \* (Vol. 5) 1918 Nag 248 (251).

[10] A sanction to prosecute may be communicated by telegram. (Vol. 7) 1920 Mad 928 (929): 42 Mad 885: 20 Cri L Jour 455 (SB).

[11] Any person can be ordered to make a complaint under this section. ('97) 22 Bom 112 (123) (FB) (Complaint by Oriental Translator to Government) \* (Vol. 25) 1938 Mad 758 (760): 39 Cri L Jour 938 (Police officer may be authorised) \* ('09) 9 Cri L Jour 108 (111): 32 Mad 3 (DB) (Do).

[12] As to the necessity of a previous sanction for prosecution for an offence punishable under Penal Code, S. 161 or S. 165, see Prevention of Corruption Act, 1949 (II of 1947), S. 6.

4. Signature on order of sanction.—[1] An order of sanction need not be signed by the head of the Government himself but may be signed by any officer having authority to sign on behalf of Government. (Vol. 25) 1938 Mad 758 (761): 39 Cri L Jour 938 (Order signed by Chief Secretary held valid and sufficient) \* ('10) 11 Cri L Jour 453 (458): 37 Cal 467 (DB) (Do.) \* (Vol. 5) 1918 Nag 248 (251) (DB) (Do.) \* (Vol. 9) 1922 Cal 298 (299, 300): 50 Cal 135: 24 Cri L Jour 111 (DB) (Order signed by Deputy Secretary held not sufficient).

[2] A Court can take judicial notice of the signature of a gazetted officer who has signed an order for prosecution under this section. (See Evidence Act, S. 57). (Vol. 10) 1923 Mad 600 (606, 601): 24 Cri L Jour 405 (DB).

[3] A person signing an order for prosecution not being himself complainant need not be examined on oath in the case. ('08) 7 Cri L Jour 10 (16): 35 Cal 141 (DB).

5. Specification of section under which complaint is to be made.—[1] The following are three views as to whether the section under this prosecution is sanctioned should be specified in the order:—

[a] Order should be for prosecution under specified sections and an alternative clause sanctioning prosecution under any other section which may be applicable is illegal. ('10) 11 Cri L Jour 453 (459): 37 Cal 467 (DB) \* ('12) 13 Cri L Jour 609 (649) (SB) (Cal).

[b] Section need not be specified provided the matter of complaint is clear. ('10) 11 Cri L Jour 583 (587): 4 Sind L R 55 (DB) \* (Vol. 12) 1926 Rang 169 (171): 4 Rang 131: 27 Cri L Jour 1075 (DB) \* (Vol. 6) 1919 Mad 968 (969): 42 Mad 180: 20 Cri L Jour 186 (DB). (Per Napier, J.)

[c] Section should be specified but sanction under two specified sections alternatively is not bad. (Vol. 9) 1922 Mad 126 (127): 23 Cri L Jour 203 (DB).

[2] Prosecution in respect of certain activities under S. 12 I P C and in respect of certain speeches under 124A I P C sanctioned—Prosecution in respect of speeches under S. 121 was held covered by the sanction. (Vol. 12) 1925 Mad 106 (106, 107): 25 Cri L Jour 401 (DB).

[3] Prosecution under S. 124A sanctioned—*Held* that prosecution for abetment of offence under S. 124A was justified under the sanction. ('09) 9 Cri L Jour 130 (132): 32 Mad 35 (DB).

6. Proof of sanction.—[1] The sanction of the Government for the prosecution must be strictly proved. ('72-92) 1872-1892 Low Bur Ral 389 (389).

[2] A sanction communicated by telegram must be proved to emanate from the Government and no presumption can be made as to the person by whom the telegram was sent. (Vol. 7) 1920 Mad 928 (928, 929): 42 Mad 885: 20 Cri L Jour 455 (SB).

7. Who can sanction prosecution.—[1] Sanction issued by the Government must be the act of the Government as a body and not of a single member of it. (Vol. 7) 1920 Mad 928 (929): 42 Mad 885: 20 Cri L Jour 455 (SB).

[2] No legal obligation is imposed by the Government of India Act imposed upon His Excellency the Governor to consult his Ministers before sanctioning the prosecution. (Vol. 25) 1938 Mad 758 (762): 39 Cr. L Jour 938.

[3] Accused cannot dispute the right of *de facto* Government to sanction prosecution under this section. ('12) 13 Cri L Jour 609 (613, 649) (SB) (Cal).

[4] As to the authority which can sanction the prosecution for an offence punishable under Penal Code, S. 161 or S. 165, see Prevention of Corruption Act, 1947, Section 6.

8. Sanction not judicial function.—[1] Government according or withholding sanction in a judicial capacity

Prosecution for certain classes of criminal conspiracy.

<sup>a</sup>[196A. No Court shall take cognizance<sup>aa</sup> of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code,

(1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provisions of section 196 apply, unless upon complaint made by order or under authority from <sup>b</sup>[the Provincial Government or some officer empowered by the Provincial Government] in this behalf, or

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('04) 1 Cri L Jour 275 (278): 27 Mad 54 (Accused need not be heard before sanction is ordered) \* (Vol. 3) 19:6 Mad 1110 (1112): 13 Cri L Jour 209: 39 Mad 750 (FB) (Sanction need not be upon legal evidence) \* (Vol. 13) 1926 Rang 169 (171): 4 Rang 131: 27 Cri L Jour 1075 (DB) (Per Duckworth, J.).

[2] In cases under S. 196 no reasons are necessary, and the order to prosecute is sufficient. (Vol. 10) 1923 Mad 338 (339): 24 Cri L Jour 116.

9. Form and contents of complaint.—[1] Complaint under this section must fulfil the requirements of the definition of a complaint under S. 4 (1) (h). ('08) 7 Cri L Jour 10 (14): 35 Cal 141 (DB) (Complaint need not be in writing or on oath).

[2] Proceedings based upon a complaint not stating the facts constituting the offence are liable to be quashed, though after the proceedings have been terminated. ('12) 13 Cri L Jour 609 (651) (SB) (Cal) (Conviction already made cannot be set aside on this ground) \* ('08) 7 Cri L Jour 10 (16): 35 Cal 141 (DB) (Defect of particulars curable under S. 537) \* ('09) 9 Cri L Jour 108 (111): 32 Mad 3 (DB) (Fact that dates of alleged seditious speeches and nature of seditious words were not given is only irregularity).

[3] Proceedings against person not mentioned as accused in the complaint cannot stand. ('11) 12 Cri L Jour 2 (3) (SB) (Cal) \* ('12) 13 Cri L Jour 609 (612) (SB) (Cal).

[4] In a prosecution for sedition the complaint must set out the alleged seditious words. (Vol. 16) 1929 Lah 284 (286): 30 Cri L Jour 1129 \* (Vol. 12) 1925 Mad 106 (107): 25 Cri L Jour 401 (DB) \* ('97) 22 Bom 112 (150) (FB).

[But see ('09) 9 Cri L Jour 108 (111): 32 Mad 3 (DB).]

10. Want of sanction—Effect.—[1] Prosecution under this section is illegal in the absence of sanction. (Vol. 24) 1937 Cal 99 (113): 38 Cri L Jour 818 (SB) \* (Vol. 13) 1926 All 231 (232): 27 Cri L Jour 705 \* (Vol. 12) 1925 Lah 449 (450): 6 Lah 188: 26 Cri L Jour 1234 \* ('08) 7 Cri L Jour 353 (356): 1908 Pun Re No. 8 Cr. (DB) \* ('07) 6 Cri L Jour 332 (335): 31 Mad 80 (DB).

[2] In a case where no sanction is obtained even evidence showing that an offence covered by this section has been committed is not admissible on the record. (Vol. 31) 1944 Sind 1 (14): 45 Cri L Jour 471: 1 L R (1945) Kar 449 (FB).

[3] Sanction given after the proceedings are commenced is not enough. (Vol. 7) 1920 Mad 223 (229):

42 Mad 855: 20 Cri L Jour 455 (SB) \* ('90) 1890 Pun Re No. 16 Cr. p. 33 (37) (DB) \* ('10) 11 Cri L Jour 453 (460): 37 Cal 467 (DB) \* (Vol. 20) 1933 Cal 332 (332): 34 Cri L Jour 518 (DB).

[4] Commitment of a case in the absence of sanction and complaint—Sessions Judge cannot accept the commitment under S. 532 even though accused is not prejudiced. ('10) 11 Cri L Jour 453 (460): 37 Cal 467 (DB) \* ('90) 1890 Pun Re No. 16 Cr. p. 33 (35, 36, 37) (DB)

[But see ('97) 22 Bom 112 (124, 125) (FB).]

11. Want of complaint—Effect.—[1] Mere sanction alone in the absence of complaint cannot validate the proceedings. ('90) 1890 Pun Re No. 16 Cr. p. 33 (34, 35) (DB) \* ('11) 12 Cri L Jour 2 (3) (SB) (Cal) \* ('08) 7 Cri L Jour 10 (16): 35 Cal 141 (DB).

[See however ('08) 7 Cri L Jour 353 (355, 356): 1908 Pun Re No. 8 Cr. (DB) (Only an irregularity curable under S. 537 and the letter of sanction may be treated as complaint)]

12. Facts of case amounting to offence requiring sanction as well as other offence—Effect.—[1] Facts of case amounting both to offence requiring sanction as well as one not requiring it—Proceedings can be taken in respect of latter offence without sanction. (Vol. 31) 1944 Sind 1 (14): 45 Cri L Jour 471: 1 L R (1945) Kar 449 (FB) \* (Vol. 23) 1941 Mad 363 (364): 1 L R (1941) Mad 169: 42 Cri L Jour 652 \* (Vol. 11) 1924 All 684 (685): 46 All 611: 26 Cri L Jour 94 (DB) \* (Vol. 15) 1928 Mad 1158 (1161, 1164): 52 Mad 695: 30 Cri L Jour 191 (DB) \* (Vol. 3) 1916 Cal 188 (197, 198): 42 Cal 957: 16 Cri L Jour 497 (DB) \* ('01) 25 Bom 90 (93, 94, 95) (DB) \* (Vol. 21) 1934 Nag 71 (73): 30 Nag L R 269: 35 Cri L Jour 1097.

[See however (Vol. 12) 1925 All 230 (232): 47 All 263: 26 Cri L Jour 332.]

[2] If facts show that an offence under S. 121 has been committed the accused must be punished under that section whether the offence also falls under some other section or not. ('10) 11 Cri L Jour 264 (268): 34 Bom 394.

#### SECTION 196-A—Note 1.

[1] This section is intended to see that prosecutions for the offence are not started in cases which are not of a sufficiently serious nature. (Vol. 21) 1934 Cal 391 (392): 35 Cri L Jour 714 (DB) \* (Vol. 21) 1934 Pat 561 (563): 13 Pat 729: 36 Cri L Jour 17 (DB).

[2] The following conditions are necessary for the application of the section.

197. a[(1) When any person who is a Judge within the meaning of section 19 of the Prosecution of Judges Indian Penal Code, or when any Magistrate, or when any public servant and public servants. who is not removable from his office save by or with the sanction of a b[Provincial Government] or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the c[previous sanction—

(a) in the case of a person employed in connection with the affairs of the Federation, of the Governor-General exercising his individual judgment; and

(b) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province exercising his individual judgment.]]

(2) d[The Governor-General or Governor, as the case may be, exercising his individual Power of Governor-judgment] may determine the person by whom, the manner in which, the General or Governor as offence or offences for which, the prosecution of such Judge, e[Magistrate] to prosecution. or public servant is to be conducted, and may specify the Court before which the trial is to be held.

f[(3) In relation to the period elapsing between the commencement of Part III of this Government of India Act, 1935, and the establishment of the Federation, the references in the section to the Federation and to the Governor-General exercising his individual judgment shall be construed as references to the Governor-General in Council.]

[1882—S. 197; 1872—S. 466; 1861—S. 167.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), s. 50;

[b] *Substituted* by A. O. for "Local Government."

[c] *Substituted* by A. O. for "previous sanction of the Local Government."

[d] *Substituted* by A. O. for "such Government."

[e] *Inserted* by Act 18 of 1923, s. 50.

[f] *Added* by A. O.

#### Objects and Reasons.

"It has been pointed out to us that difficulties with regard to Section 197 have recently come to light. There are certain public servants who are only removable from office by the Secretary of State, and it is unreasonable that they should obtain no protection under the Section. Further, in view of Section 4 (2) of the Code, the word 'Judge' has to be interpreted according to the definition given in Section 19 of the Indian Penal Code, with the result that Magistrates, acting in certain capacities under the Code, e. g., when holding inquiries, obtain no protection. We have,

therefore, proposed a re-draft of sub-section (1) of Section 197 to meet these difficulties. We have confined the operation of the Section to public servants removable by a Local Government or some higher authority and have provided that the sanction required for a prosecution will be the sanction of the authority which has power to remove. Mr. Chaudhuri would prefer to leave Section 197 unaltered save in so far as the Bill proposed to amend it; he considers that the amendment proposed by us would enhance the difficulty of obtaining sanction"—S.C.R. [XVIII of 1923.]

#### SECTION 197—SYNOPSIS.

1. Scope.

2. Judge.

3. Public servant not removable from office save by or with the sanction of a Provincial Government or some higher authority.

4. Receiver appointed by Court—Prosecution of.

5. "Is accused . . . duty."

6. Acts committed while acting or purporting to act in official capacity.

7. Taking cognizance.

8. Who can sanction prosecution.

9. Essentials of sanction.

10. Stage at which sanction is to be obtained.

11. Want of sanction—Effect.

12. Sub-section (2).

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1. Scope.—[1] The right of an injured person to prosecute any person or body of persons can be taken away or limited only by express words or by implication in a special legislation. ('78) 3 Cal 758 (761) (DB) (Per Ainslie, J.) \* (Vol. 8) 1921 Mad 278 (278), 44 Mad 417 : 23 Cri L Jour 117 (DB). (This section is an exception to the general rule laid down in S. 190.)

[2] The object of the section is to guard against vexatious proceedings against public servants and to secure the well-considered opinion of a superior authority before a prosecution is launched against them. (Vol. 29) 1942 Mad 664 (664) : 44 Cri L Jour 13 \* (Vol. 25) 1938 Pat 543 (544) : 39 Cri L Jour 774 \* (Vol. 16) 1929 Bom 375 (375) : 31 Cri L Jour 353 (DB)

[3] For this section to apply the offence must be committed by the accused while acting or purporting to act in the discharge of his official duty. (Vol. 30) 1943 Pat 229 (231, 232) : 22 Pat 76 (DB). \* (Vol. 15) 1928 Mad 161 (162, 163) : 51 Mad 259 : 28 Cri L Jour 1038 (DB). \* (Vol. 20) 1933 Sind 161 (162) : 27 Sind L R 3 : 34 Cri L Jour 191 (DB) \* (Vol. 12) 1925 Oudh 565 (565) : 28 Oudh Cas 155 : 26 Cri L Jour 1157 (DB).

[4] The section requires only a sanction for the prosecution. No formal complaint is necessary as in the case of S. 196. ('70) 1870 Rat 32 (32) (DB).

[5] The section applies to offences under the Penal Code as well as to offences under other laws. (Vol. 27) 1940 Pat 316 (320, 321) : 41 Cri L Jour 221 (DB).

[6] The section applies even to offences committed outside British India. (Vol. 18) 1931 Cal 646 (648) : 33 Cri L Jour 83 (DB).

[7] This section is not applicable to cases triable under the Criminal Law Amendment Ordinance 29 [xxix] of 1943. (Vol. 31) 1944 F C 66 (68) : 45 Cri L Jour 755 : 23 Pat 517 : (1944) F C R 262 : I L R (1944) Kar (F C) 189 (FC). \* (Vol. 31) 1944 Pat 378 (387) : 23 Pat 457 : 46 Cri L Jour 438 (DB).

[8] Offence referred to in this section also falling under S. 195 (I) (b)—Complaint referred to in that section and sanction under this section are necessary. (Vol. 25) 1938 Pat 83 (86) : 16 Pat 571 : 39 Cri L Jour 314 (DB).

[9] Consent of Governor-General under the Government of India Act (1935), S. 270 (1) obtained for prosecution of the accused—On remand charge framed under different provision—Fresh consent is not necessary. (Vol. 34 (1947) F C 9 (11) : 48 Cri L Jour 155 (FC).

2. Judge.—[1] The following persons have been held to be Judges for the purpose of this section :

(a) The President of a Municipality or other Local Board when accepting or rejecting nomination papers for election. (Vol. 16) 1929 Mad 175 (176) : 30 Cri L Jour 365.

(b) An election officer when removing names from the electoral roll. ('37) 1937 Mad W N 740 (741).

(c) A member of a Village Panchayat Court or its President. ('36) 37 Cri L Jour 294 (294) (Nag) \* (Vol. 18) 1931 Mad 492 (494) : 32 Cri L Jour 969 \* (Vol. 15) 1928 Mad 391 (391) : 29 Cri L Jour 324 \* ('37) 1937 Mad W N 213 (213) (President of the village panchayat.)

[2] No sanction of Provincial Government is necessary under this section for the prosecution of an arbitrator for acts done while acting as arbitrator. (Vol. 27) 1940 Pesh 41 (43) : 42 Cri L Jour 65.

3. Public servant not removable from office save by or with the sanction of a Provincial Government or some higher authority.—[1] This section applies only to such public servants as are not removable from office save by or with the sanction of the Provincial Government or of some higher authority. (Vol. 31) 1944 F C 66 (67) : (1944) F C R 262 : 23 Pat 517 : 45 Cri L Jour 755 : I L R (1944) Kar (F C) 189 (F C) Station-master on E. I. Railway—Section not applicable.) \* (Vol. 27) 1940 Oudh 382 (383) : 41 Cri L Jour 695 : 15 Luck 740 (DB).

[2] By the amendment in 1923, the alteration of the section brings public servants who are removable from office only by the Secretary of State for India also within the purview of the section. (Vol. 29) 1942 Mad 81 (81) : 43 Cri L Jour 133.

[See ('78) 3 Cal 758 (762, 763) : 2 Cal L Rep 520].

[3] The Commissioner in Sind is not a Provincial Government within the meaning of this section. (Vol. 19) 1932 Sind 177 (180) : 34 Cri L Jour 171 (DB) (case decided before the amendment by A. O. in 1937—But the decision is applicable even after the amendment.)

[4] The expression 'some higher authority' cannot be construed to mean any officer of the Central Government. (Vol. 32) 1945 F C 14 (15) : 46 Cri L Jour 537 : (1944) F C R 365 : I L R (1944) Kar (FC) 10 (FC).

[5] "G.H.Q." (whatever that expression might signify) is not an authority higher than a Provincial Government within the meaning of the section. (Vol. 32) 1915 F C 14 (15) : 46 Cri L Jour 537 : (1944) F C R 365 : I L R (1944) Kar (FC) 10 (FC).

[6] This section does not apply to offences alleged to have been committed by public servants who are removable from office by some authority subordinate to the Provincial Government although such authority may only be acting in the exercise of a power delegated

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by the Provincial Government. (Vol. 30) 1943 F. C. 15 (20, 21) : 44 Cri L Jour 466 : 23 Pat 349 : 1 L R (1943) Kar (F C) 2 : (1943) 5 F C R 7 (FC) (Affirming (Vol. 30) 1943 Pat 229 : 22 Pat 76 on appeal, (Vol. 22) 1935 Mad 442 : 58 Mad 787 : 36 Cri L Jour 1241\* (Vol. 18) 1926 All 271 : 48 All 264 : 27 Cri L Jour 315 \* (Vol. 22) 1935 Rang 263 : 13 Rang 540 : 36 Cri L Jour 1272, approved, (Vol. 4) 1917 Mad 344 : 17 Cri L Jour 168 \* (Vol. 21) 1934 Rang 238 : 12 Rang 530 : 38 Cri L Jour 77 overruled.) \* (Vol. 33) 1946 Bom 86 (87, 88) (DB).

[7] Where the power of removal has been transferred out and out by the Provincial Government to some other authority, this section will not apply. (Vol. 22), 1935 Rang 263 (264) : 13 Rang 540 : 36 Cri L Jour 1272 (FB).

[8] Where the delegation of powers by the Provincial Government is *ultra vires*, but the subordinate authority is otherwise competent to remove the public servant from office, sanction of the Provincial Government is not necessary for prosecution. (Vol. 25) 1938 Rang 181 (184) : 1938 Rang L R 104 : 39 Cri L Jour 614 (The General Police Act confers the powers of appointment (which connote punishment) on certain designated officers, and the Local Government cannot by any rule framed by it delegate disciplinary powers to those officers—Such delegation is *ultra vires* of the Local Government.)

[9] The fact that a public servant will cease to hold office in certain circumstances does not affect the question whether he can be removed from his office without the sanction of the Government. Therefore such a person will not lose the protection of the section. (Vol. 20) 1933 Sind 161 (163, 164) : 27 Sind L R 3 : 34 Cri L Jour 191 (DB) (President of Taluk Board.)

[10] The fact that the Provincial Government has the power of restoring to office a public servant after his dismissal by some other authority does not bring him within the purview of this section. (Vol. 9) 1922 Nag 121 (122) : 23 Cri L Jour 397 (Fact that Forest Ranger dismissed by the Conservator can be restored by the Government does not bring them within the section.)

[11] The status of the accused at the time of the commission of the offence and not at the time of the commencement of the prosecution that must be taken into account. (Vol. 24) 1937 Nag 293 (294) : 39 Cri L Jour 146 : 1 L R (1939) Nag 419 \* (Vol. 19) 1932 Sind 177 (179) : 34 Cri L Jour 171 (DB).

[See however (Vol. 25) 1933 All 513 (514, 515), 1 L R (1933) All 776 : 39 Cri L Jour 925 \* (Vol. 30) 1943 Cal 527 (530) : 44 Cri L Jour 633 : 1 L R (1944) 1 Cal 113 (DB)].

[12] The protection does not extend to persons to whom public servants mentioned in the section may delegate any portion of their powers. (197) 2 Weir 226 (226) (DB).

[13] The following persons are held to be public servants to whom this section applies.

(a) Member of municipal council. (Vol. 25) 1933 Pat 543 (545) : 39 Cri L Jour 774 \* (Vol. 21) 1934 Cal 383 (341) : 62 Cal 275 : 36 Cri L Jour 385 (DB) \* (Vol. 15) 1928 All 756 (758) : 51 All 377 : 30 Cri L Jour 62 \* (Vol. 17) 1930 Lah 147 (147) : 31 Cri L Jour 691, \* (192) 1902 Pan Re No. 17 Cr. p. 48. \* (Vol. 26) 1939 Cal 636 (636). 40 Cri L Jour 959 : 1 L R (1939) 2 Cal 321 (DB) (Even after election as Vice-Chairman.)

[But see (Vol. 19) 1932 Sind 177 (178, 179) : 34 Cri L Jour 171 (DB) (Case under Bombay District Municipalities Act 3 [III] of 1901. Since the amendment of the Act by Act, 3 [III] of 1915, Municipal Councillors are not public servants.)]

(b) Member of District Board. (Vol. 28) 1941 Dom 85 (88) : 42 Cri L Jour 441 : 1 L R (1941) Bom 191 (DB) \* (Vol. 20) 1933 All 543 (544) : 55 All 798 : 34 Cri L Jour 1208 (DB) \* (Vol. 19) 1932 Oudh 303 (303) : 8 Luck 156 : 34 Cri L Jour 253. \* (Vol. 12) 1925 Oudh 565 (566) : 23 Oudh Cas 155 : 26 Cri L Jour 1157 (DB)

(c) President of Taluk Board. (Vol. 24) 1937 Bom 160 (161) : 38 Cri L Jour 654 : 1 L R (1937) Bom 256 (DB). \* (Vol. 16) 1929 Mad 8 (10) : 52 Mad 446 : 30 Cri L Jour 164 \* (Vol. 20) 1933 Sind 161 (162) : 34 Cri L Jour 191 : 27 Sind L R 3 (DB).

(d) President of Municipality. (Vol. 25) 1938 Pat 543 (545) : 39 Cri L Jour 774 \* (Vol. 15) 1928 Cal 516 (518) : 56 Cal 227 : 30 Cri L Jour 348 (DB). \* (Vol. 15) 1928 Mad 1158 (1160, 1161) : 52 Mad 695 : 30 Cri L Jour 191 (DB) \* (Vol. 13) 1926 Rang 171 (172) : 4 Rang 128 : 27 Cri L Jour 1088.

(e) Manager of the Court of Wards of an estate. (Vol 27) 1940 Pat 316 (320) : 41 Cri L Jour 221 (DB) (See Bengal Court of Wards Act, S. 59 A.)

(f) Chairman and members of Debt-Settlement Board under the Bengal Agricultural Debtors Act. (Vol 27) 1940 Cal 405 (405) : 1 L R (1940) 2 Cal 162 : 41 Cri L Jour 354 (DB).

(14) The following persons were held to be not public servants to whom this section applies :

(a) President of Union Committee. (Vol 16) 1929 Mad 175 (176) : 30 Cri L Jour 365 \* (Vol 12) 1925 Cal 782 (782) : 52 Cal 431 : 26 Cri L Jour 1178 (DB).

(b) Forest ranger. (Vol 9) 1922 Nag 121 (122) : 23 Cri L Jour 397.

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(c) Chairman of Co-operative Credit Society. (Vol 22) 1937 Bom 36 (36); 38 Cri L Jour 532 (DB).

(d) Sub-overseer of P W D. ('12) 13 Cri L Jour 770 (770) (DB) (Mad).

(e) Member of legislative assembly. (Vol 23) 1941 Sind 39 (41); 42 Cri L Jour 437; 1 L R (1942) Kar 225.

(f) Chief store keeper and assistant superintendent of port trust estate. (Vol 23) 1941 Sind 30 (31); 42 Cri L Jour 422; 1 L R (1941) Kar 184 (DB).

(g) Sub-Inspector of Police. (Vol 27) 1940 Oudh 332 (333); 41 Cri L Jour 695; 15 Luck 740 (DB) \* (Vol 23) 1939 Sind 148 (150); 1 L R (1939) Kar 652; 40 Cri L Jour 695 (DB).

#### 4. Receiver appointed by Court—Prosecution of.—

[1] Neither the sanction of the Court nor that of the Provincial Government is necessary to prosecute a receiver appointed by Court. (Vol 26) 1939 Rang 202 (203); 40 Cri L Jour 648; 1939 Rang L R 117 \* (Vol 15) 1928 Bom 493 (495); 52 Bom 898; 38 Cri L Jour 465 (DB) \* (Vol 21) 1934 Bom 306 (306); 35 Cri L Jour 1403 (DB).

[See however (Vol 6) 1919 Cal 647 (649); 46 Cal 432; 19 Cri L Jour 820 (DB) (Sanction of Court necessary where it is proposed to prosecute him for criminal breach of trust in respect of properties vested with him as a receiver.) \* ('03) 30 Cal 721 (724) (DB) (Do).]

[2] Sanction of Provincial Government is necessary to prosecute the special official receiver of High Court in respect of any act done in his official capacity. (Vol 32) 1945 P C 18 (21, 22); 71 Ind App 203; 1 L R (1945) Lah 1; 46 Cri L Jour 413; 1 L R (1945) Kar (P C) 89 (FC).

#### 5. "Is accused. . . . . duty."

[1] The object of amending the section by substituting the words "while acting or purporting to act in the discharge of his official duty" for "as such judge or public servant" was to amplify the words and make the sense clear. (Vol 24) 1937 Pat 160 (162); 38 Cri L Jour 94 (Amendment has widened the scope of the section.)

[2] The following are the various views on the question as to what acts of such officers would come within this section;

(a) The question as to whether the particular offence comes under the present section depends not on the nature of the offence but on the circumstances under which it is committed (Vol 16) 1929 Bom 375 (376); 31 Cri L Jour 353 (DB) (Per Baker, J.) \* (Vol 16)

1929 Mad 659 (660, 661); 52 Mad 602; 30 Cri L Jour 864 (DB) \* (Vol 20) 1933 Sind 161 (164); 27 Sind L R 3; 34 Cri L Jour 191 (DB) \* (Vol 17) 1930 Sind 144 (145); 24 Sind L R 355; 31 Cri L Jour 597 (DB) \* (Vol 21) 1934 All 978 (979); 57 All 335; 36 Cri L Jour 331 \* (Vol 22) 1935 Nag 52 (53); 31 Nag L R 297; 36 Cri L Jour 1092 \* (Vol 21) 1934 Rang 233 (239); 12 Rang 530; 38 Cri L Jour 77 \* (Vol 22) 1935 Pat 52 (55, 56); 14 Pat 299; 36 Cri L Jour 650 (DB) \* ('47) 48 Cri L Jour 118 (122) (DB) (Cal).

(b) The section applies only if the act complained of is itself done by the public servant in pursuance of his public office, although it may be in excess of the duty or in the absence of such duty. (Vol. 22) 1935 Cal 176 (176, 177); 37 Cri L Jour 103 (DB) \* (Vol. 22) 1935 Rang 263 (265, 266); 13 Rang 540; 36 Cri L Jour 1272 (FB) \* (Vol. 14) 1927 Mad 566 (566, 567); 50 Mad 754; 23 Cri L Jour 539 \* (Vol. 26) 1939 Bom 63 (64); 1 L R (1939) Bom 119; 40 Cri L Jour 269 (DB) \* (Vol. 26) 1939 Lah 1 (3); 1 L R (1939) Lah 227; 40 Cri L Jour 252 \* (Vol. 26) 1939 Mad 604 (605); 40 Cri L Jour 853 \* (Vol. 26) 1939 Rang 17 (19); 1939 Rang L R 72; 40 Cri L Jour 243 (DB) \* (Vol. 24) 1937 Pat 160 (162); 38 Cri L Jour 94 \* (Vol. 26) 1939 F C 43 (56); 1 L R (1939) Kar (FC) 132; 40 Cri L Jour 468; 1 L R (1940) Lah 400; 1939 F C R 159 (FC) (Obiter).

(c) The section refers to cases where the act constituting the offence is so connected with the official duty or act as to form part of the same transaction. (Vol. 22) 1935 Pat 52 (55, 56); 14 Pat 299; 36 Cri L Jour 650 (DB).

(d) The applicability of the section depends not on the nature of the action which involves the offence but on the matter to which the action relates so that the words "in the discharge of an official duty" might be read as in the "matter of the discharge of an official duty." (Vol. 17) 1930 Sind 144 (145); 24 Sind L R 385; 31 Cri L Jour 597 (DB) \* (Vol. 15) 1928 All 736 (757, 758); 51 All 377; 30 Cri L Jour 62.

[3] This section applies only to acts that can be said to be done in an official capacity and not to acts done in a private capacity. (Vol. 34) 1947 Sind 30 (30).

[See (Vol. 26) 1939 F C 43 (52); 40 Cri L Jour 463; 1 L R (1939) Kar (FC) 132; 1 L R (1940) Lah 400; 1939 F C R 159 (FC) (On the interpretation of the words "in respect of any act done or purporting to be done in the execution of his duty" in S. 270 (1), Government of India Act, 1935.)]

[4] The mere fact that an offence is committed by a public servant when he is in office is not enough to attract the provisions of this section. (Vol. 27) 1940 Cal 274 (276); 1 L R (1940) 1 Cal 590; 41 Cri L Jour

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359 (DB) \* (Vol. 26) 1939 Rang 17 (18, 19) : 1939 Rang L R 72 : 40 Cri L Jour 243 (DB) \* (Vol. 14) 1927 Mad 566 (567) : 50 Mad 754 : 28 Cri L Jour 539.

[5] It is even enough to bring a case within this section that an offence is committed by a public servant at a time during which he is engaged in the transaction of official business. (Vol. 22) 1935 Pat 52 (56) : 14 Pat 299 : 36 Cri L Jour 650 (DB) \* (Vol. 19) 1932 Mad 214 (215) : 33 Cri L Jour 557 \* (Vol. 14) 1927 Mad 566 (567) : 50 Mad 754 : 28 Cri L Jour 539.

[6] The section cannot apply where a public servant is prosecuted not in his personal capacity but in a representative capacity. (Vol. 28) 1941 Cal 319 (322) : 42 Cri L Jour 855 : I L R (1941) 1 Cal 345.

[7] It is a question of fact in each case whether the alleged offence has been committed in an official capacity or not. (Vol. 26) 1939 F C 43 (56) : 40 Cri L Jour 468 : I L R (1939) Kar F C 132 : I L R (1940) Lah 400 : 1939 F C R 159 (FC).

[8] In determining whether an alleged offence has been committed in an official capacity or not the Court must, at the outset, have regard to the allegations in the complaint (if any) in the case. (Vol. 22) 1935 Cal 176 (176) : 37 Cri L Jour 103 (DB).

[See however (Vol. 30) 1943 Cal 594 (608) : 45 Cri L Jour 224 (SB) (Court is not always bound by the allegations in the complaint.)]

[But see (Vol. 20) 1933 Mad 268 (269) : 34 Cri L Jour 528 (It is not correct to say that only the complaint and sworn statement should be consulted.)]

[9] The section does not mean that the very act which constitutes the offence must be the official duty of the public servant concerned. (Vol. 16) 1929 Mad 172 (173) : 52 Mad 347 : 30 Cri L Jour 396 \* (Vol. 16) 1929 Mad 659 (660) : 52 Mad 602 : 30 Cri L Jour 864 (DB) \* (Vol. 22) 1935 Pat 52 (54) : 14 Pat 299 : 36 Cri L Jour 650 (DB) \* (Vol. 21) 1934 All 978 (979) : 36 Cri L Jour 331 : 57 All 385 \* (Vol. 26) 1939 Rang 17 (18) : 40 Cri L Jour 243 : 1939 Rang L R 72 (DB) \* (Vol. 25) 1938 Pat 543 (544) : 39 Cri L Jour 774 \* (Vol. 24) 1937 Nag 293 295 : 39 Cri L Jour 146 : I L R (1939) Nag 419.

[See (Vol. 26) 1939 F C 43 (51) : 40 Cri L Jour 468 : I L R (1939) Kar (F C) 132 : I L R (1940) Lah 400 : 1939 F C R 159 (FC).]

[10] A public servant who does not purport to act in the discharge of his official duty but merely uses his official position to do an illegal act cannot claim the benefit of this section. (Vol. 26) 1939 Lah 1 (3) : I L R 1939 Lah 227 : 40 Cri L Jour 252 \* (Vol. 26) 1939

Rang 17 (19) : 1939 Rang L R 72 : 40 Cri L Jour 243 (DB) \* (Vol. 4) 1917 Mad 657 (658, 659) : 17 Cri L Jour 394 \* (Vol. 16) 1929 Bom 375 (376) : 31 Cri L Jour 353 (DB) \* (Vol. 22) 1935 Rang 263 (265, 266) : 18 Rang 540 : 36 Cri L Jour 1272 (FB) \* (Vol. 34) 1947 Sind 60 (62) : I L R (1946) Kar 187 (DB) \* (Vol. 34) 1947 Sind 30 (30) : I L R (1946) Kar 172 (DB) \* (Vol. 33) 1946 Pat 432 (434, 435) : 25 Pat 174.

[11] In order that a public servant may be held to purport to act in the discharge of his official duty, it is enough if he purports to act in the capacity with which he is clothed, though his act itself may not strictly fall within his powers to do. (Vol. 30) 1943 Cal 594 (609) : 45 Cri L Jour 224 (SB) \* (Vol. 24) 1937 Nag 293 (295) : 39 Cri L Jour 146 : I L R (1939) Nag 419 \* (37) 1937 Mad W N 216 (216) \* (Vol. 18) 1931 Mad 492 (494) : 32 Cri L Jour 369 \* (Vol. 30) 1943 Pat 229 (236) : 22 Pat 76 (DB) (Act complained of need not have been actually done by public servant while acting in discharge of official duty—It is enough if it is so alleged—If so alleged section applies even though the act is outside scope of his duty.) \* (Vol. 22) 1935 Nag 52 (53) : 31 Nag L R 297 : 36 Cri L Jour 1092.

[12] Action purported to be done by the public servant must be of the sort which the public servant is empowered to do in the course of his official duties. (Vol. 19) 1932 Mad 214 (215) : 33 Cri L Jour 557 \* (Vol. 30) 1943 Pat 229 (236) : 22 Pat 76 (DB) (An act which is the very contrary of the duty of a public servant cannot be said to be done by him in the discharge of his official duties.)

[13] If a public servant does not act in the belief that he is discharging his official duty, he cannot claim the protection of this section. (Vol. 4) 1917 Mad 657 (659) : 17 Cri L Jour 394.

[14] Public servant holding two offices one coming under the section and the other not—Section will not apply in respect of acts done in the latter capacity. (03) 30 Cal 927 (933) \* (Vol. 17) 1930 Bom 487 (488) : 32 Cri L Jour 281 (DB) \* (Vol. 15) 1928 Mad 161 (162) : 51 Mad 259 : 28 Cri L Jour 1038 (DB) \* (Vol. 18) 1931 Mad 492 (494) : 32 Cri L Jour 969.

[15] Public servant mentioned in the section appointed as such public servant to another office—Acts done by him in that office also will attract the provisions of this section. (Vol. 21) 1934 Cal 338 (341) : 62 Cal 275 : 36 Cri L Jour 385 (DB) (Municipal Councillors appointed to prepare electoral roll.) \* (Vol. 17) 1930 Lah 147 (147) : 31 Cri L Jour 691 (Municipal Commissioner and Honorary Secretary of Municipal Committee—Offence committed as Secretary—Section applies.) \* (Vol. 12) 1925 Oudh 565 (565, 566) : 28 Oudh Cas 155 : 26 Cri L Jour 1157 (DB) (District Board Member appointed



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officer to sell by auction impounded cattle—Section applies in respect of offences committed in the latter capacity.)

**6. Acts committed while acting or purporting to act in official capacity.**

[1] The following cases illustrate what are acts committed in official capacity requiring sanction for prosecution and what are not :—

[136] 37 Cri L Jour 294 (294) (Nag) (Defamatory statement made while delivering judgment—Sanction necessary.)

[Vol. 21] 1934 All 975 (973) : 57 All 385 : 36 Cri L Jour 331 (Magistrate using insulting language while holding Court and complainant was in witness box—Sanction necessary.)

[Vol. 20] 1933 Sind 165 (166) : 27 Sind L R 36 : 34 Cri L Jour 819 (DB) (Zamindar requesting Executive Engineer to provide him more water—The Engineer said : “Bhena, we supply water, still you say you are dissatisfied.” The word was a term of abuse. Held that the Executive Engineer was clearly acting in his official capacity—Sanction necessary.)

[Vol. 21]-1934 Pat 548 (549) : 36 Cri L Jour 335 (Report by Municipal Commissioner that certain road-metal was missing and that on enquiry it was learnt that a certain contractor had removed it—Prosecution for defamation—Held that sanction was necessary.)

[Vol. 8] 1921 Cal 388 (388, 399) : 22 Cri L Jour 385 (DB) (Judge detaining witness—Sanction necessary.)

[Vol. 16] 1939 Mad 659 (661) : 52 Mad 602 : 30 Cri L Jour 864 (DB) (Village Magistrate sent his talayari to fetch the complainant and told him that “for not appearing when summons was sent, he sentenced him to imprisonment in the chavadi,” and confined him in his chavadi. The complainant charged the Magistrate of wrongful confinement.)

[Vol. 21] 1934 Rang 238 (233, 240) : 12 Rang 530 : 36 Cri L Jour 77 (Excise Sub-Inspector—Prosecution of, under S. 342—Sanction of Local Government is necessary.)

[Vol. 7] 1920 Mad 123 (123) : 21 Cri L Jour 233 (DB) (Judge having to maintain record of cases fabricating it—Sanction to prosecute necessary)

[Vol. 14] 1927 Bom 432 (433) : 28 Cri L Jour 534 (DB) (Village patil obtaining from Government money by misrepresentation—Held offence was committed while acting in official capacity.)

[Vol. 19] 1932 Mad 214 (215) : 33 Cri L Jour 557 (Charge under Penal Code, S. 330—Sanction necessary.)

(Vol. 27) 1940 Nag 31 (32) : I L R (1940) Nag 133 : 41 Cri L Jour 424 (DB) (Per Niyogi J. in order of reference to Division Bench : No previous sanction is necessary to prosecute a Municipal member under S. 183, Penal Code, for contravening S. 45 (1), O. P. Municipalities Act.)

(Vol. 15) 1928 Mad 1158 (1150, 1161) : 52 Mad 695 : 30 Cri L Jour 191 (Chairman threatening voter in order to make him vote in a particular manner—No sanction necessary.)

[53] 1933 Mad W N 1031 (1032) (Report by Village Munsif that complainant, a widow, was trying to cause miscarriage—No sanction necessary for prosecution of Village Munsif as he does not act as a ‘Judge’.)

[Vol. 19] 1932 Oris 308 (309) : 34 Cri L Jour 253 : 8 Luck 156 (Member of District Board using defamatory language when canvassing votes for presidency or working against the candidature of particular person—Sanction not necessary.)

(Vol. 27) 1940 Cal 274 (275) : I L R (1940) 1 Cal 590 : 41 Cri L Jour 659 (DB) (Public servant giving false evidence before a commission appointed to investigate certain charges against another—No sanction necessary.)

(Vol. 26) 1939 Bom 63 (64) : I L R (1939) Bom 119 : 40 Cri L Jour 269 (DB) (Kulkarni committing breach of trust in respect of moneys collected by him—No sanction necessary.)

(Vol. 32) 1945 Pat 136 (140) : 46 Cri L Jour 493 : 23 Pat 738 (DB) (The act of taking a bribe on the part of a public servant is not an act done in the execution of duty.)

(Vol. 30) 1943 Cal 594 (609) : 45 Cri L Jour 224 (SB) (Arrest of students by police officer—Complainant relative of one of the students while trying to make representations assaulted by the officer—Held that the act was done in official capacity.)

(Vol. 30) 1943 Pat 229 (236) : 22 Pat 76 (DB) (Excise Sub-Inspector maliciously detaining a person and accepting gratification for his release—Act not done in discharge of official duty.)

(Vol. 29) 1942 Mad 664 (664) : 44 Cri L Jour 13 (Municipal health officer smacking complainant for tying cow to a tree—Held he was acting as public servant.)

(Vol. 28) 1941 Bom 85 (88) : I L R (1941) Bom 191 : 42 Cri L Jour 441 (DB) (Sub-overseer and Chairman of works committee obtaining money by bill supported by false measurement sheet—Held section applies (Vol. 26) 1939 F O 43 : I L R (1940) Lah 400 : 1939 F O R 159 : I L R (1939) Kar (F O) 132 : 40 Cri L Jour 468 (FC) followed.)

## S. 197 (contd.)

(Vol. 27) 1940 Cal 405 (405): 1 L R (1940) 2 Cal 162: 41 Cri L Jour 352 (DB) (Member of Debt Settlement Board under Bengal Agricultural Debtors Act accused of taking gratification for purpose of turning his back on his duty—Sanction for his prosecution under S. 161, Penal Code, is not necessary.)

(Vol. 27) 1940 Pat 97 (104): 41 Cri L Jour 349 (Offences under Ss. 500, 504, and 506, Penal Code, alleged to be committed by Cane Inspector when investigating conduct of complainant in selling cane—Previous sanction necessary.)

(Vol. 27) 1940 Pat 318 (321): 41 Cri L Jour 221 (DB) (Offence committed by Manager of Court of Wards as agent of the landlord whose estate is under the management of the Court of Wards—Sanction is necessary for prosecution.)

(Vol. 26) 1939 Mad 604 (605): 40 Cri L Jour 853 (Complainant, accused in the panchayat Court assaulted by the president for protesting against irregularity in procedure—Sanction necessary.)

(Vol. 24) 1937 Pesh 52 (56): 38 Cri L Jour 1042 (DB) (Ex-cise Sub-inspector with the duty of signing certificates for goods imported in bond to Afghanistan signing false certificates—Held sanction was necessary.)

(Vol. 15) 1928 Lah 72 (73): 8 Lah 647: 29 Cri L Jour 511 (DB) (Member of municipal Committee charged with having influenced the sub-overseer to buy brick from himself instead of another—Complaint not alleging that he acted in official capacity—No sanction was held necessary.)

(Vol. 22) 1935 Rang 263 (265, 266): 13 Rang 540: 36 Cri L Jour 1272 (FB) (Mere fact that property was entrusted to the public-servant and his position afforded him an opportunity to misappropriate it is not enough to make an official act.)

(Vol. 15) 1928 Mad 161 (162, 163): 51 Mad 259: 28 Cri L Jour 1038 (DB) (Tahsildar acting as a polling officer in connection with a municipal election committing offence under S. 58, Madras District Municipalities Act—Sanction not necessary.)

(Vol. 4) 1917 Mad 759 (759): 18 Cri L Jour 37 (Village Munsif is Judge—But when he refuses to register a vakalat or authenticate an affidavit unless he is given a bribe and is charged with that offence he is not accused as such Judge.)

(Vol. 12) 1925 Omdh 565 (565, 566): 28 Omdh Cas 155: 26 Cri L Jour 1157 (DB) (Sale by auction of impounded cattle by member of District Board deputed for the purpose—Purchase at such auction by himself in name of servant—Offence (S. 169, Penal Code) is committed while acting in discharge of official duty)

(Vol. 20) 1933 Sind 161 (163, 164): 27 Sind L R 3: 34 Cri L Jour 191 (DB) (Sanction necessary before the President of a Taluk Board can be tried for embezzlement in connection with the disbursements of the

Municipal monies and for falsification of the payment accounts.)

(Vol. 16) 1929 Mad 8 (10): 52 Mad 443: 30 Cri L Jour 164 (President Taluk Board evicting from meeting of Board member who had forfeited his seat—Sanction necessary)

(Vol. 13) 1926 Rang 171 (172): 4 Rang 128: 27 Cri L Jour 1088 (President of Municipality purchasing goods for Municipality and receiving discount from seller and appropriating it to himself—Prosecution for criminal misappropriation—Sanction necessary.)

(Vol. 21) 1934 Cal 838 (841): 62 Cal 275: 36 Cri L Jour 385 (DB) (Members of a Committee appointed under S. 21 (1) Bengal Municipal Act are "public servants" under S. 197, Cr P. C., their functions being covered by the expression "official duty"—But acts done by them after the final publication of the roll, and having no reference to the things done by them while acting or purporting to act as such, do not attract the protection given by S. 197)

## 7. Taking cognizance.

[1] This section does not bar the making of a complaint or the submitting of a police-report, but only bars the act of a Magistrate in taking cognizance of the offence without sanction. (Vol. 32) 1945 Cal 385 (386); 1 L R (1944) 2 Cal 183: 47 Cri L Jour 142 (DB) \* (Vol. 26) 1933 Lah 479 (485, 486): 1 L R (1940) Lah 102: 41 Cri L Jour 65 (DB) \* (Vol. 25) 1933 Pat 83 (83): 39 Cri L Jour 314: 16 Pat 571 (DB).

[2] Magistrate can hold a preliminary enquiry to see if it is desirable in the interests of justice to have a prosecution. (Vol. 24) 1937 Rang 312 (314): 38 Cri L Jour 945 \* (94) 19 Bom 51 (60) (DB).

[3] The police can investigate into a cognizable offence without any sanction. (Vol. 32) 1945 P C 18 (21, 22): 46 Cri L Jour 413: 71 Ind App 203: 1 L R (1945) Lah 1: 1 L R (1945) Kar P C 89 (PC) \* (Vol. 32) 1945 Cal 385 (386): 1 L R (1944) 2 Cal 183: 47 Cri L Jour 142 (DB) (Magistrate cannot order cancellation of first information report or stop investigation till sanction is obtained)

[4] Sanction given in respect of one offence—Court can proceed with a different offence provided it is based on the same facts on which sanction for the other offence was given. (193) 30 Cal 905 (908) (DB) \* (Vol. 34) 1947 Cal 162 (171): 47 Cr L Jour 662 (DB).

[5] Where sanction is wrongly given in a case not requiring sanction under this section it is an irregularity curable under S. 537. (Vol. 27) 1940 Pesh 41 (44): 42 Cri L Jour, 68.

## 8. Who can sanction prosecution.

[1] When once the Secretary to the Government under the orders of the Governor certifies that the Governor has accorded sanction under this section, that is a sufficient proof that the Governor has sanctioned the prosecution in the exercise of his individual judgment as prescribed in the section in the absence of any evidence to the contrary. (Vol. 32) 1945 Mad 234 (286): 1 L R (1946) Mad 219: 47 Cri L Jour 149 (DB).

Section 197 (*contd.*)

9. Essentials of sanction.—[1] A sanction under this section must specify the offence for which the prosecution should be started. ('93) 16 Mad 463 (473, 474) (DB). (Proceedings started on a sanction which left it to another to determine the offence for which prosecution should be started is invalid.) \* (Vol 4) 1917 Mad 344 (348) : 17 Cri L Jour 168.

[2] The order of sanction need not state the section under which the offence falls but should clearly state the facts which constitute the offence for the prosecution of which sanction is accorded. ('11) 12 Cri L Jour 217 (220, 221, 222) : 1911 Pun Re No. 11 Cr \* (Vol 4) 1917 Mad 344 (348) : 17 Cri L Jour 168 \* (Vol 5) 1918 Bom 117 (118, 120, 121) : 43 Bom 147 : 20 Cri L Jour 71 (DB) \* (Vol 25) 1938 Bom 50 (53) : I L R (1937) Bom 918 : 39 Cri L Jour 214 (DB). (Sanction directing prosecution "for offence under S. 477. Penal Code, or such other section or sections of the latter Code as may be applicable to the facts of the case" — Whole facts set out in Government resolution giving sanction — Sanction is in proper form and legal.)

[3] There is no prescribed form in which the sanction must be given. (Vol 7) 1920 Lah 254 (255) : 21 Cri L Jour 760 \* ('04) 1 Cri L Jour 275 (279) : 27 Mad 54 \* (Vol 7) 1920 Pat 237 (243) : 21 Cri L Jour 584 (DB) \* (Vol 9) 1922 Lah 146 (147) : 2 Lah 305 : 23 Cri L Jour 113 \* ('72) 7 Mad H C R 53 (59) (DB). (Writing desirable but not necessary.) \* ('09) 10 Cri L Jour 463 (467) (DB) (Cal).

[4] Any deficiency or error in the particulars set out is immaterial so long as the sanction clearly indicates the offence for which prosecution is to be started. ('04) 1 Cri L Jour 275 (279) : 27 Mad 54 \* (Vol 14) 1927 Bom 501 (503) : 28 Cri L Jour 1012 (DB).

[5] A sanction under this section can be addressed to any officer. (Vol 25) 1938 Bom 50 (54) : I L R (1937) Bom 918 : 39 Cri L Jour 214 (DB) \* (Vol 20) 1933 All 543 (544) : 55 All 798 : 34 Cri L Jour 1208 (DB).

[6] A complaint based on a sanction issued under this section need not be filed by the very officer to whom the sanction was addressed. (Vol 20) 1933 All 543 (544) : 55 All 798 : 34 Cri L Jour 1208 (DB).

[7] District Magistrate ordered to institute prosecution taking cognizance of the offence and transferring it to another Magistrate for trial—*Held*, the order was substantially complied with and the proceedings were not vitiated. ('09) 10 Cri L Jour 463 (466) (DB) (Cal).

[8] The granting of a sanction under this section is an executive and not a judicial act. (Vol 9) 1922 Lah 146 (147) : 2 Lah 305 : 23 Cri L Jour 113 \* (Vol 10) 1923 Mad 338 (339) : 24 Cri L Jour 116 \* ('04) 1 Cri L Jour 275 (278) : 27 Mad 54.

[9] Sanctioning authority cannot hold a judicial enquiry before the sanction and such an enquiry will only be a departmental enquiry. ('99) 23 Mad 223 (224) (DB).

[10] A sanction need not be based on legal evidence. ('04) 1 Cri L Jour 275 (278) : 27 Mad 54.

[11] It is not necessary to give reasons for sanctioning a prosecution. (Vol 10) 1923 Mad 338 (339) : 24 Cri L Jour 116.

[12] It is not necessary before sanctioning a prosecution under this section to give the accused person an opportunity to show cause why his prosecution should not be ordered. ('04) 1 Cri L Jour 275 (278) : 27 Mad 54 \* (Vol 10) 1923 Mad 338 (339) : 24 Cri L Jour 116.

10. Stage at which sanction is to be obtained. — [1] A sanction obtained after the commencement of proceedings is not sufficient. (Vol 4) 1917 Bom 33 (33) : 42 Bom 172 : 19 Cri L Jour 342 (DB) \* ('85) 9 Bom 288 (239) (FB) \* (Vol 10) 1923 Mad 338 (339) : 24 Cri L Jour 116 \* (Vol 7) 1920 Pat 237 (243) : 21 Cri L Jour 584 (DB) \* (Vol 20) 1933 Sind 161 (103) : 27 Sind L R 3 : 34 Cri L Jour 191 (DB).

[See however (Vol 26) 1939 Lah 479 (486) : I L R (1940) Lah 102 : 41 Cri L Jour 65 (DB). (Is only an irregularity curable under S. 537.) \* (Vol 26) 1939 Lah 1 (3) : I L R (1939) Lah 237 : 40 Cri L Jour 252 \* (Vol 25) 1938 Bom 50 (53) : I L R (1937) Bom 918 : 39 Cri L Jour 214 (DB).]

11. Want of sanction—Effect.—[1] The absence of sanction in cases coming under the section will render the proceedings illegal. (Vol 31) 1944 Pat 378 (387) : 23 Pat 457 : 46 Cri L Jour 438 (DB) \* (Vol 25) 1938 Rang 181 (184) : 39 Cri L Jour 614 : 1938 Rang L R 104 \* (Vol 23) 1936 Lah 781 (783) : 37 Cri L Jour 1056 \* (Vol 4) 1917 Bom 33 (33) : 42 Bom 172 : 19 Cri L Jour 342 (DB) \* ('85) 9 Bom 288 (296, 297) (FB) \* (Vol 15) 1928 All 756 (758) : 51 All 377 : 30 Cri L Jour 62 \* (Vol 6) 1919 Lah 300 (301, 302) : 1919 Pun Re No. 4 Cr : 20 Cri L Jour 152 (DB) \* (Vol 7) 1920 Mad 123 (123) : 21 Cri L Jour 233 (DB) \* ('07) 6 Cri L Jour 382 (383) : 31 Mad 80 (DB) \* (Vol 18) 1931 Oudh 392 (393, 394) : 32 Cri L Jour 991 \* (Vol 20) 1933 Sind 161 (163) : 27 Sind L R 3 : 34 Cri L Jour 191 (DB) \* ('67) 1867 Pun Re No. 10, Cr p. 15 (15) (DB).

[See (Vol 26) 1939 Lah 479 (483) : I L R (1940) Lah 102 : 41 Cri L Jour 65 (DB). (Consent under S. 270 of the Government of India Act, 1935 not obtained—Proceedings are void *ab initio*—Illegality is incurable under S. 537, Criminal P. C.)]

[See also (Vol 30) 1943 Cal 594 (609) : 45 Cri L Jour 224 (S B) \* (Vol 26) 1939 F C 43 (50) : 40 Cri L Jour 468 : I L R (1939) Kar F C 132 : I L R (1940) Lah 400 : 1939 F C R 159 (FC). (Case under S. 270 (1) of the Government of India Act, 1935. If the prosecution is defective for want of proper consent, the proceedings would be void and the complaint would be dismissed.)]

[See however (Vol 32) 1945 Oudh 180 (182) : 47 Cri L Jour 40.]

[But see (Vol 6) 1919 Mad 190 (190) : 20 Cri L Jour 514 (D B).]

[2] Where there are a number of co-accused in a case, the want of sanction in respect of one of them will vitiate the proceedings as regards the rest also. (Vol 24) 1937 Pesh 52 (56) : 38 Cri L Jour 1042 (DB) \* (Vol 23) 1936 Lah 781 (782) : 37 Cri L Jour 1056.

[3] When a complaint is presented without obtaining the sanction required by this section, the proper course is to dismiss the complaint under S. 203. (Vol 21) 1934 Rang 238 (239) : 12 Rang 530 : 36 Cri L Jour 77.

[4] Accused person pleading S. 197 as bar to his trial should show the facts bringing the section into opera-

98. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI<sup>a</sup> of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence :

Provided that, where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on her behalf.]

Provided further that where the husband aggrieved by an offence under section 494 of the Code is serving in any of His Majesty's armed forces under conditions which are certified by a commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (1) of section 199B may, with the leave of the Court, make a complaint on his behalf.]

1862 — S. 198 ; 1872 — S. 142, para. 2 ; 1861 — S. 68.]

As to modification of this section in its application to an offence falling under Chapter XXI of the Indian Penal Code when committed against a Ruler of a State outside but adjoining India, etc., see section 2 of the Foreign Relations Act, 1932 (12 [XII] of 1932). [b] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 51. [c] Added, *ibid.*, (Second Amendment), 1943 (28 [XXVIII] of 1943), S. 2. [27-11-1943.]*

1917—Note 11 (*contd.*)

Vol 31) 1944 Pat 378 (383): 46 Cri L Jour 438: 457 (D B) \* (Vol 33) 1946 Pat 108 (108): 47 Cri 445.

. Sub-section (2).—[1] Where the authority notified the Court by which a case is to be tried under this sub-section, the High Court has no power to transfer the case to any other Court. ('99) 26 Cal 852 (D B).

In order that all cases in which a particular class of officers are concerned (*e. g.* Tahsildars) must be tried only by a particular Court cannot be made by the authority authorised to sanction prosecution. ('92) 136 (38, 39) (D B).

The Governor-General or Governor can direct a case to be tried by a Court which otherwise would have no jurisdiction over it. ('08) 8 Cri L Jour 70 (71): Bur Rul 265.

Case directed to be tried by Sessions Judge can be tried by the additional Sessions Judge of that place. Mad L Jour 397 (398) (F B).

There is nothing in the section which requires that all cases under this sub-section should necessarily be tried in every case. (Vol 25) 1938 Bom 50 (54): 1 I L R 918: 39 Cri L Jour 214 (D B).

## SECTION 198 — SYNOPSIS.

**Scope and object.**

**Abetment of offence mentioned in section—Applicability of section.**

**Complaint—Essentials.**

**Person aggrieved by such offence."**

**Defamation.**

**Bigamy, etc.**

**7. Want of complaint—Effect.**

**8. Complaint of one offence—Evidence disclosing different offence falling within section—Power of the Court to proceed in respect of such offence.**

**9. Complaint on behalf of another—Provisos.**

**1. Scope and object.**—[1] This section is one of the exceptions to the general rule that any person may set the law in motion where an offence has been committed. (Vol 22) 1935 All 938 (939): 37 Cri L Jour 56 \* (Vol 8) 1921 Cal 627 (629): 22 Cri L Jour 494 (D B)\* (1900) 25 Bom 151 (155) (F B) \* (Vol 21) 1934 Sind 188 (188): 29 Sind L R 12 : 36 Cri L Jour 408.

[2] The object of the section is to limit the persons by whom proceedings can be initiated in respect of offences referred to which are of a private character. (Vol 25) 1938 Sind 141 (142): 39 Cri L Jour 686 : 1 I L R (1939) Kar 12 (D B) \* (1900) 25 Bom 151 (155) (F B).

[See also (Vol 30) 1943 Cal 564 (564): 45 Cri L Jour 123. (Section excludes complaints by busy bodies and mischief-makers.)]

[3] Restriction is only upon initiation of proceedings and the subsequent death of complainant will not prevent the proceedings being continued to its conclusion. (Vol 28) 1941 Rang 202 (205): 1941 Rang L R 224: 42 Cri L Jour 801.

**2. Abetment of offence mentioned in section—Applicability of section.**—[1] The section does not apply to the abetment of the offences referred to in the section. (Vol 13) 1926 All 189 (191): 27 Cri L Jour 101.

[But see ('88) 1888 Pun Re No. 4 Cr, p. 6 (7) \* (Vol 30) 1943 Pat 212 (217) : 44 Cri L Jour 590 : 22 Pat 263 (D B).]

**3. Complaint—Essentials.**—[1] The fact that a complaint is made at the instance of the police does not

**Section 198 — Note 3 (contd.)**

make it other than a complaint for the purposes of this section. (Vol 6) 1919 Lah 389 (390) : 20 Cri L Jour 3 : 1919 Pun Re No. 5 Cr (D B).

[2] In construing a complaint regard must be had to every portion of it. ('91) 1891 Pun Re No. 8 Cr, p. 19 (21) (D B).

[3] Specific reference to every exhibit proposed to be put in evidence need not be given in a complaint of defamation (Vol 11) 1942 Mad 340 (341) : 25 Cri L Jour 941 (DB).

4. "Person aggrieved by such offence."—[1] Person "aggrieved" by the offence complained of can file the complaint. (Vol. 1) 1914 Mad 352 (352) : 15 Cri L Jour 337 (DB).

[2] There must be legal grievance and a sentimental reason to make a person "aggrieved." ('06) 3 Cri L Jour 187 (189) (DB) \* (1900) 25 Bom 151 (156) (FB) \* ('72-92) 1872-1892 Low Bur Rul 617 (618). (Mere mental pain caused by the offence not a grievance.) \* (Vol 21) 1934 Sind 188 (190) : 36 Cri L Jour 408 : 29 Sind L R 12.

[3] The person "aggrieved" need not have been directly injured by the offence. (Vol 30) 1943 Cal 564 (564) : 45 Cr L Jour 123 \* (Vol 15) 1928 Nag 58 (60) : 28 Cri L Jour 996.

[4] The term "aggrieved" is not confined to a person who would be entitled to compound the offence under S. 345. (1900) 25 Bom 151 (156, 157) (FB).

[5] The question whether the person is "aggrieved" within the meaning of this section is a question of fact. (Vol 21) 1934 Sind 188 (190) : 36 Cri L Jour 408 : 29 Sind L R 12 \* (Vol 15) 1928 Nag 58 (60) : 28 Cri L Jour 996 \* ('06) 3 Cri L Jour 187 (189) (DB) (Cal).

5. Defamation.—[1] Right to complain about defamation belongs not only to the person defamed but also to others who are affected by the defamation. (1900) 25 Bom 151 (156, 157) (FB). (Husband can complain where wife is defamed. Overruling 1887 Rat 327 and 1888 Rat 392.) \* (Vol 15) 1928 Nag 58 (60) : 28 Cri L Jour 996. (Complaint by adopted son of woman defamed held proper.) \* (Vol 30) 1943 Cal 564 (564) : 45 Cri L Jour 123. (Unchastity imputed to wife — Husband can complain.) \* ('05) 2 Cri L Jour 381 (381) (DB) (Mad). (Do.) \* (Vol 12) 1925 Mad 320 (321) : 26 Cri L Jour 521 (DB) \* (Vol 11) 1924 Lah 559 (561) : 5 Lah 301 : 26 Cri L Jour 342 (DB) \* ('91) 1891 All W N 188 (188) \* ('04) 1 Cri L Jour 445 (447) : 32 Cal 425 (DB). (Brother.)

[But see ('93) 1893 All W N 207 (208). (Son cannot complain of defamation of mother.) \* ('87) 1887 Pun Re No. 39 Cr. p. 91 (92). (Father cannot complain of defamation of daughter.)]

[2] Complaint by the father of a woman not on her behalf is no bar to an independent complaint by her. (Vol 25) 1938 Lah 739 (740) : 40 Cri L Jour 131.

[3] A person who is merely one whose feelings are hurt by the defamation of another cannot complain under this section. The test being whether the complainant's own personal reputation has been harmed directly or indirectly. (Vol 21) 1934 Sind 188 (190) : 36

Cri L Jour 408 : 29 Sind L R 12. (Imputation against head of religious sect not affecting his spiritual character.) \* (Vol 22) 1935 Sind 98 (100, 101) : 36 Cri L Jour 975 : 29 Sind L R 39. (Do.) \* ('03) 26 Mad 43 (47) (SB). (Attack on Health Officer of Municipality—President of Municipality cannot complain.) \* (Vol 10) 1923 Oudh 4 (6) : 26 Oudh Cas 44 : 23 Cri L Jour 641. (Where police-officer is defamed, a complaint by his superior officer on the ground that the good name of police force had been attacked cannot be entertained.)

[4] A Magistrate cannot complain in respect of defamatory statement made before him affecting a third party. (Vol 27) 1940 All 246 (247) : 1 L R (1940) All 314 : 41 Cri L Jour 660.

[5] Defamation of class of persons which can be brought home to individual members—Any member of the class may complain. (Vol 22) 1935 All 743 (744, 745) : 36 Cri L Jour 816 : 57 All 1012 (DB). (Article alleging girls of certain college guilty of misbehaviour.)

6. Bigamy, etc.—[1] Complaint of bigamy can be preferred by the second husband or by other persons aggrieved e.g. the husband by the first marriage. (Vol 30) 1943 Pat 212 (216) : 44 Cri L Jour 590 : 22 Pat 263 (DB). (The first husband.) \* ('99) 26 Cal 336 (337) (DB).

(2) The following persons have been held not to be competent to complain about a bigamous marriage.

(a) Father. ('10) 11 Cri L Jour 51 (51) : 32 All 78.

(b) Mother. ('03) 2 Weir 231 (232). (Mother of a minor husband.)

(c) Brother. ('08) 7 Cri L Jour 457 (458) : 11 Oudh Cas 148 \* ('86) 10 Bom 340 (341). (Brother of a lunatic husband.)

(d) Father, mother or brother of the first or second husband. ('02) 25 All 132 (133). (Brother of second husband.)

(e) Father of the woman who contracts the marriage. ('12) 13 Cri L Jour 204 (204) (DB).

(f) The spiritual head of the community. (Vol 18) 1931 Mad 247 (248) : 32 Cri L Jour 1116.

[3] The Magistrate cannot force the character of an aggrieved person upon the husband which he does not want to assume even though the case against the wife discloses bigamy also. (Vol 25) 1938 Sind 141 (142) : 39 Cri L Jour 686 : 1 L R (1939) Kar 12 (DB).

7. Want of complaint — Effect. — [1] Judicial proceedings held in the absence of a complaint by the aggrieved person are illegal. ('79) 1879 Pun Re No. 5 Cr. p. 6 (10) \* (Vol 17) 1930 Mad 705 (706) : 31 Cri L Jour 895 \* ('09) 9 Cri L Jour 154 (155) (Lah).

8. Complaint of one offence — Evidence disclosing different offence falling within section — Power of the Court to proceed in respect of such offence. — [1] Complaint by "aggrieved" in respect of one offence — Evidence disclosing different offence — Court cannot proceed in respect of the latter offence. ('87) 10 All 39 (43) \* ('79) 1879 Pun Re No. 5 Cr. p. 6 (9, 10) \* ('89) 1889 Pun Re No. 18 Cr. p. 67 (69) \* (Vol 10) 1923 Oudh 4 (6) : 26 Oudh Cas 44 : 23 Cri L

199. No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman, or, in his absence, <sup>a</sup>[made with the leave of the Court] by some person who had care of such woman on his behalf at the time when such offence was committed :

<sup>a</sup>[Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf.]

<sup>b</sup>[Provided further that where such husband is serving in any of His Majesty's armed forces under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, and where for any reason no complaint has been made by a person having care of the woman as aforesaid, some other person authorized by the husband in accordance with the provisions of sub-section (1) of section 199b may, with the leave of the Court, make a complaint on his behalf.]

[1882 — S. 199 ; 1872 — Ss. 478, 479 ; 1861 — Ss. 177, 178.]

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 52.  
[b] *Added, ibid.*, (Second Amendment), 1943 (28 [XXVIII] of 1943), S. 3. [27-11-1943.]

#### Section 198 — Note 8 (*contd.*)

Jour 641 ✕(Vol 25) 1938 Sind 141 (142) : 39 Cri L Jour 686 : 1 L R (1939) Kar 12 (DB).

[But see ('78) 1 Cal L R 523 (524) (DB).]

[2] If the facts stated in the complaint amount to the offence in regard to which action is proposed to be taken, non-mention of the section under which offence falls is immaterial. ('84) 1884 Pun Re No. 24 Cr, p. 42 (42) (DB) ✕(Vol 12) 1925 Lah 631 (632) : 6 Lah 375 : 27 Cri L Jour 769 (DB) ✕('03) 25 All 209 (211).

#### 9. Complaint on behalf of another—Provisos.

—[1] The complaint need not be presented in person by the aggrieved person. ('30) 1930 Mad W N 855 (858) (FB) ✕(Vol 1) 1914 Cal 479 (479) : 42 Cal 19 : 15 Cri L Jour 348 (DB).

[But see ('96) 1896 Pun Re No. 10 Cr, p. 24 (26) (DB). (*Held*, however, irregularity was cured in the circumstances of the case.)]

[2] Even where complaint by some person on behalf of another can be made under the provisos, leave of the Court is necessary, the absence of which will make the proceedings illegal. (Vol 25) 1938 Lah 739 (740) : 40 Cri L Jour 131 ✕(Vol 22) 1935 Oudh 6 (7) : 36 Cri L Jour 116 : 10 Luck 277 ✕('46) 47 Cri L Jour 717 (718) (Cal).

[3] The leave of the Court is also necessary for compounding a complaint made on behalf of another. (Vol 25) 1938 Lah 739 (740) : 40 Cri L Jour 131.

[4] Complaint by servant on behalf of pardanashin lady on oral authority — Leave of Court was held properly granted though there was no written authority and the husband was present when the lady was defamed and he did not complain. (Vol 30) 1943 Pat 117 (121) : 44 Cri L Jour 391 : 21 Pat 778 (DB).

[5] Where the lady defamed herself appears in Court and deposes sanction will not be granted to the husband. ('46) 47 Cri L Jour 717 (718) (Cal).

#### SECTION 199 — SYNOPSIS.

1. Scope and object of the section.
2. Offences to which the section applies.
3. Complaint — Essentials.
4. Who can complain.
5. Want of complaint — Effect.
6. Proceedings commencing in respect of offence not falling under section — Evidence disclosing offence within section — Power of Court to convict for such offence.

1. Scope and object of the section. — [1] The section is an exception to the rule that any person can institute a complaint of an offence. (Vol 22) 1935 All 938 (939) : 37 Cri L Jour 56.

[2] The object is to prevent other persons excepting the affected party from bringing the matter to the Court. (Vol 25) 1938 Sind 141 (142) : 1 L R (1939) Kar 12 : 39 Cri L Jour 686 (DB) ✕(1900) 25 Bom 151 (155) (FB) ✕('09) 9 Cri L Jour 450 (451) : 3 Sind L R 15 (DB) ✕('06) 3 Cri L Jour 187 (189) (DB) (Cal) ✕('77) 1877 Pun Re No. 2 Cr, p. 3 (5) (DB) ✕(Vol 4) 1917 Mad 220 (221) : 17 Cri L Jour 363.

[3] Suit for divorce in which offender is co-respondent pending—Prosecution is not barred. (Vol 15) 1928 Lah 50 (50) : 29 Cri L Jour 382. (Section 61, Divorce Act, precludes only a civil suit for damages.)

2. Offences to which the section applies. — [1] Section does not apply to other offences though the intention to commit offence under S. 497 or S. 498 may be an ingredient of such offences. Magistrate can take cognizance of these offences without a complaint by the persons mentioned in the section. (Vol 4) 1917 Nag 90 (92) : 19 Cri L Jour 881 ✕('75) 8 Mad H C R App vi (vi) ✕('77) 1877 Pun Re No. 2 Cr, p. 3 (4, 7) (DB). (Per Plowden and Lindsay, JJ., Fitzpatrick, J., dissenting.) ✕(1900) 23 All 82 (84).

[But see ('86) 1886 All W N 42 (42). (*Held*, prosecution in the absence of complaint by husband is very injudicious.)]

**Section 199—Note 2 (contd.)**

[2] The section applies to attempts to commit the offences mentioned therein. ('82) 1882 Pun Re No. 3 Cr. p. 3 (4) (DB).

**3. Complaint — Essentials.**—[1] A complaint under this section must be a complaint as defined in S. 4 (1) (h). (Vol 27) 1940 All 201 (201): 41 Cri L Jour 499\* (Vol 3) 1916 Mad 1059 (1060): 16 Cri L Jour 466 \* ('11) 12 Cri L Jour 50 (50): 1910 Pun Re No. 32 Cr \* ('03) 30 Cal 910 (915) (F B). (Allegation made to police not a complaint.) \* ('12) 13 Cri L Jour 287 (288) (D B) (Bom). (Allegation made to police or statement made as a witness is not a complaint.) \* ('04) 1 Cri L Jour 763 (764): 17 C P L R 105. (Allegation made to police not a complaint.) \* (Vol 10) 1923 Mad 59 (59): 23 Cri L Jour 592. (Do.)

[But see (Vol 3) 1916 All 307 (307): 38 All 276: 17 Cri L Jour 72. (Statement in the deposition can be taken as complaint within the meaning of S. 4 (1) (h).) \* ('81) 1881 Pun Re No. 17 Cr. p. 29 (30) (D B). (Allegation to police.) \* ('02) 29 Cal 415 (416) (D B). (Statement made as witness.)]

**4. Who can complain.**—[1] Other persons than the husband or the one who has care of the woman in his absence cannot complain under this section. (Vol 3) 1916 Mad 1059 (1060): 16 Cri L Jour 466 \* (Vol 21) 1934 Lah 122 (123): 36 Cri L Jour 423 \* (Vol 9) 1922 Lah 168 (168): 23 Cri L Jour 613 \* ('72) 1872 Pun Re No. 11 Cr. p. 15 (16) (DB). (Husband's counsel has no right.)

[2] Where a person professes to complain as the husband under this section, the factum and the validity of the marriage must be proved strictly. (Vol 1) 1914 All 214 (215): 36 All 1: 15 Cri L Jour 78 \* (Vol 4) 1917 Low Bur 30 (30): 18 Cri L Jour 321 \* ('10) 11 Cri L Jour 155 (156) (Lah) \* (Vol 17) 1930 All 834 (834): 32 Cri L Jour 315.

[3] The fact that the marital tie is broken subsequent to the offence will not deprive the husband of his right to complain under this section. (Vol 9) 1922 Lah 477 (478, 479): 23 Cri L Jour 462.

[4] The husband of a woman absent at the time of offence—Person having care of the woman on behalf of husband, can complain. (Vol 11) 1924 Lah 330 (331): 24 Cri L Jour 780. (Mother of husband.)

[5] An express delegation of trust by the husband is not necessary to entitle a person having care of a woman during her husband's absence to complain under this section. (Vol 18) 1926 Sind 159 (160): 20 Sind LR 314: 27 Cri L Jour 414 (D B). (The nephew of the husband was held competent to file complaint.) \* (Vol 29) 1942 Oudh 434 (435): 43 Cri L Jour 643. (Wife living with husband's father enticed away while on a short visit to her parents—Husband's father held could complain.)

[See however (Vol 24) 1937 Bom 186 (189): I L R (1937) Bom 244: 38 Cri L Jour 769 (D B) \* (Vol 23) 1936 Pesh 32 (32): 37 Cri L Jour 345.]

[6] Offence committed during husband's absence—Husband not absent when complaint was made and unwilling to prosecute.—Person who had care of her at the time of offence could still complain. (Vol 4) 1917 Mad 220 (221): 17 Cri L Jour 363.

[7] When a husband can be said to be "absent" within the meaning of this section is a question of fact. (Vol 9) 1922 Lah 168 (168): 23 Cri L Jour 618. (Husband living in the interior of the district while wife was in the headquarters—Held he was not absent.)

[8] The leave of Court required under the section may be implied and need not be expressly recorded. (Vol 13) 1926 Sind 159 (161): 20 Sind L R 314: 27 Cri L Jour 414 (D B).

[9] In order to make the proviso applicable the circumstances which are alleged as bringing the case within its limits should be proved. (Vol 20) 1933 Cal 144 (144): 34 Cri L Jour 290 (D B).

[10] In the absence of leave of Court the proceedings will be illegal. (Vol 20) 1933 Cal 880 (881): 34 Cri L Jour 1092 (D B) \* (Vol 21) 1934 Lah 86 (87): 35 Cri L Jour 1032.

**5. Want of complaint—Effect.**—[1] In the absence of complaint, proceedings under this section will be illegal. (Vol 24) 1937 Bom 186 (191): I L R (1937) Bom 244: 38 Cri L Jour 769 (DB) \* (Vol 2) 1915 Bom 194 (195): 16 Cri L Jour 662 (DB) \* (Vol 20) 1933 Oudh 163 (165): 34 Cri L Jour 496 \* ('92) 2 Weir 235 (236) \* ('11) 12 Cri L Jour 50 (50): 1910 Pun Re No. 32 Cr. p. 105 \* (Vol 22) 1935 Pat 357 (358): 14 Pat 717: 36 Cri L Jour 856 (D B).

[2] It is not enough that the complaint is laid after the commencement of the proceedings. See (Vol 21) 1934 Lah 122 (123): 36 Cri L Jour 423.

[But see (Vol 3) 1916 All 307 (307): 38 All 276: 17 Cri L Jour 72. (Submitted not correct.)]

**6. Proceedings commencing in respect of offence not falling under section—Evidence disclosing offence within section—Power of the Court to convict for such offence.**—[1] In regard to offences falling under this section a Court cannot proceed in the absence of a complaint by the husband or guardian where such offence is disclosed to be involved in the transaction of which Court is already in seisin. (Vol 20) 1933 All 626 (627): 55 All 871: 34 Cri L Jour 1227 \* ('12) 13 Cri L Jour 287 (288) (D B) (Bom) \* ('07) 5 Cri L Jour 164 (167): 31 Bom 218 (DB) \* (Vol 18) 1931 Cal 524 (526): 32 Cri L Jour 1135 (D B) \* (Vol 22) 1935 Pat 357 (358): 14 Pat 717: 36 Cri L Jour 856 (DB) \* ('82) 1882 Pun Re No. 3 Cr. p. 3 (4) (DB) \* (Vol 5) 1918 Lah 385 (385): 1918 Pun Re No. 2 Cr: 19 Cri L Jour 300.

[2] Proceedings commenced in respect of some offence other than one under this section upon the complaint of husband or person in charge of the woman—Subsequent disclosure that an offence referred to in this section has been committed—Proceedings cannot be taken on the same complaint. (Vol 27) 1940 All 201 (201): 41 Cri L Jour 499 \* ('88) 5 All 233 (235) \* ('02) 29 Cal 415 (417) (DB) \* ('13) 14 Cri L Jour 284 (286): 1912 Upp Bur Rul 155 \* (Vol 11) 1924 Mad 323 (323): 24 Cri L Jour 837 \* ('08) 27 Mad 61 (62) (D B) \* ('10) 14 Cal W N cclxxv (cclxxv) (DB) \* ('78) 1873 Pun Re No. 18 Cr. p. 20 (21) \* ('72) 1872 Pun Re No. 11 Cr. p. 15 (16) (DB).

[But see ('93) 20 Cal 483 (486) (D B).]

[3] It is enough if the facts alleged in the complaint

<sup>a</sup>[199A. When in any case falling under section 198 or section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall, before granting the application, give him a reasonable opportunity of objecting to the granting thereof.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 53.*

#### Objects and Reasons.

"We have adopted the suggestion that the new section 199A should apply to lunatics as well as to minors. We note that there has been some criticism of the drafting of the new section and we have re-drafted a portion of it so as to provide that, where the person applying for leave to make a complaint has not been

declared by competent authority to be the guardian of the person of the minor or lunatic, and where the Court is satisfied that such guardian has been appointed, the Court shall give such guardian a reasonable opportunity of objecting to the application."

—S. C. R. [XVIII of 1923].

<sup>a</sup>[199B. (1) The authorisation of a husband given to another person to make a complaint on his behalf under the second proviso to section 198 or the second proviso to section 199 shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by the Officer referred to in the said provisos, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(2) Any document purporting to be such an authorisation and complying with the provisions of sub-section (1), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine, and shall be received in evidence.]

[a] *Inserted by the Code of Criminal Procedure (Second Amendment) Act, 1943 (28 [XXVIII] of 1943), S. 4. [27-11-1943.]*

## CHAPTER XVI.

### OF COMPLAINTS TO MAGISTRATES.

200. <sup>a</sup>[\* \* \*] A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate :

#### Section 199 — Note 6 (contd.)

make out an offence which is taken cognizance and the section under which the offence falls need not be stated. (Vol 24) 1937 Bom 186 (190, 191) : I L R (1937) Bom 244: 38 Cri L Jour 769 (DB) ✕ (Vol 9) 1922 Mad 353 (354, 355): 22 Cri L Jour 762 (DB) ✕ (Vol 12) 1925 Lah 631 (632): 6 Lah 375: 27 Cri L Jour 769 (DB) ✕ (Vol 8) 1921 Oudh 149 (150) : 24 Oudh Cas 232 : 22 Cri L Jour 742 ✕ (Vol 21) 1934 All 472 (474) : 36 Cri L Jour 404. (Complaint stating S. 366, I. P. C.—Court can take cognizance under S. 498.) ✕ (Vol 21) 1934 Lah 945 (946): 36 Cri L Jour 789.

#### SECTION 200 — SYNOPSIS.

1. Scope and object.
2. "Magistrate taking cognizance of an offence."
3. "On complaint."

4. Stamp on complaint and written examination of the complainant.
5. Second complaint.
6. Who may make a complaint.
7. Whether Magistrate can refuse to entertain a complaint.
8. Order on complaint.
9. Who may present complaint.
10. "Shall examine."
11. Omission to examine complainant.
12. Examination before the case is transferred under S. 192.
13. Examination where complaint is by Court or by public servant.
14. Joint complaint by two or more complainants.



Provided as follows :—

- (a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192 ;
- <sup>b</sup>[(aa) when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties ;]
- (b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and <sup>c</sup>[where the complaint is made in writing] need not be reduced to writing: but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing ;
- (c) when the case has been transferred under section 192 and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

[1882 — S. 200; 1872 — Ss. 44 para 2, 144; 1861 — S. 66.]

[a] The words and figures "subject to the provisions of section 476" were *repealed* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVII] of 1923), S. 54. [b] *Inserted, ibid.* [c] *Inserted, ibid.*, 1926 (2 [II] of 1926), S. 3.

#### SECTION 200 — SYNOPSIS (*contd.*)

15. Prosecution under S. 211, Penal Code.
16. Commission for examination.
17. "Upon oath."
18. Shall be reduced to writing.
19. "Shall be signed."
20. Presidency Magistrate.
21. Shall not be bound to re-examine.

1. Scope and object. — [1] The object of an examination under the section is three-fold :

(a) To ascertain the facts constituting the offence. (Vol 8) 1921 Cal 561 (563) : 22 Cri L Jour 455 (DB). (Facts not stated in the written complaint.) \* (Vol 11) 1924 Mad 323 (323) : 24 Cri L Jour 837. (Do.) \* (Vol 13) 1926 Sind 194 (196) : 21 Sind L R 293 : 27 Cri L Jour 711. (Do.) \* (Vol 9) 1922 Mad 353 (355) : 22 Cri L Jour 762 (DB). (Doubtful points in the complaint.) \* ('10) 11 Cri L Jour 205 (206) (D B) (Lab). (Magistrate should explain the procedure and ask the complainant to state the charge.)

(b) To prevent abuse of process resulting in wastage of the time of the Court and harassment to the accused. (Vol 2) 1915 Mad 128 (129) : 37 Mad 181 \* ('11) 12 Cri L Jour 217 (220) : 1911 Pun Re No. 11 Cr \* (Vol 11) 1924 All 664 (664) : 26 Cri L Jour 176 \* (Vol 12) 1925 Sind 328 (329) : 18 Sind L R 274 : 26 Cr L J 1101 (DB).

(c) To help the Magistrate to judge if there are sufficient grounds calling for investigation and for proceeding with the case. ('11) 12 Cri L Jour 385 (385) : 1 Upp Bur Rul 73 \* ('12) 13 Cri L Jour 704 (704) (All).

[2] Examination of the complainant must be strictly observed. (Vol 6) 1919 Pat 203 (206) : 20 Cri L Jour 247 \* (Vol 7) 1920 Pat 232 (235) : 21 Cri L Jour 779.

[3] The section applies exclusively to cases when Magistrate takes cognizance of an offence on complaint under S. 190, sub-s. (1) (a). ('99) 1899 All W N 87 (89) \* (Vol 18) 1931 Oudh 392 (393) : 32 Cri L Jour 991.

[4] It does not apply to cases :

(a) When the Magistrate takes cognizance of an offence under Section 190 (1) (b) and (c). ('02) 2 Weir 241 (242) \* ('02) 2 Weir 246 (246) \* ('04) 1 Cri L Jour 193 (197, 199) : 2 Low Bur Rul 146.

(b) Where no offence is disclosed. ('02) 4 Bom L R 609 (611) (DB). (Requiring order under S. 552.) \* ('06) 4 Cri L Jour 170 (170) (DB) (Cal). (No complaint.) \* ('07) 5 Cri L Jour 13 (14). (Do.) \* ('10) 11 Cri L Jour 351 (351) (All). (Do.) \* (Vol 23) 1936 All 469 (470) : 37 Cri L Jour 857. (Do.) \* (Vol 17) 1930 Mad 705 (706) : 31 Cri L Jour 895. (Do.)

[5] Where there is a complaint any defect therein not resulting in failure of justice will not vitiate the proceedings taken. ('09) 9 Cri L Jour 108 (109) : 32 Mad 3 \* (Vol 25) 1938 Sind 209 (212) : 1 L R (1939) Kar 230 : 40 Cri L Jour 122.

[6] A Municipal Magistrate of Calcutta is governed by this section in regard to the examination of the complainant. (Vol 15) 1928 Cal 483 (484) : 30 Cri L Jour 231 (DB).

2. "Magistrate taking cognizance of an offence." — [1] Magistrate who takes cognizance of an offence must himself deal with and cannot send it for orders to another Magistrate. ('02) 6 Cal W N 843 (844) (D B) \* ('12) 13 Cri L Jour 704 (705) (All) \* (Vol 3) 1916 Cal 867 (869) : 17 Cri L Jour 146 : 43 Cal 17 (DB) \* (Vol 4) 1917 All 91 (92) : 18 Cri L Jour 765.

[2] A direction by the District Magistrate that :

### Section 200 — Note 2 (contd.)

particular class of cases should be submitted to him for orders by the Subordinate Magistrate is illegal. ('06) 4 Cri L Jour 213 (214) (DB) (Cal).

[3] A Magistrate has no jurisdiction to try the case which has not been taken cognizance of by him, or has not been sent to him or withdrawn by him, in the proper way. (Vol 17) 1930 Mad 705 (706): 31 Cri L Jour 895\* (Vol 4) 1917 All 91 (92): 18 Cri L Jour 765.

[4] Manager and occupier of factory tried on a charge under the Factories Act, 1934, on a complaint by the Inspector of Factories—Manager filing complaint against the clerk under S. 71 of the Act during the trial—He can be examined as complainant. (Vol 30) 1943 Nag 243 (248): 44 Cri L Jour 587: 1 L R (1943) Nag 362 (D B).

3. "On complaint." — [1] Lodger of first information with police reported against by them—Petition of protest made by him—He should be dealt with as complainant. (Vol 28) 1941 Pat 144 (144): 42 Cri L Jour 358 \* (Vol 27) 1940 Pat 111 (112): 41 Cri L Jour 318.

[2] A complaint should not be treated as if it had the sanctity of affidavit evidence. (Vol 21) 1934 Cal 604 (606): 35 Cri L Jour 996.

4. Stamp on complaint and written examination of the complainant. — [1] Complaints from a public servant (as defined in the Penal Code) a municipal officer or an officer or servant of a railway company are exempt from any court-fee. ('04) 1 Cri L Jour 193 (198): 2 Low Bur Rul 146 (S B) \* ('93) 16 Mad 423 (424) (DB). (Accused on conviction cannot be made to refund what was illegally levied.)

5. Second complaint. — [1] Magistrate taking cognizance of second complaint in respect of the same offence in respect of which accused was previously discharged should proceed in the manner laid down under this section. ('01) 28 Cal 652 (661) (FB) \* ('04) 1904 Upp Bur Rul 2nd Qr Cr P C 19 (20) \* (Vol 17) 1930 Rang 156 (157): 8 Rang 1: 31 Cri L Jour 824.

6. Who may make a complaint. — [1] Offences against provisions of Companies Act, 1913—Ss. 141A and 137 (6) of the Act do not bar prosecution by private individual. (Vol 27) 1940 Cal 232 (233, 234): ILR (1940) 1 Cal 575: 41 Cri L Jour 625 (DB).

[2] Offence under U. P. Municipalities Act—Complaint signed and presented by superintendent of Board—Previous resolution of Board authorising superintendent to file complaints subject to chairman's approval—Chairman's order regarding offence to start proceedings—Complaint held to be with chairman's approval and properly presented. (Vol 23) 1936 All 74 (76): 37 Cri L Jour 382.

7. Whether Magistrate can refuse to entertain a complaint. — [1] A Magistrate is bound to receive the complaint in respect of an offence cognizable by him and proceed under this section. ('88) 12 Bom 161 (163) (DB).

[2] A complaint cannot be refused on the ground that it mentions a section of the Penal Code, while the offence alleged therein falls under another section. (Vol 9) 1922 Mad 62 (62, 63): 23 Cri L Jour 148 (DB).

[3] A Magistrate should refuse to accept a complaint where it is not signed by the complainant and not preferred in person or by a person duly authorised to prefer the specific complaint. (Vol 1) 1914 Cal 479 (479): 42 Cal 19: 15 Cri L Jour 348 (DB).

8. Order on complaint. — [1] After taking cognizance the Magistrate is bound to examine the complainant on oath and hold an enquiry under S. 202. (Vol 26) 1939 Sind 208 (208): ILR (1939) Kar 277: 40 Cri L Jour 807.

[2] A complaint cannot be said to have been legally disposed of by taking no action thereon in view of the police-report and making no order thereon. (Vol 16) 1929 Mad 849 (849): 31 Cri L Jour 462.

[3] The party is entitled only to a certified copy of such order made on the complaint. ('69) 2 Weir 237 (237).

9. Who may present complaint. — [1] A complaint should be presented in person by the complainant himself though under certain circumstances the complaint may be permitted to be presented by a person duly authorised to prefer the specific complaint. (Vol 1) 1914 Cal 479 (479): 42 Cal 19: 15 Cri L Jour 348 (DB).

[2] It is competent to a Magistrate to receive and take action on complaints received by post but whether he will do so or not is a matter within his discretion. (1900) 1900 All W N 189 (190) \* (Vol 16) 1929 Sind 132 (134): 23 Sind L R 285: 30 Cri L Jour 732 (DB). (May call on the complainant to be examined.)

[3] A telegram to a Magistrate asking him to take action under the Code is a complaint and the Magistrate may examine the sender as a complainant. (Vol 23) 1936 Pesh 66 (68): 37 Cri L Jour 604 (DB).

10. "Shall examine." — [1] The requirement as to the examination of the complainant should be strictly complied with. (Vol 6) 1919 Pat 203 (206): 20 Cri L Jour 247 \* (Vol 7) 1920 Pat 232 (235): 21 Cri L Jour 779 \* (Vol 11) 1924 All 664 (664): 26 Cri L Jour 176 \* ('89) 13 Bom 590 (597) (FB) \* (Vol 2) 1915 All 417 (417): 37 All 628: 16 Cri L Jour 669 (DB). \* (Vol 1) 1914 Cal 479 (480): 42 Cal 19: 15 Cri L Jour 348 (DB) \* (Vol 6) 1919 Cal 433 (434, 436): 46 Cal 807: 20 Cri L Jour 794 (DB) \* ('11) 12 Cri L Jour 217 (219): 1911 Pun Re No. 11 Cr \* ('10) 11 Cri L Jour 535 (536) (DB) (Mad) \* ('11) 12 Cri L Jour 463 (463) (DB) (Mad) \* ('11) 12 Cri L Jour 385 (385): (1910) 1 Upp Bur Rul 73 \* (Vol 17) 1930 Rang 226 (226): 31 Cri L Jour 1064 \* (Vol 8) 1921 Sind 84 (84): 15 Sind L R 200: 23 Cri L Jour 243 (DB) \* (Vol 13) 1926 Sind 194 (196): 21 Sind L R 293: 27 Cri L Jour 711 \* (1901) 4 Oudh Cas 127 (131).

[2] The substance of the examination, reduced to writing, should be distinct from the complaint itself. ('96) 18 All 221 (222) (DB).

[3] The examination must be real and the Magistrate should make it fully to see if a *prima facie* case has been established. ('68) 10 Suth W R (Cri Cir) No. 5 p. 1 (1) (FB) \* ('10) 11 Cri L Jour 205 (206, 210) (Lab.) \* ('96) 18 All 221 (223).

[4] Magistrate while verifying the complaint should ascertain whether he has territorial jurisdiction over the case. (Vol 24) 1937 Sind 31 (31): 38 Cri L Jour 291.

Section 200—Note 10 (*contd.*)

[5] The examination should be on facts which are within complainant's knowledge. (1864) 1864 *Suth W R* (Gap No.) Cr 33 (34) (DB) ✱ (Vol 20) 1933 *Rang* 297 (298) : 35 *Cri L Jour* 52.

[6] Though it is desirable that there should be a thorough examination on the presentation of the complaint a perfunctory examination followed by full examination on another day does not vitiate the proceedings. (Vol 20) 1933 *Cal* 552 (553) : 34 *Cri L Jour* 1063.

[7] The reason that the facts were fully set out in the written complaint does not justify an omission to examine the complainant. ('99) 3 *Cal W N* 17 (18) (DB).

[8] Cross-examination of the complainant on deposition recorded under S. 159 by another is not an examination under this section. ('03) 30 *Cal* 923 (925, 926) (DB).

[9] A mere attestation upon oath that the terms of the complaint are true is sufficient compliance with the terms of this section. ('96) 18 *All* 221 (222). (Distinguishing and disapproving 9 *All* 666.)

[But see (Vol 12) 1925 *Sind* 328 (329) : 18 *Sind L R* 274 : 26 *Cri L Jour* 1101 (DB).]

[10] In the case of a complaint presented to a Presidency Magistrate he is not bound to examine on oath or to reduce such examination to writing. ('04) 6 *Bom L R* 682 (663) ✱ ('11) 12 *Cri L Jour* 550 (550) : 35 *Mad* 606.

[11] It is desirable that the substance of the oral examination should be read over to the complainant, especially if it is to be utilized for a possible prosecution for perjury. (Vol 13) 1926 *Nag* 141 (143, 144) : 26 *Cri L Jour* 1401.

[12] Complainant can demand an examination before disposal of the complaint. (1879) 4 *Cal L Rep* 134 (135) (DB) ✱ (1902) 29 *Cal* 410 (412) (DB).

[13] Irrelevant questions relating to his motive or as to the name of the person who gave him advice or drafted the complaint should not be put to the complainant nor can he be punished for refusing to answer them. (1889) 13 *Bom* 600 (604, 621).

**11. Omission to examine complainant.**—[1] Where the accused person, after conviction complains of the omission to examine the complainant, such omission will be cured by S. 537 (a) and will not ordinarily vitiate the trial or the conviction. (Vol 27) 1940 *Pat* 111 (112) : 41 *Cri L Jour* 318 ✱ (Vol 2) 1915 *All* 417 (418) : 16 *Cri L Jour* 669 : 37 *All* 628 (DB) ✱ (Vol 5) 1918 *Bom* 141 (142) : 20 *Cri L Jour* 42 (DB) ✱ (Vol 6) 1919 *Cal* 433 (434, 436) : 46 *Cal* 807 : 20 *Cri L Jour* 794 (DB) ✱ (Vol 16) 1929 *Cal* 175 (175) : 30 *Cri L Jour* 706 (DB) ✱ ('11) 12 *Cri L Jour* 217 (219, 220) : 1911 *Pun Re No.* 11 Cr ✱ (Vol 11) 1924 *Lah* 258 (259) : 4 *Lah* 359 : 25 *Cri L Jour* 125 ✱ (Vol 11) 1924 *Mad* 587 (587) : 25 *Cri L Jour* 730 (DB) ✱ (Vol 15) 1928 *Mad* 1235 (1236) : 52 *Mad* 79 : 30 *Cri L Jour* 432 ✱ (Vol 16) 1929 *Pat* 473 (475, 476) : 30 *Cri L Jour* 1056 : 9 *Pat* 707 (FB). (Overruling (Vol 4) 1917 *Pat* 611 : 2 *Pat L Jour* 657 : 18 *Cri L Jour* 890 (DB) and cases following it, *viz.*, (Vol 6) 1919 *Pat* 452 : 20 *Cri L Jour* 742; (Vol 7) 1920 *Pat* 670 : 20 *Cri L Jour* 481; (Vol 7) 1920 *Pat* 614 : 21 *Cri L Jour* 269 which held that omission to examine is

an illegality.) ✱ ('13) 14 *Cri L Jour* 420 (420) : 1 *Upp Bur Rul* 162 ✱ (Vol 11) 1924 *Rang.* 87 (87) : 1 *Rang* 517 : 25 *Cri L Jour* 273 ✱ (Vol 20) 1933 *All* 816 (818) : 56 *All* 33 : 35 *Cri L Jour* 347.

[See (Vol 25) 1928 *Bom* 50 (53) : 1 *L R* (1937) *Bom* 918 : 39 *Cri L Jour* 214 (DB). (Complainant examined before obtaining sanction—Transfer of case—Omission to re-examine complainant and re-verify complaint held a purely technical irregularity not vitiating proceedings.)]

[2] Where the objection is taken at an early stage, action will be taken to set right the defect and to proceed with the case after the examination of the complainant. (Vol 7) 1920 *Pat* 232 (235) : 21 *Cri L Jour* 779 ✱ ('13) 14 *Cri L Jour* 76 (76) (DB) (Cal) ✱ (Vol 4) 1917 *Pat* 611 (612) : 2 *Pat L Jour* 657 : 18 *Cri L Jour* 890 (DB) (Proceedings quashed.)

[3] Where the procedure adopted prejudiced the complainant and the complaint was dismissed the order will be set aside. (Vol 9) 1922 *Mad* 443 (444) : 23 *Cri L Jour* 691. (Complainant though not examined case resulting in conviction. No prejudice.) ✱ ('68) 4 *Mad H C R* 162 (164) (DB). (Complainant not examined.) ✱ ('84) 1884 *All W N* 47 (47). (Do.) ✱ ('89) 13 *Bom* 590 (597) (FB). (Do.) ✱ (Vol 11) 1924 *Bom* 321 (321) : 48 *Bom* 880 : 25 *Cri L Jour* 960 (DB). (Do.) ✱ ('03) 30 *Cal* 923 (925, 926) (DB). (Do.) ✱ (Vol 6) 1919 *Cal* 78 (79) : 20 *Cri L Jour* 175 (DB). (Do.) ✱ ('11) 12 *Cri L Jour* 539 (541) : 1912 *Pun Re No.* 2 Cr. (Do.) ✱ (Vol 6) 1919 *Pat* 319 (320) : 20 *Cri L Jour* 413 (DB). (Do.) ✱ (Vol 6) 1919 *Pat* 545 (546) : 20 *Cri L Jour* 552. (Do.) ✱ ('10) 12 *Cri L Jour* 385 (385, 386) : 1 *Upp Bur Rul* 73 (Do.) ✱ ('96) 18 *All* 221 (222) (DB) (Improper examination.)

[But see ('11) 12 *Cr L J* 550 (550) (Mad). (Where a complaint was before a Presidency Magistrate before the amending Act of 1926 and complaint was verified on oath though there was no examination.) ✱ ('72) 17 *Suth W R Cr* 87 (37) (DB). (Where the High Court refused to interfere as the case was trivial.)]

**12. Examination before the case is transferred under Section 192.**—[1] Where the complaint is made in writing the Magistrate in cases where he is transferring the case under S. 192, is not required to examine the complainant. ('10) 11 *Cri L Jour* 535 (536) (DB) (Mad) ✱ ('10) 12 *Cri L Jour* 385 (385) : 1 *Upp Bur Rul* 73.

**13. Examination where complaint is by Court or public servant.**—[1] In cases of complaints by a Court no examination is necessary. (Vol 20) 1933 *Pat* 87 (88) : 34 *Cri L Jour* 237.

[2] In cases of complaints by a public servant purporting to act in the discharge of his official duties no examination is necessary under this section. (Vol 22) 1935 *Pat* 515 (520) : 36 *Cri L Jour* 1354 (DB) ✱ (Vol 25) 1938 *All* 449 (449) : 39 *Cri L Jour* 840 ✱ (Vol 15) 1928 *All* 765 (766, 767) : 51 *All* 382 : 29 *Cri L Jour* 938 ✱ (Vol 13) 1926 *Mad* 865 (871) : 49 *Mad* 525 : 27 *Cri L Jour* 1031 (FB). (Overruling the decision in (Vol 12) 1925 *Mad* 672 : 26 *Cri L Jour* 1550 (DB), which held that a police officer when making a complaint must be examined.) ✱ (Vol 16) 1929 *Pat* 514 (517) : 31 *Cri L Jour* 55 ✱ (Vol 17) 1930 *Cal* 222 (223, 224) : 31 *Cri L Jour* 670 (DB) ✱ (Vol 17) 1930 *Cal* 665 (665) : 32 *Cri L Jour* 133 ✱ (Vol 17) 1930 *Nag* 33 (34) : 25 *Nag L R* 194 : 31 *Cri L Jour* 382.

*Procedure by Magistrate not competent to take cognizance of the case.*  
an endorsement to that effect.

201. (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.

[1882—S. 201; 1872—S. 145.]

#### Section 200—Note 13 (*con'd.*)

[3] Where the complaint is not by a Court, nor can it be treated as one by a public servant, the complainant ought to be examined. (Vol 23) 1936 Pat 145 (146) : 37 Cri L Jour 289.

14. Joint complaint by two or more complainants.—[1] A joint complaint by two or more persons is not contemplated by the Code. (Vol 18) 1931 Cal 646 (647) : 33 Cri L Jour 83 (DB).

[But see (Vol 29) 1942 Oudh 407 (408) : 43 Cri L Jour 731 : 18 Luck 248 (Both the complainants should be examined.)]

15. Prosecution under S. 211, Penal Code.—[1] Prosecution of complainant under S. 211 should not be ordered unless he is examined on oath and allowed to substantiate the charge he made. (Vol 26) 1939 Sind 78 (79) : 1 L R (1939) Kar 648 : 40 Cri L Jour 449 \* (Vol 11) 1924 All 664 (664) : 26 Cri L Jour 176 \* (Vol 11) 1924 Bom 321 (321) : 48 Bom 360 : 25 Cri L Jour 960 (DB) \* (Vol 13) 1926 Bom 284 (285, 286) : 27 Cri L Jour 740 (DB) \* ('87) 14 Cal 707 (712, 720) (FB) \* (Vol 8) 1921 Pat 205 (205) \* (Vol 14) 1927 Pat 402 (403) : 28 Cri L Jour 639 \* ('11) 12 Cri L Jour 539 (541) : 1912 Pun Re No. 2 Cr.

[But see ('08) 8 Cri L Jour 349 (350) : 4 Nag L R 136.]

16. Commission for examination.—[1] Complainant who is examined under this section is not a witness and therefore cannot be examined on commission. ('82) 5 All 92 (92, 93). (Pardanashin lady.) \* ('96) 1896 Pun Re No. 10 Cr. p. 24 (26, 27) (DB). (Ruler of a Native State.)

[But see (Vol 1) 1914 Cal 479 (480) : 42 Cal 19 : 15 Cri L Jour 348 (DB). (Pardanashin lady.)]

[2] The examination of the complainant under this section is not made in the presence of the accused and cannot be used as 'evidence' against him. ('11) 12 Cri L Jour 585 (587) (SB) (Mad).

17. "Upon oath."—[1] The evident object of getting the substance of the examination on oath and signed by him, is to use it against him if needed, in a prosecution for perjury. (Vol 13) 1926 Nag 141 (143) : 26 Cri L Jour 1401 \* ('87) 9 All 666 (670).

[2] This section does not authorise a Magistrate to administer an oath but merely recognises his power to do so. (Vol 33) 1946 Lah 281 (283) : 1916 Pun Re No. 34 Cr : 17 Cri L Jour 491 (D B).

18. Shall be reduced to writing.—[1] The substance of the examination of the complainant is required to be reduced to writing except in the case in proviso (b). ('72) 4 N W P H C R 88 (89) \* ('96)

18 All 211 (222) (D B) \* (1864) 1864 Suth W R Cr 37 (37) \* ('71) 16 Suth W R Cr 58 (59) (DB) \* ('69) 2 Weir 237 (237).

[2] The written examination must be and is intended to be distinct from the complaint. ('96) 18 All 221 (222) (D B). (9 All 666, distinguished.)

19. "Shall be signed."—[1] The examination of the complainant on oath should be signed by the complainant. ('69) 3 Beng L R Cr 67 (67, 68) (D B) \* (Vol 13) 1926 Nag 141 (143) : 26 Cri L Jour 1401. (Object is to make use of it if need be in a prosecution under S. 193.) \* ('02) 6 Cal W N 840 (841) (D B). (Statement not signed cannot be used in evidence.)

[2] The failure of the Magistrate to sign the examination would only be an irregularity curable by S. 537. ('12) 13 Cri L Jour 753 (758) : 36 Mad 275 (D B).

20. Presidency Magistrate.—[1] The examination of the complainant may be on oath or not as the Magistrate thinks fit where the complaint is before the Presidency Magistrate. ('08) 7 Cri L Jour 10 (15) : 35 Cal 141 (D B).

[2] Where the complaint before the Presidency Magistrate is in writing the examination need not be reduced to writing by him. (Vol 8) 1921 Cal 561 (563) : 22 Cri L Jour 455 (D B).

21. Shall not be bound to re-examine.—[1] Complainant examined by the Magistrate who received the complaint—Magistrate to whom it is transferred need not re-examine him before issuing process. (1900) 4 Cal W N cccxi (cccxi) (D B) \* (Vol 1) 1914 Cal 479 (480) : 42 Cal 19 : 15 Cri L Jour 348 (D B). (Where he is not examined process should not issue before such examination.)

[2] Complainant in a case requiring sanction under S. 197 examined before such sanction—Magistrate to whom case is transferred after obtaining sanction should examine him again. (Vol 25) 1938 Bom 50 (53) : 1 L R (1937) Bom 918 : 39 Cri L Jour 214 (D B).

#### Section 201—Note 1

[1] This section does not bar a Magistrate not competent to take cognizance of the complaint from hearing the case if sent to him for hearing by a Court competent to do so under S. 192 or S. 528. (Vol 26) 1939 Lah 122 (123) : 1 L R (1938) Lah 619 : 40 Cri L Jour 515.

[2] Magistrate who has no local jurisdiction to inquire into or try an offence cannot take cognizance of it. (Vol 19) 1932 Mad 427 (427, 428) : 33 Cri L Jour 452.

[3] Magistrate has to see whether, from the allegations made in the complaint, he has jurisdiction to entertain it. (Vol 8) 1921 All 12(12) : 22 Cr L J 308 (FB).

202. <sup>a</sup>[(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance, or which has been transferred to him under section 192, *Postponement for issue of process.* may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint :

<sup>b</sup>[Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.] ]

<sup>c</sup>[(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.]

<sup>d</sup>[(2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.]

(3) This section applies also to the police in the towns of Calcutta and Bombay.

[1882—S. 202; 1872—S. 146; 1861—S. 180.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 55. [b] *Substituted, ibid.*, 1926 (2 [II] of 1926), S. 4. [c] *Substituted, ibid.*, 1923 (18 [XVIII] of 1923), S. 55. [d] *Inserted, ibid.*

#### Section 201 — Note 1 (*contd.*)

[4] Magistrate himself must decide the question of jurisdiction and should not seek or act on the advice of any other District or superior Magistrate. ('12) 13 Cri L Jour 786 (786) : 37 Bom 144 (D B).

[5] Magistrate cannot refuse to take cognizance of a case, on any of the following grounds:

(a) That he is not entitled to take cognizance of a charge not named in the complaint but which could be made out from the allegations in the complaint. (Vol 18) 1931 All 10 (11) : 32 Cri L Jour 360\* ('07) 7 Cri L Jour 6 (7) : 31 Mad 43.

(b) That the offence merits greater punishment than he is empowered to inflict. ('88) 1888 Rat 375 (375) (D B).

(c) That the offence is a petty one cognizable by the head of the village. ('71) 7 Mad H C R App xxxi (xxxi).

[6] Magistrate need not and should not examine the complainant where he is incompetent to take cognizance of a case. ('05) 3 Cri L Jour 53 (54) : 28 All 268 \* ('06) 4 Cri L Jour 213 (214) (D B) (Cal).

[7] Proper course is for Magistrate to return the complaint and not for District Magistrate or High Court to transfer it to a Magistrate having jurisdiction. (Vol 29) 1942 Mad 715 (716) : 44 Cri L Jour 122.

[8] Magistrate had jurisdiction in two capacities subordinate to a different High Court — He received complaint in one capacity and transferred it to his own file in other capacity — *Held* complaint is returned under this section to be presented to the proper Court, and to have accepted it as re-presented. (Vol 17) 1930 Nag 291 (291, 292, 293) : 32 Cri L Jour 130.

[9] Sub-section (2) contemplates the presentation of oral complaints. (Vol 11) 1924 Rang 35 (36) : 1 Rang 549 : 25 Cri L Jour 229.

#### SECTION 202 — SYNOPSIS.

1. Scope and object.
2. Presidency Magistrates.
3. Complaint of an offence.
4. Complaint by Court or public servant.
5. "Authorised to take cognizance."
6. "Transferred to him under Section 192."
7. "May, if he thinks fit."
8. "For reasons to be recorded in writing."
9. "Postpone the issue of process."
10. Position of the accused.
11. May enquire into the case himself or direct investigation.
12. "Inquiry."
13. Evidence in the inquiry — Sub-section (2A).
14. Magistrate holding inquiry, if disqualified from trying.
15. Investigation.
16. "Investigation by police."
17. "Such other person."
18. Examination of the complainant — Proviso.
19. Powers of the enquiring or investigating officer.
20. Revision.

1. Scope and object. — [1] The scope of Chapter XVI is to separate unfounded from substantial cases even at the outset. (Vol 2) 1915 Mad 128 (129) : 37 Mad 181.

[2] The object of this section is to ensure that no person shall be compelled to answer a criminal charge

**Section 202 — Note 1 (contd.)**

unless there is a *prima facie* case for proceeding and issuing a process against the accused person. ('68) 10 Suth W R Cr Cir 1 (1) (DB) \* (Vol 26) 1939 All 602 (606) : 1 L R (1939) All 851 : 40 Cri L Jour 917 \* (Vol 14) 1927 Lah 30 (31) : 28 Cri L Jour 26 \* (Vol 14) 1927 Mad 19 (20, 21) : 49 Mad 918 : 28 Cri L Jour 129 (F B) \* (Vol 6) 1919 Oudh 395 (395) : 22 Oudh Cas 321 : 20 Cri L Jour 728 \* (Vol 8) 1921 Pat 85 (87) : 21 Cri L Jour 519 \* (Vol 13) 1926 Sind 186 (189) : 20 Sind L R 43 : 27 Cri L Jour 494 (D B).

[3] The degree of formality of the proceedings and the width and depth of the inquiry is entirely in the discretion of the Magistrate. (Vol 17) 1930 Pat 30 (32) : 30 Cri L Jour 554 \* ('10) 12 Cri L Jour 385 (386) : 1 Upp Bur Rul 73.

[4] The inquiry is not intended to supersede a regular trial. (Vol 18) 1931 Bom 524 (526) : 55 Bom 770 : 33 Cri L Jour 72 (D B) \* ('10) 12 Cri Jour 385 (386) : 1 Upp Bur Rul 73 \* (Vol 6) 1919 Oudh 395 (395) : 20 Cri L Jour 728 : 22 Oudh Cas 321 \* (Vol 17) 1930 Pat 30 (32) : 30 Cri L Jour 554.

[5] It is not necessary that a Magistrate should call for an inquiry under this section in every case. (Vol 7) 1920 Pat 270 (270, 271) : 21 Cri L Jour 220.

[6] Inquiry should be held where the complainant is not speaking from his own knowledge. (Vol 8) 1921 Cal 561 (563) : 22 Cri L Jour 455 (D B) \* ('06) 4 Cri L Jour 217 (218) (D B) (Cal) \* (Vol 21) 1934 Rang 167 (168) : 36 Cri L Jour 75.

[7] Where an inquiry under this section is made obligatory, the failure to do so vitiates the whole trial. (Vol 18) 1931 Lah 56 (56) : 12 Lah 383 : 32 Cri L Jour 616.

[8] Magistrate acting under this section can consider the report of inquiry or investigation directed by him. (Vol 14) 1927 All 136 (137) : 28 Cri L Jour 140.

[9] Magistrate cannot consider the following:

(a) Report made previously and not directed by him. ('14) 15 Cri L Jour 21 (21) (D B) (All).

(b) Inquest report made by another Magistrate under S. 176. (Vol 19) 1932 Cal 121 (122) : 33 Cri L Jour 218 (D B).

(c) Previous departmental inquiry. ('87) 1887 Pun Re No. 33 Cr, p. 70 (72, 73) (DB).

[10] Case taken on file after investigation by police under this section — Subsequent discharge of the accused will not justify the making of complaint under S. 211, Penal Code. ('42) 43 Cri L Jour 32 (32) (Mad).

**2. Presidency Magistrate.** — [1] Presidency Magistrate declared to be subordinate to the Chief Presidency Magistrate — Additional Chief Presidency Magistrate can make over a complaint to an ordinary Presidency Magistrate for inquiry and report under this section. (Vol 21) 1934 Cal 405 (406) : 61 Cal 467 : 35 Cri L Jour 729 (D B).

**3. Complaint of an offence.** — [1] The section applies only to cases where a Magistrate takes cognizance

of an offence on complaint under S. 190 (1) (a). ('13) 14 Cri L Jour 218 (219) (All) \* (Vol 11) 1924 Lah 729 (730) : 25 Cri L Jour 1315 (D B).

[2] Magistrate cannot direct an inquiry or investigation under this section in the following cases:

(a) Cases in which he takes cognizance of the offence on a police-report under S. 190 (1) (b). ('99) 1899 All W N 87 (89) \* ('13) 14 Cri L Jour 387 (387, 388) (DE) (Cal) \* ('80) 1880 Pun Re No. 8 Cr, p. 15 (16) (D B) \* (Vol 6) 1919 Pat 319 (320) : 20 Cri L Jour 413 \* (Vol 8) 1921 Pat 302 (303) : 22 Cri L Jour 735 \* ('13) 14 Cri L Jour 297 (297) : 40 Cal 854 (D B).

(b) Cases in which he takes cognizance of the offence on information under S. 190 (1) (c). ('88) 1888 Pun Re No. 24 Cr, p. 43 (45) (D B) \* ('94) 1894 Pun Re No. 15 Cr, p. 4 : (49) \* ('02) 2 Weir 241 (242) \* (Vol 8) 1921 Pat 302 (303) : 22 Cri L Jour 735 \* ('13) 14 Cri L Jour 600 (601) : 7 Sind L R 75 (D B).

[c] Petition under S. 107, which is not a complaint of an offence at all. (Vol 19) 1932 All 670 (671) : 54 All 1036 : 34 Cri L Jour 42 \* (Vol 15) 1928 Lah 694 (694) : 29 Cri L Jour 866. (Overruled on another point in (Vol 25) 1938 Lah 861 : ILR (1938) Lah 640 : 40 Cri L Jour 193 (DB).) \* (Vol 13) 1926 Mad 521 (522, 523) : 49 Mad 315 (D B).

[d] Petition under S. 488 for maintenance which is not a complaint of any offence. ('05) 2 Cri L Jour 421 (422) : 1905 Pun Re No. 29 Cr \* ('28) 29 Cri L Jour 902 (910) (DB) (Lah) \* ('88) 11 Mad 199 (200) (DB) \* (Vol 33) 1946 Pat 104 (105).

[e] Complaint under S. 552 for restoration of abducted females, which is not a complaint of an offence. (Vol 20) 1933 Nag 374 (376) : 35 Cri L Jour 404 : 30 Nag L R 76 \* ('02) 4 Bom L R 609 (611) (DB).

[3] Magistrate can call for report from the police. (Vol 25) 1938 Lah 861 (863, 864) : 1 L R (1938) Lah 640 : 40 Cri L Jour 193 (DB) \* (Vol 19) 1932 All 670 (671) : 54 All 1036 : 34 Cri L Jour 42 \* (Vol 13) 1926 Mad 521 (525) : 49 Mad 315 (D B).

**4. Complaint by Court or public servant.**—[1] Magistrate can investigate preliminarily under this section, whether the complaint is filed by a public servant or by any one else. (Vol 8) 1921 Sind 48 (49) : 15 Sind L R 149 : 23 Cri L Jour 31 (D B) \* (Vol 17) 1930 Pat 30 (31, 32) : 30 Cri L Jour 554.

**5. "Authorised to take cognizance."**—[1] A Magistrate cannot act under this section unless he has authority to take cognizance of the offence mentioned in the complaint. (Vol 18) 1931 Oudh 392 (393, 394) : 32 Cri L Jour 991.

**6. "Transferred to him under Section 192."**—[1] Magistrate to whom a case is transferred under S. 528 cannot order an inquiry under this section. (Vol 25) 1938 Nag 433 (434) : 39 Cri L Jour 931.

[2] Case transferred under S. 192—Stage for taking action under this section passed—Transferee Magistrate cannot hold or direct the preliminary inquiry. (Vol 29) 1942 Mad 426 (426) : 43 Cri L Jour 670 \* (Vol 24) 1937 Oudh 81 (82) : 37 Cri L Jour 1128 : 12 Luck 523.

[3] Intention of Magistrate transferring case under

**Section 202—Note 6 (contd.)**

S. 192 doubtful — Transferee Magistrate can order inquiry. (Vol 29) 1942 Mad 426 (427). 43 Cri L Jour 670.

7. "May, if he thinks fit."—[1] Magistrate has discretion whether or not an inquiry or investigation under this section should be ordered. (Vol 20) 1933 Rang 271 (272): 34 Cri L Jour 1185.

[2] A complainant cannot require his complaint to be forwarded to the police or to another Magistrate for investigation or inquiry. (Vol 22) 1935 Bom 76 (78): 39 Bom 171: 36 Cri L Jour 433 (D B).

8. "For reasons to be recorded in writing."—[1] Magistrate deciding to act under this section, is bound to record his reasons for doing so in writing. (Vol 27) 1940 Pat 97 (98): 41 Cri L Jour 349 (Vol 16) 1929 Cal 176 (177): 30 Cri L Jour 705 (DB) (87) 1887 Pun Re No. 33 Cr. p. 70 (72) (DB) (Vol 15) 1928 Lah 88 (89): 29 Cri L Jour 958 (97) 20 Mad 387 (387) (DB) (88) 2 Weir 244 (244) (DB) (Vol 13) 1926 Pat 34 (35): 26 Cri L Jour 1894 (Vol 13) 1926 Sind 194 (196): 21 Sind L R 293: 27 Cri L Jour 711 (Vol 18) 1931 Sind 113 (113, 114): 32 Cri L Jour 926 (DB) (11) 12 Cri L Jour 885 (385): 1 Upp Bur Rul 73 (13) 14 Cri L Jour 493 (493, 494) (All) (Vol 4) 1917 Cal 462 (463): 17 Cri L Jour 396 (D B) (Vol 4) 1917 All 91 (92): 18 Cri L Jour 765.

9. "Postpone the issue of process."—[1] Magistrate who, after issue of process, holds an inquiry or directs an inquiry or investigation, acts in contravention of the section. (Vol 25) 1938 Nag 433 (434): 39 Cri L Jour 981 (12) 13 Cri L Jour 749 (749): 6 Sind L R 83 (DB).

[2] The rule applies to the successor of a Magistrate who has issued the process. (86) 9 Mad 282 (282, 283) (D B).

[3] The rule applies to Magistrate to whom the case is transferred after issue of process. (Vol 25) 1938 Nag 433 (434): 39 Cri L Jour 981.

[4] Complaint made against several persons jointly—Process issued against some of them—Magistrate can postpone issue of process against others and make preliminary inquiry of offences alleged against them. (Vol 27) 1940 Nag 128 (128): 41 Cri L Jour 312.

[5] Magistrate issued processes against two accused—If one of them lays a cross-complaint, Magistrate can rescind order to issue process and send cases to a Subordinate Magistrate for inquiry and report. (Vol 10) 1923 Cal 662 (662): 25 Cri L Jour 464 (D B).

[6] Two complaints connected with same subject-matter before Magistrate—He can postpone issue of process in one pending result of the other. (Vol 20) 1933 Sind 254 (255): 34 Cri L Jour 891.

[7] The fact that police investigation has been made does not affect proceedings under this section when once process has been postponed. (Vol 5) 1918 Pat 350 (350, 351): 19 Cri L Jour 263.

[8] Magistrate directing inquiry under this section—He cannot issue process before he receives report of inquiry. (Vol 12) 1925 Cal 989 (990) (DB).

10. Position of the accused.—[1] A person can-

not be represented by a pleader during the preliminary inquiry held under this section. (Vol 20) 1933 Cal 447 (448): 60 Cal 1051: 34 Cri L Jour 604 (DB).

[2] Person complained against may attend proceedings but he has no *locus standi* as a party. (08) 8 Cri L Jour 20 (23): 4 Nag L R 81 (11) 38 Cal 880 (887) (DB) (Vol 21) 1934 Rang 167 (168): 36 Cri L Jour 75 (DB).

[3] Proceedings under this section are not proceedings *inter partes*. (Vol 13) 1926 Sind 188 (189): 20 Sind L R 43: 27 Cri L Jour 494 (DB) (Vol 13) 1926 Pat 34 (35): 26 Cri L Jour 1394 (Vol 20) 1933 Cal 447 (448): 60 Cal 1051: 34 Cri L Jour 604 (DB).

[4] The following are undesirable and contrary to the spirit of the section:

(a) Issuing notice to accused before issue of process. (Vol 14) 1927 Mad 19 (20, 21): 49 Mad 918: 28 Cri L Jour 129 (FB) (13) 14 Cri L Jour 57 (58): 40 Cal 444 (DB) (Vol 18) 1931 Bom 524 (525): 55 Bom 770: 33 Cri L Jour 72 (DB) (Vol 10) 1923 Cal 198 (198, 199): 24 Cri L Jour 333 (DB) (Vol 15) 1928 Lah 97 (97): 29 Cri L Jour 39 (Vol 17) 1930 Rang 156 (158): 8 Rang 1: 31 Cri L Jour 824 (Vol 13) 1926 Sind 194 (196, 197): 21 Sind L R 293: 27 Cri L Jour 711.

(b) Conducting inquiry in presence of accused. (02) 6 Cal W N 843 (844) (DB) (20) 25 Cal W N xii (xii) (DB) (11) 12 Cri L Jour 385 (386): 1 Upp Bur Rul 73.

[But see (13) 14 Cri L Jour 3 (4) (Lah).]

(c) Hearing arguments on behalf of accused. (Vol 12) 1925 Cal 576 (577): 26 Cri L Jour 305 (DB) (Vol 5) 1918 Pat 652 (652, 653): 19 Cri L Jour 527 (Vol 4) 1917 Cal 462 (463): 17 Cri L Jour 396 (DB).

[See however (11) 12 Cri L Jour 207 (208) (DB) (Cal).]

(d) Examining accused. (Vol 10) 1923 Lah 663 (664): 26 Cri L Jour 167 (Vol 15) 1928 Lah 88 (89): 29 Cri L Jour 958.

[See also (06) 3 Cri L Jour 138 (140): 32 Cal 1085 (DB).]

[But see (Vol 21) 1934 Sind 143 (145): 36 Cri L Jour 94 (DB).]

[5] Magistrate following procedure contrary to spirit of the section does not commit illegality. (Vol 15) 1923 Bom 290 (290, 291): 52 Bom 448: 29 Cri L Jour 975 (DB) (04) 1 Cri L Jour 102 (103) (DB) (Bom) (Vol 18) 1931 Pat 302 (303, 304): 32 Cri L Jour 1023 (Vol 18) 1931 Sind 113 (113, 114): 32 Cri L Jour 926 (DB) (Vol 21) 1934 Oudh 372 (373): 35 Cri L Jour 1239.

[See however (Vol 27) 1940 Pat 97 (100): 41 Cri L Jour 349.]

11. May inquire into the case himself or direct investigation.—[1] Magistrate choosing to inquire into the case himself—*Held* he could not direct a local investigation. (Vol 9) 1922 All 211 (212): 44 All 550: 23 Cri L Jour 279 (Vol 15) 1928 Lah 88 (89): 29 Cri L Jour 958 (Vol 4) 1917 All 91 (92): 18 Cri L Jour 765.

[2] Magistrate ordered an investigation by another

**Section 202—Note 11 (contd.)**

person—He cannot follow it up by an inquiry himself. (Vol 24) 1937 Nag 889 (889) : 39 Cri L Jour 80 \* ('12) 14 Cri L Jour 493 (494) (All).

[But see ('10) 11 Cri L Jour 525 (526) : 38 Cal 68 (DB).]

[3] Inquiry under the section can be directed only to a Subordinate Magistrate and not a superior Magistrate. ('12) 13 Cri L Jour 484 (485) : 39 Cal 1041 (DB).

[4] Inquiry can be directed only to a Subordinate Magistrate and not to a Magistrate of the same class. ('11) 12 Cri L Jour 539 (541) : 1912 Pun Re No. 2 Cr.

(5) Subordinate Magistrate directed to inquire need not be competent to entertain complaint asked to inquire into, provided Magistrate directing inquiry, is competent to entertain and dispose of the same. ('02) 6 Cal W N 295 (296) (DB).

[6] Once Magistrate directed inquiry by Subordinate Magistrate under this section, he cannot recall proceedings before inquiry is completed. (Vol 20) 1933 Nag 374 (376, 377) : 30 Nag L R 76 : 35 Cri L Jour 404.

[7] Magistrate can stay proceedings before inquiry is completed. (Vol 21) 1934 Sind 143 (144) : 36 Cri L Jour 94 (DB).

[8] Magistrate directed inquiry or investigation by another under this section—He cannot, on receipt of the report transfer the case for disposal to another Magistrate without deciding whether the case should be dismissed under S. 203 or proceeded with under S. 204. (Vol 27) 1940 Lah 61 (63) : 41 Cri L Jour 344.

**12 "Inquiry."** (1) Magistrate can inquire in any way he thinks proper. (Vol 11) 1924 Pat 797 (799) : 26 Cri L Jour 129.

[But see (Vol 21) 1934 Oudh 88 (89) : 35 Cri L Jour 415].]

[2] Magistrate is at liberty to look into police records and if he is satisfied that the complaint is groundless, he can dismiss it. (Vol 11) 1924 Pat 797 (799) : 26 Cri L Jour 129 \* ('69) 11 Suth W R Cr. 54 (54, 55) (DB).

[But see ('12) 13 Cri L Jour 125 (125) (DB) (Cal).]

[3] Magistrate examining witnesses in inquiry—Evidence opposed to complainant's allegations brought before him—He should give opportunity to complainant to explain or to meet such evidence. (Vol 15) 1928 Mad 135 (136) : 29 Cri L Jour 48 \* ('12) 13 Cri L Jour 125 (125) (DB) (Cal).

[4] Magistrate has discretion to allow the complainant to be represented by vakil or not in inquiry. ('71) 8 Bom H C R 202 (204) (DB).

[5] Proceedings in inquiry under this section should not be dilatory or protracted. (Vol 26) 1939 Cal 33 (34) : 40 Cri L Jour 213 (DB).

**13. Evidence in the inquiry—Sub-section (2A).**

[1] Magistrate can examine witnesses, whom he knows to be able to throw light on the matter, or can

import his personal knowledge into it. (Vol 17) 1930 Mad 443 (444) : 30 Cri L Jour 1160.

[2] Magistrate can thoroughly cross-examine witnesses to get the truth. (Vol 26) 1939 Pesh 16 (17) : 40 Cri L Jour 674.

[3] Practice of examining accused and his witnesses and letting witnesses of the prosecution be cross-examined by accused in inquiry under this section is irregular and ought to be deprecated, but is not illegal. (Vol 28) 1941 Pat 419 (420, 421) : 42 Cri L Jour 332. ((Vol 18) 1931 Pat 302 : 32 Cri L Jour 1023, relied on.)

[4] Magistrate inquiring into a case under this section examining witnesses—He may under sub-s. (2A) take evidence of witnesses on oath. ('09) 9 Cri L Jour 295 (296) : 36 Cal 72 (DB). (Inquiry under S. 202 (2A) is a judicial proceeding.) \* ('05) 2 Cal L Jour 65n (65n) (Do). \* (Vol 11) 1924 Pat 138 (139) : 24 Cri L Jour 862 (Do).

**14. Magistrate holding inquiry, if disqualified from trying.**—[1] Magistrate who holds a preliminary inquiry under this section is not disqualified to try the case himself when he has not initiated or directed proceedings or took personal interest in complaint presented before him. ('97) 24 Cal 167 (168, 169) (DB) \* (Vol 10) 1923 Rang 65 (65) : 24 Cri L Jour 744 \* ('98) 23 Cal 328 (334) (DB).

[2] The fact that subordinate Magistrate expressed his opinion in submitting report is no bar to his holding trial on an order by District Magistrate. (1900) 4 Cal W N 604 (605) (DB).

**15. Investigation.**—[1] When a Magistrate passes an order for investigation and report by police under this section there is no inquiry or trial pending. (Vol 29) 1942 Bom 42 (43) : 43 Cri L Jour 362 (DB).

**16. "Investigation by police."**—[1] Magistrate should not make indiscriminate use of police agency for ascertaining matters as to which they must form their own opinion. (Vol 20) 1933 Sind 339 (340) : 27 Sind L R 387 : 35 Cri L Jour 24 (DB).

[2] In cases not cognizable by police, Magistrate should take action on complaint at once. ('94) 1894 Pun Re No. 19 Cr, p. 37 (67).

[See also ('88) 12 Bom 161 (163) (DB).]

[3] Magistrate cannot proceed under chapter XIV after acting under chapter XVI. (Vol 15) 1928 Cal 24 (25) : 54 Cal 303 : 28 Cri L Jour 577 (DB) \* (Vol 15) 1928 Pat 359(361) : 29 Cri L Jour 374 \* ('22) 23 Cri L Jour 403 (403) (Pat).

[4] When complaint is referred under this section by Magistrate for investigation, police need do no more than make a report. (Vol 18) 1931 Mad 770 (770) : 54 Mad 598 : 32 Cri L Jour 690.

[5] Police is not debarred from exercising ordinary powers of arrest and investigation and sending up accused for trial under a charge-sheet. (Vol 18) 1931 Mad 770 (770) : 54 Mad 598 : 32 Cri L Jour 690 \* (Vol 19) 1932 Lah 579 (580) : 33 Cri L Jour 737 : 14 Lah 194 (DB) \* (Vol 10) 1923 Pat 547 (548, 549) : 2 Pat 379 : 24 Cri L Jour 375 (DB) \* ('78) 2 Cal L R 374 (376) (DB).



Section 202 — Note 16 (*contd.*)

[But see (Vol 16) 1929 Bom 72 (73, 74) : 53 Bom 339 : 30 Cri L Jour 781 (DB) \* (Vol 25) 1938 Sind 113 (116) : I L R (1939) Kar 85 : 39 Cri L Jour 681 (FB). ((Vol 20) 1933 Sind 136 : 27 Sind L R 67 : 34 Cri L Jour 763 (DB), overruled; (Vol 21) 1934 Sind 20 : 35 Cri L Jour 89 (DB) is no longer good law after this Full Bench decision.)]

[6] Accused himself a police-officer — Magistrate should not call for a report from him. (\*87) 14 Cal 141 (146) (D B) \* (Vol 7) 1920 Pat 655 (656) : 5 Pat L Jour 61 : 21 Cri L Jour 621 (DB).

[7] Accused himself a police-officer — Magistrate should not call for a report from superior or other police-officer. (Vol 7) 1920 All 91 (92) : 21 Cri L Jour 649 \* (Vol 7) 1920 All 125 (125) : 21 Cri L Jour 416 \* (1900) 4 Cal W N cxxxi (ccxxii) (D B) \* (Vol 15) 1928 Lah 88 (89) : 29 Cri L Jour 958 \* (Vol 6) 1919 Oudh 395 (395) : 22 Oudh Cas 321 : 20 Cri L Jour 728 \* (\*05) 2 Cri L Jour 51 (53) (DB) (Cal).

[8] Accused himself a police-officer — Magistrate should hold inquiry. (\*97) 20 Mad 387 (388) (DB).

[9] Accused himself a police-officer — Magistrate should direct local inquiry by subordinate Magistrate. (Vol 6) 1919 Pat 495 (495) : 20 Cri L Jour 396 (DB).

[10] Complaint against police-officer—Complainant should be given every facility to prove his allegations. (Vol 13) 1926 Mad 288 (288) : 27 Cri L Jour 107.

[11] Complaint against person alleged to have acted in collusion with police should not be handed over to police for investigation. (Vol 20) 1933 Sind 339 (340) : 27 Sind L R 397 : 35 Cri L Jour 24 (DB).

[12] It is not illegal to send complaint, in which *bona fides* of police are impugned, for inquiry or investigation by police-officer. (Vol 27) 1940 Lah 208 (209) : 41 Cri L Jour 618.

[13] Report called for under this section should form part of the record and copy thereof can be given to accused. (Vol 29) 1942 Rang 51 (51) : 1941 Rang L R 590 \* (\*87) 14 Cal 141 (144) (DB) \* (Vol 18) 1931 Mad 429 (429) : 32 Cri L Jour 689.

[14] Report should be submitted to Magistrate who had ordered investigation and not to another Magistrate. (Vol 5) 1918 Lah 123 (124) : 19 Cri L Jour 436.

[15] Report called for under this section is privileged. (Vol 24) 1937 All 90 (94, 96) : I L R (1937) All 390 (DB).

17. "Such other person." — [1] A master is not a fit person to be directed to investigate and make a report in a case of complaint against his servant. (Vol 2) 1915 Cal 733 (734) : 16 Cri L Jour 320 (D B) \* (\*05) 10 Cal W N xxxviii (xxxix) (DB).

[2] It is illegal for Magistrate to call upon accused himself to make report and act upon it. (\*87) 14 Cal 141 (146) (D B) \* (\*98) 1898 Rat 954 (954, 955) (D B) \* (\*99) 3 Cal W N 17 (18) (D B) \* (Vol 7) 1920 Pat 855 (656) : 5 Pat L Jour 61 : 21 Cri L Jour 621 (DB).

[3] (Vol 27) 1940 Pat 97 (100) : 41 Cri L Jour

[But see (\*06) 3 Cri L Jour 327 (328) : 28 All 421.]

18. Examination of the complainant—Proviso. — [1] A complaint cannot be sent for inquiry or investigation unless complainant has been examined on oath. (Vol 29) 1942 Pesh 61 (62) : 43 Cri L Jour 803 \* (Vol 11) 1924 All 664 (664) : 26 Cri L Jour 176 \* (\*98) 1898 Rat 954 (954, 955) (DB) \* (\*87) 12 Bom 161 (163) (D B) \* (\*01) 28 Cal 652 (661) (F B) \* (Vol 16) 1929 Pat 473 (475) : 9 Pat 707 : 30 Cri L Jour 1056 (FB) \* (Vol 1) 1914 Sind 159 (159) : 8 Sind L R 21 : 15 Cri L Jour 662 \* (\*10) 11 Cri L Jour 351 (351) (All) \* (\*11) 12 Cri L Jour 385 (385) : 1 Upp Bur Rul 73 \* (\*88) 2 Weir 244 (244) (DB) \* (Vol 6) 1919 Pat 319 (320) : 20 Cri L Jour 413 \* (Vol 8) 1921 Sind 84 (84) : 15 Sind L R 200 : 23 Cri L Jour 243 (DB).

[2] Complainant not examined on oath cannot be prosecuted with regard to his complaint, dismissed on report. (\*11) 12 Cri L Jour 539 (541) : 1912 Pun Re No. 2 Cr. \* (1900) 27 Cal 921 (924) (DB) \* (\*03) 30 Cal 923 (925, 926) (DB) \* (Vol 22) 1935 All 745 (745) : 36 Cri L Jour 860 : 58 All 129.

[But see (Vol 21) 1934 Pat 156 (157) : 35 Cri L Jour 1309.]

[3] Complaint cannot be dismissed under S. 203 on basis of report without examining complainant on oath. (Vol 29) 1942 Pesh 61 (62) : 43 Cri L Jour 803.

[4] Magistrate can take cognizance of offence on basis of report by police-officer submitted under this section and in such case, cognizance will be taken under cl. (b) and not cl. (c) of S. 190. (Vol 30) 1943 Oudh 226 (227) : 44 Cri L Jour 492.

19. Powers of the inquiring or investigating officer.—[1] Magistrate has not the powers of a police-officer to keep an accused in custody for inquiry. (Vol 17) 1930 All 259 (259, 260) : 52 All 457 : 31 Cri L Jour 998.

[2] Police-officer can make full inquiry from complainant and his witnesses and defendant and his witnesses. (\*07) 5 Cr L J 83 (84) : 33 Cal 1282 (DB).

[3] Any other person directed to make an investigation has powers conferred under Ss. 55, 56, 94, 127, 128, 153, 156, and 157. (Vol 15) 1928 Bom 290 (291) : 52 Bom 448 : 29 Cri L Jour 975 (DB).

[4] Power to arrest without warrant remains with Magistrate and police-officer. (Vol 19) 1932 Pat 72 (78) : 33 Cri L Jour 349.

20. Revision.—[1] Aggrieved party can apply in revision and High Court can interfere if Magistrate does not act as he should under this section. (Vol 25) 1938 Mad 879 (879) : 39 Cri L Jour 934.

[2] If irregularity in procedure does not result in miscarriage of justice, High Court will not make order in revision. (Vol 5) 1918 Pat 350 (351) : 19 Cri L Jour 263.

[3] Following are instances of irregularities where High Court will not interfere unless there is failure of justice :

(a) Omission of Magistrate to record reasons for postponing issue of process. (Vol 4) 1917 All 91 (92) :

203. The Magistrate before whom a complaint is made or to whom it has been transferred, *Dismissal of complaint.* may dismiss the complaint, if, <sup>a</sup>[after considering the statement on oath (if any) of the complainant and the result of <sup>b</sup>[the investigation] or inquiry <sup>c</sup>[(if any)] under section 202]; there is in his judgment no sufficient ground for proceeding. In such cases he shall briefly record his reasons for so doing.

[1882—S. 203; 1872—S. 147 Para. 1; 1861—Ss. 67, 180.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 56, for "after examining the complainant and considering the result of the investigation (if any) made under S. 202." [b] *Substituted, ibid.*, 1926 (2 [II] of 1926), S. 5, for "any investigation." [c] *Inserted, ibid.*

#### Section 202—Note 20 (*contd.*)

18 Cri L Jour 765 ✕ (Vol 18) 1931 Bom 524 (525) : 55 Bom 770 : 33 Cri L Jour 72 (DB) ✕ (Vol 16) 1929 Cal 176 (177) : 30 Cri L Jour 705 (DB) ✕ ('09) 10 Cri L Jour 117 (118) (DB) (Mad) ✕ ('11) 12 Cri L Jour 463 (464) (DB) (Mad) ✕ (Vol 5) 1918 Pat 652 (653) : 19 Cri L Jour 527 ✕ (Vol 13) 1926 Pat 34 (35) : 26 Cri L Jour 1394 ✕ (Vol 18) 1931 Sind 113 (113, 114) : 32 Cri L Jour 926 (DB).

(b) Requiring accused to attend at the inquiry or his examination thereat and allowing of cross-examination and arguments *inter partes*. (Vol 28) 1941 Pat 419 (420, 421) : 42 Cri L Jour 332 ✕ (Vol 15) 1928 Lah 97 (97) : 29 Cri L Jour 39 ✕ (Vol 18) 1931 Pat 302 (303, 304) : 32 Cri L Jour 1023 ✕ (Vol 13) 1926 Sind 188 (189) : 20 Sind L R 43 : 27 Cri L Jour 494 (DB).

(c) Omission to examine complainant under proviso. (Vol 32) 1945 Oudh 102 (103) : 46 Cri L Jour 587 ✕ (Vol 22) 1935 All 883 (884) : 36 Cri L Jour 1035 ✕ (Vol 1) 1914 Sind 159 (159) : 8 Sind L R 21 : 15 Cri L Jour 662 ✕ (Vol 16) 1929 Pat 473 (475, 476) : 9 Pat 707 : 30 Cri L Jour 1056 (FB).

[But see (Vol 29) 1942 Pesh 61 (62) : 43 Cri L Jour 803 ✕ (Vol 6) 1919 Pat 319 (320) : 20 Cri L Jour 413.]

(d) Inadequacy of inquiry—High Court will not interfere with details of inquiry or investigation. (Vol 17) 1930 Pat 30 (32) : 30 Cri L Jour 554.

(e) Where Magistrate has exercised his discretion under this section to postpone issue of process. (Vol 10) 1923 Lah 663 (664) : 26 Cri L Jour 167.

(f) Where the Magistrate does not record the statements of witnesses examined before him, but relies on the statements made before the police. (Vol 12) 1925 Pat 584 (584) : 26 Cri L Jour 1346.

[4] Inquiry made by police in perfunctory manner—Report considered by Magistrate in perfunctory manner—High Court will interfere. (Vol 5) 1918 Pat 350 (351) : 19 Cri L Jour 263.

#### SECTION 203 — SYNOPSIS.

1. Scope.
2. "May dismiss the complaint."
3. Magistrate.
4. Orders on complaint not to be delayed.
5. "Sufficient ground for proceeding."
6. Who can dismiss a complaint.
7. Effect of dismissal.

8. Dismissal without examining complainant.

9. "And the result of the investigation or inquiry (if any) under section 202."

10. "Shall record his reasons for so doing".

1. Scope.—[1] This section gives large powers to a Magistrate to dismiss a complaint without issuing a process. ('87) 14 Cal 141 (144) (DB) ✕ ('71) 6 Mad H C R App xv (xv).

[2] This section does not apply where process has been issued. ('97) 20 Mad 388 (388) (DB) ✕ (Vol 21) 1934 All 51 (52) : 56 All 285 : 35 Cri L Jour 418.

[3] This section does not apply where the proceeding is not initiated on a complaint. (Vol 19) 1932 Cal 287 (287) : 33 Cri L Jour 406 (DB) ✕ ('05) 2 Cri L Jour 421 (422) : 1905 Pun Re No. 29 Cr ✕ (Vol 11) 1924 Lah 630 (630) : 25 Cri L Jour 89. (Proceeding under S. 107.) ✕ (Vol 18) 1931 Lah 185 (185) : 32 Cri L Jour 21 (Do.) ✕ (Vol 15) 1928 Lah 694 (694) : 29 Cri L Jour 866 (Do.) ✕ ('03) 4 Bom L R 609 (611) (DB). (Proceeding under S. 552.) ✕ (Vol 26) 1939 Oudh 15 (15) : 40 Cri L Jour 33. (Proceeding under S. 145.)

[4] The Magistrate should not consider any material not provided for in the section, in dismissing a complaint. ('07) 6 Cri L Jour 85 (85, 86) (DB) (Bom).

[5] The Court cannot take into consideration the following :

(a) The statement of witnesses examined by the police. ('76) 25 Suth W R Cr. 10 (10) (DB).

(b) The evidence adduced in a counter case. (Vol 11) 1924 Cal 813 (814) : 25 Cri L Jour 941 (DB).

(c) The result of a police inquiry not ordered by the Magistrate. (Vol 20) 1933 Sind 395 (395) : 28 Sind L R 1 : 35 Cri L Jour 222 ✕ (Vol 17) 1930 Rang 226 (227) : 31 Cri L Jour 1064.

(d) The result of an inquiry on a previous petition. ('14) 15 Cri L Jour 21 (21) (All).

(e) The result of investigation ordered under S. 202 but not held in compliance with its terms. ('86) 9 All 85 (87) ✕ ('01) 4 Oudh Cas 127 (132) ✕ (Vol 7) 1920 Pat 655 (656) : 5 Pat L Jour 61 : 21 Cri L Jour 621 (DB) ✕ ('11) 12 Cri L Jour 539 (541) : 1912 Pun Re No. 2 Cr ✕ (Vol 4) 1917 Cal 462 (463) : 17 Cri L Jour 396 (DB).

[6] Where the complainant has obtained an order for the seizure of the opposite party's books and for res-

Section 203 — Note 1 (*contd.*)

training him from operating on his banking account, the opposite party can appear and ask that such orders should be vacated. (Vol 19) 1932 Cal 697 (697, 698) : 33 Cri L Jour 636 (DB).

[7] This section does not apply to complaints under the Merchant Shipping Act (XXI of 1923) which cannot therefore be dismissed under this section. (Vol 20) 1933 Cal 647 (647) : 35 Cri L Jour 25 (DB).

2. "May dismiss the complaint."—[1] Where a complaint is made to a Magistrate he has either to dismiss it under this section or issue process under S. 204. ('86) 13 Cal 334 (336) (DB) ✕ (Vol 25) 1938 Sind 192 (192) : 39 Cri L Jour 966 ✕ (Vol 14) 1927 Mad 19 (20) : 49 Mad 918 : 28 Cri L Jour 129 (FB) ✕ (Vol 17) 1930 Rang 226 (227) : 31 Cri L Jour 1064.

[2] The Magistrate cannot direct the police to submit a charge-sheet to some other Magistrate. (Vol 15) 1928 Cal 24 (25) : 54 Cal 303 : 28 Cri L Jour 577 (DB).

[3] The Magistrate cannot submit the complaint to the District Magistrate after disbelieving the complaint. ('02) 6 Cal W N 843 (844) (DB).

[4] The Magistrate cannot order the issue of a search warrant after holding that no criminal case would lie. ('36) 37 Cri L Jour 991 (991) (DB) (Cal).

[5] Where a Magistrate dismisses a complaint under this section there must be a specific order to that effect. ('69) 3 Beng L R (App) 151 (152) (DB) ✕ (Vol 15) 1928 Bom 290 (291) : 52 Bom 448 : 29 Cri L Jour 975 (DB).

[6] The order dismissing a complaint must be a judicial order. (Vol 26) 1939 Sind 208 (208) : I L R (1939) Kar 277 : 40 Cri L Jour 807 ✕ (Vol 25) 1938 Sind 192 (192) : 39 Cri L Jour 966.

[7] The following orders have been held to be dismissals of complaints under this section :

(a) An order refusing to issue process on a complaint. ('02) 29 Cal 457 (459) (DB) ✕ (Vol 10) 1923 Cal 198 (199) : 24 Cri L Jour 333 (DB).

[But see ('07) 11 Cal W N cccviii (cccix) (DB) ✕ (1900) 27 Cal 658 (660) (DB).]

(b) An endorsement on a complaint, "Enter as false. No prosecution." (Vol 5) 1918 Pat 270 (271) : 3 Pat L Jour 346 : 19 Cri L Jour 874 (DB).

(c) An order staying proceedings against some accused while proceeding with the case against others; in this case there is dismissal of the complaint so far as the former persons are concerned. ('98) 2 Cal W N 290 (292) (DB).

(d) An order holding the complaint to be false and calling upon the complainant to show cause against his prosecution. (Vol 4) 1917 Pat 15 (16) : 1 Pat L Jour 553 : 18 Cri L Jour 52 (DB).

[8] The following orders have been held not to be dismissals of complaints under this section :

(a) Where a charge is made to the police and is repeated in a complaint before the Magistrate and the Magistrate passes a departmental order to the police, "as false" but no order is passed on the complaint

itself. ('79) 4 Cal L Rep 413 (416) (DB) ✕ ('79) 4 Cal L Rep 534 (536, 537) (DB).

(b) A direction to the police after a complaint was referred to them that the complaint may be struck off the police file. ('11) 12 Cri L Jour 463 (464) (DB) (Mad).

(c) An order expunging a charge from the list of reported offences. ('81) 5 Bom 405 (407) (DB).

(d) An endorsement on the complaint "Notice is discharged." (Vol 15) 1928 Bom 290 (291) : 52 Bom 448 : 29 Cri L Jour 975 (DB).

(e) A refusal to take cognizance of an offence for want of sanction (now complaint) under S. 195. ('01) 24 Mad 337 (339) (DB).

(f) An order that the "accused is warned." ('18) 23 Cal W N xlviii (xlviii) (DB).

(g) An order of reference to arbitration, as it is not in the powers of a Magistrate to make such a reference. ('66) 1 Agra H C R 45 (46).

(h) An order withdrawing a process once issued. ('07) 6 Cri L Jour 367 (369) (DB) (Cal).

(i) An order for the issue of summary "C". (Vol 26) 1939 Sind 208 (208) : I L R (1939) Kar 277 : 40 Cri L Jour 807 ✕ (Vol 25) 1938 Sind 192 (192) : 39 Cri L Jour 966.

3. Magistrate. — [1] The Code does not apply to proceedings before Village Magistrate and a dismissal by a Village Magistrate of such a proceeding is not dismissal of a complaint under this section. (Vol 14) 1927 Mad 695 (696) : 28 Cri L Jour 507.

4. Orders on complaint not to be delayed.—

[1] There is nothing in the Code to show that the Magistrate must, at once, consider the complaint. (Vol 4) 1917 Pat 141 (142) : 19 Cri L Jour 228 (DB).

[2] It is improper for the Magistrate to delay the passing of orders for months. (Vol 4) 1917 All 95 (95) : 18 Cri L Jour 271.

[3] Two counter complaints—Disposal of one may be postponed till disposal of the other. (Vol 9) 1922 Pat 618 (618) : 24 Cri L Jour 120.

5. "Sufficient ground for proceeding." — [1] Facts alleged in complaint constitute an offence — No circumstances apparent in the examination of complainant to conclude that complaint is false—There is *prima facie* case for proceeding. ('08) 8 Cri L Jour 342 (343) ✕ 11 Oudh Cas 261 ✕ ('13) 14 Cri L Jour 571 (572) (DB) (Cal) ✕ (Vol 3) 1916 Mad 713 (713) : 13 Cri L Jour 794.

[2] Where the allegations contained in the complaint and in the complainant's oral statement disclose no criminal offence on sufficient ground exists for proceeding. (Vol 24) 1937 Mad 480 (481) : 38 Cri L Jour 581 ✕ ('87) 14 Cal 141 (146) (DB) ✕ (Vol 15) 1928 Lah 945 (946) : 30 Cri L Jour 162 ✕ (Vol 20) 1933 Rang 297 (298) : 35 Cri L Jour 52 ✕ (Vol 31) 1944 Nag 318 (320) : 46 Cri L Jour 195 : I L R (1945) Nag 486. (Grave and gross exaggeration in complaint.)

[3] A Magistrate can dismiss a complaint if he considers with reason that the most serious allegations of grave offences are falsely interlarded with complaints of

**Section 203—Note 5 (contd.)**

a lesser kind. (Vol 31) 1924 Nag 318 (319) : 26 Cri L Jour 195 : I L R (1915) Nag 486 & (Vol 22) 1935 Rang 485 (487) : 37 Cri L Jour 243 (Delay of 18 Months—Delay not explained at the time of filing complaint under S. 211 of the Penal Code — Held to be sufficient reason for not proceeding with the complaint)

[4] Where the complaint shows only a civil dispute as to title or as to other civil claims, a Magistrate should dismiss the complaint. ('37) 1937 Mad W N 1288 (1239) & (Vol 22) 1935 All 883 (884) : 36 Cri L Jour 1035 & (Vol 10) 1923 All 514 (544) : 24 Cri L Jour 693 & (Vol 5) 1918 Bom 186 (187) : 42 Bom 664 : 19 Cri L Jour 597 (DB) & (Vol 8) 1921 Bom 435 (437) : 45 Bom 110 : 21 Cri L Jour 716 (DB) & (Vol 11) 1924 Cal 908 (911) : 25 Cri L Jour 1053 (DB) & (Vol 20) 1933 Cal 149 (150) : 34 Cri L Jour 676 (DB) & (Vol 12) 1925 Lah 599 (600) : 27 Cri L Jour 331 & (Vol 14) 1927 Lah 145 (146) : 28 Cri L Jour 158 & (Vol 11) 1924 Mad 31 (31) : 25 Cri L Jour 138 & (Vol 10) 1923 Rang 157 (158) : 24 Cri L Jour 929.

[5] The Magistrate should thoroughly examine the complainant to see if any criminal offence is made out. (Vol 7) 1920 All 274 (275) : 42 All 522 : 22 Cri L Jour 84 & (Vol 8) 1921 Pat 85 (87) : 21 Cri L Jour 519 & (Vol 29) 1942 Mad 124 (124) (Allegations disclosing offence—Complaint not to be dismissed though civil remedy obtainable.) & (Vol 20) 1933 All 42 (42) : 33 Cri L Jour 884 & (Vol 13) 1926 Sind 194 (198) : 27 Cri L Jour 711 : 21 Sind L R 293.

[6] A Magistrate cannot dismiss a case off-hand unless a *prima facie* case of any kind is not made out. (Vol 10) 1923 Lah 663 (664) : 26 Cri L Jour 167 & (Vol 11) 1924 Pat 379 (380) : 24 Cri L Jour 316.

[7] Where a *prima facie* case is made out, the following are not sufficient grounds to dismiss a complaint:

(a) The fact that besides the complainant other persons could complain against an accused. (Vol 14) 1927 All 69 (70) : 27 Cri L Jour 1104.

(b) The fact that a libellous publication complained of is a mere republication. ('88) 12 Bom 167 (168) (DB). (Section 499, Penal Code, makes no exception in favour of second or third publication as compared with first.)

(c) The withdrawal of the complaint by the complainant in a warrant case which is non-compoundable. ('89) 13 Bom 600 (603) (DB).

(d) The absence of personal injury to the complainant and the complainant being a mere tool of another person. ('89) 13 Bom 590 (598) (FB).

(e) The fact that the complainant had no personal knowledge of the facts of the complaint. ('93) 1893 Rat 669 (669) (DB).

(f) The fact that the complainant is of low caste. (1865) 2 Suth W R Cr 35 (36).

(g) The fact that the charge might be laid to the police in the first instance. ('70) 14 Suth W R Cr 36 (36) (DB).

(h) The fact that the complaint was not preferred by a person more responsible than the one who preferred it. ('72) 18 Suth W R Cr. 55 (56) (DB).

(j) The fact that there is no possibility of a conviction. (Vol 13) 1926 Cal 795 (796, 797) : 53 Cal 606 : 27 Cri L Jour 788 (DB) & ('02) 29 Cal 410 (411, 412) (DB) & (Vol 6) 1919 Cal 78 (79) : 20 Cri L Jour 175 (DB).

(j) The fact that the person complained against has been exonerated in a previous departmental inquiry in which the complainant has no concern. ('87) 1887 Pur Re Nc. 33 Cr. p. 70 (72, 73) (DB).

(k-l) The fact that the complaint is cognizable by another Magistrate. ('73) 7 Mad H C R App xxxi (xxxii).

(m) Reasons arising out of the Magistrate's own personal knowledge of the affair, or conjecture, or out of knowledge acquired prior to the making of the complaint. ('07) 6 Cri L Jour 85 (85, 86) (DB) (Bom).

(n) The fact that the result of the proceeding would be undesirable or the motive or conduct of the complainant is discreditable or malicious. (Vol 3) 1916 Mad 303 (304) : 14 Cri L Jour 633 : 38 Mad 512 & (Vol 13) 1926 Sind 194 (198) : 27 Cri L Jour 711 : 21 Sind L R 293 & ('89) 13 Bom 590 (598) (FB) & (Vol 21) 1934 Nag 135 (136) : 35 Cri L Jour 1215. (Motive.)

(o) The fact that a previous complaint has been dismissed under S. 259. (Vol 1) 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174.

(p) The fact that there was some possibility that the accused might have some defence to the complaint if true. (Vol 27) 1940 Pat 179 (180) : 41 Cri L Jour 504.

[8] A complainant has a right to an adjudication on the point whether there is a sufficient ground for proceeding before his complaint is dismissed. (1900) 27 Cal 126 (130, 131) (DB) & (Vol 3) 1916 Mad 303 (303) : 14 Cri L Jour 633 : 38 Mad 512.

[9] The decision for dismissing a complaint must be based on judicial considerations. (Vol 31) 1944 Nag 318 (320) : 46 Cri L Jour 195 : I L R (1945) Nag 486 & (Vol 3) 1916 Mad 303 (303) : 14 Cri L Jour 633 : 38 Mad 512 & (Vol 13) 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788 (DB) & (Vol 26) 1939 Sind 208 (208) : I L R (1929) Kar 277 : 40 Cri L Jour 807 & (Vol 25) 1938 Sind 192 (192) : 39 Cri L Jour 966 & (Vol 31) 1944 Nag 318 (320) : 46 Cri L Jour 195 : I L R (1945) Nag 486. (Allegations utterly false — Prosecution may be ruined — Complaint should not be entertained.)

[10] It is the duty of the Court to protect the accused from unnecessary harassment and worry, and prevent an abuse of the process of the Court. (Vol 26) 1939 All 602 (605) : I L R (1939) All 851 : 40 Cri L Jour 917.

**6. Who can dismiss a complaint.** — [1] The following can dismiss a complaint under this section:

(a) The Magistrate to whom the complaint is transferred. (Vol 23) 1936 Sind 146 (147) : 30 Sind L R 217 : 37 Cri L Jour 1086 (DB) & (Vol 13) 1926 Cal 470 (477) : 53 Cal 350 : 27 Cri L Jour 385 (FB).

(b) The successor of the Magistrate who recorded the complaint and ordered inquiry. ('05) 2 Cal L Jour 65 (65n) (DB).

(c) The Magistrate to whom the complaint is sent for transfer. (Vol 11) 1924 All 666 (666) : 25 Cri L Jour 555.

## Section 203 — Note 6 (contd.)

[2] The Magistrate to whom the complaint is transferred cannot dismiss the complaint without giving notice to the complainant or such transfer. (94) 3 Cal W N 262xxxv (celxxxv).

[3] A Magistrate having examined witnesses under S. 202 and believed them, transferred the case to another Magistrate—The latter has no power to examine the same witnesses again and proceed to dismiss the complaint under this section. (Vol 24) 1287 Oudh 81 (82) : 12 Luck 523 : 37 Cri L Jour 1128.

[4] Where a complaint is dismissed under this section and further inquiry is ordered under S. 439, the Magistrate before whom the complaint comes for such further inquiry can again dismiss it under this section. (Vol 25) 1938 Mad 112 (112) : 55 Cri L Jour 281 \* (Vol 23) 1926 Sind 149 (147) : 30 Sind L R 217 : 37 Cri L Jour 1086 (DE).

7. Effect of dismissal. — [1] A dismissal of a complaint after hearing the complainant and after considering the result of an investigation on under S. 202 amounts to a legal determination of the complaint. (02) 6 Cal W N 295 (295) (DE). (Complainant can be prosecuted for making a false charge under S 182 or S. 211, Penal Code.) \* (75) 2 Cal L Rep 215 (310, 317) (DE).

[2] Until a complaint is dismissed under this section or otherwise disposed of, no proceedings can be taken under S. 182 or S. 211, Penal Code. (95) 15 All 336 (338) (DB). (Section 182.) \* (96) 1899 All W N 90 (91). (Ss. 182 and 211.) \* (Vol 13) 1929 Pat 92 (92) : 50 Cri L Jour 515. (Section 211.) \* (03) 4 Cal L Jour 68 (69) (DB) (Cal). (Do)

[3] Proceedings under S. 182 or S. 211, Penal Code, before the disposal of the complaint are *per se* no ground for setting aside conviction under these sections. (Vol 17) 1930 Pat 622 (623) : 9 Pat 126 : 31 Cri L Jour 931 (DB).

[4] A mere dismissal under this section does not afford a ground for proceeding under S. 211, Penal Code. (Vol 28) 1941 Pat 419 (421) : 42 Cri L Jour 332 \* (Vol 27) 1940 Pat 97 (99) : 41 Cri L Jour 349 \* (Vol 14) 1927 All 107 (108) : 27 Cri L Jour 1345 \* (87) 10 Mad 232 (236) (F3).

[5] The complainant must be afforded an opportunity to prove his case before being prosecuted under S. 211 or S. 182, Penal Code. (86) 8 All 38 (39) \* (Vol 7) 1920 All 125 (125) : 21 Cri L Jour 416 \* (Vol 13) 1926 Bom 284 (285, 286) : 27 Cri L Jour 740 (DB) \* (87) 14 Cal 707 (720) (FD) \* (05) 2 Cri L Jour 615 (617) : 33 Cal 1 (DB) \* (Vol 20) 1933 Pat 499 (500) : 34 Cri L Jour 1140.

[But see (98) 23 Bom 596 (603) (DB).]

[6] Complainant had opportunity to prove his case—Complaint dismissed after hearing him and taking all steps prescribed — Complainant cannot be said not to have been given an opportunity. (02) 6 Cal W N 295 (297) (DB) \* (Vol 6) 1919 Pat 530 (531) : 20 Cri L Jour 389 \* (07) 5 Cri L Jour 491 (492) : 1907 Pun Re No. 2 Cr \* (10) 11 Cri L Jour 338 (338) (DB) (Bom).

[7] Where the dismissal under this section is illegal for want of the examination of the complainant under S. 200, the complainant cannot be prosecuted for bring-

ing a false charge. (Vol 11) 1924 Bom 321 (321) : 48 Bom 360 : 25 Cri L Jour 960 (DB) \* (Vol 13) 1926 Bom 284 (285, 286) : 27 Cri L Jour 740 (DB) \* (Vol 11) 1924 All 604 (604) : 26 Cri L Jour 176 \* (99) 4 Cal W N 295 (300) (DB) \* (01) 4 Oudh Cas 127 (131, 132).

[8] A District Magistrate has no power under S. 436 to order that a complaint be removed to file. (Vol 25) 1925 Mad 112 (112) : 55 Cri L Jour 281.

[9] Dismissal of previous complaint is no bar to second complaint. (Vol 32) 1946 Mad 137 (137).

8. Dismissal without examining complainant. — [1] The "statement on oath" referred to in the section is the examination of the complainant under S. 200. (Vol 19) 1932 Sind 58 (58, 59) : 25 Sind L R 468 : 33 Cri L Jour 330 (DB).

[2] Where the complainant is present but not examined under S. 200 the Court cannot dismiss the complaint. (Vol 11) 1924 Bom 321 (321) : 48 Bom 360 : 25 Cri L Jour 960 (DB) \* (83) 13 Bom 590 (597) (FD) \* (Vol 5) 1919 Cal 78 (79) : 23 Cri L Jour 175 (DB) \* (Vol 13) 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788 (DB) \* (Vol 8) 1921 Pac 205 (205) \* (Vol 10) 1923 Pat 533 (540) : 24 Cri L Jour 843 \* (1903-02) 1 Tex Bar Rat 125 (125, 126) \* (92-96) 1 Ury Bar Rat 270 (270).

[But see (Vol 22) 1935 All 883 (884) : 36 Cri L Jour 1035.]

[3] Complainant absent on dates when matter comes up for his examination — Order dismissing the complaint is justified. (Vol 15) 1928 Cal 559 (570) : 29 Cri L Jour 798 (DB).

9. "And the result of the investigation or inquiry (if any) under Section 202". — [1] Where an inquiry is ordered under S. 202 and the complainant has witnesses to prove his case, he should be given an opportunity to do so before the complaint is dismissed. (Vol 12) 1925 Cal 1031 (1031) : 23 Cri L Jour 561 (DB) \* (Vol 3) 1916 Mad 639 (639) : 16 Cri L Jour 423.

[2] Where the complainant declines to prove his case *ex parte* the Magistrate is not wrong in dismissing the complaint under this section. (72) 17 Suth W R Or. 3 (3) (DB).

[3] Inquiry ordered under S. 202 found to be insufficient — Court of revision may set aside dismissal of complaint — Further inquiry may be ordered. (Vol 8) 1921 Cal 552 (553) : 25 Cri L Jour 167 (DB) \* (Vol 15) 1923 Lah 119 (120) : 29 Cri L Jour 267 \* (Vol 14) 1927 Bom 436 (436, 437) : 28 Cri L Jour 575 (DB) \* (Vol 6) 1919 Cal 725 (725) : 20 Cri L Jour 794 (DB).

[4] In complaints against police-officers and other Government officials the Magistrate should order an inquiry into the matter giving the complainant every opportunity to prove his allegations. (Vol 13) 1926 Mad 288 (288) : 27 Cri L Jour 107. (Police-officer.) \* (Vol 7) 1920 All 77 (78) : 21 Cri L Jour 343 \* (Vol 11) 1924 Oudh 174 (174) : 24 Cri L Jour 814 \* (Vol 7) 1920 All 303 (304) : 22 Cri L Jour 81. (A Government officer.)

[5] The words "if any" clearly show that this section empowers the Magistrate to dismiss a complaint without any investigation or inquiry under S. 202, if after examining the complainant he considers there is no

## CHAPTER XVII.

## OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

204. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient *Issue of process.* ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

[1882—S. 204; 1872—Ss. 147 Para. 3, 148, 149; 1861—Ss. 67, 248, 257.]

Section 203 — Note 9 (*contd.*)

sufficient reason for proceeding. (Vol 12) 1925 Pat 704 (705) : 26 Cri L Jour 921 (DB) \* (Vol 5) 1918 Pat 350 (350, 351): 19 Cri L Jour 263\* ('81) 7 Cal 208 (211) (DB).

[6] Where on further inquiry being ordered into a complaint dismissed under this section, the case is sent to another Magistrate for disposal, he is entitled to act on the result of the inquiry or investigation ordered by the Magistrate who originally disposed of the case. (Vol 23) 1926 Sind 146 (147) : 30 Sind L R 217 : 37 Cri L Jour 1086 (DB).

## 10. "Shall record his reasons for so doing."—

[1] A Magistrate should record his reasons for dismissing a complaint under this section. (Vol 25) 1938 Mad 879 (880) : 39 Cri L Jour 984 \* ('87) 14 Cal 141 (145, 146) (D B) \* ('12) 13 Cri L Jour 482 (483) : 40 Cal 41 (D B) \* (Vol 11) 1924 Pat 436 (437) : 24 Cri L Jour 823 \* (Vol 13) 1926 Pat 57 (57) : 26 Cri L Jour 1502 \* ('12) 11 Cri L Jour 331 (331) (Mad) \* ('13) 14 Cri L Jour 493 (494) (All).

[2] The section is mandatory and the Magistrate must make it apparent in his order that he has not omitted to apply his mind to the facts before he made the order. (Vol 32) 1945 Bom 147 (149) : 46 Cri L Jour 434 : 1 L R (1945) Bom 141 (DB).

[3] The object of this requirement is to enable the High Court to consider whether the discretion vested in the Magistrate has been properly exercised or not. (Vol 27) 1940 Pat 97 (98) : 41 Cri L Jour 349\* ('87) 14 Cal 141 (146) (DB).

[4] This is an imperative provision of law and where no reasons are recorded the order of dismissal is without jurisdiction. (Vol 32) 1945 Bom 147 (148) : 46 Cri L Jour 434 : 1 L R (1945) Bom 141 (DB) \* (Vol 13) 1926 Pat 57 (57, 58) : 26 Cri L Jour 1502.

[5] Records not showing sufficient grounds for issuing process—Process not issued—Reasons not given—High Court will not interfere—But where Magistrate had no good grounds to decline issue of process High Court will interfere in revision. (Vol 25) 1938 Mad 879 (879) : 39 Cri L Jour 984.

[6] The reasons stated in a police-report on the basis of which an order of dismissal is made are sufficient if the report itself is part of the order. ('10) 11 Cri L Jour 331 (331) (Mad).

## SECTION 204 — SYNOPSIS.

1. Scope.
2. Magistrate taking cognizance only can issue process.
3. The Magistrate must have taken cognizance of an offence.
4. "Sufficient ground for proceeding."
5. "In the opinion of a Magistrate."
6. Issue of process.
7. Omission to issue process.
8. Notice, if a "process."
9. Order directing summons.
10. "Some other Magistrate having jurisdiction."
11. Process-fee.
12. Revision.

1. Scope. — [1] This section relates to the procedure for effecting attendance of the accused where the Magistrate does not discuss the complaint, but thinks that there is sufficient ground for proceeding against him. ('67) 8 Suth W R Cr. 65 (65) (DB).

[2] This is the only section authorizing a Magistrate to issue process to an accused, whether he takes cognizance on a private complaint or on a police report. (Vol 19) 1932 Pat 72 (76, 77, 78) : 33 Cri L Jour 349 \* ('69) 11 Suth W R Cr. 1 (1) (D B). (Information or knowledge other than a police report or complaint).

[3] This section applies where the Magistrate takes cognizance of an offence under any other law. There is no specific provision either in this section or elsewhere in the Code in regard to cases in which the accused is already under arrest or on bail. ('72-92) 1872-1892 Low Bur Rul 486 \* ('76) 25 Suit W R Cr. 20 (21) (DB).

[4] In cases where the accused is under arrest or on bail, if the Magistrate thinks that there is no case against the accused he may discharge him or cancel the

**Section 204 — Note 1 (contd.)**

bail bond is the case may be. (Vol 28) 1941 Bom 294 (255); 42 Cri L Jour 814 (DB).

[5] In cases where the accused is on arrest or on bail, if the Magistrate considers that there is sufficient ground for proceeding, he may order the accused to be produced before the Court for inquiry or trial. (Vol 28) 1941 Pat 215 (252, 253); 45 Cri L Jour 177; 22 Pat 453 (SB).

[6] Unless and until the Magistrate issues process for the attendance of the accused, the judicial proceedings do not commence against him. (Vol 28) 1941 Pat 215 (252, 253); 45 Cri L Jour 177; 22 Pat 453 (S B). (In a police case where the accused is arrested, proceedings do not commence unless the Magistrate orders the accused to be produced for trial).

**2. Magistrate taking cognizance only can issue process.** — [1] Unless the Magistrate "takes cognizance" of an offence under S. 190, a process cannot be issued under this section. ('02) 6 Cal W N 926 (926, 927) (DB).

[2] A Magistrate taking cognizance is the proper officer to issue a process. (Vol 15) 1928 Cal 24 (24); 34 Cal 303; 28 Cri L Jour 577 (DB).

[3] A Magistrate to whom a case has been transferred under S. 192 is covered by the expression "Magistrate taking cognizance of an offence" in this section and can issue process for compelling the attendance of the accused. (Vol 28) 1941 Cal 185 (190, 191); 1 L R (1941) 1 Cal 67; 42 Cri L Jour 490; ('99) 3 Cal W N cclxxxv (cclxxxv). (Case transferred after examining complainant—Process can be issued without examining him again).

[4] Where a Magistrate fails or refuses to issue process, under this section, a District or Superior Magistrate cannot do so. ('03) 30 Cal 449 (451, 452) (DB); ('1900) 27 Cal 658 (660) (DB); ('08) 7 Cri L Jour 203 (204); 1908 Pun Re No. 4 Cr.

[5] A Magistrate who is the "presiding officer" within the meaning of Ss. 68 and 75, may sign the process even if he may not have taken cognizance of the offence and directed issue of the process. (Vol 19) 1932 Pat 175 (176); 34 Cri L Jour 297; ('Vol 19) 1932 Pat 171 (175); 33 Cri L Jour 706 (DB). (Per Scroope J.—Dhavlé J., dissenting.)

**3. The Magistrate must have taken cognizance of an offence.** — [1] Where the Magistrate gets information as to the possibility of an offence being committed, the matter is not one for the Magistrate to issue process. ('75) 1875 Rat 90 (91) (DB).

[2] If, on a complaint, it should appear to the Court that the act imputed amounted to an offence under the Penal Code or any other penal law in force, the Court should proceed with the matter. (Vol 13) 1926 Cal 795 (797); 53 Cal 606; 27 Cri L Jour 788 (DB).

[3] Where the acts alleged do not disclose any offence, the Court should not allow criminal proceedings to proceed. (Vol 15) 1928 Lah 945 (946); 30 Cri L Jour 162.

[4] An application for maintenance under S. 498 is not a complaint and a Magistrate dealing with it cannot dismiss it under sub-s. (3). ('98) 16 Mad 234 (234) (DB).

[5] Where an offence is disclosed there must be definite evidence of an offence within the local jurisdiction of the Magistrate receiving the complaint. ('08) 7 Cri L Jour 541 (895).

[6] The fact that a complainant did not specifically describe the offence under any section of the Penal Code does not render a complaint filed in the complaint and the Court should not refuse to issue an offence table by the Magistrate who receives the complaint. ('99) 26 Cal 786 (789) (DB).

[7] Where, on the receipt of a complaint, the police start investigation and arrest a person and on investigation report to the Magistrate that no offence has been disclosed and the Magistrate discharges the person, the order of discharge has been held to be one after taking cognizance. (Vol 28) 1941 Bom 294 (295); 42 Cri L Jour 814 (DB).

**4. "Sufficient ground for proceeding."**—[1] A Magistrate taking cognizance of an offence is bound to issue process under this section only if, in his opinion, there is sufficient ground for proceeding. (1900) 27 Cal 985 (988) (DB); ('1900-02) 1 Low Bar Rd 286 (287).

[2] The stage at which the sufficiency of the ground for proceeding is to be considered, is, in the case of a complaint, after the examination of the complainant under S. 200. (Vol 4) 1917 Pat 611 (612); 2 Pat L Jour 637; 18 Cri L Jour 890 (DB); ('Vol 1) 1914 Cal 479 (480); 42 Cal 19; 15 Cri L Jour 348 (DB).

[3] If the facts alleged in the complaint and the complainant's statement show a sufficient ground for proceeding, process should issue. (Vol 28) 1941 Cal 185 (192); 42 Cri L Jour 490; 1 L R (1941) 1 Cal 67; ('12) 18 Cri L Jour 609 (611, 612) (S B) (Cal); ('Vol 4) 1917 Cal 671 (671); 18 Cri L Jour 626 (DB).

[4] The Magistrate need not hold any inquiry in all cases before issuing process. (Vol 28) 1941 Cal 185 (192); 42 Cri L Jour 490; 1 L R (1941) 1 Cal 67; ('Vol 7) 1920 Pat 270 (270, 271); 21 Cri L Jour 220.

[5] Magistrate satisfied on police report that no sufficient ground for proceeding exists—Accused, if under arrest, must be discharged—If on bail, bail bond must be cancelled. (Vol 28) 1941 Bom 294 (295); 42 Cri L Jour 814 (DB).

[6] A *prima facie* case means that there is sufficient ground for proceeding. (Vol 18) 1931 Cal 607 (611, 615); 33 Cri L Jour 3; 59 Cal 275 (DB).

[7] Where a *prima facie* case is made out, the Magistrate should issue process. (Vol 25) 1938 Mad 879 (880); 39 Cri L Jour 984; ('Vol 13) 1926 Sind 194 (196); 27 Cri L Jour 711; 21 Sind L R 293; ('Vol 17) 1930 Pat 30 (32); 30 Cri L Jour 554; ('89) 13 Bom 590 (598) (FB); ('Vol 4) 1917 Low Bar 30 (31); 18 Cri L Jour 321; ('11) 12 Cri L Jour 123 (124) (Mad). (*Prima facie* case made out—Process should be issued even if Magistrate thinks civil remedy more appropriate.) ('Vol 13) 1926 Sind 194 (198); 27 Cri L Jour 711; 21 Sind L R 293 (Do).

[See however (Vol 18) 1931 Cal 607 (615); 33 Cri L Jour 3; 59 Cal 275 (DB).]

## Section 204 — Note 4 (concl.)

[8] There cannot be said to be sufficient grounds in the following cases for issue of process :

(a) Where the complaint is made on information and not on personal knowledge. ('06) 4 Cri L Jour 217 (218) (DB). (The Court should satisfy itself on inquiry that case for issue of process exists.)

(b) Where the allegations made in the complaint are not substantiated by the statement on oath. (Vol 4) 1917 Cal 671 (671) : 18 Cri L Jour 626 (DB).

(c) Where the allegations disclose a dispute purely of a civil nature. (Vol 10) 1623 All 544 (544) : 24 Cri L Jour 693 \* (Vol 11) 1927 Lah 145 (146) : 28 Cri L Jour 158 \* (Vol 10) 1923 Rang 157 (157, 158) : 21 Cri L Jour 929.

[9] The following are not sufficient grounds for refusing issue of process :

(a) Where a *prima facie* case is made out but in the Magistrate's opinion there is no chance of conviction and no useful purpose will be served by the enquiry. ('02) 29 Cal 410 (411, 412) (DB) \* (Vol 13) 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788 (DB).

(b) The fact that one of the accused was a member of the highest service in the land who was sworn to do justice. (Vol 27) 1940 Pat 97 (98) : 41 Cri L Jour 349.

5. "In the opinion of a Magistrate".—[1] In deciding on the sufficiency of the ground for proceeding, the Magistrate must be guided by his own independent opinion and not by that of a police-officer. ('68-69) 4 Mad H C R 162 (165) (DB).

6. Issue of process.—[1] When a Magistrate who receives a complaint neither dismisses it under S. 203 nor postpones issue of process under S. 202, process for the attendance of the accused shall issue. (Vol 25) 1938 Sind 192 (192) : 39 Cri L Jour 966 \* (1900) 27 Cal 921 (924) (DB) \* ('22) 23 Cri L Jour 403 (103) (Pat) \* ('13) 14 Cri L Jour 493 (493) (All).

[2] The discretion of issuing summons instead of warrant, under this section, should be so used as not to subject accused persons to the indignity of arrest unless there is real need for it. ('92-96) 1 Upp Bur Rul 31 (31).

[3] If the Magistrate issues a warrant in a case in which he ought to have issued summons, the error is not a ground for setting aside the proceedings. (1864) 1 Suth W R Cr. 16 (16) (DB) \* ('13) 14 Cri L Jour 604 (605) : 7 Sind L R 40 (DB). (Warrant issued instead of summons—Warrant can be cancelled and summons issued.)

[4] Process should ordinarily issue against all the accused who are *prima facie* shown to have committed an offence. (1900) 4 Cal W N 560 (562) (DB).

[See however (Vol 12) 1925 Rang 122 (126) : 3 Rang 11 : 26 Cri L Jour 492. (Magistrate not bound to issue process against a witness, found to be accomplice during trial.) \* (Vol 24) 1937 Nag 17 (23) : 1 I L R (1937) Nag 315 : 38 Cri L Jour 237 (FB.) (Overruling (Vol 7) 1920 Nag 255 : 16 Nag L R 9 : 21 Cri L Jour 769). (Person in custody during investigation—Police obtaining his release and producing him as witness—Failure to proceed against him does not invalidate trial.)]

[5] There is nothing irregular or improper in a Magistrate first issuing process for one accused person and then issuing process for all the accused. (Vol 15) 1928 Lah 541 (542) : 29 Cri L Jour 293.

[6] When once the Magistrate issues process under this section, proceeding commences and goes on unless something occurs to show that the Magistrate has made a wrong exercise of his discretion. ('71) 21 Suth W R Cr 44 (45) (DB).

[7] In suit for damages for malicious prosecution, prosecution commences when proceedings commence under this section and proceedings commence when process is issued against the accused. (Vol 19) 1932 All 386 (389) (DB) \* (Vol 2) 1915 Mad 128 (129) : 37 Mad 181 \* (Vol 13) 1926 Mad 521 (524) : 49 Mad 315 (DB) \* (Vol 13) 1931 All 665 (665) : 53 All 771 (DB) \* (Vol 16) 1929 Pat 271 (271, 272) : 8 Pat 285 (DB) \* (Vol 1) 1914 Lah 531 (533) : 1915 Pun Re No. 1 \* ('77-78) 2 Bom 481 (487) (DB). (Prosecution commences when complaint is made).

[8] Accused under arrest in a police case — Magistrate's order to produce him for trial corresponds to the issue of process — Proceedings commence — Right of appeal or right of trial by jury may accrue, if accused is entitled, at this stage. (Vol 30) 1943 Pat 245 (252, 253) : 22 Pat 433 : 45 Cri L Jour 177 (SB).

[9] Where A and B are jointly accused of an offence but the Magistrate issues process only against A, B is competent to give evidence as a witness at the trial of A. ('82) 10 Cal L Rep 553 (554) (DB).

[10] An order by a Magistrate to the police to charge-sheet a person may be treated as a warrant under this section. (Vol 19) 1932 Pat 72 (77) : 33 Cri L Jour 349.

7. Omission to issue process. — [1] Magistrate without issuing any process to the accused convicts him — Conviction is illegal. ('92) 15 Mad 83 (87) (DB).

[2] The accused appears in Court without a summons — Case to be proceeded with at his instance — Omission to issue summons is immaterial. ('02) 26 Bom 552 (557) (DB) \* (Vol 6) 1919 Lah 389 (390) : 1919 Pun Re No. 5 Cr : 20 Cri L Jour 3 (DB)

8. Notice, if a "process". — [1] A mere notice to the person complained against that a preliminary enquiry will be held does not amount to a summons. (Vol 2) 1915 Mad 128 (129) : 37 Mad 181 \* (Vol 14) 1927 Mad 19 (20, 21) : 49 Mad 918 : 28 Cri L Jour 129 (FB) \* (Vol 10) 1923 Cal 198 (199) : 24 Cri L Jour 333 (DB) \* (Vol 5) 1918 Pat 652 (653) : 19 Cri L Jour 527.

9. Order directing summons. — [1] An order directing the issue of summons is not a judgment and the Magistrate can rescind the order, send the complaint for enquiry or recall the summons. (Vol 10) 1923 Cal 662 (662) : 25 Cri L Jour 464 (DB).

[But see ('07) 6 Cri L Jour 367 (369) (DB) (Cal).]

10. "Some other Magistrate having jurisdiction". — [1] Process issued by one Magistrate — Another Magistrate cannot rescind it — He can discharge the accused of the offence for which process was issued — He can issue fresh process for any other offence.



*Magistrate may dispense with personal attendance of accused.*

**205. (1)** Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

[1882—S. 205; 1872—S. 151; 1861—S. 261.]

**Section 204—Note 10 (contd.)**

(Vol 32) 1945 Sind 51 (54) : 47 Cri L Jour 48 : 1 L J (1944) Kar 411 (DB).

**11. Process-fee.** — [1] Process-fee not paid — Complaint should be dismissed — Order acquitting accused is not correct. (Vol 31) 1944 Cal 457 (418) : 48 Cri L Jour 253 (DB).

[2] Where a complaint is against two persons, but the complainant has paid process-fees for summons against one only, the other must be discharged. (192) 26 Bom 552 (557) (DB).

[3] Complainant ordered to pay process for enforcing accused's attendance on the date of judgment — Process not paid — Complaint cannot be dismissed. (Vol 12) 1925 All 392 (393) : 26 Cri L Jour 963.

[4] An application for maintenance under S. 488 should not be dismissed under this sub-section for failure to pay process-fees. (193) 16 Mad 234 (234) (DB).

[5] Complaint dismissed under this sub-section in a *de novo* trial after charges had been framed — Dismissal amounted to discharge and not acquittal — Second trial on same facts not barred. (Vol 18) 1931 Nag 39 (40) : 27 Nag L R 13 : 32 Cri L Jour 603.

[But see (Vol 2) 1915 Mad 23 (24) : 38 Mad 585; 15 Cri L Jour 673 (DB).]

[6] Complaint dismissed under this sub-section — High Court, Sessions Judge or District Magistrate may, under S. 436, direct further inquiry. (Vol 25) 1938 Sind 192 (192) : 39 Cri L Jour 966 \* (Vol 9) 1922 Pat 54 (54) (DB). (Notice to show cause neither desirable nor necessary.)

**12. Revision.** — [1] The High Court will interfere in revision where neither the complaint nor the prosecution disclosed a case against the accused but process was issued under this section. (199) 1899 All W N 212 (213) (DB) \* (196) 20 Bom 543 (545) (DB) \* (110) 11 Cri L Jour 525 (527) : 38 Cal 68 (DB) \* (Vol 3) 1916 Mad 408 (409) : 16 Cri L Jour 477 : 39 Mad 561 \* (Vol 19) 1932 Pat 72 (78) : 33 Cri L Jour 349.

[2] The High Court will not interfere in revision in the following cases :

(a) Where a Magistrate exercised discretion judicially in issuing process. (Vol 13) 1926 Cal 795 (797) : 53 Cal 606 : 27 Cri L Jour 788 (DB).

(b) Where the error, omission or irregularity in the issue of process is curable under S. 537. (107) 6 Cri L

Jour 240 (251) : 31 Bom 611 (DB) \* (Vol 3) 1916 Pat 129 (130) : 18 Cri L Jour 366 : 1 Pat L Jour 592 (DB) \* (Vol 16) 1929 Lah 887 (867) : 30 Cri L Jour 702.

[3] Where the record does not disclose sufficient grounds for issuing process merely because Magistrate failed to record reasons for not issuing the process. (Vol 25) 1938 Mad 879 (879) : 39 Cri L Jour 984.

**SECTION 205 — SYNOPSIS.**

1. Scope.
2. "Whenever a Magistrate issues a summons."
3. "Dispense with."
4. Bond from the accused.
5. Pardanashin lady.
6. "Permit him to appear by his pleader."
7. "Pleader."
8. Applicability to security proceedings.
9. "At any stage of the proceedings."
10. Revision.

**1. Scope.** — [1] This section applies only to Magistrates and not to Courts of Session or the High Court. But S. 353 shows that the latter Courts have similar power. (Vol 9) 1922 Mad 79 (79) : 23 Cri L Jour 266 : 45 Mad 359 \* (12) 13 Cri L Jour 464 (464) (Bom) \* (14) 15 Cri L Jour 281 (283) (D B) (Cal).

[2] High Court can under its inherent powers dispense with personal attendance. (Vol 17) 1930 Nag 61 (62) : 31 Cri L Jour 284 : 26 Nag L R 50.

**2. "Whenever a Magistrate issues a summons."** — [1] This section does not apply where a warrant has been issued. (109) 13 Cal W N cl \* (Vol 4) 1917 Lah 292 (293) : 18 Cri L Jour 975 : 1917 Pun Re No. 36 Cr. (D B).

[2] This section is inapplicable where the accused has been arrested without a warrant. (Vol 11) 1924 Pat 46 (47) : 2 Pat 793 : 24 Cri L Jour 872 (D B).

[3] Where, a summons has been issued in the first instance and thereafter the accused is brought in under a warrant of arrest, the section would apply. (Vol 17) 1930 Nag 61 (62) : 26 Nag L R 50 : 31 Cri L Jour 284.

[4] Even in cases in which a warrant is ordinarily issuable this section will apply if a summons has been issued. (194) 21 Cal 588 (589, 590) (DB).

[5] The section will also apply in the following cases :

[a] Where warrant is cancelled and summons is

Section 305—1884 2 (Cal.).  
 issued. (Vol 27) 1940 All 178 (180); 41 Cri L Jour 500.  
 \* (68) 8 Cri L Jour 451 (154) (Lah).

[1] Where accused being present before the Magistrate summons is issued. (Vol 27) 1940 All 178 (180); 41 Cri L Jour 500.

[6] All that is required under this section is that the Magistrate should consider that a summons is sufficient for the appearance of the accused in the case and if he is of that opinion he may then permit the accused to appear by pleader. (Vol 27) 1940 All 178 (180); 41 Cri L Jour 500.

3 "Dispense with."—[1] The discretion to dispense with attendance should be used liberally especially:—

[a] In trivial cases. ('14) 18 Cal W N xxxi (xxvi) (DB).

[b] Where accused is a *pardanashin* lady. (1884) 6 All 59 (60) \* (Vol 14) 1927 All 149 (149, 150); 28 Cri L Jour 94 \* ('10) 11 Cri L Jour 197 (198); 3 Sind L R 167 (DB) \* (1914) 15 Cri L Jour 281 (283) (DB) (Cal).

[c] Where accused is too ill to attend. ('02) 6 Cal W N lix (lix) (D B) \* ('12) 13 Cri L Jour 464 (464) (Bom).

[2] Where permission to appear by pleader is refused, reasons should be recorded. ('84) 6 All 59 (60) \* (Vol 34) 1947 Mad 66 (66); 1 L R (1947) Mad 79.

[3] In considering the propriety of an order under this section, the Magistrate should always take into account whether there is anything in the nature of a *prima facie* case. (Vol 27) 1940 All 178 (180, 181); 41 Cri L Jour 500.

[4] A Magistrate can dispense with the personal attendance of the accused as often as he pleases. ('10) 14 Cal W N cxxxi (cxxx) (DB) \* ('17) 21 Cal W N clxviii (clxviii) (DB).

[5] Omission to note the fact of dispensing with the personal attendance is merely an irregularity which will not justify interference in revision. (Vol 13) 1926 Bom 218 (221); 50 Bom 250; 27 Cri L Jour 440 (D B).

4. Bond from the accused.—[1] By a recognizance bond the pleader of a party cannot be bound to attend. ('68) 5 Bom H C R Cr 64 (65) (D B).

5. *Pardanashin* lady.—[1] A Magistrate should dispense with the personal attendance of a *pardanashin* lady until such time as he has before him some legal and satisfactory evidence indicative of her having committed a breach of the law. ('84) 6 All 59 (60) \* (Vol 9) 1922 Mad 79 (79); 45 Mad 359; 23 Cri L Jour 266 \* ('08) 8 Cri L Jour 454 (455) \* (Vol 1) 1914 Sind 51 (51); 7 Sind L R 161; 15 Cri L Jour 539 (DB) \* (Vol 14) 1927 All 149 (150); 28 Cri L Jour 94 \* ('14) 15 Cri L Jour 281 (281) (D B) (Cal) \* ('17) 21 Cal W N clxviii (clxviii) (DB) \* (Vol 18) 1931 Sind 37 (38); 32 Cri L Jour 665 (DB) \* ('09) 9 Cri L Jour 158 (159, 160) (Lah) \* ('10) 11 Cri L Jour 197 (198); 3 Sind L R 167 (D B).

[2] An order should not be refused merely because:

[a] The Magistrate thinks that she is not *pardana-*

*shah*. ('10) 11 Cri L Jour 197 (198); 3 Sind L R 16 (D B).

[b] Other women belonging to the same class the observed *pardah* had appeared in Court. (Vol 12) 192 All 149 (149, 150); 28 Cri L Jour 94.

[c] She is the daughter of a prostitute, if she is married to a respectable husband in whose family women observe *pardah*. (12) 14 Cri L Jour 3 (4) (Lah).

[2] The Court will extend the privilege of *pardah* to women who, though not strictly observing *pardah*, are not accustomed generally to appear before the public (1897) 2 Hyde 88 (88).

6. "Permit him to appear by his pleader."—[1] Law considers that the interest of the accused will be completely safeguarded if his pleader is in attendance (Vol 15) 1928 Cal 27 (32); 29 Cri L Jour 49 (S B).

[2] The words "appear by pleader" in their ordinary acceptance mean "represent by pleader," that is, having a pleader to act and to plead. (Vol 15) 1928 Cal 27 (32); 29 Cri L Jour 49 (S B).

[3] The appearance by a pleader involves the performance of all acts that devolve upon the accused in the course of the trial. (Vol 13) 1926 Bom 218 (219); 50 Bom 250; 27 Cri L Jour 440 (D B) \* ('13) 14 Cri L Jour 272 (272); 6 Sind L R 206 (D B) \* ('17) 21 Cal W N clxviii (clxviii) (D B) \* (Vol 15) 1928 Cal 27 (32); 29 Cri L Jour 49 (S B).

[4] The Magistrate may, even at the time of issuing summons, dispense with the personal attendance of the accused and permit him to appear by pleader. (Vol 13) 1926 Bom 218 (219); 50 Bom 250; 27 Cri L Jour 440 (D B).

[See (Vol 27) 1940 All 178 (180); 41 Cri L Jour 500.]

[5] If the Magistrate wants the personal attendance of the accused an order directing such attendance should be made. (1900) 27 Cal 985 (988, 989) (D B).

[6] The Magistrate cannot grant or refuse permission to appear through a pleader in the Sessions Court to which he commits the accused. ('65) 2 Suth W R Cr. 50 (50) (D B).

7. "Pleader."—[1] "Pleader" includes any person appointed by the accused with the permission of the Court to act in the proceedings against him. (Vol 13) 1926 Bom 218 (222); 50 Bom 250; 27 Cri L Jour 440 (DB).

[2] The appointment and the permission need not however be express but may be implied from the circumstances of the case. See (Vol 13) 1926 Bom 218 (221); 50 Bom 250; 27 Cri L Jour 440 (DB).

[3] Where the father-in-law of the accused who was unwell appeared in Court on her behalf and the trying Magistrate thereupon proceeded with the case, it was assumed that the Magistrate must have given the necessary permission. ('84) 1884 Rat 206 (207) (D B).

[4] It is, however, generally advisable that something should be noted on the record to show that the person who represents the accused has been duly appointed by

## CHAPTER XVIII.

## OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

203. (1) "If \* \* \* Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, or any Magistrate [not being a Magistrate of the third class] empowered in this behalf by the [Provincial Government], may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

[1882—S. 206; 1872—S. 142; 1861—Ss. 51, 52.]

[a] The words and figures "Subject to the provisions of S. 413" were repealed by the Criminal Law (Amendment) Act, 1923 (12 [XII] of 1923), S. 9. [b] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 57. [c] Substituted by A. O. for "Local Government".

## Section 205—Note 7 (contd.)

him and the Court has given the requisite permission for his appearance in place of the accused. (Vol 13, 1926 Bom 218 (223) : 50 Bom 250; 27 Cri L Jour 440 (D B).

[5] In the absence of an appointment by the accused of any person to represent him, the mere permission of the Magistrate will not enable any person to act as a pleader for the accused, and the Magistrate would have no jurisdiction to proceed with the case in the absence of the accused. (Vol 11) 1924 Pat 46 (47); 2 Pat 793 : 24 Cri L Jour 872 (D B) & (Vol 17) 1930 Nag 51 (63) : 26 Nag L R 50 : 31 Cri L Jour 284 & (Vol 13) 1926 Bom 218 (223, 224) : 50 Bom 250; 27 Cri L Jour 440 (D B) & ('84) 1884 Rat 205 (206) (D B).

[See (Vol 11) 1924 Rang 383 (383) : 26 Cri L Jour 845. (Accused absent throughout the proceeding and a co-accused allowed to represent him.)]

8. Applicability to security proceedings.— [1] This section does not apply to proceedings under Ss. 107 to 110, in Chapter VIII, Division B. ('03) 2 Weir 54 (55).

9. "At any stage of the proceedings." — [1] Where the Court has allowed the accused to appear by pleader, but thinks it necessary or desirable that the accused should be present in person for any particular purpose, he may order the personal appearance of the accused. (Vol 13) 1926 Bom 218 (219) : 50 Bom 250 : 27 Cri L Jour 440 (D B) & (Vol 5) 1918 Pat 152 (153) : 19 Cri L Jour 119 & (Vol 21) 1934 All 693 (694) : 35 Cri L Jour 879.

[See ('37) 1937 Mad W N 182 (183) (D B) & (Vol 21) 1934 Bom 212 (212) : 35 Cri L Jour 1035 (D B).]

[2] Where the accused is convicted and the sentence is not one of fine only, the Magistrate must, under S. 366, sub-s. (2), direct the personal attendance of the accused for hearing the judgment. (Vol 14) 1927 Rang 73 (73) : 4 Rang 506 : 28 Cri L Jour 226 & ('13) 14 Cri L Jour 272 (272) : 6 Sind L R 206 (D B).

[See (Vol 9) 1922 Mad 79 (79) : 45 Mad 359; 23 Cri L Jour 266 & ('14) 15 Cri L Jour 281 (281) (D B) (Cal).]

[3] Though at any time the Magistrate can revoke the permission given to the accused to appear by a pleader, yet he should not do so on a trivial ground such as that

the accused objects to the case being tried by that Magistrate and wants a transfer of his case to some other Magistrate. ('23) 24 Cri L Jour 902 (903) (D B) (Cal).

10. Revision.— [1] The High Court will in proper cases interfere in revision and will dispense with personal presence. (Vol 14) 1927 All 119 (150) : 28 Cri L Jour 94. (Pardanashin lady.) & ('14) 15 Cri L Jour 281 (281) (D B) (Cal.) ; Do. & ('02) 6 Cal W N lix (lix) (D B). (Extreme illness and distance of Court from house.)

[2] The High Court will not interfere where the irregularity alleged is the mere omission of the Magistrate to make a record that he has given permission to the accused to appear by his pleader. (Vol 13) 1926 Bom 218 (221) : 50 Bom 250 : 27 Cri L Jour 440 (D B).

[3] The High Court will not interfere where the case is an extremely trivial one. ('84) 1884 Rat 206 (206) (D B).

[4] Where the Magistrate dispenses with the presence of the accused in a case in which a warrant has been issued, the High Court will set aside the order giving such permission. (Vol 11) 1924 Pat 46 (47) : 2 Pat 793 : 24 Cri L Jour 872 (D B).

[5] A Sub-divisional Magistrate cannot, in revision, cancel the order of a Bench Court dispensing with the personal attendance of the accused. He can only forward the record to the District Magistrate who should, under S. 438 of the Code, refer the matter to the High Court. ('37) 1937 Mad W N 182 (183) (D B).

## Section 206—Note 1

[1] Before a Magistrate commits a case for trial to a Sessions Court, he must hold a preliminary inquiry into the facts alleged against the accused. (Vol 2) 1915 Bom 195 (196) : 16 Cri L Jour 747 (D B).

[2] The committing Magistrate must satisfy himself that there is a real case for trial. ('05) 2 Cri L Jour 534 (541) (SB) (Cal).

[3] The object of inquiry is:

(a) To prevent the committal of cases in which there is no reasonable ground for conviction. ('82) 5 All 161 (162) & ('99) 1899 All W N 135 (136) & (Vol 9) 1922

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

[1892—S. 207, 1872—S. 189; 1861—S. 179.]

Section 206—Note 1 (*contd.*)

Mad 13 (44) : 23 Cri L Jour 209 \* (12) 13 Cri L Jour 778 (780) : 36 Mad 321 (DB).

[See also (Vol 26) 1939 Sind 222 (221) : I L R (1940) Kar 95 : 40 Cri L Jour 818 (DB).]

(b) To provide that no person shall be committed for trial without being previously made acquainted with the facts and circumstances of the offence imputed to him. (Vol 32) 1945 Lah 286 (290) : 47 Cri L Jour 269 (FB) \* (81) 4 Mad 227 (228) (DB) \* (12) 13 Cri L Jour 877 (884) : 6 Low Bul Rul 129 (F B) \* (75) 14 Beng L R 54 (59, 60) (DB).

[4] The British Consul at Zanzibar is a Magistrate empowered to commit accused for trial to the High Court of Bombay. (79) 3 Bom 334 (339).

[5] A District or Sub-Divisional Magistrate to whom a Sub-Magistrate has submitted the case under S. 349 has got the power to commit the case to the Court of Session. (80) 4 Bom 240 (246) (SB).

[6] A District or Sub-Divisional Magistrate to whom a Sub-Magistrate has submitted the case under S. 349 has no power to send the case back to the Sub-Magistrate with directions to commit it. (86) 10 Bom 196 (197) (DB).

[7] A Magistrate having power to commit does not lose the power merely because he has been specially appointed to try the accused. (Vol 18) 1931 Bom 517 (519) : 33 Cri L Jour 68.

[8] A Presidency Magistrate's jurisdiction to commit a case is not ousted by the fact that the coroner has held an inquiry and has drawn up an inquisition under Act 4 [IV] of 1871. (92) 16 Bom 159 (161) (DB) \* (94) 1 Cri L Jour 13 (18, 19, 20) : 31 Cal 1 (DB).

[9] The procedure laid down in Chapter XVIII is not confined to cases exclusively triable by Court of Session but is also applicable to cases which, in the opinion of the Magistrate, ought to be tried by such Court. (84) 6 All 477 (479).

[10] Where the case is one exclusively triable by a Court of Session, the Magistrate must proceed under this chapter and cannot try the case himself. (98) 1898 Rat 953 (953) (DB) \* (10) 11 Cri L Jour 196 (197) (DB) (Mad) \* (Vol 9) 1922 All 345 (346) : 23 Cri L Jour 456 \* (Vol 1) 1914 Oudh 361 (363) : 15 Cri L Jour 502 \* (68) 9 Suth W R Cr 5 (5) (DB) \* (92-96) 1 Upp Bur Rul 231 (231) \* (11) 12 Cri L Jour 20 (20) (DB) (Mad).

[See (Vol 17) 1930 All 280 (280) : 31 Cri L Jour 563.]

[11] Where the facts *prima facie* disclose offence, the Magistrate should commit the case. He will not be justified in trying the case for deciding whether it constitutes a lesser offence. (92) 5 C P L R Cr 38 (38) \* (92) 5 C P L R 48 (49).

[12] Offence not of a nature triable by a Court of Session at all — Magistrate must try the case himself (97) 19 All 465 (466) (DB) \* (96) 3 Cri L Jour 9 (95) (All) \* (1864) 1 Suth W R Cr L 14 (14) \* (1864) 1 Suth W R Cr 5 (5) (DB) \* (70) 5 Mad H C R 27 (279).

[13] Where the offence is one triable both by a Court of Session and by himself, the Magistrate has discretion to decide whether to try the case himself or to proceed under this chapter. (Vol 12) 1925 Pat 75 (759) : 27 Cri L Jour 313 \* (1900-02) 1 Low Bur Rul 158 (159, 160) \* (Vol 5) 1918 Nag 141 (142) : 20 Cri L Jour 97.

[See (Vol 17) 1930 All 280 (280) : 31 Cri L Jour 563.]

[14] In cases not triable by the Magistrate himself but triable by a Court of Session or by some other Magistrate, the Magistrate has a discretion to decide whether to proceed under this chapter or to send the case for trial by the proper Magistrate. (84) 6 All 477 (479).

[15] There is nothing to prevent a Magistrate who started with the trial of a case from subsequently deciding to commit it for trial by a Sessions Court. (12) 13 Cri L Jour 877 (882, 884, 885, 888) : 6 Low Bur Rul 129 \* (Vol 1) 1914 Mad 643 (644) : 15 Cri L Jour 366 (DB).

[16] The Magistrate committing case to Sessions after partially trying it may proceed from where he left and continue the enquiry. (80) 2 All 910 (912) \* (Vol 17) 1930 Cal 666 (668) : 32 Cri L Jour 243 (DB) \* (Vol 8) 1921 All 148 (148) : 22 Cri L Jour 496.

[17] Where a native Indian subject who is charged with having committed an offence in a Native State is brought to the British territory, he will be considered to have been "found" at the place to which he is brought and the Sessions Court having jurisdiction in that place will be competent to try the offence. (82) 6 Bom 622 (625) (DB).

[18] High Court is not prevented from trying cases committed to it by a mofussil Court, by exercising the power given to the High Court by S. 526, sub-s. (1). (Vol 7) 1920 Mad 824 (825) : 42 Mad 791 : 20 Cri L Jour 484 (DB).

Section 207—Note 1

[1] Where an offence though triable by a Court of Session or High Court is neither exclusively triable by such Court nor one which in the opinion of the Magistrate ought to be tried by such Court, the Magistrate cannot commit it to the Sessions Court. (Vol 15) 1928 Pat 551 (552) : 29 Cri L Jour 612.

[2] A preliminary inquiry is not necessary where a case is committed to the Court of Session in obedience to the lawful orders of a superior Court. (80) 2 All 910 (912) \* (Vol 12) 1925 Rang 82 (83) : 2 Rang 447 : 26 Cri L Jour 1106.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed *Taking of evidence pro-* to hear the complainant (if any), and take in manner hereinafter pro-  
*duced.* vided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the *Process for production of* Magistrate to issue process to compel the attendance of any witness or  
*further evidence.* the production of any document or thing the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

[1892—S. 208; 1872—Ss. 190, 191, 357 para 1; 1861—Ss. 186, 193, 194, 207.]

#### Provincial Amendments.

##### BENGAL.

For the purpose of trials under the Bengal Criminal Law Amendment Ordinance, 1947 (No I of 1947), a new Section 208 was substituted for Sections 208 to 220 inclusive by Section 9 of that Ordinance.

##### PUNJAB.

For the purpose of trials under the Punjab Public Safety Ordinance, 1946 (No. XIV of 1946), a new section was substituted for Sections 208 to 220 inclusive; see Section 34 (1) of that Ordinance. [19-11-1946.]

#### Section 207 — Note 1 (*contd.*)

[But see (Vol 19) 1932 Cal 688 (684, 685) : 33 Cri L Jour 770 (DB). (Appellate Court discharging accused out saying that if the Magistrate wishes to proceed further in the matter he may commit the accused to the Court of Session — Preliminary enquiry under Chapter XVIII necessary before accused can be committed.)]

[3] Where an accused is charged with two or more offences one of which is exclusively triable or ought to be tried by a Court of Session, the proper course is to commit him for trial for all the offences. ('21) 22 Cri L Jour 480 (480) (Cal) \* (Vol 20) 1933 Lah 500 (501) : 34 Cri L Jour 314 \* ('97) 2 All 398 (400, 405) (DB).

[See (Vol 5) 1918 All 126 (126) : 40 All 615 : 19 Cri L Jour 706.]

[4] Where several persons are jointly charged in respect of one transaction and it appears from the facts implicating the whole of them that one has committed an aggravated offence, which must or should be tried by a Court of Session, the Magistrate should commit all the accused for trial. ('81) 1881 All W N 64 (64) \* ('99) 2 Weir 258 (258).

[5] There is no objection to hold a preliminary enquiry against a person jointly with others but the trial on commitment should be separate. (Vol 29) 1942 Bom 212 (213) : I L R (1942) Bom 534 : 43 Cri L Jour 773 \* ('02) 26 Mad 592 (594) (DB) \* (1900) 1900 All W N 206 (206).

[But see ('97) 1897 Rat 925 (926) (DB) \* ('64) Beng L Sup. Vol Cr 750 (757, 758) (FB). (Failure to make separate commitment—Mere irregularity.)]

#### SECTION 208 — SYNOPSIS.

1. Object of the section.
2. "When the accused appears or is brought before him."

3. "Hear the complainant (if any)."
4. Take all such evidence.
5. Evidence for the prosecution.
6. Evidence for the accused.
7. "In manner hereinafter provided."
8. Sub-section (2)—Right of cross-examination.
9. Sub-section (3)—Summoning of witnesses.

1. Object of the section. — [1] The object of the section is that the accused should be made aware of all the evidence that he will have to meet on his trial and also that he should have a full opportunity of convincing the Magistrate that there are not sufficient grounds for committing him for trial. ('12) 13 Cri L Jour 877 (882, 883) : 6 Low Bur Rui 129 (FB).

[See (Vol 26) 1939 Sind 222 (224) : I L R (1940) Kar 95 : 40 Cri L Jour 818 (DB).]

2. "When the accused appears or is brought before him." — [1] Where an enquiry was held in which a certain person was not put in the situation of an accused person at all but was himself examined on solemn affirmation like other witnesses, and was not given any opportunity of cross-examining the other witnesses, and then was committed to the Court of Session on a charge which was the result of the inquiry, it was held that the commitment was illegal. ('68) 9 Suth W R Cr 54 (56, 57) (DB).

[2] The "appearance" of the accused may be voluntary and need not be under any process issued against him under S. 204. (Vol 6) 1919 Lah 389 (390) : 20 Cri L Jour 3 : 1919 Pun Re No. 5 Cr.

3. "Hear the complainant (if any)." — [1] The section requires that the complainant shall be heard, not necessarily examined. (Vol 32) 1945 Nag 127 (129) :

Section 208—*Para 5 (continued)*

117 (1941) 1941 Cr L Jour 240 (2) (Vol 10) 1929 Cal 222 (30); 30 Cr L Jour 502 (11).

c. *Take all such evidence.*—[1] The Magistrate is not to refuse to draw up a charge, so take all such evidence as may be produced in support of the prosecution on behalf of the accused or as may be called for by the Magistrate. (92) 1 Low Bur Rul 338 (338) (DB) & (12) 18 Cr L Jour 443 (44) (A1).

[See (Vol 26) 1939 Sind 222 (224) : 1 L R (1939) Kar 95 : 40 Cr L Jour 818 (DB).]

[2] Irrelevant or unnecessary evidence to prove the point in issue need not be taken. (12) 18 Cr L Jour 443 (44) (A1) & (Vol 20) 1933 All 690 (695) : 55 All 1040 : 31 Cr L Jour 967 (DB).

[3] It is the duty of the Magistrate to record the evidence fully in order that the accused may have ample notice of the matter with which he is charged, and of the evidence by which the prosecutor seeks to prove the case. (Vol 25) 1938 Pat 579 (582) : 40 Cr L Jour 147 (DB).

[4] The Magistrate is not absolved from recording all the evidence produced even in cases where the accused has confessed his guilt. ('96) 1896 Rat 842 (842) (DB).

[5] Magistrate should collect evidence precisely on a particular offence before commitment. ('90) 15 Bom 491 (504) (DB).

5. Evidence for the prosecution.—[1] It is the duty of the prosecution to call as witnesses all persons who have been eye-witnesses or otherwise connected with the transaction although the evidence of any of them may be favourable to the accused, and an adverse inference can be drawn from the failure to call any material witness. (Vol 28) 1941 Sind 168 (172) : 42 Cr L Jour 850 : 1 L R (1941) Kar 270 (DB) & (Vol 24) 1937 All 182 (186, 187) : 38 Cr L Jour 401 & (Vol 8) 1921 Cal 257 (257) : 22 Cr L Jour 475 (DB) & (Vol 2) 1915 Cal 545 (546, 547) : 16 Cr L Jour 170 : 42 Cal 422 (DB) & (Vol 3) 1916 Lah 408 (409) : 17 Cr L Jour 267 : 1916 Pun Re No. 12 Cr (DB) & (Vol 19) 1932 Lah 500 (501) : 33 Cr L Jour 497 (DB) & (Vol 16) 1929 Pat 348 (346) : 8 Pat 625 : 30 Cr L Jour 1136 (DB) & ('31) 1931 Mad W N 727 (728) (D B).

[See also (Vol 25) 1938 Pat 579 (582) : 40 Cr L Jour 147 (D B).]

[2] The prosecution is not under any duty to call witnesses whom it regards as false or unnecessary. (Vol 14) 1927 Mad 475 (476) : 28 Cr L Jour 307 (DB) & (Vol 15) 1928 Pat 46 (48) : 28 Cr L Jour 868 (DB) & (Vol 19) 1932 Bom 279 (282) : 56 Bom 434 : 33 Cr L Jour 613 (D B).

[See (Vol 23) 1936 Lah 533 (535) : 17 Lah 176 : 37 Cr L Jour 742 (FB) & (Vol 10) 1928 Oudh 217 (224) : 24 Cr L Jour 770 (DB).]

[3] Prosecution not sending up material witness—Magistrate should call such witness and examine him himself. (Vol 13) 1926 Pat 5 (8) : 26 Cr L Jour 1589 (DB).

[4] The examination of the investigating police-officer is necessary in all important cases, especially of murder and dacoity. ('81) 1881 Rat 173 (173) (D B).

[5] When committing cases, Magistrate should direct to send up evidence to prove that a body sent to hospital for post-mortem examination is really the body of the person referred to in the case under trial, or that an article analysed by the chemical examiner was actually the article sent to him for analysis in the case under trial. ('72-92) 1872-92 Low Bur Rul 63 & (632).

6. Evidence for the accused.—[1] A commitment order passed without taking the evidence produced for the defence is illegal and liable to be quashed. (11) 1924 All 317 (318) : 46 All 137 : 27 Cr L Jour 6 & (Vol 15) 1928 Rang 299 (299) : 6 Rang 531 : 30 Cr L Jour 1 & (Vol 21) 1934 Lah 610 (610) : 36 Cr L Jour 110.

[See (Vol 26) 1939 Sind 222 (224, 225) : 1 L R (1939) Kar 95 : 40 Cr L Jour 818 (D B).]

[See also (Vol 29) 1942 Pat 38 (39) : 42 Cr L Jour 767.]

[2] No request made on behalf of the accused to produce evidence. Commitment order passed without examining the defence witnesses cannot be quashed on the ground of any irregularity or illegality. (Vol 2) 1941 Lah 371 (371, 372) : 43 Cr L Jour 104.

[3] The rule laid down in this section is limited to examination of witnesses produced by the defence. (Vol 3) 1916 Cal 106 (106) : 42 Cal 608 : 16 Cr L Jour 41 (DB). (Magistrate refusing application for calling further witnesses, on day on which order of commitment passed—*Held*, this does not show that S. 208 is not complied with—Commitment cannot be quashed.)

7. "In manner hereinafter provided."—[1] These words refer to Chapter XXV. (Vol 13) 1926 Pat 58 (59) : 26 Cr L Jour 1475.

8. Sub-section (2)—Right of cross-examination.—[1] The accused is of right entitled to cross-examine the witnesses for the prosecution during the preliminary enquiry before the charge is framed. The refusal or omission of the Magistrate to give the accused an opportunity to cross-examine the witnesses for the prosecution is a legal flaw and will render the order of commitment liable to be set aside. (Vol 11) 1924 Cal 780 (780) : 51 Cal 442 : 26 Cr L Jour 63 (D B) & ('98) 20 All 529 (531) (DB) & (Vol 17) 1930 Cal 754 (755) : 57 Cal 945 : 32 Cr L Jour 182 (D B).

[See (Vol 33) 1946 Oudh 26 (31).]

[2] Unless the accused has reserved the cross-examination to the Sessions Court, the order of commitment, without giving accused opportunity to cross-examine prosecution witnesses, is liable to be set aside. ('91) 2 Weir 260 (260) (DB).

[3] The proper time to exercise the right of cross-examination is after the examination-in-chief of each witness. The accused has no right to reserve his cross-examination till the examination-in-chief of all the prosecution witnesses is over. (Vol 6) 1919 Low Bur 159 (160) : 9 Low Bur Rul 109 : 19 Cr L Jour 327 & ('12) 13 Cr L Jour 443 (445) (All) & (Vol 16) 1929 Cal 593 (595) : 57 Cal 44 : 30 Cr L Jour 1107 & ('14) 15 Cr L Jour 29 (30) (Mad) & (Vol 18) 1931 Bom 517 (518) : 33 Cr L Jour 68 & (Vol 14) 1927 Pat 243 (245) : 6 Pat 329 : 28 Cr L Jour 709 (D B).

[4] The Magistrate has a discretion in the exercise

208. (1) When the evidence referred to in section 208, sub-sections (1) and (3), has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

[1882 — S. 209 ; 1872 — S. 195 para. 1 and Explanation 3 ; 1861 — S. 225.]

#### Section 208—Note 8 (contd.)

of his inherent power in suitable circumstances to allow the accused to reserve his cross-examination. (Vol 16) 1929 Cal 593 (595) : 57 Cal 44 : 30 Cri L Jour 1107 (D B) \* (Vol 14) 1927 Pat 243 (245) : 6 Pat 329 : 28 Cri L Jour 709 (D B) \* (Vol 6) 1919 Low Bur 159 (160) : 9 Low Bur Rul 109 : 19 Cri L Jour 327.

[5] Where the Magistrate, in the exercise of his discretion, permits the reservation of cross-examination, he cannot then refuse to recall the prosecution witnesses. (Vol 17) 1930 Cal 751 (755) : 57 Cal 945 : 32 Cri L Jour 182 (D B).

[6] Accused applying for copies of statements made by prosecution witnesses to police—Magistrate ordering such copies to be furnished — Magistrate is bound to allow cross-examination with reference to such statements. (Vol 14) 1927 Pat 243 (246) : 6 Pat 329 : 28 Cri L Jour 709 (DB).

[7] A Magistrate has no power to curtail the cross-examination of witnesses. ('12) 13 Cri L Jour 443 (445) (All).

[But see (Vol 16) 1929 Sind 137 (139) : 23 Sind L R 340 : 30 Cri L Jour 845 (DB). (Magistrate not to allow unnecessarily lengthy cross-examination.)]

[8] The cross-examination of the prosecution witnesses need not be confined to matters elicited in examination-in-chief. ('71) 6 Beng L R App 88 (89) (DB).

[9] The Magistrate himself can cross-examine witnesses if he thinks it necessary to do so for ascertaining the truth of the prosecution story. (Vol 2) 1915 Bom 195 (196) : 16 Cri L Jour 747 (DB) \* ('84) 7 All 160 (162) (DB).

#### 9. Sub-section (3)—Summoning of witnesses.

—[1] The Magistrate is bound to issue process for the attendance of any witness or the production of any document when such process is applied for, either by the prosecution or the accused. (Vol 11) 1924 All 317 (318) : 46 All 137 : 25 Cri L Jour 624.

[2] The Magistrate need not issue process for the production of unnecessary evidence. ('12) 13 Cri L Jour 778 (780) : 36 Mad 321 (DB) \* (Vol 14) 1927 Pat 243 (247) : 6 Pat 329 : 28 Cri L Jour 709 (DB).

[3] Magistrate refusing to issue process — Magistrate must record his reasons for refusal—Omission to record reasons an illegality — Subsequent order, either of discharge, or of commitment is liable to be set aside. (Vol 14) 1927 Mad 162 (162, 163) : 27 Cri L Jour 1327.

[4] Inordinate delay in applying for summons is a proper reason to renege process. (Vol 16) 1929 Bom 269 (272) : 30 Cri L Jour 1056 (DB) \* (Vol 3) 1916 Cal 196 (196) : 16 Cri L Jour 415 : 42 Cal 608 (DB).

[5] Witnesses required to be summoned for the purpose of causing variation to those witnesses—Magistrate can refuse to issue summons. (Vol 15) 1928 Mad 652 (652) : 29 Cri L Jour 725.

[6] Magistrate should not refuse to call evidence on behalf of the accused merely because he will have ample opportunity to produce evidence later on, when he is committed to the sessions. (Vol 26) 1939 Sind 222 (224) : 1 L R (1940) Kar 95 : 39 Cri L Jour 818 (DB).

[7] Magistrate exercising discretion and recording reasons for refusal — Revisional Court will not interfere unless the reason appears on the face of it to be untenable. (Vol 16) 1929 Bom 269 (271) : 30 Cri L Jour 1066 (DB).

[But see (Vol 14) 1927 Pat 243 (247) : 6 Pat 329 : 28 Cri L Jour 709 (DB). (High Court in revision is not at all concerned as to whether the reasons given would have appealed to another person or not.)]

[8] A Magistrate is bound to take the evidence of the witnesses summoned. ('12) 13 Cri L Jour 443 (444).

#### Section 209 — Note 1

[1] Except in cases coming under sub-s. (2) Magistrate must hear all evidence referred to in S. 208, sub-ss. (1) and (3) before commitment. ('04) 26 All 564 (567) : 1 Cri L Jour 510 (DB) \* ('12) 13 Cri L Jour 443 (444) (All) \* ('72-92) 1872-92 Low Bur Rul 538 (539).

[See ('74) 1874 Pun Re No. 17 Cr, p. 29 (30) \* ('79) 3 Cal L Rep 263 (264) (DB) \* ('77) 1877 Rat 121 (121).]

[2] Magistrate cannot on evidence for prosecution and before evidence for defence, consider whether there are sufficient grounds for committing accused. (Vol 15) 1928 Rang 299 (299) : 6 Rang 531 : 30 Cri L Jour 1.

[3] Application under sub-s. (3) of S. 208 can be refused by Magistrate. ('12) 13 Cri L Jour 778 (779, 780) : 36 Mad 321 (DB).

[4] Accused is not bound to tender evidence in preliminary inquiry and his refusal to do so cannot give rise to adverse inference against him. (Vol 14) 1927 Pat 292 (295) : 28 Cri L Jour 611.

[5] Where there is *prima facie* case for commitment Magistrate must commit accused and not enter into

When charge is to be framed.

210. (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are suffi-

Section 209 — Note 1 (contd.)

questions of probabilities of case and discharge him on ground that evidence is not sufficient to sustain conviction. (Vol 30) 1913 Oudh 233 (235, 236) : 44 Cri L Jour 309 \* (Vol 29) 1912 All 334 (335) : 43 Cri L Jour 875 (DB) \* (Vol 29) 1912 Pat 38 (40) : 42 Cri L Jour 767 \* (Vol 28) 1911 Nag 224 (225) : 42 Cri L Jour 689 : 1 J R (1912) Nag 438 \* (Vol 28) 1911 Pat 505 (506, 507) : 42 Cri L Jour 576 \* ('38) 1938 Mad W N 819 (820) \* (Vol 24) 1937 All 573 (373) : 38 Cri L Jour 659 \* (Vol 24) 1937 Mad 651 (655) : 38 Cri L Jour 703 \* (Vol 22) 1935 Bom 137 (141) : 59 Bom 125 : 36 Cri L Jour 643 (FB) \* (71) 3 N W P E C R 27 (27) \* (Vol 13) 1926 Cal 528 (528) : 27 Cri L Jour 509 (DB) \* (Vol 11) 1924 Cal 639 (640) : 51 Cal 849 : 26 Cri L Jour 117 (DB) \* (Vol 16) 1929 Lah 403 (404) : 30 Cri L Jour 234 \* ('93) 1893 Pnn Re No. 2 Cr, p 4 (5) (FB) \* (Vol 12) 1925 Oudh 167 (168) : 25 Cri L Jour 1189 \* (Vol 16) 1929 Sind 137 (139) : 30 Cri L Jour 845 : 23 Sind L R 340 (DB) \* (Vol 17) 1930 Sind 99 (103) : 31 Cri L Jour 117 : 24 Sind L R 96 (DB) \* ('72-92) 1 Low Bur Rul 348 (348).

[See (Vol 20) 1933 Lah 39 (39) : 34 Cri L Jour 39 (DB).]

[6] Magistrate can weigh evidence to satisfy himself that there are grounds for commitment. (Vol 30) 1913 Oudh 233 (235) : 44 Cri L Jour 309 \* (Vol 29) 1912 Pat 38 (40) : 42 Cri L Jour 767 \* (Vol 28) 1911 Pat 505 (506, 507) : 42 Cri L Jour 576 \* ('38) 1938 Mad W N 819 (820) \* (Vol 24) 1937 Mad 654 (655) : 38 Cri L Jour 703 \* (Vol 24) 1937 Posh 12 (13) : 38 Cri L Jour 427 \* (Vol 22) 1935 Bom 137 (138) : 59 Bom 125 : 36 Cri L Jour 643 (FB).

[7] Magistrate finding evidence against accused untrustworthy must discharge him under this section. (Vol 28) 1911 Pat 505 (506) : 42 Cri L Jour 576 \* ('38) 1938 Mad W N 819 (820) \* (Vol 24) 1937 Mad 654 (655) : 38 Cri L Jour 703 \* (Vol 2) 1915 Bom 195 (196) : 16 Cri L Jour 747 (D B) \* (Vol 20) 1933 Bom 158 (161, 162) : 57 Bom 430 : 34 Cri L Jour 564 (D B) \* (Vol 22) 1935 Bom 137 (143) : 59 Bom 125 : 36 Cri L Jour 643 (F B) \* (Vol 11) 1924 Cal 639 (640) : 51 Cal 849 : 26 Cri L Jour 117 \* (Vol 13) 1926 Cal 528 (528) : 27 Cri L Jour 509 (D B) \* (Vol 10) 1923 Lah 279 (279) : 23 Cri L Jour 601 \* (Vol 10) 1923 Lah 337 (338) : 4 Lah 69 : 25 Cri L Jour 238 \* ('26) 27 Cri L Jour 274 (275) (All) \* (Vol 12) 1925 Pat 279 (280) : 25 Cri L Jour 1089 \* (Vol 5) 1918 Upp Bur 11 (11, 12) : 3 Upp Bur Rul 29 : 19 Cri L Jour 102 \* (Vol 8) 1921 Sind 5 (6) : 15 Sind L R 1 : 22 Cri L Jour 570 \* (Vol 12) 1925 Oudh 167 (168) : 25 Cri L Jour 1189 \* (Vol 14) 1927 Rang 74 (78) : 4 Rang 471 : 28 Cri L Jour 219 \* (Vol 12) 1925 All 670 (670, 671) : 27 Cri L Jour 2 (D B) \* (Vol 13) 1926 Pat 5 (8) : 26 Cri L Jour 1589 (D B).

[8] Magistrate not finding sufficient grounds for commitment must discharge the accused under this section. (Vol 30) 1913 Oudh 233 (235) : 44 Cri L Jour 309 \* (Vol 29) 1912 All 334 (335) : 43 Cri L Jour 879 (D B) \* (Vol 29) 1912 Pat 38 (40) : 42 Cri L Jour 767 \* (Vol 22) 1935 Bom 137 (138, 141, 143) : 59 Bom 125 : 36 Cri L Jour 643 (F B) \* (Vol 10) 1923 Lah 279 (280) : 23 Cri L Jour 601 \* (Vol 2) 1915 Cal 715 (716) : 16 Cri L Jour 5 (D B) \* ('91) 2 Weir 255 (257) (D B) \* ('05) 2 Cri L Jour 534 (549) (S B) \* (Vol 20) 1933 All 482 (484) : 34 Cri L Jour 1201.

[See (Vol 19) 1932 Rang 193 (194) : 10 Rang 495 : 34 Cri L Jour 187.]

[9] No *prima facie* case in preliminary inquiry — Accused discharged — Sessions Judge who took different view without *prima facie* evidence, held acted improperly.

ly. (Vol 26) 1939 Mad 253 (251, 255) : 40 Cri L Jour 392 \* ('73) 1873 Rat 73 (73) (D B) \* ('71) 1874 Pnn R. No. 17 Cr. p. 29 (30).

[10] In proceeding against *A* some witnesses saying that offence was committed by *D* — Proceeding should not be started against *D* until *A* is convicted, acquitted or discharged. (Vol 16) 1929 Sind 17 (17) : 30 Cri L Jour 459 (D B).

[11] Order of discharge may be presumed to have been made though there is no formal order on the record. ('77) 1 Bom 610 (619) (D B).

[12] Person charged with a major offence — Magistrate finding that charge does not lie, framing a charge for a minor offence and proceeds — Proceeding amounts to discharge of accused with reference to major offence. (Vol 6) 1919 All 66 (66, 67) : 42 All 128 : 20 Cri L Jour 778 \* (Vol 19) 1932 Nag 85 (85) : 33 Cri L Jour 558.

[13] The fact that accused has been charged with minor offence does not mean that he has been discharged in respect of major offence. (Vol 6) 1919 Mad 847 (847) : 19 Cri L Jour 945 : 41 Mad 982 (D B).

[14] Disqualification of accused to give evidence does not attach to person discharged. ('09) 9 Cri L Jour 376 (372) : 4 Low Bur Rul 362 (D B).

[15] Discharged person can maintain action for damages for malicious prosecution. ('81) 6 Bom 376 (380) (D B).

[16] Magistrate must record reasons discharging accused under this section. (Vol 26) 1939 Bom 372 (374) : 40 Cri L Jour 951 (D B) \* (Vol 14) 1927 Rang 74 (78) : 4 Rang 471 : 28 Cri L Jour 219.

[17] Magistrate need not record formal judgment laid down in S. 367. (Vol 6) 1919 All 126 (126) : 40 All 615 : 19 Cri L Jour 706.

[18] Several and different accused discharged at different stages of inquiry — Reasons for their discharge can be recorded at the end of inquiry. (Vol 9) 1922 Mad 195 (196, 197) : 24 Cri L Jour 269 (D B).

[19] No sufficient grounds for commitment — Magistrate may try the case himself or send it to other Magistrate for trial instead of discharging accused. (Vol 24) 1937 Lah 217 (219) : 38 Cri L Jour 992 \* ('99) 22 Mad 459 (460) \* ('84) 10 Cal 85 (86) (D B).

[20] Good grounds for commitment — Magistrate must frame charge and commit the case to Court of Session, and not send it to Magistrate with special powers under S. 30. ('03) 7 Cal W N 457 (460) (D B).

[21] Magistrate should not treat grave offence beyond his jurisdiction as less grave offence to bring it within his jurisdiction. (Vol 32) 1945 Sind 125 (127) : 1 L R (1945) Kar 109 : 47 Cri L Jour 37 (D B) \* (Vol 31) 1944 Mad 166 (168) : 45 Cri L Jour 508 \* (Vol 28) 1941 Pat 287 (287) : 42 Cri L Jour 622 \* (Vol 28) 1941 Sind 36 (38) : 42 Cri L Jour 460 \* ('11) 12 Cri L Jour 20 (20) (D B) (Mad).

[22] Account of transaction given by prosecutor depriving it of criminal character — Magistrate can discharge accused immediately. (Vol 15) 1928 Lah 945 (946) : 30 Cri L Jour 162 \* ('84) 1884 Rat 201 (201) (D B).

[23] Magistrate cannot discharge accused under this sub-section where a case cannot be taken cognizance of for want of complaint under S. 195. (Vol 20) 1933 Mad 413 (416) : 34 Cri L Jour 800.

[See (Vol 28) 1941 Mad 833 (833, 834).]

Section 210 — Note 1

[1] Framing of charge does not amount to commitment which should be made by separate order under S. 213. ('85) 15 Cal 608 (622) (FB). (Per Princep, J.) \* ('10) 11 Cri L Jour 486 (487, 488) (DB) (Bom).



cient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

*Charge to be explained, and copy furnished, to accused.*

(2) As soon as "[such charge] has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

[1882 — S. 210; 1872 — Ss. 198 para 1, 199; 1861 — Ss. 227 2, 23.]

[a] *Substituted by the Code of Criminal Procedure (Amendment) Act. 1923 (Is [XVIII] of 1923). S. 38.*

**211.** (1) The accused shall be required at once to give in orally or in writing, a list of the *List of witnesses for persons (if any) whom he wishes to be summoned to give evidence on defence on trial.* his trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of *Further list.* witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

[1882 — S. 211; 1872 — S. 200 paras. 1, 3; 1861 — S. 227.]

#### Section 210 — Note 1 (*contd.*)

[2] Magistrate can take further evidence after charge is framed and if he finds no sufficient grounds for committing accused he can cancel charge and discharge accused. (Vol 27) 1940 Pat 355 (359); 19 Pat 413; 41 Cri L Jour 931 (DB).

[3] Magistrate can amend charge after it is framed and proceed to try the case himself instead of committing it to sessions. ('10) 11 Cri L Jour 486 (488) (DB) (Dom).

[4] The expression "when upon such evidence being taken" refers to evidence mentioned in S. 208, sub-ss. (1) and (3). (Vol 23) 1936 Lah 533 (535); 17 Lah 176; 37 Cri L Jour 742 (FB).

[5] Magistrate cannot frame charge under this section until he has taken all evidence which accused may produce. ('98) 20 All 264 (265) & ('04) 1 Cri L Jour 357 (357, 358); 26 All 177.

[6] Under sub-s. (3) of S. 208, Magistrate can refuse an application for summons to any witness. ('12) 13 Cri L Jour 778 (779, 780); 36 Mad 321 (DB).

[7] When evidence already let in by prosecution is sufficient to establish *prima facie* case against accused, Magistrate is not bound to take rest of prosecution evidence. (Vol 20) 1933 All 690 (694, 695); 55 All 1040; 34 Cri L Jour 967 (DE) & ('66) 3 Mad H C R App ii (iii).

[8] An accused cannot be committed to sessions on charge of previous conviction to enhanced punishment under S. 75, Penal Code, unless there is *prima facie* evidence on record to prove previous conviction. (Vol 28) 1941 Sind 173 (176); 1 L R (1941) Kar 308; 43 Cri L Jour 12 (DB).

[9] Task of framing charge is the duty of Magistrate and not of prosecutor. ('89) 1889 Pun Re No. 26 Cr, p. 85 (89) (FB).

[10] Magistrate must consider what offence is disclosed on materials before him and should not be influenced by considerations as to what would be effect of framing charge for particular offence. ('01) 1901 Pun Re No. 5 Cr, p. 15 (15, 16).

[11] Magistrate should be careful not to mention anything in charge in form not justified by materials before him. ('89) 1889 Pun Re No. 26 Cr, p. 85 (90) (FB).

[12] Magistrate directed by appellate Court under

S. 423 to commit accused for trial before Court of Session — He has to frame charge under this section and proceed under Ss. 211 and 213 to commit the accused. (Vol 22) 1935 All 379 (583); 36 Cri L Jour 1013 (DB).

#### SECTION 211 — SYNOPSIS.

1. Object of the section.
2. "The accused shall be required."
3. "At once."
4. Right of accused filing the list—Enforcement of attendance of witnesses.
5. Refusal of Magistrate to summon witnesses.
6. Reserving of defence by the accused.
7. Failure of the accused to give a list — Effect of.
8. Further list.

1. Object of the section. — [1] Under S. 201 the accused can examine witnesses who are present in Court although they were not previously named by him. (Vol 23) 1936 Lah 533 (535, 536); 17 Lah 176; 37 Cri L Jour 742 (FB).

2. "The accused shall be required." — [1] After the charge framed against the accused has been read and explained to him under S. 210, sub-s. (2), the Magistrate is bound under this section to require the accused to give in a list of witnesses whom he wishes to be summoned in the Court of Session. ('05) 2 Cri L Jour 601 (602) (DB) & (Vol 21) 1934 Lah 23(1) (23); 35 Cri L Jour 616 (DB). (Questioning accused "Have you any evidence" is not enough.)

[2] A failure to ask an accused person to give in his list of witnesses will render his conviction liable to be quashed, even though he has been tried along with others, who had been so asked. ('68) 10 Suth W R Cr 7 (7).

[3] Where a Magistrate omits to enter the names of witnesses for the defence on the record the Sessions Judge ought not to try the accused. ('72) 18 Suth W R Cr. 20 (20, 21) (DB).

3. "At once." — [1] The list of witnesses should be presented as soon as the charge has been framed. (Vol 27) 1940 Pat 355 (359); 19 Pat 413; 41 Cri L Jour 931 (DB).

[See however (Vol 17) 1930 Cal 188 (189); 31 Cri L Jour 695 (DB).]

*Power of Magistrate to examine such witnesses.*

**212.** The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under section 211.

[1882 — S. 212 ; 1872 — S. 200. para. 2 ; 1861 — S. 207.]

**213.** (1) When the accused, on being required to give in a list under section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

(2) If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.

[1882 — S. 213 ; 1872 — Ss. 198 para. 1, 200 para. 2 ; 1861 — Ss. 220, 227.]

#### Section 211 (contd.)

**4. Right of accused filing the list — Enforcement of attendance of witnesses.** — [1] The accused is entitled to have the witnesses named by him in the list, summoned and examined on his behalf at the trial. (Vol 27) 1940 Pat 355 (359) : 19 Pat 413 : 41 Cri L Jour 931 (DB) ✕ (Vol 17) 1930 Cal 188 (188) : 31 Cri L Jour 695 (DB). (The accused can enforce the attendance of the witnesses.) ✕ (Vol 18) 1931 Cal 6 (7) : 58 Cal 412 : 32 Cri L Jour 316. (DB) (i) Crown to secure attendance of witnesses. (ii) Inconvenience in securing their attendance is no ground to refuse examination of witnesses.) ✕ (Vol 7) 1920 Cal 531 (531) : 47 Cal 758 : 21 Cri L Jour 842 (DB). (Application for enforcing attendance of the witnesses should not be refused.)

[2] A conviction will not be set aside on the ground that the attendance of some of the witnesses was not enforced unless the accused has been thereby prejudiced. (Vol 17) 1930 Cal 188 (190) : 31 Cri L Jour 695 (DB).

[3] Defence has no right to have a witness, not mentioned in his list, brought before the Court. (Vol 33) 1946 P C 43 (44) : 47 Cri L Jour 356 (PC).

(4) Summons to witness served late — Witness could not appear — Date of trial postponed for other reason and defence asked to inform witness — Defence dropping that witness — Procedure, held, not irregular. (Vol 33) 1946 P C 43 (44) : 47 Cri L Jour 356 (P C).

**5. Refusal of Magistrate to summon witnesses.** — [1] The Magistrate cannot refuse to summon a witness on the ground that he is suspected to be implicated in the offence with which the accused is charged. ('71) 6 Beng L R App 65 (66) (DB).

[2] Magistrate doubting the value of evidence of witness — Summons to that witness cannot be refused. ('71) 15 Suth W R Cr 15 (15, 16) (DB).

[3] The list containing large number of witnesses — This is no ground to refuse summoning any witness. ('85) 11 Cal 762 (766) (DB).

**6. Reserving of defence by the accused.** — [1] The Magistrate cannot prevent the accused from reserving his defence for the Court of Session. ('70) 13 Suth W R Cr 1 (11) : 4 Beng L R App 1 (DB) ✕ ('92) 14 All 242 (245) (DB). (i) Accused can refuse to disclose his witnesses. (ii) Magistrate should not cross-examine the accused regarding his witnesses.) ✕ ('97) 19 All 502 (504) (DB).

[2] The accused who has reserved his defence, cannot claim to keep back any of his witnesses mentioned in the list from being examined by the Magistrate under S. 212, on the ground that his right of reserving the defence would be prejudicially affected thereby. ('96) 18 All 380 (380, 381) (DB).

**7. Failure of the accused to give a list—Effect of.** — [1] The accused is entitled under S. 291 to call any witness present in the Court of Session and ex-

amine him, though not summoned. (Vol 23) 1936 Lah 533 (536) : 17 Lah 176 : 37 Cri L Jour 742 (F1B) ✕ ('97) 19 All 502 (503) (DB).

[2] Sessions Court considering evidence of a witness material — Sessions Court ought to summon such witness. (Vol 27) 1940 Pat 355 (358, 359) : 19 Pat 413 : 41 Cri L Jour 931 (DB) ✕ ('97) 19 All 502 (504) (DB). (14 All 212, explained.)

[3] List of witnesses not submitted to committing Magistrate—Accused requesting adjournment in Sessions Court for production of his witnesses — Refusal to adjourn, held perfectly legal. (Vol 12) 1925 Lah 557 (557, 558) : 27 Cri L Jour 134 (DB) ✕ ('24) 25 Cri L Jour 97 (97, 98) (Pesh).

**8. Further list.** — [1] Where the accused does not give in his list immediately after the charge is framed, the Magistrate has a discretion to accept a list subsequently. (Vol 27) 1940 Pat 355 (358) : 19 Pat 413 : 41 Cri L Jour 931 (DB) ✕ (Vol 23) 1936 Lah 533 (535) : 17 Lah 176 : 37 Cri L Jour 742 (F1B) ✕ (Vol 18) 1931 All 434 (435) : 53 All 692 : 32 Cri L Jour 849.

[2] Magistrate allowing further list under sub-s. (2)—List is governed by same principles as one under sub-s. (1). (Vol 17) 1930 Cal 188 (189) : 31 Cri L J 695 (DB).

[See however (Vol 27) 1940 Pat 355 (358) : 19 Pat 413 : 41 Cri L Jour 931 (DB).]

#### Section 212 — Note 1

[1] The Magistrate may summon and examine the witnesses for the defence even when the accused has reserved his defence for the Court of Session. ('96) 18 All 380 (381, 382) (DB).

[2] The discretion entitles the Magistrate to ascertain whether there is a presumption of guilt against the accused. ('12) 13 Cri L Jour 778 (780) : 36 Mad 321 (11B) ✕ ('06) 4 Cri L Jour 452 (452) ✕ ('10) 11 Cri L Jour 751 (752) (Lah). (After weighing evidence.)

[3] The discretion has to be exercised sparingly and cautiously. ('70) 13 Suth W R Cr 1 (11) : 4 Beng L R App 1 (DB).

[4] The accused has no right to have his witnesses summoned and examined after the charge is framed under S. 210. (Vol 14) 1927 Pat 243 (246) : 6 Pat 329 : 28 Cri L Jour 709 ✕ (12) 13 Cri L Jour 778 (780) : 36 Mad 321 (DB).

[5] A Magistrate is not required to record his reasons for acting or refusing to act under this section. ('96) 18 All 380 (381, 382) (DB).

#### Section 213 — Note 1

[1] After a charge is framed with a view to commitment, the Magistrate may change his mind and proceed to try the case himself. ('10) 11 Cri L Jour 486 (487, 488) (DB) (Bom).

[2] Order of commitment by Additional District Magistrate is legal. (Vol 32) 1945 Mad 459 (460) :

214. [Person charged outside presidency towns jointly with European British subject] Repealed by the Criminal Law (Amendment) Act, 1923 (12 [XII] of 1923) s. 10.

[1882—S. 214; 1872—S. 197, 1881—S. 226.]

215. A commitment once made under section 213 or 214 by a competent Magistrate or by a Civil or Revenue Court Quashing commitment under section 478, can be quashed by the High Court only, and only on a point of law.

[1882—S. 215; 1872—S. 197 Explanation.]

[a] The words and figures "or section 214" were repealed by the Criminal Law (Amendment) Act, 1923 (12 [XII] of 1923) S. 11.

[b] The words and figures "or by a Court of Session under sec. 477" were repealed by the Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923) S. 59.

### Section 213 (contd.)

[8] Where the offence is not exclusively triable by a Court of Session, the reasons must disclose grounds for committing the case to the Court of Session instead of its being tried by the Magistrate himself. (Vol 1) 1914 Bom 237 (238); 23 Bom 114; 14 Cri L Jour 609 (DB). (Omission to give reasons in such a case is not a mere irregularity but illegality.)

[4] A Magistrate may not discharge the accused if the evidence of defence witnesses merely casts some doubt on the case. (1900-02) 1 Low. Bar. Rul. 348 (248) (DB).

[5] Where the Magistrate comes to the conclusion that the evidence of the defence witnesses, examined subsequent to the charge, rebuts that produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may act upon his opinion and pass an order of discharge. (Vol. 28) 1941 Pat 505 (507); 42 Cri L Jour 576 \* (Vol 9) 1922 All 168 (169); 44 All 57; 22 Cri L Jour 703 \* (Vol 12) 1925 All 670 (670); 27 Cri L Jour 2 (DB).

[6] After the case been committed, the Magistrate becomes *functus officio* and cannot thereafter change his mind and cancel the commitment or discharge the accused. (05) 2 Cal L Jour 33n (33n) (DB) \* (81) 4 All 151 (152).

[7] Where the Magistrate has not taken further evidence after the framing of the charge, he cannot cancel the charge once framed and discharge the accused. (02) 2 Low Bar Rul 140 (140).

[8] Sub-s. (2) does not apply to warrant cases and the Magistrate who after framing the charge finds that the charge is unsustainable must acquit the accused. (Vol 12) 1925 Oudh 517 (517, 548); 26 Cr L Jour 520 (DB).

[9] An accused, who has declined to cross-examine the prosecution witnesses and who has not been permitted by the Magistrate to reserve his cross-examination till a later stage, is not entitled to cross-examine the prosecution witnesses after the charge is framed. (Vol 16) 1929 Cal 598 (593, 594, 595); 57 Cal 44; 30 Cri L Jour 1107 (DB) \* (Vol 18) 1931 Bom 517 (518); 23 Cri L Jour 68 (DB) \* (Vol 6) 1919 Low Bar 159 (160); 9 Low Bar Rul 109; 19 Cri L Jour 327 \* (Vol 4) 1917 Oudh 200 (200); 18 Cri L Jour 105; 19 Oudh Cas 239.

[10] The expression "witnesses for the defence" in sub-s. (2) does not include the witnesses for the prosecution who are cross-examined, and therefore

does not confer any right on the accused to cross-examine the prosecution witnesses after the charge is framed. (Vol 16) 1929 Cal 598 (595); 57 Cal 44; 30 Cri L Jour 1107.

[11] The Magistrate has an inherent power to allow the accused an opportunity to cross-examine the prosecution witnesses after the charge is framed. (Vol 16) 1929 Cal 598 (595); 57 Cal 44; 30 Cri L Jour 1107 \* (Vol 6) 1919 Low Bar 159 (160); 9 Low Bar Rul 109; 19 Cri L Jour 327.

### SECTION 215—Synopsis.

1. Scope of the section.
2. "Once made."
3. Competent Magistrate.
4. "By the High Court only".
5. "On a point of law".
6. Grounds not sufficient for quashing commitment.
7. Time for quashing commitment.
8. Effect of quashing commitment.

1. Scope of the section.—[1] Where a commitment is made under S. 213 or 478 it can be quashed only on a point of law. (Vol 11) 1924 Rang 165 (167); 1 Rang 526; 25 Cri L Jour 261 \* (Vol 7) 1920 Mad 144 (145); 43 Mad 361; 21 Cri L Jour 28 (DB).

[2] Commitment not made under S. 213 or 478—High Court can interfere both on a point of fact as well as law. (07) 6 Cri L Jour 406 (408) (DB) (Cal) (Commitment under S. 437) \* (03) 7 Cal W. N. 327 (328) (do) \* (Vol 6) 1919 Low Bar 146 (147, 148); 9 Low Bar Rul 208; 19 Cri L Jour 801 (Do.) \* (04) 1 Cri L Jour 275 (277); 27 Mad 54 (Do) \* (Vol. 32) 1945 Lah 1 (2); 46 Cr L Jour 648 (DB) (Commitment under S. 446) \* (Vol 9) 1922 Low Bar 40 (40); 11 Low Bar Rul 375; 25 Cri L Jour 518 (Commitment under S. 423). \* (04) 1 Cri L Jour 275 (277); 27 Mad 54 (Commitment by High Court under S 526).

[But see (Vol 32) 1945 Mad 459 (460) \* (41) 46 Pun Law Rep 178 (178).]

[3] In actual practice, the High Court will not go beyond the rule contained in this section and interfere in revision on grounds of fact. (Vol 32) 1945 Lah 1 (2); 46 Cri L Jour 648 (DB).

[4] An order of commitment under S. 347, however, falls within the purview of S. 213 and can be quashed, if at all, only under this section. (Vol 11) 1924 Sind 61 (62, 63); 17 Sind T. R 188; 26 Cri L Jour 148 (DB).

**Section 215 (contd.)**

[5] When a commitment is not made by a competent Magistrate, the commitment may be quashed under S. 532. (Vol 5) 1918 Bom 117 (118): 18 Bom 147: 20 Cri L Jour 71 (DB).

[6] The section does not in any way restrict the powers of the High Court to pass any orders subsequent to the quashing of the commitment. (Vol 20) 1938 Bom 494 (495): 35 Cri L Jour 479 (DB).

[7] This section does not control S. 194. (Vol 19) 1932 Cal 699 (703): 60 Cal 233: 34 Cri L Jour 133 (SP).

[8] Order directing case to be tried by Sessions Judge appointed as Special Judge under the special Court, Ordinance 1942—Order not one of commitment under this section. (Vol 30) 1943 Oudh 41 (42): 44 Cri L Jour 86: 18 Luck 657.

[9] This section does not take away the power of High Court to interfere in revision with an order passed under S. 443 or 446. (Vol 33) 1916 Nag 225 (226): 47 Cri L Jour 364.

**2. "Once made."**—[1] Sessions Judge under S. 437 setting aside order of discharge and directing committal—High Court in revision can consider question of law and fact. ('07) 5 Cri L Jour 100 (100, 101): 30 Mad 224.

**3. Competent Magistrate.**—[1] "Competent Magistrate" includes for the purposes of this section.

- (a) A Magistrate to whose file a case has been transferred from that of another Magistrate. (Vol 1) 1914 All 45 (45, 46): 36 All 315: 15 Cri L Jour 354.
- (b) The District Magistrate to whom a case had been transferred under S. 349. ('87) 1887 Rat 350 (353).
- (c) A Magistrate to whose notice an offence contemplated under S. 195 is brought in a judicial proceeding. ('94) 1894 Rat 704 (705).
- (d) A first-class Magistrate who had been appointed as a special Magistrate to try the case since he has powers to commit ordinarily under S. 206. (Vol 18) 1931 Bom 517 (518, 519): 33 Cri L Jour 68 (DB).

[2] In the following cases the Magistrate was held not competent to commit.

- (a) Magistrate disqualified under S. 556 committing without necessary leave under that section. ('04) 2 Low Bur Rul 209 (211).
- (b) Magistrate committing a case without sanction where sanction is necessary to prosecute. ('93-1900) 1893-1900 Low Bur Rul 377 (378).

[3] Records called for and sent to superior Court in a case pending before Magistrate returned for purpose recording evidence of a particular witness—No order of stay of proceedings—Magistrate completing enquiry and committing—Committal held valid as his jurisdiction was not ousted. ('05) 2 Cri L Jour 534 (538, 539, 543) (SB) (Cal).

**4. "By the High Court Only."**—[1] Committal once made cannot be quashed by the Magistrate—Only High Court can do so. ('81) 4 All 150 (152) \* (1865) 2 South. W. R. Cr. 57 (57) (DB).

[2] Sessions Judge to whom case is committed cannot quash the committal and order a re-trial. (Vol 26) 1939 Pat 35 (36): 39 Cri L Jour 997: 18 Pat 82 (DB) \* (1900-1902) 1 Low Bur Rul 88 (88, 89) \* ('97) 10 C P J. R. Cr. 13 (14) \* (Vol 13) 1926 Mad 865 (870): 49 Mad 525: 27 Cri L Jour 1031 (FB) \* ('87) 10 Mad 232 (239) (FB) \* (Vol 6) 1919 Lah 889 (390): 20 Cri L Jour 3: 1919 Pun Re. No. 5 Cr. (DB) \* ('71) 1874 Pun Re. No. 3 Cr. p. 5 (5) \* ('01) 5 Cal W N 411 (413) (DB) \* (Vol 5) 1918 Bom 117 (118): 13 Bom 147: 20 Cri L Jour 71 (DB) \* ('72) 4 N W P I L C R 6 (6) \* ('82) 1882 All W. N. 165 (165) \* ('81) 1881 All W. N. 60 (60) (DB) (Trial should be proceeded with and an order for acquittal if the guilt is not proved or the prosecution is withdrawn with leave) \* ('75) 7 N W P I L C R 211 (213) (Even if the Committal was at his direction) \* (Vol 22) 1935 Nag 202 (201): 31 Nag L R 360: 36 Cri L Jour 1389.

[3] Committal of foreign subject for offence committed on foreign territory which is *ab initio* void—Sessions Judge can discharge the accused or refer matter to High Court. ('97) 1897 Rat 922 (923).

[4] Committal in a case requiring sanction for prosecution under S. 196A—Prosecution launched without sanction—Sessions Judge cannot discharge the accused but should refer to High Court. (Vol 31) 1944 Sind 225 (227): ILR (1944) Kar 316: 46 Cri L Jour 739.

[5] Irregularity in Committal capable of being cured by the Sessions Judge himself—He need not refer the case to the High Court. (Vol 31) 1944 Sind 47 (48): ILR (1943) Kar 259: 45 Cri L Jour 269.

[6] Judicial Commissioner of Sind sitting in Sessions can quash a committal in a case before him as a Sessions Judge. (Vol 11) 1924 Sind 61 (62): 17 Sind L R 188: 26 Cri L Jour 148 (DB) \* (Vol 19) 1932 Sind 157 (159): 26 Sind L R 107: 34 Cri L Jour 14.

[7] Single Judge of High Court exercising original Criminal Jurisdiction can quash the committal in a case before him. ('08) 8 Cri L Jour 221 (223): 36 Cal 48 (DB) \* (Vol 25) 1938 Rang 105 (107): 39 Cri L Jour 470 \* (Vol 16) 1929 Cal 777 (778): 56 Cal 785: 31 Cr L Jour 184.

[But see (Vol 29) 1942 Bom 212 (213): 43 Cri L Jour 773: ILR (1942) Bom 534].

[8] Principles of S. 537 should generally guide the High Court in disposing of an application under this section. (Vol 13) 1926 Cal 470 (477, 478): 53 Cal 350: 27 Cri L Jour 385 (FB) \* ('11) 12 Cri L Jour 320 (321) (Sind).

**5. "On a point law."**—[1] A commitment can be quashed only on a point of law. (Vol 27) 1940 All 396 (397): ILR (1943) All 531: 41 Cri L Jour 869 \* (Vol 27) 1940 Oudh 15 (15): 40 Cri L Jour 908 \* (Vol 25) 1938 Mad 675 (676): 39 Cri L Jour 894 \* (Vol 32) 1945 Mad 459 (460) \* (Vol 23) 1936 Sind 3 (7): 37 Cri L Jour 314: 29 Sind L R 281 (DB) \* (Vol 22) 1935 Oudh 9 (9): 36 Cri L Jour 175 \* ('05) 2 Cri L Jour 432 (433) (DB) (Bom) \* ('12) 13 Cri L Jour 842 (844): 37 Bom 146 (DB) \* (Vol 16) 1929 Cal 428 (429): 31 Cri L Jour 750 (DB) \* (Vol 16)

**Section 215 (contd.)**

1929 Sind 250 (251): 30 Cri L Jour 1121 \* (Vol 21: 1934 All 963 (969): 57 All 412: 36 Cri L Jour 137 (FB).

[2] The test is to see from the judgment of the Magistrate what his finding on the evidence are and whether those findings are capable *prima facie* of sustaining the charges he has framed and on which the commitment to the Court of Session is made. (Vol 27) 1940 All 396 (398): ILR (1940) All 531: 41 Cri L Jour 869 \* (Vol 16) 1929 Bom 263 (269): 30 Cri L Jour 1066 (DB).

[3] A commitment should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution. (Vol 12) 1925 All 751 (751): 26 Cri L Jour 1233.

[4] All that the High Court is required to apply its mind to is to see whether, assuming the facts are proved, they do justify the conviction of the accused or not. (Vol 19) 1932 Sind 157 (159): 26 Sind L R 407: 34 Cri L Jour 14.

[5] The following errors have been held to justify a quashing of the Commitment:—

(a) Commitment on no inquiry or imperfect inquiry prejudicing accused. ('12) 13 Cri L Jour 413 (414, 415) (All) \* (1882) 4 Mad 227 (227, 228) (DB) \* ('81) 1881 Pun Re. No. 6 Cr. p. 6 (6) (DB).

(b) Alteration of charge or addition without re-examining witness without allowing fresh evidence. (Vol 11) 1924 All 665 (665, 666): 25 Cri L Jour 798.

(c) Commitment made without giving accused opportunity to defend. ('01) 5 Cal W. N. 110 (113) (DB) (Commitment in the absence of accused) \* ('13) 14 Cri L Jour 605 (605) (Opportunity denied to show cause against commitment) \* (Vol 2) 1915 All 411 (412): 38 All 29: 16 Cri L Jour 801 (DB) (Opportunity to cross-examine prosecution witnesses denied) \* (Vol 14) 1927 Pat 243 (246): 6 Pat 329: 28 Cri L Jour 709 (Do) \* (Vol 17) 1930 Cal 754 (755, 756): 57 Cal 945: 32 Cri L Jour 182 (DB) (Do) \* (1912) 13 Cri L Jour 877 (883, 887, 888) (FB) (Cal) (Do) \* (1906) 4 Cri L Jour 452 (452, 453) (All) (Evidence tendered by accused not examined) \* (Vol 19) 1932 Mad 502 (502, 503): 33 Cri L Jour 765 (Do).

(d) Commitment either to a Court having no authority to try the case or by a Magistrate having no jurisdiction to commit or is disqualified under S. 556. ('10) 11 Cri L Jour 54 (55) (All) (Commitment to Court having no authority). \* (1904) 2 Low Bur Rul. 209 (211) (Disqualification under S. 556) \* (Vol 1) 1914 Low Bur 9 (9): 15 Cri L Jour 270 (Commitment without jurisdiction).

(e) Commitment on inadmissible evidence. (Vol 27) 1940 All 396 (397): ILR (1940) All 531: 41 Cri L Jour 869 \* (Vol 21) 1934 Mad 691 (692): 36 Cri L Jour 319 (DB) \* (Vol 16) 1929 Sind 250 (251, 252): 30 Cri L Jour 1121.

(f) Commitment made not on legal grounds (Vol 32) 1915 Bom 433 (494): 47 Cri L Jour 231 (DB) \* (Vol 1) 1917 Bom 33 (34): 42 Bom 172: 19 Cr L Jour 312 (DB) (That it is in accordance with Government resolution).

(g) Two sets of accused committed on the ground that one of them is guilty. (1907) 17 Mad L Jour 46 (46).

(h) Commitment in cases requiring previous sanction or complaint launched without it. (Vol 4) 1917 Lah 333 (341): 18 Cri L Jour 543: 1917 Pun Re. No. 19 Cr. \* (Vol 2) 1915 All 110 (111): 27 All 283: 16 Cri L Jour 310 \* (Vol 4) 1917 Bom 33 (33): 42 Bom 172: 19 Cri L Jour 342 (DB) \* ('01) 24 Mad 121 (123) (DB) \* (Vol 20) 1933 Pat 273 (274, 275): 12 Pat 353: 34 Cri L Jour 938 (DB).

[See however ('31) 1931 Mad W. N. 361 (363).]

(i) Commitment made in the absence of evidence. (1905) 2 Cri L Jour 383 (386) (DB) (Cal) \* (1905) 2 Cri L Jour 534 (548, 549) (FB) (Cal) \* (Vol 27) 1940 All 296 (397): ILR (1940) All 531: 41 Cri L Jour 869 \* (Vol 11) 1924 Pat 754 (755): 25 Cri L Jour 636 \* (Vol 11) 1924 Rang 165 (167): 1 Rang 526: 25 Cri L Jour 261 \* ('27) 28 Cri L Jour 137 (138) (Oudh) \* (Vol 19) 1932 Sind 157 (159): 26 Sind L R 407: 34 Cri L Jour 14 \* (Vol 32) 1945 Lah 1 (2): 46 Cri L Jour 648 (DB) \* ('31) 1931 Mad W. N. 361 (363, 364).

[See however (Vol 18) 1931 Bom 517 (519): 33 Cri L J 68 (DB) \* (Vol 22) 1935 Nag 202 (205): 36 Cri L Jour 1889: 31 Nag L R 360].

[But see (Vol 18) 1931 Lah 467 (467): 32 Cri L Jour 867 \* (Vol 2) 1915 Mad 24 (24, 25): 15 Cri L Jour 665 (DB)].

(j) Commitment in cases where Magistrate himself can pass adequate orders. (Vol 27) 1940 Oudh 15 (15, 16): 40 Cri L Jour 903 \* (Vol 25) 1938 Sind 79 (79): 39 Cri L Jour 507 \* ('10) 11 Cri L Jour 54 (54, 55) (All) \* ('02) 1 Low Bur Rul 158 (159, 160) \* ('13) 14 Cri L Jour 657 (658) (DB) (Bom) \* (Vol 16) 1929 Cal 756 (761, 762): 57 Cal 1042: 31 Cri Jour 806 (FB) \* (Vol 21) 1934 Lah 95 (95): 35 Cri L Jour 1459.

[See (Vol 23) 1936 Pesh 139 (139): 37 Cri L Jour 352].

[6] Appraisement of evidence is a question of fact. (Vol 16) 1929 Pat 121 (123): 30 Cri L Jour 519.

[7] A decision that there is no evidence to support a finding is a decision of law. (Vol 1) 1914 P C 67 (71): 41 Cal 972: 41 Ind App 110 (P C).

**6. Grounds not sufficient for quashing commitment.**—The following have been held not grounds for quashing a commitment:—

(a) Joint commitment of accused in a case falling under S. 233. ('05) 2 Cri L Jour 432 (433) (DB) (Bom) \* (Vol 1) 1917 Mad 612 (612): 17 Cri L Jour 369.

**218.** (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the <sup>a</sup>[Provincial Government] in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge :

and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

English translation to be forwarded to High Court. (2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

[1882—S. 218; 1872—Ss. 198 paras 2 to 4, 202 para 1; 1861—Ss. 229, 231.]

[a] *Substituted* by A. O. for "Local Government".

**219.** (1) <sup>a</sup>[The committing Magistrate or, in the absence of such Magistrate, any other Magistrate empowered by or under section 206] may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

(2) Such examination shall, if possible, be taken in the presence of the accused, and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall <sup>b</sup>[be given to the accused free of cost].

[1882—S. 219; 1872—S. 357 para 2.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 60, for "The Magistrate".

[b] *Substituted, ibid.*, for "if the accused so require, be given to him free of cost".

**220.** Until and during the trial, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant, to custody. <sup>a</sup>[Where the accused is committed to custody, the Magistrate shall, subject to the provisions of this Code regarding the taking of bail, commit the accused by warrant, to custody.]

[1882—S. 220.]

#### SECTION 219—Note 1.

[1] This section empowers the Magistrate even after a case has been committed, to call and examine supplementary witnesses and forward their evidence to the Sessions Court. (Vol 23) 1936 Lah 533 (536): 17 Lah 176: 37 Cri L Jour 742 (FB) \* (Vol 22) 1935 All 267 (267): 36 Cri L Jour 446 \* (Vol 9) 1922 Oudh 109 (109): 23 Cri L Jour 79.

[2] Where the trial has actually commenced, the Magistrate has no power to add to the record by examining additional witnesses even under the orders of the Sessions Court. (88) 1888 Pun Re No. 20 Cr p. 59 (61, 62) (DB).

[3] The Magistrate can exercise the power on his own accord or on being directed to do so by the Sessions Judge who, on examining the record, finds gaps in the evidence which he deems necessary to be filled up. (92) 1892 Pun Re No. 4 Cr p. 9 (10) (DB).

[4] Where the accused has confessed his guilt, the Magistrate is justified in examining supplementary witnesses so as to have on the record all the material evidence. (96) 1896 Rat 842 (812).

[5] Where the Magistrate examines additional witnesses on one side he should allow the other side to let in rebutting evidence if it desired to do so. (Vol 20) 1933 Pat 577 (578): 35 Cri L Jour 85 (DB).

[5] The power to amend or add to the charge under S. 226 cannot justify the charge being amended or added to on the basis of supplementary evidence taken under this section. (Vol 20) 1933 Mad 247 (250): 34 Cri L Jour 278.

[7] Copies of evidence of witnesses are exempt from court-fees under S. 35, Court-fees Act, 1870. (Vol 21) 1934 Bom 487 (487): 36 Cri L Jour 344.

[8] The examination of the supplementary witnesses after commitment may be taken when the accused is not present. (Vol 23) 1936 Lah 533 (536): 17 Lah 176: 37 Cri L Jour 742 (FB).

## CHAPTER XIX.

## OF THE CHARGE.

*Form of Charges.*

Charge to state offence.

**221.** (1) Every charge under this Code shall state the offence with which the accused is charged.

Specific name of offence sufficient description.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

## SECTION 221—Synopsis.

1. Charge—General.
2. Sub-section (1).
3. Sub-section (2).
4. Definition of the offence—Sub-section (3).
5. Sub-section (4).
- 5a Sub-section (5).
6. Previous convictions—Sub-section (7).
7. Charge for offences one of which is triable as a warrant case and the other as a summons case.
8. Liability to whipping, if to be stated in the charge.
9. Aggravating circumstances.
10. Constructive offences.
11. Unnecessary averments in the charge—Surplusage.
12. Cases where no charge need be framed.

1. Charge—General.—[1] It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him. (Vol 23) 1936 Lah 409 (111): 37 Cri L Jour 732 (DB).

[2] Where accused is not informed of the exact nature of charge against him he may be seriously prejudiced in his defence. (Vol 3) 1916 Cal 188 (192): 16 Cri L Jour 497: 42 Cal 957 (DB) \* (Vol 13) 1926 Cal 439 (440): 26 Cri L Jour 567 (DB) \* ('02) 15 CPLR 112 (113).

[3] Before a person is convicted of any offence he should (subject to certain exceptions) be formally charged with having committed the offence specified and be given an opportunity to defend himself against such charge. (Vol 13) 1926 Cal 581 (582): 53 Cal 436: 27 Cri L Jour 606 (DB) \* (Vol 19) 1932 Pat 215 (216): 11 Pat 523: 33 Cri L Jour 364 (DB) \* (Vol 3) 1916 All 126 (126): 17 Cri L Jour 407 \* ('03) 27 Bom 394 (399, 400) (DB) \* ('10) 11 Cri L Jour 274 (275) (FB) (Mad).

[4] A person can be convicted only on proof of the particular offences specified and not for offences not specified. (Vol 32) 1945 All 81 (84): 46 Cri L Jour 750: ILR (1945) All 558 \* (Vol 29) 1942 Pat 401 (404): 43 Cri L Jour 625: 21 Pat 113 (DB) \* (Vol 12) 1925 Oudh 676 (676): 26 Cri L Jour 1042 \* (Vol 20) 1933 Sind 225 (225, 226): 35 Cri L Jour 582 (DB) \* ('90) 1890 Rat 529 (530) (DB) \* (Vol 12) 1925 Cal 903 (904): 26 Cri L Jour 594 (DB) \* (1900) 27 Cal 660 (662) (DB) \* (Vol 9) 1922 Lah 135 (135, 136): 23 Cri L Jour 5 \* ('30) 1930 Mad WN 249 (283) (FB).

[5] A "charge" is very much more than a mere form. (Vol 13) 1926 Oudh 148 (149): 27 Cri L Jour 62.

[6] Charge should be carefully drawn up in accordance with the offence disclosed. (Vol 30) 1943 All 271 (271): 44 Cri L Jour 624 \* ('01) 1901 Pun R No. 5 Cr p 11 (15, 16).

[7] The object of stating particulars in charge is to enable the accused to know the substantive charge he will have to meet and to be ready for it before the evidence is given. (Vol 32) 1945 All 81 (85): 46 C L Jour 750: ILR (1945) All 558.

(?) If the accused <sup>a</sup>[having been previously convicted of any offence, is liable, by Previous conviction reason of such previous conviction, to enhanced punishment, or to when to be set out. punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence,] the fact, date and place of the previous conviction shall be stated in the charge. If such statement <sup>b</sup>[has been omitted,] the Court may add it at any time before sentence is passed.

#### Illustrations.

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fall within the definition of murder given in sections 299 and 300 of the Indian Penal Code, that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception apply to it.

(b) A is charged, under section 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code, but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(d) A is charged, under section 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public-servant. The charge should be in those words.

[1892—S. 221; 1872—S. 439, 1861—Ss. 234, 235.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 61, for "has been previously convicted of any offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court is competent to award".

[b] *Substituted, ibid.*, for "is omitted."

#### Section 221 (contd.)

[8] The extent of the particulars necessary to be given will depend upon the facts and circumstances of each case. ('98) 1898 Rat 659 (666) (DB).

[9] In drawing up a charge all matters which are not necessary for the prosecution to prove should be avoided. (Vol 13) 1926 Oudh 215 (247, 248): 27 Cri L Jour 57 (DB).

[10] A charge should be precise in its scope and particular in its details. (Vol 23) 1941 Rang (5): 42 Cri L Jour 385: 1941 Rang LR 26 \* (Vol 6) 1919 Pat 27 (30): 20 Cri L Jour 161: 4 Pat J. Jour 74 (FB) \* (Vol 13) 1926 Oudh 148 (149): 27 Cri L Jour 62.

[11] The charge should be stated to the accused by the Magistrate himself and not be left to be stated by others. ('71) 16 Suth W R Cr 43 (43) (DB).

**2. Sub-section (1).**—[1] Where a person is charged with several offences all having reference to the same subject-matter or series of transactions, a single charge may be framed with several counts or heads of charge for the several offences. (Vol 25) 1938 Cal 460 (462): 39 Cri L Jour 674 (DB) \* (Vol 15) 1928 Cal 675 (677): 29 Cri L Jour 1022: 55 Cal 858 (DB).

[See also ('35) 36 Cri L Jour 1037 (1038) (DB) (Sind).]

**3. Sub-section (2).**—[1] In a charge under S 147, Penal Code, where the word "rioting" is included in the charge, the words "by force or by show of force" need not be included. (Vol 23) 1936 Pat 627 (628): 28 Cri L Jour 87 (DB).

[2] It is open to the prosecution to charge abetment generally and then, if the evidence did not establish abetment other than in one particular form, to rely on this particular form for a conviction. (Vol 25) 1938 Cal 125 (126): 39 Cri L Jour 395 (DB).

[3] The Court has a discretion to give further details according to the facts and circumstances of each case giving the accused clear notice of the accusation against him. (1865) 2 Suth WR Cri Letters 24 (24) \* (1865) 3 Suth WR Cri Letters 20 (20).

**4. Definition of the offence — Sub-section (3).**—[1] The Court should adhere to the language of the statute as far as possible. (Vol 13) 1926 Cal 439 (440): 26 Cri L Jour 567 (DB) \* (Vol 3) 1916 Cal 188 (195): 16 Cri L Jour 497: 42 Cal 957 (DB) \* ('92) \* C P L R Cr 18 (19) \* ('92-96) 1 Upp Bur Rul 32 (32).

[2] Offence under S. 211 of the Penal Code—Charge should set forth that the prisoner "falsely charged" and not that he "made an accusation." (1865) 2 Suth WR Cri Letters 2 (2).

[3] A repetition of the words in the marginal note to the section is not enough. (1865) 2 Suth W R Cri Letters 6 (6) \* (1865) 2 Suth W R Cri Letters 7 (7).



**Section 221 (contd.)**

**5. Sub-section (4).—**[1] Where the section of the Penal Code with which a person is intended to be charged contains several parts, that part of the section which is applicable to the case should be stated. ('90) 15 Bom 189 (198, 194) (DB).

**5a. Sub-section (5).—**[1] The effect of this sub-section is not to override the provisions of S. 105 of the Evidence Act regarding the burden of proof. (Vol 28) 1941 All 402 (410): 1 L R (1941) All 848: 48 Ori L Jour 177 (FB) (Per Iqbal Ahmad, J.)

**6. Previous convictions—Sub-section (7).—**[1] Where a person is intended to be tried and punished with enhanced punishment or with punishment of a different kind as being a previous offender, the particulars of the previous conviction should be stated in the charge. (Vol 31) 1944 Lah 25 (28): 45 Cri L Jour 364: 1 L R (1948) Lah 477 (FB) \* (Vol 28) 1941 Sind 173 (176): 43 Cri L Jour 12: 1 L R (1941) Kar 308 (DB) \* ('86) 9 Mad 284 (285) (DB) \* (Vol 19) 1932 Nag 111 (112): 28 Nag L R 18: 38 Ori L Jour 573 \* (Vol 4) 1917 Low Bur 58 (58): 18 Ori L Jour 79: 3 Low Bur 461 \* (Vol 4) 1917 Mad 968 (969): 17 Ori L Jour 288 \* ('74) 21 Suth W R Or 40 (40) (DB) \* ('78) 19 Suth W R Or 41 (42) (DB) \* ('88) 1883 All W N 110 (110) \* ('81) 1881 All W N 144 (144) \* ('02) 4 Bom L R 177 (177) (DB) \* (1900) 2 Bom L R 304 (321, 322).

[2] The extent of the former punishment need not be stated. ('68-69) 4 Mad H C R App xi (xi).

[3] In the absence of a statement, the accused cannot be awarded enhanced punishment. ('83) 2 Weir 264 (265) \* ('06) 3 Cri L Jour 97 (98) (Kathiawar).

[4] A statement of the previous conviction in the charge is not necessary where such conviction is to be taken into consideration not for awarding enhanced punishment under S. 75, Penal Code but merely for the purpose of exercising the discretion of the Court as to the extent of the punishment to be awarded within the maximum fixed for the offence charged. (Vol 15) 1928 Rang 200 (203, 205): 6 Rang 391: 29 Cri L Jour 869 (FB) \* (Vol 20) 1933 Nag 315 (316): 29 Nag L R 309: 34 Cri L Jour 1166 \* (Vol 17) 1930 Sind 211 (214, 216): 31 Cri L Jour 1046: 24 Sind L R 252 (DB).

[See (Vol 28) 1941 Sind 173 (176): 43 Ori L Jour 12: 1 L R (1941) Kar 308 (DB).]

[5] A "previous conviction" means a previous conviction by a British Indian Court and not by a foreign Court. ('13) 14 Cri L Jour 527 (527): 1918 Pun Re No. 17 Or \* ('80) 1980 Mad W N 173 (174) \* (Vol 6) 1919 All 68 (68): 42 All 186: 21 Cri L Jour 144.

[6] "Previous Conviction" means a conviction obtained before the moment of time when the charge is framed. ('79) 1879 Pun Re No. 21 Or p. 60 (64) (DB).

[7] S. 75 of the Penal Code does not apply to a case where the subsequent offence is committed before the conviction for the former offence. (Vol 13) 1926 Bom 305 (305): 27 Cri L Jour 726.

[8] The word "punishment" in this section does not include an order under S. 565 for not notifying the address of the offender. ('13) 14 Cri L Jour 390 (390, 391): 9 Nag L R 88.

[9] A sentence passed already cannot be enhanced by the subsequent discovery of the fact that the prisoner has been previously convicted. ('89) 1839 Rat 458 (458) (DB) \* ('89) 1889 Rat 457 (458) (DB) \* ('78) 19 Suth W R 41 (42) (DB).

[10] The High Court may in revision, add the charge in proper cases and direct evidence to be taken on such charge. ('79) 1879 Pun Re No. 19 Or p. 54 (56) (DB) \* ('79) 1879 Pun Re No. 28 Or p. 78 (79) (DB).

[11] Amendment to this sub-section in 1923—Amendment does not affect the mode of proof of previous convictions. (Vol 28) 1941 Sind 173 (175): 43 Cri L Jour 12: 1 L R (1941) Kar 308 (The amendment was designed merely to remove doubt as to the competence of certain Courts to impose enhanced sentences. *Prima facie* evidence of previous conviction necessary for commitment to sessions on a charge under S. 75 I P C—Mere conviction slip not enough).

**7. Charge for offences one of which is triable as a warrant case and the other as a summons case.**—[1] Person intended to be tried for two offences—One triable as a warrant case (in which a charge is to be framed) and the other as a summons case (in which no charge need be framed)—Charge in respect of the former offence should also state the latter offence. ('02) 29 Cal 481 (482) (DB) \* ('06) 3 Cri L Jour 350 (350): 3 Low Bur 113.

**8. Liability to whipping, if to be stated in the charge.**—Where a person is tried for an offence which is liable to be punished with whipping, the liability to whipping must be stated in the charge. ('82) 5 Mad 158 (158).

**9. Aggravating circumstances.**—[1] Where a person is charged of an offence which provides a certain punishment under certain circumstances and higher punishment under aggravating circumstances, the existence of such aggravating circumstances should be set forth in the charge. ('71) 1871 Rat 55 (56) (DB) \* ('97) 1897 Rat 921 (921) (DB).

**10. Constructive offences.**—[1] Where the accused was only charged with an offence under S. 126 of the Railways Act, a conviction for an offence under that section read with S. 149 of the Penal Code on the basis of constructive liability cannot be sustained where it has prejudiced the accused. (Vol 12) 1925 Mad 1 (5, 6): 47 Mad 746: 25 Cri L Jour 1297 (FB). (Conviction on such a defective charge is not bad unless the accused has been materially prejudiced in his defence).

[2] A charged constructively for an offence—Person charged with committing the substantive offence acquitted—A cannot be convicted of the substantive offence. ('12) 13 Cri L Jour 502 (508) (DB) (Cal).

[3] Where an offence is intended to be proved to have been committed in pursuance of the common object, the fact should be mentioned in the charge unless it has already been set out in the main charge. ('12) 13 Cri L Jour 218 (219): 33 Cal 781 (DB).

**222.** (1) The charge shall contain such particulars as to the time and place of the offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234 :

Provided that the time included between the first and last of such dates shall not exceed one year.

[1882—S. 222; 1872—S. 440.]

#### Section 221 (*contd.*)

[4] Charge for rioting and murder by virtue of Ss. 34 and 149 I P C—Omission to charge each accused with particular acts committed by him—Evidence showing that accused knew what acts they were alleged to have done—Held, conviction could not be set aside as there was no miscarriage of justice. (Vol 28) 1941 Mad 598 (600): 42 Cri L Jour 798.

[5] Where the accused was separately charged under S. 325 (grievous hurt) and S. 149 (unlawful assembly), but there was no mention of S. 149 in the charge under S. 325—Held that the irregularity was curable under S. 537. (Vol 13) 1926 Nag 459. (460, 461): 27 Cri L Jour 880.

**11. Unnecessary averments in the charge—Surplusage.**—[1] A charge should never contain more than what is necessary for the prosecution to prove. (Vol 13) 1926 Oudh 245 (247, 248): 27 Cri L Jour 57.

[2] Allegations in the charge not necessary to be proved to constitute an offence and which might be entirely omitted without affecting the charge and without detriment to the indictment may be disregarded in evidence. (Vol 15) 1928 Cal 675 (676, 677): 55 Cal 858: 29 Cr L Jour 1022 \*('67) 4 Bom H C R Cr Cas 17 (22).

**12. Cases where no charge need be framed.**—[1] It is not essential that there should be a definite charge, a finding and a conviction as a foundation for a sentence under the Insolvency Acts. (Vol 5) 1918 Nag 214 (214, 215): 19 Cri L Jour 627.

[But see (Vol 2) 1915 Cal 117 (117): 16 Cri L Jour 135 \* (Vol 7) 1920 Cal 624 (625): 21 Cri L Jour 481 (Charge not framed in pursuance of notice which did not set forth the substance of offence—Conviction under that charge set aside) \* (Vol 3) 1916 Lah 182 (183): 17 Cri L Jour 318: 1916 Pun Re No. 110 (Or) (No charge of any specific offence under S. 43, Provincial Insolvency Act—Proceedings held wholly irregular).]

#### SECTION 222—Synopsis.

1. Scope of the section.
2. Time of offence.
3. Person against whom offence was committed.
4. Thing in respect of which offence was committed.

5. Sub-section (2)—Charge of criminal breach of trust or dishonest misappropriation.

6. Applicability of sub-section (2) to cases where there are two or more accused persons.

7. Charge under sub-section (2)—Whether trial for another item misappropriated during same period is barred.

8. Charge of criminal conspiracy.

**1. Scope of the section.**—[1] It is necessary that the charge should contain particulars as to the time and place of the alleged offence and the person (if any) against whom and the thing (if any) in respect of which the offence is alleged to have been committed. ('91) 15 Bom 491 (503, 504) (DB) \* (Vol 6) 1919 Mad 487 (490, 497): 20 Cri L Jour 354 (DB) \* (Vol 6) 1919 Pat 27 (30): 4 Pat L Jour 74: 20 Ori L Jour 161 (FB). (Charge to be precise in scope and particular in detail) \* (Vol 3) 1916 Mad 571 (572): 16 Cri L Jour 293 (DB) \* ('07) 6 Cri L Jour 446 (448, 449) (Lah) \* (1864) 1 Suth W R Cri Letters 2 (2) \* ('84) 6 All 204 (207).

[2] Particulars must be reasonably sufficient to give the accused notice of the matter with which he is charged. ('02) 15 C P L R 112 (113) (Charge of house trespass at Nagpur is too vague) \* ('91) 15 Bom 491 (503, 504) (DB).

[3] The charge is not necessarily invalidated by the giving of more particulars than are absolutely necessary. (Vol 31) 1944 Cal 388 (389): 46 Cri L Jour 151: 1 I L R (1944) 1 Cal 109 (DB) \* ('78) 2 Weir 267 (268) \* ('67) 4 Bom H C R Cr 17 (22, 24).

**2. Time of offence.**—[1] The time of the alleged offence should be given in the charge with as much particularity as is necessary to give the accused sufficient notice of the matter of which he is charged. ('08) 30 Cal 402 (404) (DB) \* (Vol 17) 1930 Sind 62 (63, 64): 30 Cri L Jour 1073 (DB) \* (Vol 12) 1925 Mad 690 (691): 26 Cri L Jour 1513: 49 Mad 74.

[2] Where it is impossible to specify the particular date on which the offence was committed, it will be sufficient to state two dates between which the offence was committed. (Vol 30) 1943 Pat 212 (217): 44 Cri L Jour 590: 22 Pat 268 (DB) \* (Vol 11) 1924 Cal 616 (617): 25 Ori L Jour 997: 51 Cal 488 (DB) \* (Vol 2) 1915 Lah 16 (19, 48): 16 Cri L Jour 354: 1915 Pun Re No. 17 Or (DB).

**Section 222 (contd.)**

**3. Person against whom offence was committed.**—[1] In a case of theft the charge should state the person whose property was stolen. (1865) 2 Suth W R Cr L 5 (5) \* (1865) 2 Suth W R Cr L 15 (15) (DB).

[2] In a charge of cheating, the name of the person cheated must be stated. (1862-68) 1 Mad H C R 31 (34, 37) \* (Vol 11) 1924 Cal 18 (41): 25 Cri L Jour 1813 (DB) \* ('04) 1 Cri L Jour 124 (129) (FB).

[3] Charge under S. 405, Penal Code, not stating who made the alleged entrustment, or who suffered from the alleged breach of trust, offends against the provisions of S. 22 (1) Cr P C. ('86) 37 Cri L Jour 439 (440): 63 Cal 18 (DB).

[4] Charge under S. 411, Penal Code—The name of the owner must be specified. (Vol 13) 1926 Sind 129 (129): 27 Cri L Jour 32: 20 Sind L R 3.

[5] Charge of conspiracy—Defrauding public by deceitful means mentioned—Persons defrauded not specified—Charge not bad. (Vol 21) 1934 Sind 57 (59): 28 Sind L R 119: 35 Cri L Jour 1837 (DB).

**4 Thing in respect of which offence was committed.**—[1] Charge under S. 147, Penal Code, should state the property in respect of which the riot is said to have taken place. ('06) 3 Cri L Jour 153 (159): 33 Cal 295 (DB).

[2] Charge under S. 475, Penal Code—It should state the particular papers, bearing a counterfeit mark or device, which the accused had in his possession with the intent mentioned in the section. ('90) 15 Bom 189 (194).

[3] Charge under S. 411, Penal Code (receiving stolen property) must specify the articles alleged to be dishonestly received or retained. (Vol 22) 1935 Oudh 475 (475, 476): 36 Cri L Jour 1206.

**5. Sub-section (2)—Charge of Criminal breach of trust or dishonest misappropriation.**—

[1] Where a person commits criminal breach of trust or dishonest misappropriation in respect of various sums at different times in the course of a single year, he may be charged in respect of the total of all the sums as for a single offence without specifying the items of which it is composed or the dates on which they were misappropriated. ('10) 11 Cri L Jour 442 (443, 444): 33 All 36 (DB) \* (Vol 26) 1939 Bom 129 (138): 40 Cri L Jour 579 (DB) \* (Vol 16) 1929 Cal 175 (175): 30 Cri L Jour 706 (DB) \* (Vol 19) 1932 Oudh 145 (147): 6 Luck 435: 33 Cri L Jour 343 \* ('07) 5 Cri L Jour 133 (135): 29 Mad 558 (DB) \* ('05) 2 Cri L Jour 578 (580): 30 Bom 49 (DB) \* (Vol 18) 1931 All 267 (268): 52 All 941: 32 Cri L Jour 155 (DB) \* ('08) 8 Cri L Jour 160 (160): 1 Sind L R 38 (DB) \* (Vol 21) 1934 Pat 232 (233): 13 Pat 170: 35 Cri L Jour 876 (DB) \* (Vol 22) 1935 Nag 178 (179): 31 Nag L R 337: 36 Cri L Jour 1216 (DB) \* (Vol 22) 1935 Cal 312 (313): 62 Cal 808 (DB).

[2] Sub-section (2) was primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated any specific sum. (Vol 29) 1942 Oudh 89 (92): 17 Luck 353: 43 Cri L Jour 153 \* (Vol 19) 1932 Oudh 145 (147): 6 Luck 435: 33 Cri L Jour 343.

[8] A charge which does not specify even the gross sum alleged to have been misappropriated and the dates between which the offence is alleged to have been committed will be bad. (Vol 23) 1936 Bom 379 (389): 38 Cri L Jour 9 (DB) \* (Vol 14) 1927 Lah 109 (109): 28 Cri L Jour 170 \* (Vol 22) 1935 Oudh 273 (275): 36 Cri L Jour 518.

[4] A charge which contains the gross sum and the dates may yet be bad as being too vague. ('86) 37 Cri L Jour 439 (440): 63 Cal 18 (DB) \* ('07) 6 Cri L Jour 187 (188, 189) (Lah).

[5] The Sub-section does not dispense with the necessity of a finding as to a definite sum having been misappropriated before the accused can be convicted. (Vol 7) 1920 All 274 (275): 22 Cri L Jour 84: 42 All 522 \* (Vol 12) 1925 Cal 260 (261): 26 Cri L Jour 532 (DB).

[But see (Vol 15) 1928 Bom 148 (149): 29 Cri L Jour 407: 52 Bom 280 (DB). (Accused can be convicted where prosecution establishes that some of the money mentioned in the charge has been misappropriated by him even though it may be uncertain what is the exact amount so misappropriated.)]

[6] The sub-section does not prohibit the specification of particular items misappropriated where a gross sum is given as the subject-matter of the offence. ('04) 1 Cri L Jour 791 (793): 31 Cal 928 (DB) \* ('05) 2 Cri L Jour 578 (580): 30 Bom 491 (DB) \* (Vol 17) 1930 Cal 717 (718): 32 Cri L Jour 321 (DB) \* (Vol 21) 1934 Pat 232 (233): 13 Pat 170: 35 Cri L Jour 876 (DB).

[7] Where a charge is laid for a gross sum embezzled, the Court is not precluded from examining the evidence in respect of each item which went to make up the total amount entered in the charge-sheet. (Vol 23) 1936 Oudh 376 (377): 37 Cri L Jour 941.

[8] The fact the particular items are specified in the charge does not detract from its character as a charge for a single offence and convert it into a charge for as many offences as there are items particularised. ('04) 27 All 69 (70) \* ('02) 24 All 254 (255).

[9] The sub-section does not prohibit the framing of different charges in respect of different items. (Vol 17) 1930 Mad 978 (980): 32 Cri L Jour 223 \* ('10) 1 Cri L Jour 337 (338) (DB) (Bom).

[10] The sub-section does not permit different charge for different items when framed to be treated as a charge for a single offence. (Vol 20) 1933 Nag 327 (327) \* 34 Cri L Jour 673 \* (Vol 18) 1926 Bom 110 (113): 49 Bom 893: 27 Cri L Jour 805 (DB) \* ('07) 5 Cri L Jour 341 (342): 30 Mad 328 (DB).

[See (Vol 29) 1942 Oudh 89 (92): 43 Cri L Jour 153: 17 Luck 353 \* (Vol 18) 1931 Rang 161 (162): 32 Cri L Jour 1068.]

[See however (Vol 31) 1944 Cal 388 (389): 46 Cri L Jour 151: ILR (1944) 1 Cal 109 (DB) (Different items mentioned and period during which defalcation was committed also mentioned—Gross sum not mentioned—Charge is of one offence—The gross sum though not mentioned in the charge could be ascertained by addition of the items mentioned)].

**Section 222** (*contd.*)

[11] The sub-section applies to cases where the particular items might have been, but are not, specified. ('07) 5 Cri L Jour 133 (135): 29 Mad 558 (DB).

[12] The sub-section only applies to cases of criminal breach of trust or dishonest misappropriation in respect of money and not in respect of any other property. (Vol 31) 1944 Pat 135 (137): 45 Cri L Jour 633 \* (Vol 26) 1939 Mad 575 (576): 40 Cri L Jour 851: \* (Vol 9) 1922 Oudh 280 (280): 26 Oudh Cas 1: 24 Cri L Jour 10 \* (Vol 5) 1918 Cal 233 (234): 18 Cri L Jour 310 (DB) \* (Vol 14) 1927 All 223 (224): 49 All 312: 28 Cri L Jour 171.

[See (Vol 15) 1928 Bom 521 (521): 30 Cri L Jour 329 (DB).]

[13] The sub-section applies only to offences of criminal breach of trust or dishonest misappropriation. (Vol 31) 1944 Cal 224 (227): 45 Cri L Jour 666: ILR (1944) 1 Cal 398 (DB) \* (Vol 31) 1944 Oudh 122 (124, 126, 129): 19 Luck 493: 45 Cri L Jour 538 (DB) \* (Vol 29) 1942 Pat 401 (405): 43 Cri L Jour 625: 21 Pat 113 (DB) \* (Vol 18) 1931 Pat 102 (103): 32 Cri L Jour 611 \* (Vol 13) 1926 Bom 110 (113): 49 Bom 392: 27 Cri L Jour 305 (DB) \* (Vol 2) 1915 Cal 296 (296): 15 Cri L Jour 153: 41 Cal 722 (DB) \* (Vol 20) 1933 Nag 327 (327): 34 Cri L Jour 673 \* ('12) 13 Cri L Jour 21 (22) (DB) (Mad) \* (1900) 10 Mad L Jour 147 (186) (FB).

[14] Where the accused is alleged to have obtained on different occasions several sums from the complainant by false pretences, a single charge of cheating in respect of all the items is not tenable. ('01) 1 Cri L Jour 977 (978, 979) (All) \* (Vol 18) 1931 Pat 102 (103): 32 Cri L Jour 611.

[15] The provision enabling different items to be lumped together and be charged as a single offence in the case of a criminal breach of trust or dishonest misappropriation cannot be made use of to justify a joint trial of such offence with an offence of a different character. (Vol 29) 1942 Pat 401 (405): 21 Pat 113: 43 Cri L Jour 625 (DB) \* (Vol 26) 1939 Bom 129 (143): 40 Cri L Jour 579 (DB) ((Vol 22) 1935 Cal 312: 62 Cal-808 dissented from) \* (Vol 23) 1936 Bom 154 (159): 60 Bom 148: 37 Cri L Jour 688 (DB) \* ('07) 5 Cri L Jour 341 (342): 30 Mad 328 \* (Vol 2) 1915 All 462 (462): 38 All 42: 16 Cri L Jour 813 \* (Vol 6) 1919 Lah 440 (441): 19 Cri L Jour 187 (DB) \* (Vol 2) 1915 Cal 296 (296): 15 Cri L Jour 153: 41 Cal 722 \* (Vol 18) 1931 Rang 161 (162): 32 Cri L Jour 1068 \* (Vol 4) 1917 Mad 612 (612): 17 Cri L Jour 369.

[See however (Vol 31) 1944 Oudh 122 (123, 129): 19 Luck 493: 45 Cri L Jour 538 (DB). (A charge under S. 408, I.P.C., framed in accordance with the provisions of S. 222 (2) of the Cr P.C., combining a number of offences of criminal breach of trust can be combined with a charge under S. 477A, I.P.C., of falsification of account and covering a number of false entries in account books, if the offence under S. 477A can be said to have been committed in the course of the same transaction as the offence under S. 408).]

[16] Where the dates of misappropriation of the various items extend over a period of more than one year they cannot all be lumped together in the same

charge. ('36) 37 Cri L Jour 430 (440): 63 Cal 18 (DB) \* ('05) 2 Cri L Jour 130 (131): 1905 Pun Re No. 14 Cr \* (Vol 22) 1935 Oudh 241 (244): 36 Cri L Jour 477 \* (Vol 21) 1934 Pat 132 (133): 35 Cri L Jour 693.

[17] The provision enabling it to be stated that the offence was committed between certain dates (instead of on a certain date) applies also to cases where a specific sum is alleged to have been the subject of the offence. (Vol 15) 1928 Bom 557 (560): 53 Bom 119: 30 Cri L Jour 135 (DB).

[18] Single charge framed in respect of the embezzlement of different sums—Separate sentence cannot be passed in respect of each of the items included in the charge. (Vol 18) 1931 All 267 (268, 269): 52 All 941: 32 Cri L Jour 155 (DB).

[19] Jurisdiction to try the charge arises at any place where the offence was committed in respect of any of the items included in the charge or at any place where the money involved in the misappropriation of any of the items was received or retained by the accused. (Vol 19) 1932 All 26 (27, 28): 33 Cri L Jour 127.

#### 6. Applicability of sub-section (2) to cases where there are two or more accused persons.—

[1] If sub-section contemplates only cases in which there is only one accused person and that where there are two or more accused persons in a case, separate charges must be framed in respect of the several items as for different offences. ('12) 13 Cri L Jour 506 (507) (DB) (Cal).

[But see (Vol 4) 1917 Mad 524 (525): 17 Cri L Jour 30 (DB) \* (Vol 23) 1936 Bom 379 (392): 36 Cri L Jour 9 (DB) (Two accused—Lumping together the sums said to have been misappropriated held to be proper) \* (Vol 29) 1942 Oudh 89 (92): 17 Luck 353: 43 Cri L Jour 153 (Two persons jointly embezzling money in respect of several items—All items can be lumped together and accused can be charged with embezzlement of gross total and tried jointly).]

[2] Charge alleging that some of the accused took part in the misappropriation only in respect of some of the items of which the total sum is composed—Single charge cannot be framed so as to cover the acts of all the accused. (Vol 18) 1931 Rang 90 (93, 94): 8 Rang 632: 32 Cri L Jour 980.

#### 7. Charge under sub-section (2)—Whether trial for another item misappropriated during same period is barred.—

[1] Where an accused is charged under sub-s. (2) and is convicted or acquitted he can be tried again in respect of another sum of money alleged to have been misappropriated by him during the same period but not included in the sum which was the subject-matter of the previous trial. (Vol 10) 1923 Cal 654 (656): 50 Cal 632: 25 Cri L Jour 156 (SB) \* (Vol 18) 1931 All 209 (209): 53 All 411: 32 Cri L Jour 376 \* ('10) 11 Cri L Jour 337 (339) (DB).

[But see (Vol 4) 1917 Mad 524 (525): 17 Cri L Jour 30 (DB).]

[2] Where the previous trial was not for a gross sum misappropriated between two dates but was for misappropriation of specific sums of money received on specific dates a fresh trial for another offence in respect of a different sum of money said to have been misappropriated about the same time is not barred. (Vol 17) 1930 Mad 978 (980): 32 Cri L Jour 223.

**223.** When the nature of the case is such that the particulars mentioned in

When manner of sections 221 and 222 do not give the accused sufficient notice of the committing offence matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

*Illustrations.*

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

[1882—S. 223; 1872—S. 441.]

**Section 222 (contd.)**

**8. Charge of criminal conspiracy.**—[1] A charge of criminal conspiracy to commit a criminal breach of trust or criminal misappropriation is not bad for want of particulars as to dates, etc., of the alleged misappropriation. (Vol 25) 1938 Cal 195 (199): 39 Cri L Jour 417 (DB).

[2] A charge of criminal conspiracy is not bad because the period of the conspiracy is said to exceed one year. (Vol 25) 1938 Cal 195 (199): 39 Cri L Jour 417 (DB) \* (Vol 25) 1938 Sind 171 (173): 39 Cri L Jour 890: 1 L R (1939) Kar 204 (DB).

[3] Charge of Criminal Conspiracy to give and take bribe—Giving and taking are not two separate objects. (Vol 34) 1947 Cal 162 (167) (DB).

**SECTION 223—Synopsis.**

1. **Scope of the section.**
2. **Offence of giving false evidence.**
3. **Rioting.**
4. **House-breaking, criminal trespass, etc.,**
5. **Sedition, promoting class-hatred, etc.,**
6. **Cheating.**
7. **Defamation.**
8. **Falsification of accounts.**
9. **Hurt, grievous hurt, etc.,**
10. **Forgery, etc.,**
11. **Culpable homicide and murder.**
12. **Receiving stolen property.**
13. **Kidnapping and abduction.**
14. **Extortion.**
15. **Unlawful assembly.**
16. **Other offences.**
17. **Act done by several persons in furtherance of a common intention.**

1. **Scope of the section.**—[1] The object of the section is to enable the Court to keep in view the real points in issue and to confine the evidence to such points. ('69) 1869 Pun Re No. 36 Cr p. 65 (65).

[2] No general rule can be laid down as to in what cases such particulars will be necessary, the matter

depending on the circumstances of each case. ('12) 13 Cri L Jour 218 (219): 39 Cal 781.

[3] A Charge should not be prolix and rambling and should not contain unnecessary allegations. (Vol 13) 1926 Oudh 245 (247, 248): 27 Cri L Jour 57 (DB).

**2 Offence of giving false evidence.**—[1] A charge of giving false evidence should be very carefully drawn up and must contain full particulars of the manner in which the offence was committed. ('06) 4 Cri L Jour 227 (229) (DB) (Cal) \* (Vol 11) 1924 Cal 104 (109): 25 Cri L Jour 177 (DB) (Statements alleged to be false should be specified \* (Vol 4) 1917 Pat 689 (689): 18 Cri L Jour 1039 (DB) (Do) \* (Vol 5) 1918 Pat 448 (450, 451): 19 Cri L Jour 169 (Do).

[See however (10) 11 Cri L Jour 277 (279) (PO) \* (Vol 11) 1924 Cal 104 (106, 109): 25 Cri L Jour 177 (Giving entire deposition without specifying false portions is not enough)].

[2] Where a person is accused of giving false evidence on several occasions he should be distinctly charged for each occasion. ('12) 13 Cri L Jour 62 (63) (DB) (Cal).

[3] It is not necessary to state that the charge falls within a particular part of the section. (Vol 8) 1921 Bom 3 (13): 45 Bom 834: 22 Cri L Jour 241 (FB).

[4] It is not necessary to state that the subject of the false statement is material to the result of the inquiry. (1862) 1 Mad H C R 38 (42, 48).

**3. Rioting.**—[1] "Rioting" is an offence with a specific name and, under sub-s. (2) of S. 221, may be described by its name only. ('12) 13 Cri L Jour 218 (219): 39 Cal 781 (DB) \* (Vol 15) 1928 Cal 732 (734): 55 Cal 879: 29 Cri L Jour 823 (DB).

[2] It is not necessary to set out what the ingredients constituting the offence of rioting are. (Vol 23) 1936 Pat 627 (628): 38 Cri L Jour 87 (DB) \* (Vol 15) 1928 Cal 732 (733, 734): 55 Cal 879: 29 Cri L Jour 823 (DB).

[3] The common object of the unlawful assembly is not necessary to be stated in the charge though it would be desirable to do so. (Vol 20) 1933 Oudh 19 (20): 8 Luck 199: 34 Cri L Jour 398 \* (Vol 2) 1915 Lah 418 (422): 16 Cri L Jour 689: 1915 Pun Re No. 16 (DB).

**Section 223** (*contd.*)

[See however ('12) 13 Cri L Jour 218 (219): 39 Cal 781 (DB) \* (Vol 3) 1916 Mad 834 (834): 16 Cri L Jour 809 \* (Vol 8) 1921 Cal 605 (606): 25 Cri L Jour 524 (DB) \* (Vol 12) 1925 Cal 913 (913): 26 Cri L Jour 827 (DB) \* (Vol 21) 1934 Sind 164 (169): 36 Cri L Jour 231 (DB) \* (Vol 11) 1924 Lah 667 (668): 25 Cri L Jour 43 \* (Vol 15) 1928 Pat 405 (408): 29 Cri L Jour 390].

**4. House-breaking, criminal trespass, etc.—**

[1] The charge must specify the intention with which the accused is alleged to have committed the trespass. ('94) 22 Cal 391 (403) (DB) \* ('71) 16 Suth W R Cr 53 (54) (DB).

[2] Where the charge does not specify any intention of the kind mentioned in the section, the accused cannot be convicted under it. ('11) 12 Cri L Jour 483 (488) (Lah).

[3] It is not open to a Court to convict an accused under S. 457, Penal Code, when the intention entertained by him is different from that specified in the charge. (Vol 9) 1922 Pat 5 (7, 8): 23 Cri L Jour 114 \* ('23) 24 Cri L Jour 119 (119) (DB) (Cal).

[4] Where the intention specified in the charge under S. 457 is not established, it is open to the Court to convict him under S. 456. (Vol 4) 1917 Cal 824 (826): 17 Cri L Jour 424: 44 Cal 358.

[5] For conviction under S. 447 (Criminal trespass) which is an offence with a specific name, it is not necessary to specify the ulterior offence the accused intended to commit. ('11) 12 Cri L Jour 453 (454) (DB) (Mad).

[But see ('96) 19 Mad 240 (241) (DB).]

**5. Sedition, promoting class-hatred, etc.—**

[1] In a charge under S. 124A, or S. 153A, Penal Code it is not necessary to set out the offending passages of the speech or writing where the case for the prosecution is that the speech or writing in question taken as a whole comes within the mischief of the law. ('08) 8 Cri L Jour 272 (279): 33 Bom 77 (DB) \* ('10) (11) Cri L Jour 588 (587): 4 Sind L R 55 (DB) (Case under S. 153A) \* ('09) 9 Cri L Jour 456 (460): 32 Mad 384 (DB).

[But see ('09) 9 Cri L Jour 108 (112): 32 Mad 3 (DB).]

**6. Cheating.—**[1] In a case of cheating the

charge must set out the manner in which the offence was committed. (Vol 12) 1925 Cal 603 (604): 26 Cri L Jour 849 (DB) (Manner described as "by deceiving with false representations and promises as well as by conduct". This was held to be too vague and indefinite). \* ('04) 1 Cri L Jour 124 (129) (FB) (Cal) \* (Vol 20) 1933 Sind 169 (171): 34 Cri L Jour 1049 (DB) \* (Vol 5) 1918 Nag 22 (26): 19 Cri L Jour 657 \* (Vol 4) 1917 All 108 (108): 18 Cri L Jour 131 \* (Vol 9) 1922 Lah 424 (424): 23 Cri L Jour 595.

[2] Where the charge is for an offence under the first portion of S. 415, Penal Code, it is not necessary to state that any loss was caused by the inducement. (Vol 17) 1930 Lah 407 (408): 32 Cri L Jour 299 \* (1862) 1 Mad H C R 31 (36) (DB). (It should be stated that the property induced to be delivered was that of the prosecutor).

[3] Where the charge is under the second portion of S. 415, it is necessary to state in what way the complainant would be a loser as a result of the inducement. (Vol 25) 1938 Lah 828 (831): 40 Cri L Jour 371 \* (Vol 4) 1917 All 108 (108): 18 Cri L Jour

[4] A charge of an attempt to cheat should state the persons upon whom the attempt was made and the manner in which he was induced. ('01) 1 Cri L Jour 124 (129) (FB) (Cal).

**7. Defamation.**—[1] A charge of defamation should set out the words alleged to be defamatory. (Vol 30) 1943 Cal 478 (479): 45 Cr L Jour 129 (DB) \* (Vol 12) 1925 Cal 1121 (1125): 26 Cr L Jour 1539 (DB).

[See however (Vol 19) 1932 Nag 158 (159): 34 Cri L Jour 154.]

[2] Where defamatory words are alleged to have been uttered by the accused on several occasions, the charge must give particulars of the various occasions. (Vol 17) 1930 Sind 62 (63, 64): 30 Cri L Jour 1073 (DB).

**8. Falsification of accounts.**—[1] A charge of falsification of accounts under S. 477A, Penal Code, must specify the entries alleged to be falsified. ('12) 13 Cri L Jour 251 (251) (DB) (Mad).

**9. Hurt, grievous hurt, etc.**—[1] A charge under S. 324, Penal Code, should follow the wording of the definition of the offence. ('97-01) 1 Upp Bur Rul 318 (318) \* ('68) 4 Mad H C R App v (v) (Hurt caused on grave and sudden provocation need not be denied).

[2] Where two persons commit an affray and also cause hurt to each other the charge must be for the more serious offence of hurt. ('08) 7 Cri L Jour 498 (499): 4 Low Bur Rul 237.

[3] Where the accused is alleged to have caused several hurts, a general charge covering all the hurts without particularising the details will be bad ('90) 15 Bom 491 (503, 504) (DB).

**10. Forgery, etc.**—[1] A charge of forgery should contain a description of the document forged. It is not sufficient to say merely that the accused committed forgery by signing the name of a certain person (specified) on a document. (1865) 4 Suth W R Cri L 4 (4) \* ('13) 14 Cri L Jour 129 (130) (DB) (Cal).

[2] Accused prejudiced due to failure to mention documents forged—Conviction held, would be set aside. (Vol 34) 1947 Oudh 35 (39).

**11. Culpable homicide and murder.**—[1] The charge for murder should follow the definition and language of S. 300, Penal Code. (Vol 13) 1926 Oudh 148 (149): 27 Cri L Jour 62 \* ('82) 8 Cal 211 (213) (DB) \* (1864) 1 Suth W R Cr L 9 (9) (In cases of wilful murder the words "culpable homicide amounting to murder" must be used).

[2] Section 34 of the Penal Code cannot be used in a charge under the second part of S. 304 of that Code. (Vol 12) 1925 Cal 913 (915): 26 Cri L Jour 827 (DB) \* (Vol 22) 1935 Rang 299 (300): 36 Cri L Jour 1380.

[3] The question of intention or knowledge should never be mentioned in a charge of homicide. (Vol 22) 1935 Rang 299 (300): 36 Cri L Jour 1380.

[4] Charge under S. 304 Penal Code, should indicate under which part of the section accused is charged. (Vol 22) 1935 Sind 23 (23): 28 Sind L R 295: 36 Cri L Jour 504 (DB).

**12. Receiving stolen property.**—[1] A charge of receiving stolen property should state that the accused dishonestly retained or received stolen property knowing or having reason to believe that it had been stolen. ('98) 1898 All W N 70 (70).

**Section 223** (*contd.*)

[2] The charge should also mention the name of the person to whom the property belonged. (1868) 1 Bom H C R 95 (96) (DB).

**13. Kidnapping and abduction.**—[1] In a charge of kidnapping under S. 366 Penal Code it should appear clearly whether the accused persons are being charged with kidnapping or with abduction, and whether the intent alleged was to compel the victim to marry against her will or whether the kidnapping or abduction was with the knowledge that it was likely that the victim would be forced or seduced to illicit intercourse. (Vol 20) 1938 Cal 194 (195): 34 Cri L Jour 1107 (DB) \* (29) 30 Cri L Jour 857 (858) (Cal).

[2] Where a charge is made, in respect of the same occurrence, both of kidnapping and abducting, it is not illegal to make the two charges under one head, but the point to be seen in each case is whether the accused person was prejudiced thereby. (Vol 25) 1938 Cal 460 (462): 39 Cri L Jour 674 (DB) (Vol 14) 1927 Cal 644: 28 Cr L Jour 805 (DB) dissented from) \* (Vol 6) 1919 Pat 27 (30): 20 Cri L Jour 161: 4 Pat L Jour 74 (F.B).

**14. Extortion.**—[1] A charge for extortion should state with accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person. (Vol 3) 1916 All 60 (60): 17 Cri L Jour 411.

**15. Unlawful assembly.**—[1] In a charge for the offence of being a member of an unlawful assembly, the accused shall have reasonably distinct notice of the common object imputed to the assembly. (Vol 10) 1923 Pat 1 (4): 2 Pat 134: 23 Cri L Jour 625 (SB) \* ('99) 4 Cal W N 190 (192, 193) (DB).

[2] The charge of unlawful assembly with the common object of "harassing Hindus" is not too general or unfair or unjust to the accused. (Vol 11) 1924 Mad 376 (377): 24 Cri L Jour 852 (DB).

**16. Other Offences. Abetment of offences.**—[1] It is open to the prosecution to charge abetment generally—The charge will amount to notice to the accused that they have to meet a case of abetment in one or more of the different ways indicated in S. 107, Penal Code. (Vol 25) 1938 Cal 125 (126): 39 Cri L Jour 395 (DB).

[2] Abetment of offence under S. 114 Penal Code—Specific charge to that effect necessary. (Vol 12) 1925 Cal 341 (345): 52 Cal 258: 26 Cri L Jour 487.

[3] Charge of abetment by being present at offence of mischief—No particulars as to any act before the offence—Charge bad. (Vol 12) 1925 Mad 364 (364): 25 Cri L Jour 1254.

[4] A general charge of instigating various persons to commit dacoities is bad; separate acts of abetment must be distinctly specified. (1901) 25 Bom 90 (100) (DB).

[5] Charge of abetment by conspiracy not alleging an overt act in pursuance, is bad. (1901) 24 Mad 523 (546) (SB).

[6] Charge-sheet which does not specify which accused is charged for abetment and which accused for the principal offence is defective. (Vol 9) 1922 Oudh 250 (251): 25 Oudh Cas 151: 28 Cri L Jour 637.

[7] *Robbery and Dacoity.*—Although charge under S. 396 has an incidental reference to a charge of murder there should be no conviction for murder without specific charge under S. 302, Penal Code. (Vol 20) 1938 Cal 294 (295): 34 Cri L Jour 524 (DB).

[8] If a dacoit commits murder during the dacoity, he should be charged under S. 396, Penal Code, and not under Ss. 304, 395, Penal Code. (Vol 12) 1925 Lah 337 (337): 6 Lah 44: 26 Cri L Jour 1153 (DB) \* ('77) 1 Weir 447 (448) (DB).

[9] Dacoity with murder—A charge should never contain more than what it is necessary for the prosecution to prove. (Vol 13) 1926 Oudh 245 (247, 248): 27 Cri L Jour 57 (DB).

[10] Robbery—Substantive S. 393 should be mentioned in the charge. ('11) 12 Cri L Jour 468 (468) (Low Bur).

[11] Conviction for dacoity founded on a common object not charged is not sustainable. (Vol 11) 1924 Mad 584 (584): 25 Cri L Jour 396 (DB).

[12] *Theft.*—Charge of stealing paddy from a certain land must contain an accurate description of the land from which the paddy was stolen. (Vol 8) 1921 Cal 605 (606): 25 Cri L Jour 524 (DB).

[13] *Criminal Conspiracy.*—Indictment must in the first place charge the conspiracy. (Vol 3) 1916 Cal 188 (194): 16 Cri L Jour 497: 42 Cal 957 (DB).

[14] Charge need not contain names of all other conspirators. (Vol 20) 1938 All 493 (501): 35 Cri L Jour 768.

[15] In the nature of things charge of conspiracy would be vague if the defence expects the proof of the conspiracy to be included in the charge. (Vol 13) 1926 Oudh 161 (165): 26 Cri L Jour 1602.

[16] Charge of conspiracy in respect of an agreement between several accused persons to cheat such members of the public as they could defraud by deceitful means is not bad. (Vol 13) 1926 Sind 171 (173): 20 Sind L R 18: 27 Cri L Jour 243 (DB).

[17] Accused may legally be charged merely with the offence of criminal conspiracy. ('24) 26 Cri L Jour 33 (40) (DB).

[18] Charge need not state in all its details the actual specific acts that the conspirators are alleged to have agreed to do or cause to be done—in most conspiracies the agreements amongst the conspirators is of a general nature. (Vol 15) 1928 Rang 118 (123, 124): 6 Rang 6: 29 Cri L Jour 555 (DB).

[19] Gist of the offence of criminal conspiracy is the agreement itself and where the object of the agreement is to do an unlawful act and not to do a lawful act by an unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object. (Vol 14) 1927 Sind 161 (163): 28 Cri L Jour 426: 22 Sind L R 91 (DB) \* ('09) 10 Cri L Jour 125 (127) (DB) (Cal).

[20] Charge need not mention the exact date on which conspirators entered into conspiracy. (Vol 2) 1915 Lah 16 (47, 48): 16 Cri L Jour 354: 1915 Pun Re No. 17 Cr (DB).

[21] Approximate dates as to when the conspiracy began and ended will be enough—Exact dates not necessary—No objection to acts done by conspirators in pursuance of the conspiracy being enumerated. (Vol 21) 1934 Sind 57 (59, 61): 28 Sind L R 119: 35 Cri L Jour 1337 (DB).



Words in charge taken in sense of law under which offence is punishable.

**224.** In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

[1882—S. 224.]

**225.** No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

*Illustrations.*

(a) A is charged under section 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from these facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

[1882—S. 225 : 1872—S. 443.]

**Section 223 (contd.)**

[22] *Offences against Public justice.*—Under S. 206, Penal Code, the specification of the fraudulent transaction is necessary. ('92) 16 Bom 414 (124) (DB).

[23] *Miscellaneous.*—Charge under S. 292 I.P.C.—Some attempt should be made to indicate in the charge in what respect exactly the book was obscene. (Vol 19) 1932 Cal 651 (652, 653): 33 Cri L Jour 771: 60 Cal 201 (DB).

[24] *Contempt of Court*—Formal charge is necessary. (Vol 13) 1926 Rang 188 (190): 4 Rang 257: 27 Cri L Jour 1241 (DB).

[25] Charge under S. 4 (b) of Act 6 (VI) of 1908 (Explosive Substances Act) omitted to state that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously" and secondly that it was the intent of the accused to endanger life in British India—Held, defect did not vitiate trial. (Vol 3) 1916 Cal 188 (192): 16 Cri L Jour 497: 42 Cal 957 (DB).

**17. Act done by several persons in furtherance of a common intention.**—[1] It is not essential that the words of S. 34, Penal Code, should be incorporated in the charge, although it is desirable that some reference should be made to the common intention alleged against the accused and their confederates. (Vol 22) 1935 Rang 304 (308): 36 Cri L Jour 1393 (DB).

**SECTION 225.—Note 1.**

[1] Where accused is not misled, defect in charge is not material. (Vol 29) 1942 Oudh 394 (395): 43 Cri L Jour 721 \* (Vol 28) 1941 Lah 214 (215): ILR (1941) Lah 428: 42 Cri L Jour 660 (DB) \* (Vol 25) 1938 Cal 195 (200): 39 Cri L Jour 417 (DB) \* (Vol 25) 1938 Nag 445 (446): 39 Cri L Jour 895: ILR (1939) Nag 180

(DB) \* (37) 1937 Mad W N 1331 (1331) \* (Vol 22) 1935 Oudh 488 (489): 36 Cri L Jour 1198: 11 Luck 343 \* (Vol 2) 1915 Irh 16 (47, 48): 16 Cri L Jour 954: 1915 Pun Re No. 17 Cr. (DB) \* (Vol 19) 1932 All 73 (75): 33 Cri L Jour 373 \* (Vol 12) 1925 Cal 603 (603, 604): 26 Cri L Jour 849 (DB) \* (Vol 6) 1919 Pat 27 (30): 4 Pat L Jour 71: 20 Cri L Jour 161 (FB) \* (Vol 17) 1930 Rang 114 (117): 7 Rang 321: 31 Cri L Jour 387 \* (Vol 12) 1925 Nag 147 (149): 25 Cri L J 1152.

[2] Where accused is prejudiced, defect in charge is material. (Vol 25) 1938 Lah 828 (832): 40 Cri L Jour 371 \* ('01) 8 Cal W N 278 (285) (FB) \* ('02) 15 C P L R 112 (113) \* ('12) 13 Cri L Jour 125 (126) (DB) (Mad).

[3] The irregularity of clubbing together different offences instead of charging them separately was curable under this section and S. 537 if the accused was not prejudiced. (Vol 25) 1938 P C 130 (135): 39 Cri L Jour 452: 65 Ind App 158: 32 Sind L R 476: ILR (1938) 2 Cal 295 (PC).

[See also (Vol 27) 1940 Pat 603 (604): 41 Cri L Jour 523 (DB) (Lumping together of three cases of cheating in charges under S. 420 Penal Code—But no prejudice caused to accused by irregularity—Sections 225 and 537 cure defect) \* (Vol 29) 1942 Mad 417 (418): 43 Cri L Jour 807 (Incidents on four different dates mentioned in charge though attention of accused was drawn primarily to incident on one date—Held there was no prejudice.)]

[See however (Vol 29) 1942 Oudh 89 (92): 43 Cri L J 153: 17 Luck 353 (Offence under S. 408—Six different items embezzled mentioned but not the gross sum—Charge violates Ss 222 and 234—Defect cannot be cured.)]



Section 225—Note 1 (*contd.*)

[4] The Court should decide in each case whether the defect in the charge has misled the accused. (Vol 16) 1929 Pat. 712 (714) : 30 Cri L Jour 891 : 9 Pat 642 (DB).

[5] In considering the question whether the accused has been prejudiced in his defence by the defect in the charge, regard must be had to the fact that the objection to the frame of the charge was not raised till a late stage in the proceeding. (Vol 22) 1935 Oudh 488 (488) : 36 Cri L Jour 1198 : 11 Luck 343 \* ('09) 9 Cri L Jour 108 (112, 113) : 32 Mad 3 (DB) \* (Vol 3) 1916 Cal 188 (192) : 16 Cri L Jour 497 : 42 Cal 957 (DB) \* (Vol 20) 1933 Pat 488 (491) : 34 Cri L Jour 892.

[6] The section is aimed at objections on the ground of variance between the charge and the evidence : ('09) 9 Cri L Jour 456 (484, 485) : 32 Mad 384 (DB).

[But see (Vol 3) 1916 All 60 (60) : 17 Cri L Jour 411 (411). (It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him.)]

[7] Where a charge expressed in vague terms has been understood in a certain sense and proceedings have gone on, on such basis, it is not thereafter open to the prosecution to contend that the charge means something else. ('78) 2 Bom. 142 (145) (DB).

[8] Where the guilt of the accused has been proved, he can be convicted notwithstanding that the charge contains unnecessary allegations which the prosecution has not proved. ('67) 4 Bom H C R Cr 17 (22).

[9] An error or omission to specify the common object of the unlawful assembly will vitiate the trial if the accused has been prejudiced in his defence by reason of such defect in the charge. ('07) 6 Cri L Jour 446 (448, 449) (DB) (Lah) \* ('06) 3 Cri L Jour 153 (159) : 33 Cal 295 (SB) \* (Vol 9) 1922 Cal 191 (191) : 24 Cri L Jour 855 (DB) \* (Vol 11) 1924 Mad 584 (584) : 25 Cri L Jour 396 (DB). (Conviction for dacoity founded on a common object not charged is not sustainable.)

[10] If the accused has not been prejudiced by reason of such error or omission, the defect is not a material one. (Vol 22) 1935 Oudh 488 (488) : 36 Cri L Jour 1198 : 11 Luck 343 \* (Vol 3) 1916 Cal 693 (705, 706) : 16 Cri L Jour 641 (DB) \* (Vol 5) 1918 Mad 350 (350) : 19 Cri L Jour 200 \* (Vol 4) 1917 Pat 453 (453) : 2 Pat L Jour 541 : 18 Cri L Jour 911 (DB) \* (Vol 13) 1926 Cal 439 (439, 440) : 26 Cri L Jour 567 (DB) \* (Vol 5) 1918 Pat 257 (258) : 3 Pat L Jour 565 : 19 Cri L Jour 735 (DB) \* (Vol 14) 1927 Pat 398 (400) : 6 Pat 892 : 28 Cri L Jour 769 (DB) \* (Vol 5) 1918 Nag 64 (65) : 20 Cri L Jour 760 \* (Vol 20) 1933 Oudh 19 (20) : 8 Luck 199 : 34 Cri L Jour 393 \* (Vol 3) 1916 Cal 355 (355) : 17 Cri L Jour 92 (DB) \* (Vol 17) 1930 Mad 188 (189) : 31 Cri L Jour 347 \* (Vol 15) 1928 Bom 286 (287) : 30 Cri L Jour 467 (DB) \* (Vol 18) 1931 Bom 520 (522) : 55 Bom 725 : 33 Cri L Jour 64 (DB).

[11] Where the charge is to the effect that the accused is liable constructively under S. 149 of the Penal Code the trial is not necessarily vitiated because the charge does not specify, or states erroneously the common object, in pursuance of which the act is alleged to have been done. (Vol 2) 1915 Lah 418 (422) : 16 Cri L Jour 689 : 1915 Pun Re No. 16 Cr (DB).

[But see ('12) 13 Cri L Jour 218 (219) : 39 Cal 781 (DB).]

[12] Charge of cheating defective by reason of Magistrate's failure to set out particular consequences by virtue of which the deception became offence — Defect being material irregularity is not curable under S. 225. (Vol 25) 1938 Lah 828 (832) : 40 Cri L Jour 371.

[13] Accused charged under S. 304, Penal Code, but tried under S. 302 — Held, illegality could not be cured under S. 537, Criminal P. C. (Vol 22) 1935 Pat 431 (432, 433) : 36 Cri L Jour 1506 (DB).

[14] Extortion — Charge of — Charge must state the amount alleged to have been obtained from each person and the nature of the extortion used against each. (Vol 3) 1916 All 60 (60) : 17 Cri L Jour 411.

[15] Charges under Ss. 397 and 395 — Held that the charges did not give the accused sufficient particulars of what they had to meet. (Vol 12) 1925 Mad 690 (691) : 49 Mad 741 : 26 Cri L Jour 1513.

[16] Where accused is charged with having beaten the complainant at a particular place and at a particular time and the prosecution fails to establish that charge, the accused cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion. (Vol 11) 1924 Lah 616 (617) : 25 Cri L Jour 471.

[17] In the charge framed the manner of cheating was set out as follows : "By deceiving with false representations and promises as well as by conduct." Held, the expression "used" was too vague and so dangerously wide as might include almost anything. (Vol 12) 1925 Cal 603 (604) : 26 Cri L Jour 849 (D B).

[18] Charge-sheet filed by police relating to offence on 18th May 1941 — Charge itself relating primarily to incident on 26th March 1941 — Sub-Inspector only witness in case referring to incidents other than that on 18th May 1941, one of them being that of 26th March 1941 — Accused questioned particularly with regard to incident of 26th March 1941 — Accused pleading guilty — Accused held not prejudiced by difference in charge and charge-sheet. (Vol 29) 1942 Mad 417 (418) : 43 Cri L Jour 807.

[19] Misjoinder of charges — Specific offences satisfactorily proved and corroborated — No miscarriage of justice — Held irregularity was such that it could be and was cured under Ss. 225 and 537 by the finding that the accused had not been prejudiced. (Vol 25) 1938 P. C 180 (135) : 39 Cri L Jour 452 : 65 Ind App 158 : 32 Sind L R 476 : I L R (1938) 2 Cal 295 (P. C.).

[20] Charge of conspiracy containing words that accused agreed with each other "or" with others unknown, to commit offence — Held, accused could not have been misled and defect, if any, was not such as could not be sufficiently met by S. 225 or S. 537. (Vol 25) 1938 Cal 195 (200) : 39 Cri L Jour 417 (DB).

[21] Charge under S. 409, Penal Code, erroneous in respect of the date as well as place of payment — Nothing in case to show that accused was misled — No prejudice having resulted to the accused, error in the charge is immaterial and cannot affect legality of trial. (Vol 25) 1938 Nag 445 (446) : 39 Cri L Jour 895 : I L R (1939) Nag 180 (DB).

[22] Mistake or doubt as to particular weapons used does not entitle accused to absolute acquittal — Conviction for lesser offence instead of more serious offence is sustainable. ('37) 1937 Mad W N 1331 (1334).

[23] Offence under S. 211, Penal Code, committed at two places but only one stated — Accused not misled in defence — His conviction is unaffected. (Vol 23) 1936 Pat 358 (360) : 37 Cri L Jour 862 (DB).

[24] Charge under S. 411, Penal Code, not specifying particular articles possessed — But accused not prejudiced by this — Defect is cured by S. 537. (Vol 22) 1935 Oudh 475 (475, 476) : 36 Cri L Jour 1206.

[25] Defamation — Plea that though there was publication, there was no publication to the person mentioned in the charge is a highly technical plea and the defect in the charge is curable under S. 537. (Vol 14) 1927 Sind 58 (59) : 27 Cri L Jour 947.

[26] Omission to mention S. 34, Penal Code, by the application of which accused was convicted, held not to have caused any failure of justice. (Vol 21) 1934 Lah 227 (228) : 35 Cri L Jour 1386.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

*Illustrations.*

- (1) A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted.
- (2) A is charged with forging a valuable security under section 467 of the Indian Penal Code. A charge of fabricating false evidence under section 193 may be added.
- (3) A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under section 23 of the Indian Penal Code cannot be added.

[1882—S. 226; 1872—S. 446.]

**SECTION 226—SYNOPSIS.**

1. Scope of the section.
2. "Without a charge."
3. "With an imperfect or erroneous charge."

1. Scope of the section.—[1] The present section is by way of an exception to Ss. 193 and 194. (Vol 2) 1915 Sind 50 (50, 51); 16 Cri L Jour 573; 9 Sind L R 37 (DB). (The combined effect of Ss. 226 to 231 is to confer a very wide jurisdiction upon the Court of Session.)

[2] The Sessions Judge should before the commencement of the trial scrutinize the charges and amend them if necessary under this section. (Vol 32) 1945 Lah 286 (290); 47 Cri L Jour 269; I L R (1946) Lah 483 (FB) & (Vol 5) 1918 Mad 821 (822); 18 Cri L Jour 346 (DB) & (Vol 13) 1926 Oudh 245 (248); 27 Cri L Jour 57 (DB).

[3] When the Sessions Judge finds the charges framed by the committing Magistrate imperfect in any way, he should amend them under this section and not acquit the accused. ('82) 8 Cal 450 (453) (DB).

[See however (Vol 15) 1928 Bom 475 (476); 30 Cri L Jour 191.]

[4] The Sessions Judge can totally reject a charge framed by the Magistrate and substitute a new charge in its place. ('82) 1882 All W N 165 (165).

[See however ('37) 66 Cal L Jour 575 (576, 577) (DB). (Depriving accused of right to trial by jury by manoeuvre of substituting a new charge is bad.)]

[5] The Sessions Judge can add a charge to that framed by the committing Magistrate. (Vol 33) 1946 Bom 183 (183) & (Vol 2) 1915 Sind 50 (51, 52); 16 Cri L Jour 573; 9 Sind L R 37 (DB) & (Vol 11) 1924 Cal 625 (626); 26 Cri L Jour 5 (DB) & (Vol 11) 1924 Lah 413 (414); 24 Cri L Jour 177 & (Vol 20) 1933 Oudh 375 (377); 35 Cri L Jour 63.

[See also (Vol 33) 1946 Sind 1 (6); I L R (1945) Kar 275; 47 Cri L Jour 455. (Application for inclusion of charge e. g. abetment charge is to be made to trial Court.)]

[But see ('86) 8 All 665 (667).]

[6] An Assistant Sessions Judge, while cancelling the charge framed by the committing Magistrate and framing a new charge, should not omit framing a charge for a more serious offence and frame the charge for a less serious offence, in order to acquire jurisdiction; and if he does so through a misapprehension of the evidence, he fails to exercise a proper discretion in the matter. (Vol 32) 1945 Cal 42 (44); I L R (1944) 1 Cal 280; 46 Cri L Jour 557 (DB).

[7] The added charge need not be related to the original charge. (Vol 32) 1945 Lah 286 (291); 47 Cri L Jour 269; I L R (1946) Lah 483 (FB) & (Vol 2) 1915 Sind 50 (51); 16 Cri L Jour 573; 9 Sind L R 37 (DB) & (Vol 30) 1933 Oudh 375 (377); 35 Cri L Jour 63.

[But see ('04) 1 Cri L Jour 794 (797); 32 Cal 22 & (Vol 7) 1920 Mad 131 (132); 21 Cri L Jour 57 (DB)]

[8] Any action, under this section can be taken only on the facts disclosed on evidence before the committing Magistrate. (Vol 32) 1945 Lah 286 (290); 47 Cri L Jour 269; I L R (1946) Lah 483 (FB) & (Vol 2) 1915 Sind 50 (51); 16 Cri L Jour 573; 9 Sind L R 37 (DB) & ('81) 3 Mad 351 (353) (DB).

[9] An amendment or addition cannot be made under this section on the basis of additional evidence taken by the committing Magistrate under S. 219 after commitment. (Vol 20) 1933 Mad 247 (250); 34 Cri L Jour 278.

[10] The fact that in framing a single charge against all the accused the Court of Session would be acting on evidence taken in the course of two different commitment enquiries is no bar to framing a single charge. (Vol 32) 1945 Lah 286 (289, 290); 47 Cri L Jour 269; I L R (1946) Lah 483 (FB).

[11] Where the accused are tried jointly without the charge being re-framed but after the separate charge are read out and explained to the accused, the omission to frame a single charge is only an irregularity curable under S. 537. (Vol 32) 1945 Lah 286 (293); 47 Cri L Jour 269; I L R (1946) Lah 483 (FB).

[12] The power of the Sessions Judge to frame a charge under this section is not fettered by the fact that a complaint in respect of the offence has been dismissed by the Magistrate. ('92) 16 Bom 414 (424, 427) (DB).

[13] The Sessions Judge cannot substitute a charge of adultery for one of rape framed by the Magistrate. ('02) 29 Cal 415 (416) (DB).

[14] The Sessions Judge has no power under this section to order the Magistrate to re-draw the charges. ('76) 25 Suth W R Cr 17 (17) (DB).

[15] High Court remanded a case for trial on certain charges to Sessions Court — Sessions Judge can amend the charges in his discretion. ('04) 1 Cri L Jour 79 (796); 32 Cal 22.

[16] The evidence of witnesses who gave evidence in the preliminary inquiry and subsequently died may be admitted in the sessions trial where the Session Judge has framed additional charges. ('81) 7 Cal 42 (44) (D B).

[17] The Clerk of Crown cannot withdraw charge on the ground that there is no evidence to go to jury — That can be done only by Court. (Vol 29) 1942 Bom 212(214); 43 Cri L Jour 773; I L R (1942) Bom 534

2. "Without a charge."—[1] A commitment under S. 437 or S. 526 may be made without framing a charge. ('04) 1 Cri L Jour 275 (277); 27 Mad 54.

[2] The expression applies to cases in which a charge has been framed by the committing Magistrate but there is no charge in respect of the offence which the Sessions Judge may think the prisoner ought to be tried for. ('84) 8 Bom 200 (210) (D B).

[But see ('86) 8 All 665 (667).]

3. "With an imperfect or erroneous charge."—[1] The word "imperfect" implies defect in form

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

[1892—S. 227; 1872—Ss. 444, 445; 1861—S. 244.]

Section 226—Note 3 (*contd.*)

(Vol 12) 1925 Oudh 158 (160): 25 Cri L Jour 1162 (D B).

[2] The expression covers an imperfection due to a misjoinder of charges. ('82) 8 Cal 450 (453) (D B).

[3] The fact that the evidence recorded by the committing Magistrate justifies an additional head of charge being included does not make the charge as framed imperfect or erroneous and the Sessions Court has no power under the section to add a charge. ('86) 8 All 665 (667).

#### SECTION 227—SYNOPSIS.

1. Scope.
2. "Or add to."
3. "May"—Discretion of Court.
4. Record of reasons.
5. Time for alteration of or addition to charge.
6. Amendment of charge after remand.
7. Amendment by Court of Session.
8. Application for alteration of charges.
9. Amendment—How made.
10. Examination of accused after amendment.
11. Sub-section (2).
12. Revision.

1. Scope. — [1] The section applies to all Courts and is intended to apply to alterations or additions to charge during the course of trial. (Vol 20) 1933 Mad 247 (250): 34 Cri L Jour 278.

[2] Alterations or additions must be based on facts disclosed by evidence recorded. (Vol 2) 1915 Sind 50 (51): 16 Cri L Jour 573: 9 Sind L R 37 (D B).

[3] It is not necessary to amend charge and accused can be convicted of offence though he was not charged with it. (Vol 22) 1935 All 935 (937): 37 Cri L Jour 247.

[4] The word "alter" in this section includes power to withdraw charge. ('90) 1890 All W N 178 (178).

2. "Or add to." — [1] New charge may be added to original charge even if it be unconnected with the latter. (Vol 2) 1915 Sind 50 (51): 16 Cri L Jour 573: 9 Sind L R 37 (D B) & (Vol 11) 1924 Cal 625 (626): 26 Cri L Jour 5 (D B).

[But see (Vol 14) 1927 Sind 28 (34): 21 Sind L R 55: 27 Cri L Jour 1217 (D B).]

3. "May"—Discretion of Court. — [1] Court has large discretion to alter or to add to charge framed under the Code. (Vol 24) 1937 Bom 260 (261): 1 I L R (1937) Bom 369: 38 Cri L Jour 850 & (Vol 13) 1926 Bom 255 (255): 27 Cri L Jour 496 (D B) & (Vol 18) 1931 Oudh 73 (73, 74): 32 Cri L Jour 330 (D B) & (Vol 1) 1914 Low Bur 63 (123): 15 Cri L Jour 80: 7 Low Bur Rul 143 (F B).

[2] Magistrate must be ever ready to alter or add to charge, or to refer case under S. 347. (Vol 14) 1927 Mad 307 (308): 28 Cri L Jour 164 & ('10) 11 Cri L Jour 154 (154, 155) (D B) (Mad) & (Vol 11) 1924 Lah 718 (718): 26 Cri L Jour 420.

[3] When offence more aggravated than one complained of is discovered, Court should charge accused with the more aggravated offence. (Vol 16) 1929 Lah 838 (839): 30 Cri L Jour 957.

[4] Powers of Court under this section can be exercised even if alteration of charge leads to discharge of jury which has been sworn in and empanelled. (Vol 24) 1937 Bom 260 (261): 1 I L R (1937) Bom 369: 38 Cri L Jour 850.

[5] The section does not warrant striking out of charge for curing illegality already committed and does not enable Court to proceed on those charges only that have been legally joined. (Vol 31) 1944 Bom 306 (309, 310): 1 I L R (1944) Bom 728 (DB) & ('07) 5 Cri L Jour 94 (95, 96): 29 Mad 569 & (Vol 12) 1925 Mad 1065 (1066): 26 Cri L Jour 1618.

[But see (Vol 24) 1937 Sind 1 (2): 30 Sind L R 391: 38 Cri L Jour 324 (29 Mad 569, dissented from.)]

[6] Accused charged with more than three offences committed in a year—Trial in contravention of S. 234—Illegality could not be cured by striking out charges to reduce number to three. (Vol 31) 1944 Bom 306 (310): 1 I L R (1944) Bom 728 (DB) & (Vol 9) 1922 Cal 401 (401): 49 Cal 555: 24 Cri L Jour 86 (D B) & (Vol 13) 1926 Lah 193 (194): 27 Cri L Jour 793.

[7] Charge properly framed but found groundless after evidence—Court is not prevented from striking out such charge. ('90) 12 All 551 (552) & ('82) 11 Cal 85 (90) (DB) & (Vol 26) 1939 Pat 35 (36): 39 Cri L Jour 997: 18 Pat 82 (DB).

[8] Alteration or addition of charge must be for offence made out by evidence recorded in trial before Court. (Vol 16) 1929 Sind 250 (251, 252): 30 Cri L Jour 1121 & (Vol 12) 1925 Cal 579 (580): 26 Cri L Jour 302 (D B).

[See ('81) 3 Mad 351 (352, 353) (D B).]

[9] Sessions Court cannot amend and add to charges with regard to matter not covered by indictment. ('04) 1 Cri L Jour 794 (797): 32 Cal 22.

[10] Persons committed for murder of A—Sessions Judge acquitting them: cannot add and convict on charge of causing grievous hurt to B. (Vol 7) 1920 Mad 131 (132): 21 Cri L Jour 57 (DB) & ('10) 11 Cri L Jour 131 (133) (D B) (Lah).

[11] In absence of complaint charge cannot be altered into charge for offence which requires such complaint. ('02) 29 Cal 415 (416) (DB).

[See also (Vol 12) 1925 Lah 631 (632): 6 Lah 375: 27 Cri L Jour 769 (D B).]

[12] Adding serious charge after defence evidence is heard and proceeding with case without allowing further time to accused is not sound exercise of discretion. ('02) 6 Cal W N 72 (78) & ('07) 5 Cri L Jour 164 (167): 31 Bom 218 (D B) & ('09) 9 Cri L Jour 226 (231): 33 Bom 221 (DB).

[13] Charge of compoundable offence—Parties file compromise—Court should not frame charges after application for compromise. (Vol 1) 1914 Lah 561 (563): 16 Cri L Jour 81: 1914 Pun Re No. 29 Cr (FB) & ('99) 3 Cal W N 548 (550).

4. Record of reasons. — [1] Sessions Judge altered charge under S. 395, Penal Code, to one of robbery, without assigning reason—Held that this should not have been done. ('12) 13 Cri L Jour 127 (128) (D B) (Cal).

5. Time for alteration of or addition to charge. — [1] The words "return of the verdict" in the section mean return of final verdict which Judge must finally record. ('84) 8 Bom 200 (211) (S B) & ('74) 21 Suth W R Cr 1 (2) (D B).

6. Amendment of charge after remand. — [1] Court can after remand by superior Court, amend charge, and remand order cannot fetter this power. ('04) 1 Cri L Jour 794 (796): 32 Cal 22 & ('99) 26 Cal 560 (563) (DB).

**228.** If the charge framed or alteration or addition made under section 226 or section 227; *When trial may proceed* such that proceeding immediately with the trial is not likely, in the *immediately after alteration.* opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

[1882—S. 228; 1872—S. 447; 1861—S. 245.]

**229.** If the new or altered or added charge is such that proceeding immediately with the trial *When new trial may be* is likely, in the opinion of the Court, to prejudice the accused or the *directed, or trial suspended.* prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

[1882—S. 229; 1872—S. 448; 1861—S. 246.]

**230.** If the offence stated in the new or altered or added charge is one for the prosecution of *Stay of proceedings if prosecution of offence in altered charge require previous sanction.* which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

[1882—S. 230; 1872—S. 450.]

#### Section 227 (contd.)

**7. Amendment by Court of Session.**—[1] Order of Sessions Judge directing Magistrate to hold further inquiry into more serious charge than that for which committal was made is illegal. (Vol 32) 1945 Mad 424 (425); 47 Cri L Jour 230; I L R (1946) Mad 136.

[2] Withdrawing proved charge and substituting another to deprive accused of trial by jury is improper. (Vol 13) 1926 Pat 253 (254); 5 Pat 238; 27 Cri L Jour 512 (DB).

**8. Application for alteration of charges.**—[1] Application for alteration of or addition to charge should be made early. (Vol 20) 1933 Cal 598 (599); 34 Cri L Jour 836 (D B).

[2] Orders on application for alteration of or addition to charge should be passed at the same time and not be postponed. ('92) 16 Bom 414 (426) (DB).

[3] Court may refuse to entertain application for amendment of charge if made at late stage of case. (Vol 15) 1928 Bom 475 (476); 30 Cri L Jour 191.

**9. Amendment — How made.**—[1] Magistrate amending charge, should not write over original charge but should leave it on file and should write new charge separately and correctly date it. (Vol 2) 1915 Low Bur 102 (103); 16 Cri L Jour 2.

**10. Examination of accused after amendment.**—[1] Court is not bound to re-examine accused after alteration of charge under this section. (Vol 10) 1923 Mad 609 (615); 46 Mad 449; 24 Cri L Jour 547 (1'B)\* (Vol 9) 1922 Pat 393 (394); 1 Pat 54; 23 Cri L Jour 146 (D B).

[2] Court is not bound to re-examine accused even if some witnesses are recalled under S. 231 after alteration of charge. (Vol 9) 1922 Pat 393 (394); 1 Pat 54; 23 Cri L Jour 146 (DB).

**11. Sub-section (2).**—[1] If alteration is not read and explained to accused and he is prejudiced in his defence, conviction is illegal. (Vol 13) 1926 All 227 (227); 27 Cr Lj 152\*(75) 23 Suth W R Cr 59(59)(DB).

[2] Counsel of accused asked whether he wanted new trial—He did not want it—Accused held not prejudiced by omission of Judge to read and explain alteration in charge. ('84) 8 Bom 200 (212) (DB).

[3] Accused should not be called upon to meet additional charges without notice nor should be convicted under charges different from those which he was called upon to meet. ('01) 3 Bom L R 675 (676) (D B)\* (Vol 1) 1914 Cal 663 (663); 41 Cal 748; 15 Cri L Jour 190 (D B)\* (Vol 16) 1929 Rang 256 (256); 30 Cri L Jour

990; 7 Rang 316\*(23) 24 Cri L Jour 119 (119, 120) (DB) (Cal)\* (Vol 8) 1921 Pat 496 (497); 22 Cri L Jour 485 (D B).

[See (Vol 19) 1932 Pat 215 (216); 33 Cri L Jour 86; 11 Pat 523 (DB)\* (1900) 3 Oudh Cas 314 (315, 316)

**12. Revision.**—[1] Trial Court refused to alt charge on ground that re-casting of charges would embarrass jury and prejudice accused in his trial. Reason not capricious or involved no disregard of legal principles—High Court would refuse to interfere on appeal or revision. (Vol 14) 1927 Sind 28 (30, 35); 1 Sind L R 55; 27 Cri L Jour 1217 (D B).

[2] Alteration in charges occasioning failure of justice—Court of revision may interfere. (Vol 18) 1931 M 439 (440); 32 Cri L Jour 756.

#### Section 228—Note 1

[1] Different charges laid against two accused. Charges amended later and accused charged with same offence—*Held* they could be said to be tried for same offence within S. 30, Evidence Act and confession one of co-accused could be considered against other ('74) 11 Bom H C R 278 (279, 280).

[2] Amended charge repeats substance of original charge—Question of prejudice to accused cannot arise (Vol 31) 1944 Sind 1 (14); I L R (1943) Kar 449; 1 Cri L Jour 471 (FB).

#### Section 229 — Note 1

[1] Retrial can be directed by the trying Court itself and there is no need to refer the case to the High Court for this purpose. (Vol 24) 1937 Sind 1 (2); 1 Sind L R 391; 38 Cri L Jour 324 (DB).

[See also (Vol 25) 1938 Cal 258 (261); I L R (1938) Cal 588; 39 Cri L Jour 596 (DB).]

[2] Where it is doubtful whether proceeding immediately with the trial will prejudice the accused, the Court must lean in favour of holding that such procedure will prejudice the accused. ('69) 6 Bom H C Cr 76 (81) (D B).

[3] Where the accused has not been given a proper opportunity of defending himself against the altered charge, the proceedings can be set aside and a retrial ordered. ('99) 1899 All W N 39 (40) (DB).

#### Section 230 — Note 1

[1] Where a charge is amended or a new charge framed and the new or altered charge relates to same offence, for the prosecution of which previous sanction is necessary, the trial cannot be proceeded with till sanction is obtained. (Vol 10) 1923 Lah 260 (261); Lah 440; 23 Cri L Jour 709.

**231.** Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-charge altered. *Recall of witnesses when* summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

[1882—S. 231; 1872—S. 449; 1861—S. 247.]

**232. (1)** If any Appellate Court, or the High Court in the exercise of its powers of revision *Effect of material error.* or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

**(2)** If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

*Illustration.*

A is convicted of an offence, under section 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had it, it shall direct a new trial upon an amended charge; but, if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

[1882—S. 232; 1872—S. 451.]

**Section 230—Note 1 (contd.)**

[2] Where sanction has already been obtained for a prosecution on the same facts as those on which the new or altered charge is founded, fresh sanction is not necessary. ('03) 30 Cal 905 (908) (DB) & (Vol 7) 1920 Lah 367 (369, 370) : 1919 Pun Re No. 31 Cr : 21 Cri L Jour 230 (DB) & ('79) 4 Cal 712 (713) (DB).

[3] Where the facts on which the new or altered charge is founded are not the same as those on which the sanction was based originally, a fresh sanction is necessary. (Vol 13) 1926 Rang 169 (171) : 4 Rang 131 : 27 Cri L Jour 1075 (DB) & (Vol 11) 1924 Pat 377 (379) : 24 Cri L Jour 478.

**Section 231 — Note 1**

[1] The section is mandatory and the Court is bound to allow the prosecution and accused to recall and examine any witness who may have been already examined. (Vol 19) 1932 Cal 486 (487) : 33 Cri L Jour 265 (DB) & (Vol 14) 1927 Pat 398 (400) : 6 Pat 832 : 28 Cri L Jour 769 (DB) & (Vol 11) 1924 All 665 (665, 666) : 25 Cri L Jour 798.

[2] The right is not confined to the witnesses on whose evidence the alteration in or addition to the charge may be based. (Vol 13) 1926 Lah 60 (61) : 26 Cri L Jour 1497.

[3] The right of the prosecution and the accused is an absolute one and does not depend on the question whether the examination of the witnesses is necessary to avoid prejudice in the conduct of the case. (Vol 16) 1929 Mad 200 (201) : 52 Mad 346 : 30 Cri L Jour 223 & (Vol 19) 1932 Cal 486 (486, 487) : 33 Cri L Jour 265 (DB).

[4] No application made for the re-calling of any witnesses and their examination—It cannot be subsequently complained that the examination was not allowed. (Vol 27) 1940 Pat 355 (359) : 41 Cri L Jour 931 : 19 Pat 413 (DB) & (Vol 17) 1930 All 215 (216) : 52 All 455 : 32 Cri L Jour 22.

[5] A request to summon a fresh witness can only be refused on the ground that the evidence of the witness is not thought by the Court to be material. (Vol 27) 1940 Pat 355 (359) : 41 Cri L Jour 931 : 19 Pat 413 (D B).

[6] Even where a charge is amended under the direction of the High Court, the Court is bound to allow the examination. (Vol 8) 1921 Cal 605 (606) : 25 Cri L Jour 524 (DB).

[7] Where in the course of a trial the Magistrate

alters the charge and decides to commit the case to the sessions under S. 347, this section has no application. (Vol 18) 1931 All 434 (435) : 53 All 692 : 32 Cri L Jour 849.

**Section 232 — Note 1**

[1] Where a person is convicted of an offence, and the Appellate Court or the High Court is of the opinion that he has been misled in his defence by the absence of a charge or by an error in the charge, a re-trial may be ordered on an amended charge. (Vol 29) 1942 Pat 143 (144) : 43 Cri L Jour 134 & (Vol 3) 1916 Lah 52 (53) : 17 Cri L Jour 454 : 1916 Pun Re No. 33 Cr (D B) & ('03) 7 Cal W N 301 (303, 304) & (Vol 9) 1922 Lah 135 (136, 137) : 23 Cri L Jour 5 & ('02) 29 Cal 481 (482) (D B). [See (Vol 3) 1916 Mad 1222 (1222) : 16 Cri L Jour 737 (D B).]

[See also (Vol 10) 1923 Pat 1 (4) : 23 Cri L Jour 625 : 2 Pat 134 (S B).]

[2] Where an accused is charged with one offence and convicted of a different offence without a charge being framed in respect of it, a re-trial can be ordered if it is found that he has been misled in his defence by the absence of a charge. ('12) 13 Cri L Jour 593 (594) : 40 Cal 168 (D B) & (Vol 11) 1924 Mad 584 (584, 585) : 25 Cri L Jour 396 (D B) & (Vol 1) 1914 Cal 663 (663) : 41 Cal 743 : 15 Cri L Jour 190 (D B) & ('09) 9 Cri L Jour 406 (406) (D B) (Mad) & (Vol 14) 1927 All 75 (75, 76) : 27 Cri L Jour 1351 & (Vol 14) 1927 Rang 32 (32) : 4 Rang 355 : 27 Cri L Jour 1360 & ('90) 1890 Rat 529 (530).

[3] Where a charge is framed in the alternative form in a case in which the Code does not authorize the charge to be framed in such a form and the accused is thereby misled into pleading guilty to one of the offences instead of pleading not guilty to both the charges, a re-trial may be ordered. ('86) 10 Bom 124 (129, 130) (D B).

[4] Previous conviction of the accused intended to be used for the purpose of enhancing the sentence—Charge omitting to specifically allege the previous conviction—Accused on conviction, awarded higher punishment—Sentence is liable to be reduced on appeal. ('11) 12 Cri L Jour 233 (234).

[5] Accused not misled in his defence by the absence of the charge or the error in the charge—Defect in the proceedings does not afford sufficient ground for ordering a re-trial. (Vol 29) 1942 Sind 102 (102) : 43 Cri L Jour 799 : I L R (1942) Kar 112 & (Vol 4) 1917 Mad 687 (688) : 17 Cri L Jour 334 & (Vol 16) 1929 Pat 712 (714) : 9 Pat 642 : 30 Cri L Jour 891 (D B) & (Vol 19) 1932 Pat

*Joinder of Charges.*

232. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the case mentioned in sections 234, 235, 236 and 239.

*Illustration.*

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

[1882—S. 233; 1872—S. 452; 1861—S. 241.]

**Section 232—Note 1 (contd.)**

215 (216) : 11 Pat 523 : 33 Cri L Jour 864 (DB) \* (Vol 11) 1924 Bom 502 (503) : 49 Bom 81 : 26 Cri L Jour 1000 (D B) \* (Vol 16) 1929 Lah 867 (867) : 30 Cri L Jour 702 \* (Vol 19) 1932 Cal 461 (462) : 59 Cal 113 : 33 Cri L Jour 549 \* (Vol 5) 1918 Lah 397 (400) : 1917 Pun Re No. 29 Cr : 18 Cri L Jour 575 (D B) \* (Vol 18) 1931 Mad 225 (227) : 32 Cri L Jour 753 \* (Vol 18) 1931 Cal 410 (413) : 58 Cal 1303 : 32 Cri L Jour 844 (D B).

[6] The fact that the accused was defended by a pleader who did not raise any objection to the proceedings is a factor to be considered while determining the question of prejudice to the accused. ('86) S All 665 (668) \* (Vol 7) 1920 All 72 (73) : 21 Cri L Jour 410 \* (Vol 2) 1915 Sind 50 (52) : 16 Cri L Jour 573 : 9 Sind L R 37 (D B).

[7] Re-trial must be from the point at which the irregularity occurred and not from the very beginning. (Vol 29) 1942 Sind 103 (103) : I L R (1942) Kar 112 : 43 Cri L Jour 799 \* (Vol 12) 1925 Nag 147 (149) : 25 Cri L Jour 1152.

[8] Where punishment already suffered by the accused was sufficient, the Court, held, would decline to make an order for re-trial. ('02) 29 Cal 481 (482) (D B).

**SECTION 233 — SYNOPSIS.**

1. Joinder of charges and joint trials.
2. Scope and object of the section.
3. Distinct offences—Illustration.
4. Separate charges.
5. Non-compliance with the section.
6. Counter-cases.

1. Joinder of charges and joint trials.—[1] The object of exception is to avoid trouble to witnesses and also to combine into one trial offences in which evidence would overlap. ('08) 8 Cri L Jour 191 (195) : 1 Sind L R 73 (D B) \* (Vol 12) 1925 Mad 690 (697) : 49 Mad 74 : 26 Cri L Jour 1513.

[2] The sections coming under the exception are, so framed as to minimise the danger of prejudice to the accused by the joining together of more than one offence in the same trial. (Vol 3) 1916 Mad 550 (552) : 16 Cri L Jour 323 (D B).

[3] Of these exceptions, Ss. 234, 235 and 236 apply to cases where one person may be dealt with at one trial for more than one offence, while S. 239 applies to the trial of more persons than one jointly. (Vol 1) 1914 Low Bur 263 (264) : 7 Low Bur 272 : 16 Cri L Jour 44 (DB) \* (Vol 8) 1921 All 246 (247) : 22 Cri L Jour 657 (D B) \* ('08) 8 Cri L Jour 11 (13) : 4 Nag L R 71.

[4] The principles as to joinder of charges and joint trial of accused persons embodied in Ss. 233 to 239 are applicable to the trial of even summons cases. ('05) 2 Cri L Jour 739 (744) : 3 Low Bur 52 (F B) \* (Vol 1) 1914 Cal 603 (606) : 41 Cal 694 : 15 Cri L Jour 73 (D B) \* ('12) 13 Cri L Jour 124 (124) (Mad) \* (Vol 19) 1932 Mad 497 (500) : 33 Cri L Jour 589.

[5] The principles as to joinder of charges and joint trial of persons apply to inquiries under S. 107. ('04) 1 Cri L Jour 58 (60) (D B) (Cal).

[6] No objection can be taken to the commitment on account of any misjoinder of charges or joint inquiry. (Vol 29) 1942 Bom 212 (213) : 43 Cri L Jour 773 : I L R

(1942) Bom 531 \* ('02) 26 Mad 592 (594) (DB). (It is open to the Sessions Judge to try the accused separately.) (1900) 1900 All W N 206 (206). (Do.) \* ('05) 2 Cri L Jour 432 (433) (D B) (Bom) \* (Vol 6) 1919 Mad 190 (191) 20 Cri L Jour 514 (D B) \* (Vol 16) 1929 Nag 237 (237) 30 Cri L Jour 404.

[7] It is the multiplicity of charges which vitiates the trial and prejudices the accused in his defence and not the number of offences he is convicted of. (Vol 33) 194 Sind 23 (24, 25) : 47 Cri L Jour 512 : I L R (1945) Ka 100 (D B) \* (Vol 25) 1938 Sind 171 (173) : 39 Cri L Jour 890 : I L R (1939) Kar 204 (D B).

[See also (Vol 25) 1938 P C 130 (133, 134) : 39 Cri L Jour 452 : I L R (1938) 2 Cal 295 : 65 Ind App 158 : 3 Sind L R 476 (P C).]

[8] Magistrate finding that framing charges against all accused will result in misjoinder of charges — He can direct new trial in respect of some of them and need not frame charges against them. (Vol 25) 1938 Cal 258 (261) I L R (1938) 1 Cal 588 : 39 Cri L Jour 596 (D B).

[See also (Vol 23) 1936 Rang 474 (475) : 38 Cri L Jour 183 (D B).]

2. Scope and object of the section.—[1] The provisions of this section are mandatory. ('12) 13 Cri L Jour 593 (593) : 40 Cal 168 (D B) \* (Vol 12) 1925 Ca 341 (345) : 52 Cal 253 : 26 Cri L Jour 487 (D B) \* (Vol 8) 1921 Pat 291 (292) : 21 Cri L Jour 619 (D B).

[2] The provisions of this rule must be strictly applied (Vol 8) 1921 All 246 (247) : 22 Cri L Jour 657 (D B) \* (Vol 3) 1916 Mad 110 (115) : 39 Mad 527 : 16 Cri L Jour 593 (F B) \* ('03) 1903 Pun Re No. 17 Cr, p. 44 (46).

[3] Separate trial is the rule and joint trial the exception. (Vol 10) 1923 All 88 (98) : 24 Cri L Jour 155 \* (Vol 10) 1923 All 126 (126) : 45 All 223 : 24 Cr L J 149

[4] The exceptions must be strictly construed and applied so as not to defeat the right of independent trial conferred by this section. (Vol 5) 1918 Pat 168 (169, 170) : 3 Pat L Jour 124 : 19 Cri L Jour 673 (D B) \* (Vol 7) 1920 Pat 230 (231) : 5 Pat L Jour 11 : 21 Cri L Jour 161 (D B) \* (Vol 4) 1917 All 404 (404) : 38 All 457 : 18 Cri L Jour 47 (D B) \* ('13) 14 Cri L Jour 116 (117) (DB) (All) \* ('05) 2 Cri L Jour 34 (36) : 1905 Pun Re No. 2 Cr (D B).

[5] The section has been enacted for the benefit of the accused. ('05) 2 Cri L Jour 34 (36) : 1905 Pun Re No. 2 Cr (D B).

[6] Separate charge for every distinct offence and separate trial for every such charge are required for the following reasons:

(a) To notify accused of the charges he has to meet. (Vol 3) 1916 Cal 693 (697) : 16 Cri L Jour 641 (D B).

(b) To avoid embarrassment to the accused and the Judge and also to eliminate the possibility of his being prejudiced. ('85) 7 All 174 (177) (F B) \* (Vol 8) 1921 All 19 (21) : 22 Cri L Jour 641 \* ('91) 15 Bom 491 (497) (D B) \* (Vol 3) 1916 Mad 550 (552) : 16 Cri L Jour 323 (D B) \* (Vol 26) 1939 Bom 129 (143) : 40 Cri L Jour 579 (D B) \* ('08) 2 Low Bur 10 (12) \* (Vol 12) 1925 Mad 690 (697) : 49 Mad 74 : 26 Cri L Jour 1513.

[See (Vol 26) 1939 Mad 59 (59) : 40 Cri L Jour 211 (D B).]

Section 233—Note 2 (*contd.*)

[7] This section applies not only to original trials but also to an Appellate Court in altering a finding under S. 423. ('05) 2 Cri L Jour 694 (695); 1905 Pun Re No. 38 Cr.

[8] The section applies also to an appellate Court altering the finding in the trial of two appeals arising out of two separate cases. (Vol 15) 1928 Cal 230 (230, 231) : 29 Cri L Jour 512 (DB).

3. **Distinct offences—Illustration.**—[1] "Distinct offence" in the section means, offences which have no connexion with each other. (Vol 26) 1939 Bom 129 (138) : 40 Cri L Jour 579 (DB) & (Vol 26) 1939 Cal 32 (33) : 40 Cri L Jour 290 (DB) & (Vol 3) 1916 Cal 693 (705) : 16 Cri L Jour 641 (DB).

[2] The following are illustrations of distinct offences:

(a) Offences falling under different sections of the same penal enactment. ('41) I L R (1941) All 36 (38). (Offences falling under different sections of Penal Code.) & (Vol 27) 1940 Pesh 10 (11) : 41 Cri L Jour 543. (Do.) & (Vol 26) 1939 Bom 129 (138) : 40 Cri L Jour 579 (DB). (Do.) & (Vol 26) 1939 Cal 32 (33) : 40 Cri L Jour 290 (DB). (Do.) & (Vol 20) 1933 Mad 434 (434) : 34 Cri L Jour 1183. (Do.) & ('08) 8 Cri L Jour 497 (502, 504) : 4 Low Bur Rul 294 (FB). (Do.) & ('02) 15 C P L R Cr 53 (54). (Do.) & (Vol 20) 1933 Lah 512 (512) : 34 Cri L Jour 402 (DB). (Do.) & (Vol 18) 1931 Oudh 86 (87) : 6 Luck 441 : 32 Cri L Jour 540. (Do.) & (Vol 1) 1914 Lah 455 (456) : 1914 Pun Re No. 20 Cr. : 15 Cri L Jour 172. (Offences falling under different sections of a special Act.) & ('10) 11 Cri L Jour 211 (212) (Lah). (Do.) & (Vol 18) 1931 All 705 (705, 706) : 32 Cri L Jour 1031. (Do.) & (Vol 24) 1937 Nag 188 (189) : 38 Cri L Jour 542 : I L R (1939) Nag 297. (Do.)

(b) Offences falling under different penal enactments. (Vol 20) 1933 Lah 231 (231, 232) : 34 Cri L Jour 637. (Offences falling under Penal Code and some other special or local law.) & ('10) 11 Cri L Jour 293 (294) (DB) (Mad). (Do.) & (Vol 21) 1934 Oudh 457 (459) : 35 Cri L Jour 1417 : 10 Luck 235 (DB). (Do.) & ('02) 29 Cal 385 (386) (DB). (Do.) & (Vol 15) 1928 Lah 34 (35) : 29 Cri L Jour 521. (Do.) & (Vol 5) 1918 Lah 148 (148) : 1917 Pun Re No. 44 Cr. : 19 Cri L Jour 100 (DB). (Do.) & (Vol 29) 1942 Oudh 462 (463) : 43 Cri L Jour 912. (Offences falling under different special Acts.)

[See however (Vol 23) 1936 Cal 686 (687) : 38 Cri L Jour 1 (DB).] (Held, offence under S. 283, Penal Code, of creating obstruction in river bed by extending a tank and making banks and offence under S. 76B, Bengal Embankment Act, are not distinct offences within the meaning of S. 403.)

(c) Offences committed on different occasions, though under the same section. (Vol 31) 1944 Cal 224 (227) : 45 Cri L Jour 666 : I L R (1944) 1 Cal 398 (DB) & (Vol 30) 1943 Cal 564 (564, 565) : 45 Cri L Jour 123 & (Vol 27) 1940 Mad 509 (510) : 41 Cri L Jour 581 (DB) & (Vol 26) 1939 Bom 129 (138) : 40 Cri L Jour 579 (DB) & (Vol 24) 1937 Sind 304 (304) : 32 Sind L R 30 : 39 Cri L Jour 59 (DB) & (Vol 5) 1918 All 399 (400) : 40 All 565 : 19 Cri L Jour 967 & (Vol 11) 1924 All 316 (317) : 46 All 54 : 25 Cri L Jour 466 & (Vol 19) 1932 Bom 277 (278) : 33 Cri L Jour 699 (DB) & (Vol 15) 1928 Lah 637 (637) : 10 Lah 158 : 29 Cri L Jour 737 & (Vol 19) 1932 Lah 615 (615) : 34 Cri L Jour 458 & (Vol 3) 1916 Mad 762 (763) : 16 Cri L Jour 717 & ('97) 11 C P L R Cr 6 (7). (Abduction of each girl is a distinct offence.) & ('97) 1 Oudh Cas 4 (7). (Kidnapping.) & (Vol 9) 1922 Oudh 250 (251) : 25 Oudh Cas 151 : 23 Cri L Jour 687 & (Vol 8) 1921 Pat 291 (291) : 21 Cri L Jour 619 (DB) & (Vol 20) 1933 Pat 488 (489) : 34 Cri L Jour 892 & (26) 27 Cri L Jour 872 (873) (DB) (Sind).

(d) Offences against different persons. (Vol 26) 1939 Cal 32 (33) : 40 Cri L Jour 290 (DB) & ('04) 1 All L Jour 225n (225n) & ('04) 1 Cri L Jour 364 (364) : 26 All 195 &

(26) 27 Cri L Jour 872 (873) (DB) (Sind) & (Vol 9) 1922 Oudh 250 (251) : 25 Oudh Cas 151 : 23 Cri L Jour 687 & (Vol 3) 1916 Cal 693 (699, 706) : 16 Cri L Jour 641 (DB).

[3] Following offences of the same kind committed on one occasion though consisting of parts are not distinct offences but are to be treated as constituting only one offence.

(a) The theft of several articles from one person or more at the same time. (Vol 23) 1936 Rang 94 (95) : 37 Cri L Jour 530 & (Vol 13) 1926 Nag 89 (90) : 26 Cri L Jour 1495 & (Vol 7) 1920 Cal 571 (573) : 21 Cri L Jour 682 (DB).

(b) The receiving of stolen property belonging to different owners or the gains of different thefts but received at the same time. (Vol 10) 1923 All 547 (547, 548) : 45 All 485 : 24 Cri L Jour 632 (DB) & (Vol 10) 1923 Cal 557 (558) : 50 Cal 594 : 24 Cri L Jour 707 (DB) & ('89) 1839 Pun Re No. 26 Cr, p. 85 (86) (FB) & (Vol 21) 1934 Pat 483 (485) : 13 Pat 161 : 36 Cri L Jour 342 (DB).

(c) The making of any number of false allegations in one statement. ('09) 10 Cri L Jour 150 (154) : 36 Cal 808 (DB) & ('71) 6 Mad H C R App xxvii (xxvii).

[See however (Vol 24) 1937 Pat 176 (177, 178) : 38 Cri L Jour 97.]

(d) The misappropriation of several sums of money not proved to be committed on different occasions. ('87) 14 Cal 128 (132) (DB). (In regard to one person.) & ('13) 14 Cri L Jour 219 (222) (DB) (Cal). (In respect of several books of the same estate.) & (Vol 8) 1921 Cal 114 (115) : 22 Cri L Jour 666 (DB). (In respect of several articles.)

(e) A single use of several forged documents as genuine, in a Court of law. ('93) 20 Cal 413 (417) (DB).

(f) Receiving a bribe partly on one day and partly on another. ('01) 5 Cal W N 332 (335) (DB) & ('11) 12 Cri L Jour 217 (224) : 1911 Pun Re No. 11 Cr.

(g) An alternative charge of perjury. ('84) 10 Cal 937 (945) (SB).

4. **Separate charges.**—[1] The rule that there should be a distinct charge in respect of every offence charged even though there may be a joint trial in respect of them. Mere fact that in one part of charge-sheet, the charges are mentioned together does not invalidate the charge-sheet where actually separate charges have been framed. (Vol 27) 1940 Oudh 396 (396) : 41 Cri L Jour 725 & (Vol 25) 1938 P C 130 (135) : 39 Cri L Jour 452 : I L R (1938) 2 Cal 295 : 65 Ind App 158 : 32 Sind L R 476 (PC).

5. **Non-compliance with the section.**—[1] Single charge framed in respect of offences not falling within the exceptions and jointly tried—Irregularity in mode of trial and framing charges is not one curable under S. 537. (Vol 32) 1945 Pat 398 (399) : 24 Pat 303 (DB) & (Vol 31) 1944 Bom 306 (312) : I L R (1944) Bom 723 (DB) & (Vol 31) 1944 Cal 224 (227, 228) : 45 Cri L Jour 666 : I L R (1944) 1 Cal 398 (DB) & (Vol 29) 1942 Cal 237 (239) : 43 Cri L Jour 553 (DB) & (Vol 23) 1942 Oudh 462 (464) : 43 Cri L Jour 912 & (Vol 29) 1942 Oudh 441 (442, 443) : 43 Cri L Jour 776 : 18 Luck 403 & (Vol 26) 1939 Bom 129 (138) : 40 Cri L Jour 579 (DB) & (Vol 25) 1938 Sind 164 (168) : 39 Cri L Jour 881 : I L R (1939) Kar 64 (DB) & (Vol 2) 1915 All 462 (462) : 38 All 42 : 16 Cri L Jour 813 & (Vol 14) 1927 All 223 (224) : 49 All 312 : 28 Cri L Jour 171 & ('07) 5 Cri L Jour 341 (342) : 30 Mad 328 (DB).

[2] Separate charges framed in respect of distinct offences not falling within the exceptions and tried jointly—Irregularity in mode of trial not curable under S. 537. (Vol 28) 1941 Cal 707 (710) : 43 Cri L Jour 389 : I L R (1941) 2 Cal 319 (DB) & (Vol 9) 1922



234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, (whether in respect of the same person or not), he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law :

[Provided that, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable

Section 233 — Note 5 (contd.)

Lah 144 (145) : 22 Cri L Jour 505 & (Vol 18) 1951 All 705 (706) : 32 Cri L Jour 1031 & (102) 4 Bom L R 440 (441) & (92) 26 Mad 125 (127) (DB) & (Vol 18) 1931 Oudh 86 (88) : 6 Luck 411 : 32 Cri L Jour 546 & (Vol 3) 1916 Cal 188 (195) : 42 Cal 957 : 16 Cri L Jour 497 (DB) & (Vol 8) 1921 Low Bur 51 (55) : 11 Low Bur Rul 73 : 23 Cri L Jour 49 & (Vol 1) 1914 Low Bur 263 (264) : 7 Low Bur Rul 272 : 16 Cri L Jour 44 (DB) & (Vol 21) 1934 Oudh 457 (459) : 10 Luck 235 : 35 Cri L Jour 1417 (DB) & (Vol 20) 1933 Nag 327 (328) : 34 Cri L Jour 673 & (33) 1933 Mad W N 326 (328) & (Vol 8) 1921 Lab 381 (382, 383) : 1 Lah 562 : 21 Cri L Jour 626 (DB) & (Vol 15) 1928 All 417 (417) : 30 Cri L Jour 214.

[3] Single charge framed in respect of several distinct offences and tried jointly—Offences falling within the exceptions — Irregularity in framing charges is curable under S. 537. (Vol 27) 1940 Pat 603 (605) : 41 Cri L Jour 523 (DB) & (Vol 27) 1940 Oudh 395 (396) : 41 Cri L Jour 725 & (Vol 25) 1938 P C 130 (135) : 39 Cri L Jour 452 : 65 Ind App 158 : 32 Sind L R 476 : 1 L R (1938) 2 Cal 295 (P C).

[But see (Vol 17) 1930 Sind 62 (64) : 30 Cri L Jour 1073 (DB). (There was also prejudice in this case.)]

[4] A conviction for an offence different from that charged in a case not covered by S. 237 or S. 238 is an illegality not curable under S. 537. (Vol 26) 1939 All 665 (667) : 40 Cri L Jour 948.

[See also (Vol 31) 1944 All 137 (143) : 46 Cri L Jour 38 : 1 L R (1944) All 403 (FB).]

[5] An objection as to non-compliance with the section regarding the mode of trial can be taken for the first time even in appeal. (Vol 29) 1942 Oudh 441 (443) : 43 Cri L Jour 776 : 18 Luck 403 & (33) 1933 Mad W N 326 (328).

[6] Two out of the three offences charged separately under S. 409, Penal Code, and the third under S. 467, Penal Code—Accused pleading guilty in respect of the third—Held the other two charges under S. 409 could be tried jointly. (43) 1943-1 Mad L Jour 466 (467).

6. Counter-cases.—[1] Joint trial of the two parties to a riot is illegal and void. (Vol 31) 1944 Bom 146 (147) : 1 L R (1944) Bom 344 : 45 Cri L Jour 701 (DB). (Accused have not acted for a common purpose.) & (Vol 30) 1943 Pat 376 (376) : 45 Cri L Jour 308 & (Vol 11) 1924 Lah 104 (106, 107) : 4 Lah 376 : 25 Cri L Jour 68 (DB) & (Vol 12) 1925 Lah 149 (150) : 25 Cri L Jour 551 & (Vol 7) 1920 Low Bur 90 (90) : 22 Cri L Jour 707 & (103-04) 2 Low Bur Rul 106 (107).

[2] Rioting — Even committal should be separately made — Sessions Judge can try separately even in the case of joint committal. (81) 1881 Pun Re No. 22 Cr, p. 47 (49) (D B) & (67) 8 Suth W R Cr 47 (52) (FB) & (82) 1882 All W N 160 (161).

[3] The evidence for the prosecution in the trial of one party cannot be used as evidence for the defence in the other case and *vice versa*. (Vol 25) 1938 Oudh 249 (249) : 39 Cri L Jour 929.

[See also (Vol 31) 1944 Lah 377 (378) (DB).]

[See however (Vol 29) 1942 Oudh 444 (446) : 45 Cri L Jour 781. ((Vol 25) 1938 Oudh 249 : 39 Cri L Jour 929, explained.)]

[4] Simultaneous trial where it happens to be irregular and improper cannot justify the setting aside of the trial unless it has prejudiced the defence of accused. (101) 1 Cri L Jour 199 (203, 204) (DB) (Cal) & (Vol 15) 1928 All 593 (593, 595) : 50 All 457 : 30 Cri L Jour 337 (DB) & (Vol 12) 1925 Pat 152 (153) : 25 Cri L Jour 1018 & (Vol 12) 1925 Pat 619 (621) : 26 Cri L Jour 1179.

[See also (Vol 14) 1927 P C 26 (27) : 8 Lah 193 : 28 Cri L Jour 254 (P C).]

[5] The proper course to pursue is to give each party or faction a separate trial so as to enable its several members to be examined as witnesses in the case in which they are the complainants. (81) 1881 All W N 28 (29).

[6] The case against a person should be taken up first before the case in which he is the complainant. (Vol 12) 1925 Cal 1260 (1262) : 26 Cri L Jour 1615 (DB).

[See (32) 1932 Mad W N 692 (710).]

[7] If one case looks on its face stronger than the other, it can be heard first. (31) 1931 Mad W N 1316 (1317).

[8] Where the Judge tries each case to the conclusion and pronounces judgment in both he should be careful to keep an open mind and detach himself from extraneous circumstances. (Vol 20) 1933 Mad 367 (369) : 56 Mad 159 : 34 Cri L Jour 175 (FB) & (23) 29 Cri L Jour 1059 (1060) (Lah).

[9] Two separate trials — Judgment only one document — Decisions separate and distinct — Findings in each based on evidence in each case — Judgment in one case based on its own evidence — Procedure held not illegal and accused not prejudiced thereby. (Vol 23) 1936 Lah 294 (295, 296) : 37 Cri L Jour 1033.

[10] Cross-cases — Magistrate hearing evidence in each case separately — Same argument for both cases and one judgment delivered — Held, trial, though irregular, did not cause prejudice to accused. (Vol 22) 1935 Cal 548 (550) : 36 Cri L Jour 1339.

[11] Simultaneous trials of the two cases before two different Courts over one and the same occurrence are undesirable. (Vol 31) 1944 Bom 146 (147, 148) : 1 L R (1944) Bom 344 : 45 Cri L Jour 701 & (Vol 23) 1936 Lah 356 (356) : 37 Cri L J 510.

## SECTION 234 — SYNOPSIS.

1. Section applies to trials and not to committals.
2. "Whether in respect of the same person or not."
3. "More offences than one."
4. "Committed within the space of twelve months."
5. "Not exceeding three."
6. Offences of the same kind.

1. Section applies to trials and not to committals. — [1] Accused committed to trial on more than three charges—Commitment is not illegal. (Vol 4) 1917 Mad 612 (612) : 17 Cri L Jour 369.



under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.]

[1882 — S. 234; 1872 — S. 453.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 62.

#### Section 234 (*contd.*)

2. "Whether in respect of the same person or not". — [1] A person can be charged for offences of the same kind not exceeding three within a year, even if they were committed against several persons. (Vol 26) 1939 Cal 32 (33) : 40 Cri L Jour 290 (D B) \* (Vol 13) 1926 Pat 347 (348) : 27 Cri L Jour 909.

3. "More offences than one". — [1] The word "offence" is not intended to include every act so connected with that offence as to form part of the same transaction. (Vol 31) 1944 Sind 142 (144, 145) : I L R (1944) Kar 107 (DB) \* (Vol 21) 1934 Sind 57 (64) : 28 Sind L R 119 : 35 Cri L Jour 1337 (D B) \* ('05) 2 Cri L Jour 34 (37) : '1905 Pun Re No. 2 Cr (DB).

[2] A charged with an offence under S. 401 of the Penal Code — Charge based on several offences of theft and various acts of association extending over more than one year — The trial is not bad. (Vol 7) 1920 Cal 87 (88) : 47 Cal 154 : 21 Cri L Jour 886 (DB).

[3] A charged with the offence of waging war under S. 121 of the Penal Code — Charge based upon seventeen separate incidents ranging over a period of fifteen months — The trial is not bad. (Vol 12) 1925 Mad 690 (695) : 49 Mad 74 : 26 Cri L Jour 1513.

[4] A charged with the offence of falsification of accounts under S. 477A, Penal Code — Prosecution not restricted to only three instances of falsification — Any number of false entries or omission of entries may be proved. (Vol 18) 1931 Cal 8 (9) : 32 Cri L Jour 318 (DB) \* (Vol 2) 1915 Cal 296 (297) : 15 Cri L Jour 158 : 41 Cal 722 (DB).

[5] The printing of a seditious article on a particular date — The printing of another article of a similar nature on another date — The two offences can be tried together at one trial. ('08) 8 Cri L Jour 272 (277, 280) : 33 Bom 77 (DB).

[6] The section does not allow a single trial in respect of two transactions of the same kind, each of such transactions being made up of offences of different kinds. (Vol 4) 1917 Sind 40 (41) : 10 Sind L R 192 : 18 Cri L Jour 664 (DB).

[7] Accused charged with three offences of theft and three offences of dishonest misappropriation in alternative — Section does not apply. (Vol 31) 1944 Cal 224 (227, 228) : I L R (1944) 1 Cal 398 : 45 Cri L Jour 666 (DB).

[8] Two transactions each of such a nature that a charge in alternative for offence under S. 380 or S. 411, Penal Code, can be framed — Offences involved are not of same kind — Same accused involved in both the transactions cannot be jointly tried under S. 239 (c). (Vol 30) 1943 Mad 209 (209) : 44 Cri L Jour 413.

[9] Series of defalcations and falsifications of accounts to conceal the defalcations — But each defalcation and connected falsification being a separate transaction — Joint trial under Ss. 409 and 477A, I. P. C. for all the offences committed in one year not legal. (Vol 29) 1942 Pat 401 (405) : 43 Cri L Jour 625 : 21 Pat 113 (DB).

[10] The joint effect of Ss. 234 and 235, Cr. P. C., is not to sanction the joinder of all charges arising out of three transactions of the same kind carried out within space of twelve months unless it is clearly alleged at the trial that the three transactions were carried out in furtherance of a general conspiracy to commit such

offences. (Vol 28) 1941 Cal 707 (712) : 43 Cri L Jour 389 : I L R (1941) 2 Cal 319 (DB).

[11] The provisions of S. 239 (d), Cr. P. Code, cannot be combined with those of S. 234 so as to allow of three sets of offences committed in the course of three transactions or six offences in all being charged and tried together. (Vol 28) 1941 Rang 337 (339) : 43 Cri L Jour 448 : 1941 Rang L R 559.

[12] Person charged with several offences of the same kind — *Held*, there is no objection to his being freed on additional charges framed under S. 235 or S. 236. (Vol 31) 1944 Bom 306 (311) : I L R (1944) Bom 728 (DB.) \* (Vol 29) 1942 Pat 401 (405) : 43 Cri L Jour 625 : 21 Pat 113 (DB).

[13] Accused may be tried in batches of three offences at each trial under separate charges. (Vol 5) 1918 Pat 343 (344) : 19 Cri L Jour 255.

[14] The section does not bar a separate trial of the accused for each separate offence. ('10) 11 Cri L Jour 337 (337, 338) (DB) (Bom) \* ('78) 3 Cal 540 (541) (DB).

[15] The offences continue to be separate though there is only one trial for all of them. (Vol 21) 1934 Sind 185 (186) : 28 Sind L R 336 : 36 Cri L Jour 608 (DB).

4. "Committed within the space of twelve months." — [1] Offences extending over a period longer than a year — Single trial therefor is illegal — Defect is not curable under section 537. ('02) 25 Mad 61 (97) : 28 Ind App 257 (PC). (On appeal from and overruling 10 Mad L Jour 147 (FB), and also overruling 27 Cal 839 (FB).)

5. "Not exceeding three". — [1] A trial for more than three offences committed during the year is an illegality and not merely an irregularity covered by S 537. (Vol 28) 1941 Bom 156 (156, 157) : 42 Cri L Jour 571 (DB) \* (Vol 25) 1938 Sind 164 (168) : I L R (1939) Kar 64 : 39 Cri L Jour 881 (DB) \* ('37) 1937 Mad W N 209 (209) \* (Vol 23) 1936 Cal 693 (694) : 38 Cri L Jour 201 (DB) \* ('02) 25 Mad 61 (96, 97) : 28 Ind App 257 (PC).

[But see ('08) 7 Cri L Jour 95 (97) : 35 Cal 161 (DB).]

[2] Accused charged with three offences of theft and three offences of dishonest misappropriation in alternative — All six offences tried at one and same trial — Joinder of charges held illegal and not curable under S. 537. (Vol 31) 1944 Cal 224 (227, 228) : 45 Cri L Jour 666 : I L R (1944) 1 Cal 398 (DB).

[3] Where a person is charged with more than three offences at one trial, the Judge can, before the trial begins, strike off a charge or charges so as to reduce the number of charges to be tried to three. ('08) 8 Cri L Jour 281 (302, 303, 341) (Bom).

[4] After the trial begins, the illegality cannot be cured by the striking out of the extra charges. (Vol 31) 1944 Bom 306 (311) : I L R (1944) Bom 728 (DB) \* ('07) 5 Cri L Jour 94 (95, 96) : 29 Mad 569 \* (Vol 9) 1922 Cal 401 (401) : 49 Cal 555 : 24 Cri L Jour 86 (DB) \* (Vol 13) 1926 Lah 193 (194) : 27 Cri L Jour 793.

6. Offences of the same kind. — [1] The section does not apply where a person is accused of offences which are not of the same kind, such as criminal breach of trust and falsification of accounts. (Vol 24) 1937 Sind 1 (1) : 30 Sind L R 891 : 38 Cri L Jour 224 (DB) \* (Vol 13) 1926 Bom 110 (111) : 49 Bom 892 :

**235. (1)** If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

*Offence falling within two definitions.* (2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

*Acts constituting one offence, but constituting when combined a different offence.* (3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

#### Section 234 — Note 6 (contd.)

27 Cri L Jour 305 (DB) \* ('07) 5 Cri L Jour 311 (342) : 30 Mad 328 (DB.)

[ See ('13) 14 Cri L Jour 428 (429) : 40 Cal 318. ]

[2] The provisions of the section cannot be evaded by the omission to name the offences and sections of the statute in the charge, where in fact the accused has been charged with two offences which are not of the same kind. (Vol 24) 1937 Sind 293 (295) : 39 Cri L Jour 123 : 32 Sind L R 87 (DB).

#### SECTION 235 — SYNOPSIS.

1. Scope.
2. "Same transaction".
3. "Same transaction"—Illustrations.
4. "More offences than one".
5. "May be tried at one trial".
6. "Trial" includes conviction.
7. Sub-section (2).
8. "Constitute, when combined, a different offence"—Sub-section (3).
9. Joint trial for several charges not forming part of same transaction—Effect.
10. Offences forming part of same transaction — Jurisdiction to try.

1. Scope.—[1] The general rule that every offence should be charged separately applies, though there may be one trial for all such offences under the provisions of the section. (Vol 26) 1939 Cal 321 (322) : 40 Cri L Jour 649 (DB) \* (Vol 25) 1938 Bom 481 (484) : I L R (1939) Bom 42 : 40 Cri L Jour 118 (DB) \* ('03) 1 Cri L Jour 364 (364) : 26 All 195 \* (Vol 14) 1927 Cal 17 (20) : 54 Cal 237 : 28 Cri L Jour 99 (DB). (Overruled on another point in (Vol 26) 1939 P C 47 : 1941 Rang L R 789n : 18 Pat 234 : 66 Ind App 66 : I L R (1939) Kar (P C) 123 : 40 Cri L Jour 364 (P C).)

[2] Separate trial for different offences being the rule and joint trial the exception, the burden of proof is on the prosecution to show that the case falls within the exceptions to the general rule. (Vol 28) 1941 Mad 339 (342) : 42 Cri L Jour 414 \* ('38) I L R (1938) 1 Cal 98 (106) (DB) \* (Vol 10) 1923 All 88 (88) : 24 Cri L Jour 155 \* (Vol 2) 1915 All 380 (381) : 16 Cri L Jour 795.

[3] Anything contained in the Criminal Law Amendment Act does not bar the operation of the provisions of the Code of Criminal Procedure as contained in Ss. 196, 235, 236 and 237. (Vol 24) 1937 Cal 99 (114) : 38 Cri L Jour 818 (SB).

2. "Same transaction". — [1] The term "same transaction" should be interpreted, not in any special or technical way, but in its ordinary etymological meaning of "an affair" or a "carrying through". (Vol 31) 1944 Bom 306 (311) : I L R (1944) Bom 728 (DB) \* (Vol 23) 1936 Bom 154 (156) : 60 Bom 148 : 37 Cri L Jour 688 (DB) \* (Vol 12) 1925 Mad 690 (698) : 26 Cri L Jour 1513 :

49 Mad 74 \* ('97-01) 1 Upp Bur Rui 31 (40) \* ('10) 11 Cri L Jour 293 (291) (Mad) \* ('05) 2 Cri L Jour 578 (581) : 30 Bom 49 (DB) \* (Vol 21) 1931 Pat 483 (484, 485) : 13 Pat 161 : 36 Cri L Jour 342 (DB).

[See however (Vol 5) 1918 Bom 117 (121) : 43 Bom 147 : 20 Cri L Jour 71 (DB). (Wide meaning to be given.)]

[2] Illustrations, which are not exhaustive, may be taken as guide in the interpretation of "same transaction". ('91) 15 Bom 491 (495) (DB) \* ('05) 2 Cri L Jour 578 (581) : 30 Bom 49 (DB) \* (Vol 10) 1923 All 88 (88) : 24 Cri L Jour 155 \* ('10) 11 Cri L Jour 293 (294) (Mad) \* ('08) 8 Cri L Jour 191 (195) : 1 Sind L R 73 (DB).

[3] Whether several offences are connected together so as to form one transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. ('02) 27 Bom 135 (138, 139) (DB) \* (Vol 34) 1947 Pat 312 (220) : 25 Pat 503 (DB) \* ('44) 25 Pat L Tim. 173 (174, 175) \* (Vol 33) 1946 Oudh 26 (32) (DB) \* (Vol 31) 1944 Bom 306 (311) : I L R (1944) Bom 728 (DB) \* (Vol 31) 1944 Oudh 122 (128) : 45 Cri L Jour 538 : 19 Luck 493 (DB) \* (Vol 29) 1942 Oudh 441 (442) : 43 Cri L Jour 776 : 18 Luck 403 \* (Vol 28) 1941 Sind 121 (126) : 42 Cri L Jour 715 (DB) \* (Vol 26) 1939 Bom 129 (141) : 40 Cri L Jour 579 (DB) \* ('38) I L R (1938) 1 Cal 98 (108) (DB) \* (Vol 9) 1922 Lah 144 (145) : 22 Cri L Jour 505 \* (Vol 21) 1934 Mad 88 (94) : 57 Mad 545 : 35 Cri L Jour 631 (DB) \* (Vol 4) 1917 Low Bur 5 (5) : 19 Cri L Jour 34 \* (Vol 22) 1935 Nag 149 (154) : 36 Cri L Jour 1153 : 31 Nag L R 318 \* (Vol 12) 1925 All 301 (303) : 26 Cri L Jour 734 \* (Vol 5) 1918 Pat 343 (344) : 19 Cri L Jour 255 \* (Vol 25) 1938 Nag 283 (285) : I L R (1939) Nag 686 : 40 Cri L Jour 197. (Unity of time, place and purpose ought to be looked to.)

[4] Proximity of time is not so essential as continuity of action and purpose. (Vol 32) 1945 Pat 293 (294) : 24 Pat 144 : 46 Cri L Jour 652 (DB) \* (Vol 33) 1946 Oudh 26 (32) (DB) \* (Vol 28) 1941 Rang 337 (339) : 43 Cri L Jour 448 : 1941 Rang L R 559 \* ('38) I L R (1938) 1 Cal 98 (107, 108) (DB) \* (Vol 23) 1936 Bom 154 (157) : 60 Bom 148 : 37 Cri L Jour 688 (DB) \* (Vol 16) 1929 Bom 128 (131) : 53 Bom 344 : 30 Cri L Jour 588 (DB) \* (Vol 11) 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cri L Jour 1082 \* (Vol 7) 1920 Lah 265 (267) : 1 Lah 562 : 21 Cri L Jour 626 (DB) \* (Vol 4) 1917 Low Bur 5 (5) : 19 Cri L Jour 34 \* (Vol 22) 1935 Nag 149 (154) : 36 Cri L Jour 1153 : 31 Nag L R 318.

[5] The mere proximity of time between several acts will not necessarily constitute the acts parts of the same transaction. ('38) I L R (1938) 1 Cal 98 (107) (DB) \* ('12) 13 Cri L Jour 485 (486) (Low Bur) \* ('02) 26 Mad 125 (127) (DB).

*Illustrations.*

to sub-section (1)—

(a) *A* rescues *B*, a person in lawful custody, and in so doing causes grievous hurt to *C*, a constable in whose custody *B* was. *A* may be charged with, and convicted of, offences under sections 225 and 333 of the Indian Penal Code.

(b) *A* commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with *B*'s wife. *A* may be separately charged with, and convicted of, offences under sections 454 and 497 of the Indian Penal Code.

(c) *A* entices *B*, the wife of *C*, away from *C*, with intent to commit adultery with *B*, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under sections 498 and 497 of the Indian Penal Code.

(d) *A* has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under section 466 of the Indian Penal Code. *A* may be separately charged with, and convicted of, the possession of each seal under section 473 of the Indian Penal Code.

(e) With intent to cause injury to *B*, *A* institutes a criminal proceeding against him, knowing that there is no just or lawful ground for such proceeding; and also falsely accuses *B* of having committed an offence, knowing that there is no just or lawful ground for such charges. *A* may be separately charged with, and convicted of, two offences under section 211 of the Indian Penal Code.

(f) *A*, with intent to cause injury to *B*, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, *A* gives false evidence against *B*, intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with, and convicted of, offences under sections 211 and 194 of the Indian Penal Code.

(g) *A*, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. *A* may be separately charged with, and convicted of, offences under sections 147, 325 and 152 of the Indian Penal Code.

(h) *A* threatens *B*, *C* and *D* at the same time with injury to their persons with intent to cause alarm to them. *A* may be separately charged with, and convicted of, each of the three offences under section 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time.

to sub-section (2)—

(i) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under sections 352 and 323 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property, for the purpose of concealing them. *A* and *B* thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with, and convicted of, offences under sections 411 and 414 of the Indian Penal Code.

(k) *A* exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. *A* may be separately charged with, and convicted of, offences under sections 317 and 304 of the Indian Penal Code.

(l) *A* dishonestly uses a forged document as genuine evidence, in order to convict *B*, a public servant, of an offence under section 167 of the Indian Penal Code. *A* may be separately charged with, and convicted of, offences under sections 471 (read with 466) and 196 of the same Code.

to sub-section (3)—

(m) *A* commits robbery on *B*, and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under sections 323, 392 and 394 of the Indian Penal Code.

[1892 — S. 235 ; 1872 — S. 454 ; 1861 — S. 240.]

### Section 235 — Note 2 (contd.)

[6] Intervals of time between the various acts will not necessarily import want of continuity. (Vol 33) 1946 Oudh 26 (32) (DB) \* ('38) 1 I L R (1938) 1 Cal 98 (108) (DB) \* ('02) 27 Bom 135 (138) (DB) \* ('02) 2 Low Bur Rul 19 (21) \* ('06) 6 Cri L Jour 28 (29, 30) : 1907 Upp Bur Rul Cr 5 \* (Vol 4) 1917 Pat 287 (288) : 18 Cri L Jour 789.

[7] Length of the interval may be an important element in determining the connection between the several acts. (Vol 23) 1936 Bom 154 (157) : 60 Bom 148 : 37 Cri L Jour 688 (DB) \* ('02) 27 Bom 135 (138) (DB) \* (Vol 4) 1917 Sind 40 (41) : 10 Sind L R 192 : 18 Cri L Jour 664 (DB) \* (Vol 22) 1935 Nag 149 (154) : 36 Cri L Jour 1153 : 31 Nag L R 318.

[8] The transaction; itself need not be a criminal transaction, an offence can be committed in the course of a transaction the aim of which is perfectly legitimate. (Vol 22) 1935 Nag 149 (154) : 36 Cri L Jour 1153 : 31 Nag L R 318.

[9] The mere existence of some general purpose or design is not sufficient. It must be something parti-

cular and definite. (Vol 31) 1944 Bom 306 (311) : 1 I L R (1944) Bom 728 (DB) \* (Vol 28) 1941 Rang 337 (338, 339) : 43 Cri L Jour 448 : 1941 Rang L R 559 \* (Vol 26) 1939 Bom 129 (141) : 40 Cri L Jour 579 (DB) \* (Vol 23) 1936 Bom 154 (158) : 60 Bom 148 : 37 Cri L Jour 688 (DB) \* (Vol 18) 1931 Pat 102 (103, 104) : 32 Cri L Jour 611 \* ('10) 11 Cri L Jour 253 (261) : 33 Mad 502 (DB) \* (Vol 11) 1924 Lah 734 (737, 738) : 25 Cri L Jour 1020.

[But see (Vol 13) 1926 Sind 171 (173) : 27 Cri L Jour 243 : 26 Sind L R 18 (DB). (Offence of conspiracy to cheat the public.)]

[10] Where a transaction comes to an end either by attainment of its object or by being abandoned, a subsequent transaction, though identical in its nature and having the same purpose, is not the same transaction as the previous one. (Vol 28) 1941 Rang 337 (339) : 43 Cri L Jour 448 : 1941 Rang L R 559 \* (Vol 23) 1936 Bom 154 (158) : 60 Bom 148 : 37 Cri L Jour 688 (DB) \* (Vol 26) 1939 Bom 129 (141) : 40 Cri L Jour 579 (DB) \* (Vol 29) 1942 Pat 401 (405) : 43 Cri L Jour 625 : 21 Pat 113 (DB). (Each defalcation committed as

**Section 235 — Note 2 (contd.)**

occasion and opportunity arose held separate offence.) \* (Vol 22) 1935 Nag 178 (181) : 31 Nag L R 337 : 36 Cri L Jour 1216.

[11] Charge for two offences—Evidence to prove one offence identical with that by which the other is to be established—Offences held committed in the course of the same transaction. (Vol 26) 1939 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625 (DB).

[12] What constitutes part of the same transaction depends largely upon the circumstances of each case. (Vol 31) 1944 Cal 224 (227) : 45 Cri L Jour 666 : I L R (1944) 1 Cal 398 (DB) \* (Vol 24) 1937 All 714 (717, 718) : I L R (1937) All 779 : 39 Cri L Jour 38 (DB) \* (Vol 14) 1927 Cal 330 (332) : 28 Cri L Jour 347 (DB) \* (Vol 14) 1927 Lah 274 (275) : 28 Cri L Jour 357 \* (Vol 12) 1925 Mad 690 (699, 700) : 49 Mad 74 : 26 Cri L Jour 1513 \* (Vol 17) 1930 Mad 857 (858) : 53 Mad 937 : 32 Cri L Jour 30 (DB) \* (Vol 18) 1931 Oudh 86 (88) : 6 Luck 441 : 32 Cri L Jour 540 \* (Vol 32) 1945 Pat 293 (294) : 24 Pat 144 : 46 Cri L Jour 652 (DB) \* (Vol 24) 1937 Nag 188 (189) : I L R (1939) Nag 297 : 38 Cri L Jour 542 \* (Vol 23) 1936 Bom 154 (153) : 60 Bom 148 : 37 Cri L Jour 688 \* (Vol 22) 1935 Nag 149 (154) : 31 Nag L R 318 : 36 Cri L Jour 1153 \* (Vol 12) 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cri L Jour 257 (DB) \* (Vol 6) 1919 Mad 487 (493) : 20 Cri L Jour 354 (DB) \* (Vol 20) 1933 Bom 266 (267) : 34 Cri L Jour 870 : 57 Bom 400 (DB).

[13] The offence of hiring a person to take part in a riot is ordinarily a separate and distinct offence from the riot itself but the two may, in certain circumstances form parts of the same transaction. (Vol 12) 1925 Cal 903 (905) : 26 Cri L Jour 594 (DB).

[14] Where the object of an offence is the concealment of another offence already committed or about to be committed, the two ordinarily form parts of the same transaction. (Vol 27) 1940 Pat 289 (290) : 19 Pat 369 : 41 Cri L Jour 257 (DB) \* (Vol 25) 1938 All 91 (95) : 39 Cri L Jour 364 \* (Vol 12) 1925 Sind 233 (235) : 18 Sind L R 199 : 27 Cri L Jour 257 (DB) \* (Vol 11) 1924 All 211 (211) : 25 Cri L Jour 964. (Theft and then beating complainant to prevent him from making complaint.) \* (Vol 16) 1929 Lah 843 (844) : 30 Cri L Jour 958. (Criminal breach of trust and falsification of accounts to conceal it.) \* (Vol 7) 1920 Pat 775 (776) : 22 Cri L Jour 230 (DB). (Do.) \* (Vol 21) 1934 Mad 673 (674) : 35 Cri L Jour 1503 : 58 Mad 178. (Theft of railway ticket and making forged entries thereon.) \* (Vol 20) 1933 Nag 136 (140) : 34 Cri L Jour 505 : 29 Nag L R 251 (DB). (Charge under Ss. 302 and 201, Penal Code.) \* (Vol 22) 1935 Nag 178 (181) : 31 Nag L R 337 : 36 Cri L Jour 1216. (Embezzlement and falsification of accounts to conceal it.) \* (13) 14 Cri L Jour 428 (429) : 40 Cal 318. (Criminal breach of trust and falsification of accounts to conceal it.) \* (Vol 10) 1923 Bom 262 (263) : 25 Cri L Jour 1349 (DB). (Murder and being accessory after the fact.) \* (12) 13 Cri L Jour 137 (137) (D B) (Bom). (Causing grievous hurt for the purpose of extorting information and making false entries to attribute another cause for the death of the injured person.) \* (10) 11 Cri L Jour 731 (733) : 4 Sind L R 174 (DB). (Murder and causing disappearance of evidence of the murder.)

[But see (Vol 9) 1922 All 244 (245) : 23 Cri L Jour 671. (Cheating and then stealing articles to destroy evidence of cheating do not form part of the same transaction.)]

[15] Where a gang of dacoits lie concealed waiting for nightfall in order to commit dacoity, but being seen by a woman, kill her fearing detection, and thereafter commit dacoity, the murder and dacoity will form parts of the same transaction. (102) 4 Bom L R 789 (791) (DB).

[16] An offence A and an offence B, the object of which is to conceal offence C, are not parts of the same transaction. (Vol 6) 1919 Lah 410 (411) : 19 Cri L Jour 187 (DB).

[17] Offences committed in pursuance of a conspiracy having a definite object in view generally form parts of the same transaction. (Vol 25) 1938 P C 130 (133) : 65 Ind App 158 : 32 Sind L R 476 : I L R (1938) 2 Cal 295 : 39 Cri L Jour 452 (PC) \* (Vol 26) 1939 Bom 129 (140) : 40 Cri L Jour 579 (DB) \* (Vol 25) 1938 Cal 195 (201) : 39 Cri L Jour 417 (DB) \* (Vol 25) 1938 Cal 258 (260) : I L R (1938) 1 Cal 588 : 39 Cri L Jour 596 (DB) \* (Vol 25) 1938 Sind 171 (173) : I L R (1939) Kar 204 : 39 Cri L Jour 890 (DB).

[18] Isolated acts committed by individual conspirators during the continuance of but not committed in pursuance of the conspiracy are not parts of the same transaction with the conspiracy itself. (Vol 24) 1937 All 714 (718) : I L R (1937) All 779 : 39 Cri L Jour 38 (DB).

[19] All offences committed in prosecution of a common object will generally be parts of the same transaction. (Vol 31) 1944 Oudh 122 (129) : 45 Cri L Jour 538 : 19 Luck 493 (DB). (Number of falsifications connected with the same fraud.) \* (Vol 13) 1926 Lah 367 (367, 368) : 7 Lah 864 : 27 Cri L Jour 803 (D B) \* (Vol 16) 1929 Lah 843 (844) : 30 Cri L Jour 958. (Series of falsifications of accounts to cover a single act of defalcation.) \* (Vol 7) 1920 Mad 201 (202) : 43 Mad 411 : 21 Cri L Jour 297 (DB) \* (Vol 15) 1928 Pat 634 (637) : 29 Cri L Jour 728 (D B) \* (109) 9 Cri L Jour 367 (368) (D B) (Mad). (Several acts done at different times to demonstrate the power of the accused.)

**3. "Same transaction" — Illustrations. — [1]**

As to illustrative cases of acts which form the same transaction, see the following cases :

(Vol 32) 1945 Nag 143 (145) : I L R (1945) Nag 315 : 47 Cri L Jour 196 (DB). (Offences under Ss. 302, 201 and 330, Penal Code.)

(Vol 33) 1946 Oudh 26 (32) (DB). (Accused charged under Ss. 379 and 411, Penal Code and also under R. 48 of Defence of India Rules for wearing uniform without excuse.)

(Vol 32) 1945 Pat 293 (294) : 24 Pat 144 : 46 Cri L Jour 652 (D B). (Illegal possession of opium and illegal possession of ganja.)

(Vol 33) 1946 Sind 23 (24) : I L R (1945) Kar 100 : 47 Cri L Jour 512 (D B). (Visit to brothel for committing theft—Accused also committing rape on prostitute.)

(Vol 31) 1944 Oudh 122 (129) : 19 Luck 493 : 45 Cri L Jour 538 (D B). (Charge firstly under S. 408, Penal Code for breach of trust of gross sum and secondly, under S. 477A for having with intent to defraud made series of entries relating to defalcations.)

(Vol 30) 1943 Pat 212 (217) : 44 Cri L Jour 590 : 22 Pat 263 (DB). (Accused abducting married girl and having her married a second time—Accused paid sum of money by second husband—*Held*, offences under S. 366 and S. 420.)

(Vol 29) 1942 Oudh 214 (215) : 43 Cri L Jour 252 : 17 Luck 513. (Offences under Ss. 457 and 380, Penal Code.)

(Vol 28) 1941 Rang 337 (338) : 43 Cri L Jour 448 : 1941 Rang L R 559. (Where on the strength of a misrepresentation a person obtains an advance of money and on the strength of the same or original misrepresentation obtains further advances in accordance with the original agreement, the obtaining of the advances form part of the same transaction.)

(Vol 28) 1941 Sind 204 (207) : 43 Cri L Jour 241 : I L R (1941) Kar 328 (D B). (Offences under Ss. 477A and 409, Penal Code.)

Section 235 — Note 3 (*contd.*)

- (40) 1940 Mad W N 865 (867). (User of four forged documents at registration of a sale-deed and obtaining money.)
- (Vol 26) 1939 Mad 59 (59) : 40 Cri L Jour 211 (D B). (Offences of murder and preferring false complaint of murder though form part of the same transaction should not be jointly tried.)
- (Vol 26) 1939 Pat 577 (579) : 18 Pat 450: 40 Cri L Jour 625 (DB). (Offences under Ss. 302, 392 and 411, Penal Code.)
- (Vol 25) 1938 Oudh 95 (96): 39 Cri L Jour 341. (Charge under S. 147 and Ss. 323 and 325, Penal Code.)
- (Vol 10) 1923 All 137 (137) : 24 Cri L Jour 153 (DB). (Gang of dacoits robbing several carts on road at short intervals.)
- (Vol 14) 1927 Oudh 369 (376) : 2 Luck 631 : 29 Cri L Jour 129 (D B). (Joinder of charges under Ss. 121A and 120B, Penal Code, is not illegal.)
- (Vol 19) 1932 Oudh 28 (29) : 33 Cri L Jour 275 (D B). (Events beginning with the kidnapping or abduction and ending with the discovery of the woman from the same transaction.)
- (08) 7 Cri L Jour 76 (78) : 4 Low Bur Rul 104 (F B). (Owning of common gaming house and also taking part in gambling.)
- (08) 7 Cri L Jour 464 (466) : 4 Low Bur Rul 199 (FB). (Theft and taking gratification to restore stolen property.)
- (Vol 4) 1917 All 11 (12) : 39 All 623 : 18 Cri L Jour 788. (Members of an unlawful assembly causing hurt to one person and by a separate act causing hurt to another—The offences under Ss. 323 and 147 can be tried jointly.)
- (Vol 2) 1915 Bom 203 (204) : 16 Cri L Jour 761 : 40 Bom 97 (DB). (Forging and using the document.)
- (Vol 21) 1934 Pat 483 (485) : 13 Pat 161: 36 Cri L Jour 342 (D B). (Property stolen on different occasions — Dishonest retention forms a single transaction.)
- (Vol 22) 1935 Rang 357 (358, 359) : 37 Cri L Jour 3. (On two consecutive nights offences under Ss. 447 and 448, Penal Code, committed by accused in respect of property over which they asserted a right of possession.)
- (Vol 34) 1947 Pat 23 (27) : 25 Pat 298 (D B). (Joinder of charges under Ss. 420 and 368, Penal Code, held, authorised under S. 235 (1) — Joinder not improper though Magistrate had no jurisdiction to try charge under S. 366.)
- [2] In the following cases the offences were held not to form parts of the same transaction :
- (Vol 31) 1944 Bom 306 (311) : I L R (1944) Bom 728 (D B). (Acts of supplying bomb-shells and throwing them at different places on different dates by the receiver.)
- (Vol 31) 1944 Cal 224 (227, 228) : 45 Cri L Jour 666 : I L R (1944) 1 Cal 898 (D B). (Three offences of theft in respect of different items committed on different dates and three offences of dishonest misappropriation in alternative.)
- (Vol 29) 1942 Cal 237 (238, 239) : 43 Cri L Jour 553 (D B). (Forging a document with the intention that the document so forged shall be used for the purpose of deceiving somebody and thereby inducing that person to part with property cannot be part of the same transaction as the dishonest misappropriation of property entrusted to the alleged forger as a servant.)
- (Vol 29) 1942 Oudh 462 (462, 463) : 43 Cri L Jour 912. (Accused's house raided and charas and opium recovered — Offences under Excise Act and Opium Act.)
- (Vol 29) 1942 Oudh 441 (442) : 18 Luck 403 : 43 Cri L Jour 776. (Accused of village B forming unlawful assembly — In prosecution of common object of extorting money from K of village B accused tying him to

tree and putting him in fear of beating — People of village S coming and trying to rescue K — Accused chasing them to village S and breaking tiles — People of village N coming and trying to stop — Accused beating them in village N — Offences at village B and village N.)

- (Vol 34) 1947 Pat 17 (20) : 25 Pat 241 (DB). (Joint trial of person abducting and person joining him subsequently.)
- (Vol 28) 1941 Cal 707 (711, 712) : I L R (1941) 2 Cal 319: 43 Cri L Jour 389 (DB). (Held offences under Ss. 420, 467 and 477A, Penal Code, were not committed in course of one transaction.)
- (Vol 27) 1940 Mad 509 (510) : 41 Cri L Jour 581 (DB). (Two distinct offences of theft in two separate houses or in the alternative two charges under S. 411 in respect of properties stolen from two houses.)
- (Vol 26) 1939 Cal 32 (33) : 40 Cri L Jour 290 (DB). (Two murders and offence of causing grievous hurt committed at different times and places during same night — No evidence to suggest any connexion.)
- (38) I L R (1938) 1 Cal 98 (108, 109) (DB). (Accused entered complainant's service by personating as a Brahmin and after a year killed complainant's wife — Cheating not part of the same transaction as murder.)
- (Vol 24) 1937 Nag 188 (189) : I L R (1939) Nag 297 : 38 Cri L Jour 542. (Offence of sale of opium without a licence and the offence of importing foreign opium into British India.)
- (Vol 23) 1936 Bom 154 (157) : 60 Bom 148 : 37 Cri L Jour 688 (DB). (Charges of forgery in respect of different consignments of tickets supplied at intervals in batches.)
- (Vol 22) 1935 Nag 90 (98) : 36 Cri L Jour 744. (Composing of article, editing and printing at one place and publishing it at different places at different times cannot be regarded as one set of acts forming the same transaction.)

4 "More offences than one." — [1] More than three offences can be combined. (Vol 25) 1938 Bom 481 (484) : I L R (1939) Bom 42 : 40 Cri L Jour 118 (DB) & (Vol 8) 1921 All 19 (22) : 22 Cri L Jour 641 & (Vol 13) 1926 Oudh 161 (165) : 26 Cri L Jour 1602.

[But see (38) 6 All 121 (124, 125) (Obiter).]

[2] A trial is not illegal by reason of containing more than three offences spread over a period longer than a year. (Vol 12) 1925 Mad 690 (695) : 26 Cri L Jour 1513 : 49 Mad 74 & (10) 11 Cri L Jour 258 (260) : 33 Mad 502.

[3] A multitude of accusations which will result in bewildering the accused and prejudicing him in his defence ought not to be permitted. (Vol 28) 1941 Mad 339 (342, 343) : 42 Cri L Jour 414 & (Vol 21) 1934 Sind 57 (60) : 28 Sind L R 119 : 35 Cri L Jour 1337 (DB).

5. "May be tried at one trial." — [1] Even in cases where a joint trial is provided a separate trial for each of the offences is not illegal. (Vol 28) 1941 Mad 339 (342) : 42 Cri L Jour 414 & (Vol 28) 1941 Oudh 33 (36) : 42 Cri L Jour 40 & (Vol 12) 1925 Cal 341 (345) : 52 Cal 253 : 26 Cri L Jour 487 (DB) & (Vol 14) 1927 Pat 13 (14) : 6 Pat 208 : 27 Cri L Jour 1100 (DB) & (Vol 15) 1928 Bom 231 (232) : 29 Cri L Jour 981 (DB) & (Vol 2) 1915 Mad 1036 (1037) : 16 Cri L Jour 717 (DB).

[2] If there is a risk of embarrassing the defence, a joinder of charges should not be resorted to. (Vol 28) 1941 Mad 339 (342) : 42 Cri L Jour 414. (The usual course to adopt in a case of very large number of counts is to ask the Public Prosecutor to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

*Illustrations.*

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

[1882 — S. 236; 1872 — S. 455; 1861 — S. 242.]

**Section 235—Note 5 (contd.)**

is known.) (Vol 26) 1939 Mad 59 (59): 40 Cri L Jour 211 (DB). (It is very embarrassing to the accused to have to answer a charge of murder at the same time as a charge of wilfully preferring a false complaint of murder — It is also embarrassing to the prosecution and may lead to failure of justice.) (Vol 23) 1936 Cal 753 (759): 38 Cri L Jour 545 (DB) (Vol 12) 1925 Cal 311 (345): 52 Cal 253: 26 Cri L Jour 487 (DB) (Vol 8) 1921 All 19 (21): 22 Cri L Jour 641 (90) 15 Bom 491 (497) (DB) (Vol 12) 1925 Cal 413 (414): 26 Cri L Jour 467 (DB) (Vol 12) 1925 Mad 690 (697): 26 Cri L Jour 1513: 49 Mad 74 (Vol 15) 1928 Oudh 401 (401): 3 Luck 664: 29 Cri L Jour 801 (98) 8 Cri L Jour 191 (195): 1 Sind L R 73 (DB) (Vol 21) 1934 Sind 57 (60): 28 Sind L R 119: 35 Cri L Jour 1337 (DB).

[See also (Vol 9) 1922 Cal 573 (574): 24 Cri L Jour 72: 50 Cal 94 (DB).]

[3] It is not necessary that the accused should be tried for all offences committed by the same acts. (01) 25 Bom 90 (98) (DB) (Vol 29) 1942 Pat 199 (200): 43 Cri L Jour 230: 21 Pat 130 (DB).

[4] A joint trial of several offences in cases not authorised by the Code is an illegality and not merely an irregularity. (Vol 22) 1935 Nag 90 (98): 36 Cri L Jour 744 (35) 1935 Mad W N 1286 (1987).

[See also (43) (1943) 1 Mad L Jour 466 (466, 467).]

6. "Trial" includes conviction.—[1] The word "trial" in this section includes conviction. (10) 11 Cri L Jour 415 (416): 3 Sind L R 224 (DB).

7. Sub-section (2).—[1] Where the same facts will constitute different offences, this sub-section authorizes a combined trial in respect of all of them. (Vol 31) 1944 Cal 224 (228): I L R (1944) 1 Cal 398: 45 Cri L Jour 666 (DB). (Sub-section does not cover the case where different sets of acts constitute different offences.) (Vol 23) 1936 All 74 (75): 37 Cri L Jour 382.

[See (35) 36 Cri L Jour 1037 (1038) (DB). (Sind.)]

[2] A girl of fifteen went out of her husband's hut at night—Accused seized her and took her away—Act will amount to both kidnapping and abduction and can be tried at one trial. (Vol 20) 1933 Cal 676 (678): 60 Cal 1394: 34 Cri L Jour 1219 (DB).

[3] Under S. 71, Penal Code, the offender cannot be punished with a more severe punishment than can be awarded for any one of the offences constituted. (35) 36 Cri L Jour 1037 (1038) (DB) (Sind.)

8. "Constitute, when combined, a different offence"—Sub-section (3).—[1] An offence of theft under S. 379 of the Penal Code and an offence of taking a gift to restore stolen property under S. 215 of the Penal Code do not form, when combined, a different offence. (93-1900) 1893-1900 Low Bur Rul 226 (228).

[2] An offence under S. 143 (unlawful assembly) and an offence under S. 353 (assault on a public servant)

may, when combined, become an offence under S. 147 ('85) 12 Cal 495 (498) (DB).

[3] Robbery, charge of—Hurt caused by offender while trying to get away with the property—Offence of hurt is included in the robbery and where the latter charge is to be tried by a jury, a separate charge for hurt to be tried by the Judge with assessors is not justified. (Vol 24) 1937 Pat 662 (664): 39 Cri L Jour 156 (DB).

9. Joint trial for several charges not forming part of same transaction—Effect.—[1] A joint trial of several charges in respect of acts not forming parts of the same transaction is illegal and is not cured by S. 537. (Vol 31) 1944 Bom 306 (312): I L R (1944) Bom 728 (DB) (Vol 31) 1944 Cal 224 (228): I L R (1944) 1 Cal 398: 45 Cri L Jour 666 (DB) (Vol 29) 1942 Oudh 462 (464): 43 Cri L Jour 912 (Vol 29) 1942 Oudh 441 (442, 443): 43 Cri L Jour 776: 18 Luck 403 (Vol 27) 1940 Cal 588 (583): 42 Cri L Jour 334 (38) I L R (1938) 1 Cal 98 (103, 113) (DB) (Vol 25) 1938 Sind 164 (168): I L R (1939) Kar 64: 39 Cri L Jour 881 (DB) (Vol 23) 1936 Lah 507 (507): 37 Cri L Jour 722 (Vol 22) 1935 Nag 149 (155): 36 Cri L Jour 1153: 31 Nag L R 318.

[But see (Vol 33) 1946 Oudh 26 (32, 33) (DB) (Vol 31) 1944 Oudh 122 (129): 19 Luck 493: 45 Cri L Jour 538 (DB).]

10. Offences forming part of same transaction—Jurisdiction to try.—[1] The accused were charged under S. 420 read with S. 120B, Penal Code. The conspiracy was entered into at B where the accused lived, but one or two acts of cheating were committed within the jurisdiction of the Court at P. It was held that the Court at P could not be clothed with jurisdiction to try the charge of conspiracy. (Vol 23) 1936 Mad 317 (317): 37 Cri L Jour 634.

**SECTION 235—SYNOPSIS.**

1. Scope.
2. "Which of several offences."
3. Theft and taking illegal gratification for the return of stolen property.
4. Contradictory statements—Illustration (b).
5. Murder and concealment of body to screen offender.
6. Murder, culpable homicide not amounting to murder and causing death by negligence.
7. Principal offence and abetment thereof.
8. Alternative charges.
9. Sentence.
10. "Series of acts," meaning of.

1. Scope.—[1] This section deals with a class of cases, which the language of S. 235 may fail to cover and is an exception to S. 233. (13) 14 Cri L Jour 135 (137): 9 Nag L R 26.

[See (Vol 32) 1945 Pat 376 (379) (DB) (Vol 31) 1944 All 137 (143): 46 Cri L Jour 38: I L R (1944) All 403 (FB).]



Section 236—Note 1 (*contd.*)

[2] The stage at which this section applies is before the evidence is gone into in the case, in other words, before the trial begins. (Vol 25) 1938 Cal 51 (68, 69): 1 L R (1938) 1 Cal 290: 39 Cri L Jour 161 (DB) \* (Vol 23) 1936 Cal 796 (799): 62 Cal 956: 37 Cri L Jour 701 (DB).

[But see (Vol 23) 1936 Bom 193 (196): 60 Bom 485: 37 Cri L Jour 753.]

[3] If at the time the trial begins the prosecution relies on certain facts which are provable and from them the inference arises that the accused has committed some one of several offences, but it is not possible to say which one of them without the aid of certain other facts, the accused may be charged cumulatively with all of them or alternatively with them. (007) 5 Cri L Jour 472 (480) (Mad). (Charged under S. 379 and S. 411 of Indian Penal Code.) \* (Vol 32) 1945 Cal 421 (422) (DB). (If the view is taken that there might be doubt as to whether the evidence of actual identification at the time of dacoity would be accepted, there would be a charge framed both under Section 395, I. P. C., and also under section 412 and also there might have been a charge in the alternative under S. 395 or S. 412.) \* (Vol 32) 1945 Cal 402 (406) (DB). (Accused misleading authorities by making false promise in order to get out of difficulty created by contravention of freezing order — *Held*, accused can be charged alternatively under R. 75 A of Defence of India Rules or under R. 46 (2) (d) but not under both.) \* (Vol 30) 1943 Lah 220 (221): 45 Cri L Jour 80: 1 L R (1944) Lah 145 (DB). (A person can be charged with an offence under section 380, I. P. C., and alternatively with an offence under section 420, I. P. C.).

[4] Cumulative or alternative charges framed — Further facts disclosed in the trial dispelling doubt — Conviction should be for the offence proved. (Vol 18) 1931 Cal 414 (415): 59 Cal 8: 32 Cri L Jour 892 (D B) \* (13) 14 Cri L Jour 278 (280): 1913 Pun Re No. 8 Cr (D B) \* (Vol 17) 1930 Cal 139 (140): 57 Cal 801: 31 Cri L Jour 610 (D B). (Offence under Ss. 395 and 457).

[See (Vol 18) 1929 Pat 660 (661): 8 Pat 731: 31 Cri L Jour 362 (D B).]

[5] Doubt as to which one of the offences was committed at the end of the trial — Judgment should be passed in the alternative. (Vol 32) 1945 Cal 421 (423) (D B) \* (Vol 24) 1937 All 754 (754): 39 Cri L Jour 152 \* (Vol 18) 1931 Cal 414 (415): 59 Cal 8: 32 Cri L Jour 892 (D B) \* (Vol 1) 1914 Lah 549 (550): 14 Cri L Jour 664: 1913 Pun Re N. 11 Cr.

[6] Charge framed only for one offence — Offence committed found to be another — Provided the same facts could have sustained a charge for the latter offence conviction can be given for the offence proved. (Vol 32) 1945 All 87 (90): 1 L R (1945) All 432: 46 Cri L Jour 495 \* (Vol 32) 1945 Cal 421 (423) (D B) \* (Vol 31) 1944 Pat 67 (73): 45 Cri L Jour 624: 22 Pat 681 (D B) \* (Vol 30) 1943 Bom 458 (461): 45 Cri L Jour 221: 1 L R (1944) Bom 25 (D B) \* (Vol 30) 1943 Mad 209 (209): 44 Cri L Jour 413 \* (Vol 27) 1940 Pat 414 (416): 41 Cri L Jour 810 \* (Vol 24) 1937 Rang 250 (251): 38 Cri L Jour 989 \* (Vol 23) 1936 All 337 (352): 58 All 695: 37 Cri L Jour 794 (D B) \* (Vol 11) 1924 Rang 256 (260): 2 Rang 80: 25 Cri L Jour 907 \* (Vol 10) 1923 Cal 596 (597): 50 Cal 564: 24 Cri L Jour 372 (D B) \* (35) 36 Cri L Jour 244 (245, 246) (D B) (Lah) \* (Vol 15) 1928 Bom 130 (134): 52 Bom 885: 29 Cri L Jour 403 (D B) \* (Vol 12) 1925 Mad 1 (6): 47 Mad 746: 25 Cri L Jour 1297 (F B) \* (Vol 19) 1932 Nag 173 (173, 174): 28 Nag L R 218: 34 Cri L Jour 622 \* (Vol 14) 1927 Oudh 196 (197): 2 Luck 444: 28 Cri

Jour 315 \* (Vol 16) 1929 Pat 11 (14, 15): 7 Pat 758: 30 Cri L Jour 205 (D B) \* (Vol 22) 1935 Pesh 67 (68): 36 Cri L Jour 1438 \* (Vol 20) 1933 Oudh 162 (163): 8 Luck 474: 34 Cri L Jour 385 \* (Vol 14) 1927 Nag 163 (164): 28 Cri L Jour 189 \* (Vol 16) 1929 Sind 147 (148): 30 Cri L Jour 875 (D B) \* (Vol 18) 1931 Sind 9 (12): 25 Sind L R 1: 32 Cri L Jour 517.

[7] Acquittal of the only charge framed on facts on which cumulative or alternative charges could have been framed — He cannot be again tried for an alternative charge on the same facts. (Vol 30) 1943 Mad 737 (739): 45 Cri L Jour 518 \* (Vol 18) 1931 Bom 309 (311): 55 Bom 520: 33 Cri L Jour 62 \* (Vol 14) 1927 Bom 629 (629, 630): 28 Cri L Jour 1032 (D B) \* (Vol 5) 1918 Cal 406 (407): 19 Cri L Jour 198: 45 Cal 727 (D B) \* (Vol 8) 1921 Sind 137 (139, 142): 16 Sind L R 1: 23 Cri L Jour 305 (D B) \* (Vol 11) 1924 Mad 478 (479): 25 Cri L Jour 244 \* (13) 14 Cri L Jour 135 (138): 9 Nag L R 26 \* (Vol 8) 1921 Pat 22 (22): 22 Cri L Jour 63 \* (Vol 2) 1915 Low Bur 60 (61): 16 Cri L Jour 267 \* (10) 11 Cri L Jour 731 (733): 4 Sind L R 174 (D B).

[8] The applicability of the section depends upon the facts charged in each case. (Vol 25) 1938 Cal 51 (69): 1 L R (1938) 1 Cal 290: 39 Cri L Jour 161 (D B) \* (Vol 23) 1936 Cal 796 (799): 62 Cal 953: 37 Cri L Jour 701 (D B) \* (Vol 17) 1930 Cal 209 (210): 57 Cal 1074: 31 Cri L Jour 903 (D B). (Facts clear as to which offence was committed — Section does not apply.)

[But see (Vol 20) 1933 Cal 676 (677): 60 Cal 1394: 34 Cri L Jour 1219.]

[9] Section does not apply in the following cases:—  
(a) Where it appears that the accused has committed distinct offences. (Vol 32) 1945 Pat 376 (379) (D B) \* (Vol 29) 1942 Oudh 473 (477): 43 Cri L Jour 830: 18 Luck 408 \* (Vol 28) 1941 Lah 214 (215): 42 Cri L Jour 660: 1 L R (1941) Lah 423 (D B) \* (Vol 23) 1936 Pat 503 (504): 37 Cri L Jour 785 \* (Vol 23) 1936 Rang 174 (174): 14 Rang 24: 37 Cri L Jour 492 \* (Vol 22) 1935 Nag 178 (182): 31 Nag L R 337: 36 Cri L Jour 1216 \* (06) 3 Cri L Jour 240 (242) (D B) (Bom) \* (Vol 20) 1933 Lah 969 (969, 960): 35 Cri L Jour 291 \* (Vol 12) 1925 Nag 294 (294): 26 Cri L Jour 1358 \* (32) 1935 Mad W N 247 (248) \* (01) 5 Cal W N 567 (568) (D B) \* (97) 20 All 107 (108) (D B) \* (Vol 14) 1927 All 75 (75): 27 Cri L Jour 1351 \* (Vol 9) 1922 Bom 9 (98, 99): 46 Bom 657: 23 Cri L Jour 259 (D B) \* (Vol 20) 1933 Sind 225 (225, 226): 35 Cri L Jour 58: (D B) \* (Vol 14) 1927 Rang 32 (32): 4 Rang 355: 27 Cri L Jour 1360 \* (Vol 20) 1933 Mad 843 (843, 844): 34 Cri L Jour 76 (Ss. 325 and 160.) \* (Vol 13) 1926 Cal 58 (582): 53 Cal 466: 27 Cri L Jour 606 (D B) \* (Vol 16) 1931 Sind 116 (117): 25 Sind L R 9: 33 Cri L Jour 4 (D B) \* (Vol 20) 1933 Oudh 815 (321): 8 Luck 518: 34 Cri L Jour 10 (D B) \* (Vol 21) 1934 Cal 409 (410): 6 Cal 537: 35 Cri L Jour 637 (D B).

(b) Where there is no doubt as to the offence or offences committed. (Vol 26) 1939 All 565 (567): 41 Cri L Jour 948 \* (Vol 26) 1939 All 710 (712): 41 Cri L Jour 111 \* (Vol 25) 1938 Cal 51 (69): 1 L R (1938) Cal 290: 39 Cri L Jour 161 (D B) \* (Vol 23) 1936 Cal 796 (799): 62 Cal 956: 37 Cri L Jour 701 (D B) \* (Vol 2) 1915 Bom 203 (204): 40 Bom 97: 16 Cri L Jour 761 (D B) \* (98) 2 Weir 361 (302) (D B) \* (Vol 7) 1920 Pat 216 (218, 219): 21 Cri L Jour 439 (D B) \* (Vol 7) 1920 Pat 512 (513): 21 Cri L Jour 44 \* (18) 11 Cri L Jour 420 (421): 1910 Pun Re No. 20 Cr \* (Vol 17) 1930 Pat 26 (27): 9 Pat 585: 30 Cri L Jour 806 (D B).

(c) Where facts relied upon do not amount to an offence at all. (Vol 18) 1931 Cal 528 (528): 59 Cal 92: 32 Cri L Jour 1167 (D B) \* (Vol 7) 1920 Pat 512 (513): 21 Cri L Jour 44.

Section 236 — Note 1 (*contd.*)

(d) Where the prosecution is not clear as to what facts it will rely upon. (Vol 18) 1931 Cal 414 (415) : 59 Cal 8 : 32 Cri L Jour 892 (D B) \* (Vol 18) 1931 Cal 528 (528) : 59 Cal 92 : 32 Cri L Jour 1167 (D B).

[But see (Vol 29) 1942 Bom 71 (74) : 43 Cri L Jour 529 : I L R (1942) Bom 384 (F B).]

[10] "Doubt" in the section means only doubt as to questions of fact and not as to questions of law. (Vol 20) 1933 Rang 236 (237, 238) : 11 Rang 354 : 35 Cri L Jour 41 \* (Vol 15) 1928 All 139 (140) : 29 Cri L Jour 232 \* (Vol 18) 1931 Cal 414 (415) : 59 Cal 8 : 32 Cri L Jour 892 (D B) \* (11) 12 Cri L Jour 221 (228) : 5 Sind L R 16 (D B).

[See however (Vol 24) 1937 All 754 (754) : 39 Cri L Jour 152. (Where the facts themselves are in doubt, section does not apply.) \* (Vol 18) 1931 Cal 414 (416) : 59 Cal 8 : 32 Cri L Jour 892 (DB). (Do).]

[But see (Vol 32) 1945 All 81 (85) : 46 Cri L Jour 750 : I L R (1945) All 558 \* (Vol 25) 1938 Cal 51 (68) : I L R (1938) 1 Cal 290 : 39 Cri L Jour 161 (D B) \* (Vol 25) 1938 Sind 63 (65) : 31 Sind L R 480 : 39 Cri L Jour 460 (D B) \* (Vol 23) 1936 Rang 174 (174) : 14 Rang 21 : 37 Cri L Jour 492 \* (Vol 12) 1925 Cal 903 (904) : 26 Cri L Jour 594 (D B) \* (Vol 16) 1929 Rang 209 (210) : 7 Rang 96 : 30 Cri L Jour 750 \* (87) 1887 Pun Re No. 11 Cr p. 19 (21, 22) (D B) \* (Vol 5) 1918 Pat 628 (629) : 19 Cri L Jour 202.]

[11] The several offences should fall under the same chapter of the Penal Code. (Vol 24) 1937 Rang 250 (251) : 38 Cri L Jour 989.

[12] Section applies only in the following cases:—

(a) Offences constituting on the same facts should be cognate offences. (Vol 11) 1924 Rang 106 (108) : 1 Rang 690 : 25 Cri L Jour 553 \* (Vol 16) 1929 Pat 660 (661) : 8 Pat 731 : 31 Cri L Jour 362 \* (Vol 14) 1927 Nag 163 (164) : 28 Cri L Jour 189 \* (88) 1888 All W N 116 (117) \* (Vol 19) 1932 Oudh 103 (106) : 7 Luck 543 : 33 Cri L Jour 926.

(b) The offences should be such that they merely vary in degree because of the varying degree in intention or by reason of subsidiary aggravating circumstances. (11) 12 Cri L Jour 224 (226) : 5 Sind L R 16.

[13] The section applies only where from the evidence led by the prosecution it is doubtful which of several offences have been committed by the accused. (Vol 32) 1945 Pat 376 (379) (D B) \* (Vol 10) 1923 Pat 121 (122) : 23 Cri L Jour 30.

[14] Nothing contained in Criminal Law Amendment Act bars operation of Ss. 196, 235, 236 and 237, Cr. P. C.—Conviction or acquittal of person or overt act in regard to conspiracy does not bar trial of such person over again under S. 121A, Penal Code. (Vol 24) 1937 Cal 99 (114) : 88 Cri L Jour 318 (S B).

2. "Which of several offences." — [1] This section applies even where the doubt is whether the accused committed one offence only or both that offence and another. (13) 14 Cri L Jour 214 (216, 217) : 36 Mad. 308 (DB).

[2] A charge can be framed under this section in respect of offences falling under any penal enactment. (Vol 10) 1923 Cal 596 (597) : 50 Cal 564 : 24 Cri L Jour 372 (DB) \* (Vol 2) 1915 Low Bur 60 (61) : 16 Cri L Jour 267 \* (Vol 8) 1921 Pat 22 (22) : 22 Cri L Jour 63 \* (Vol 14) 1927 Bom 629 (629) : 28 Cri L Jour 1032 (DB).

3. Theft and taking illegal gratification for the return of stolen property. — [1] A person who takes gratification for restoring property known to be stolen and fails to restore it or cause the offender to be apprehended, no inference can be drawn that he is also the thief and cannot be charged with theft along with a charge under S. 215, I. P. C. (Vol 14) 1927 Rang 254

(255) : 28 Cri L Jour 759 \* (Vol 16) 1929 R (210) : 7 Rang 96 : 30 Cri L Jour 750.

[2] Where after taking gratification a person the stolen property but does not bring the offender to justice a doubt arises as to whether he was not therefore an alternative charge for theft can be in addition to one under S. 213, I. P. C. (108) Jour 464 (469) : 4 Low Bur Rul 199 (FB).

4. Contradictory statements — Illustrat — [1] A charge for giving false evidence can be where a person makes two contradictory statements (99) 22 All 115 (117) (DB) \* (Vol 8) 1921 Bom 45 Bom 834 : 22 Cri L Jour 241 (F B). (Ov (1894) 18 Bom 377.) \* (103) 1903 Pun L R Nc 245 (246) (DB) \* (Vol 12) 1925 Oudh 660 (661) Cri L Jour 1457 \* (110) 11 Cri L Jour 731 (732) Bur \* (108) 7 Cri L Jour 302 (303) (All) \* Mad 55 (59, 60, 61, 65) (DB). (Contradiction in statement.) \* (84) 10 Cal 937 (940, 941, 91 (Do).]

[See also (Vol 26) 1939 Sind 170 (171) : I L I Kar 280 : 10 Cri L Jour 707. (Two conflicting statements by witness — Charge under Section 236 framed.)]

[2] Statement in Sessions Court contradicting committal Court — Accused can be charged natively and convicted. (Vol 34) 1947 Bom 16 (DB).

[3] Alternative charge in respect of two contradictory statements can be framed only when the prosecution is unable to prove which of the two statements. (90) 1890 Pun lte No. 27 Cr, p. 90 (93) \* (8 Pun Re No. 32 Cr, p. 65 (68) (DB) \* (96) 2 W (300) (DB) \* (74) 22 Suth W R Cr 2 (3) (DB).

[4] In the following cases no alternative charge can be made as the person was not bound by law to state truth :

(a) Statement made in a petition. (02) 2 W (169) (DB).

(b) Statement before Magistrate in an examination for ascertainment of information. (1900) 27 (457) (DB).

(c) Amin executing decree reporting obstructive Civil Court. (95) 17 All 436 (437) (DB).

(d) Statement made under police threat of treatment. (1865) 3 Suth W R Cr 6 (8) (DB).

[5] Accused reciting in sale deed a particular consideration received and depositing in a sub-pre-emption suit a different sum can be charged S. 193 or S. 423, I. P. C. (103) 1903 Pun L R p. 245 (246) (DB).

5. Murder and concealment of body of offender. — [1] Facts relied upon by prosecution that murder was committed and that accused had concealed the evidence for screening the offender — that he could be convicted of offence under though charge against him was only under S. 302 (12) 1925 P C 130 (131) : 6 Lah 226 : 52 I 191 : 26 Cri L Jour 1059 (PC) \* (Vol 27) 11 289 (289, 290) : 19 Pat 369 : 41 Cri L Jour 914

[(See however (95) 22 Cal 638 (639, 640) (D

[2] Where the disposal of the dead body is a transaction from the actual murder the act under both the sections 302 and 201 is legal. (1942 Lah 271 (275) : 44 Cri L Jour 77 (DB).

6. Murder, culpable homicide not amounting to murder and causing death by negligence : The following are the three views as to the charges in respect of facts which give rise to an offence of murder or culpable homicide not amounting to murder :

(a) Either cumulative or alternative charge framed in respect of them (Vol 12) 1903 R



237. (1) If, in the case mentioned in section 236, the accused is charged with one offence, and

*When a person is charged with one offence, he can be convicted of another.* it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

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## Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence.

[1882—S. 237; 1872—S. 237; 1861—Ss. 56 to 59.]

[a] Sub-section (2) was repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 63.

## Section 236—Note 6 (contd.)

(311) : 55 Bom 520 : 33 Cri L Jour 62 \* ('72-92) 1872-92 Low Bur Rul 300 (301) \* (Vol 2) 1915 Bom 297 (298) : 16 Cri L Jour 305 (DB) \* (Vol 11) 1924 Bom 450 (451) : 26 Cri L Jour 211. (Vol 1) 1914 Cal 65 : 41 Cal 621 : 14 Cri L Jour 660 (DB), Followed.)

(b) Cumulative or alternative charge cannot be framed. ('87) 1887 Pun Re No. 11 Cr, page 19 (21) (DB).

(c) Cumulative charge but not alternative charge can be framed. (Vol 25) 1938 Sind 63 (65) : 31 Sind L R 480 : 39 Cri L Jour 460 \* ('11) 12 Cri L Jour 224 (226) : 5 Sind L R 16.

## 7. Principal offence and abetment thereof.—

[1] A person may be convicted of abetment of an offence, even if he is charged with the substantive offence and *vice versa*, if the facts relied upon could have supported a charge for that offence. ('46) 25 Pat 562 (570). (Conviction altered as one for abetment in revision.) \* (Vol 31) 1944 Nag 192 (193, 194) : 46 Cri L Jour 80 : I L R (1944) Nag 589 (DB) \* (Vol 31) 1944 Pat 67 (73) : 45 Cri L Jour 624 : 22 Pat 681 (DB) \* (Vol 17) 1930 Nag 145 (148) : 30 Cri L Jour 224 \* (Vol 18) 1931 Oudh 274 (276) : 7 Luck 102 : 32 Cri L Jour 905 (DB) \* (Vol 21) 1934 Pat 561 (563) : 13 Pat 729 : 36 Cri L Jour 17 (D B) \* (Vol 7) 1920 Lah 15 (18) : 22 Cri L Jour 161 (D B) \* (Vol 12) 1925 Rang 122 (127, 128) : 3 Rang 11 : 26 Cri L Jour 492 \* (Vol 3) 1916 Cal 431 (443, 445) : 42 Cal 1094 : 17 Cri L Jour 113 (SB) \* (Vol 11) 1924 Bom 502 (507) : 49 Bom 84 : 26 Cri L Jour 1000 (DB) \* (Vol 19) 1932 Cal 455 (456) : 59 Cal 1192 : 33 Cri L Jour 720 (DB) \* (Vol 18) 1931 Mad 225 (227) : 32 Cri L Jour 753 \* (Vol 22) 1935 All 935 (937) : 37 Cri L Jour 247 \* (Vol 22) 1935 Pesh 67 (68) : 36 Cri L Jour 1438 \* ('32) 1932 Mad W N 1217 (1217).

[But see ('12) 13 Cri L Jour 223 (223) (Mad) \* ('12) 13 Cri L Jour 203 (203) (DB) (Mad) \* (Vol 11) 1924 Bom 432 (432) : 25 Cri L Jour 1135 (DB) \* (Vol 16) 1929 Nag 325 (328) : 30 Cri L Jour 944 (DB) \* ('21) 22 Cri L Jour 311 (312) (Pat) \* (Vol 7) 1920 Pat 512 (513) : 21 Cri L Jour 44 \* (Vol 10) 1923 Cal 453 (455) : 50 Cal 41 : 24 Cri L Jour 763 (DB) \* (Vol 14) 1927 Cal 63 (64) : 28 Cri L Jour 2 (DB) \* (Vol 15) 1928 Lah 382 (390) : 30 Cri L Jour 18.]

8. Alternative charges.—[1] Even alternative charges must conform to the provisions of Ss. 233, 234, 235 or S. 239 and each must be a legal charge. (Vol 25) 1938 Sind 171 (173) : I L R (1939) Kar 204 : 39 Cri L Jour 890 (D B).

[2] Alternative charges should be framed as in form given in Sch. V, No. 28, sub-head II. ('72-92) 1872-92 Low Bur Rul 436 (437).

[3] Charges of distinct offences such as kidnapping and abduction—Charges separately for kidnapping and abduction desirable. (Vol 14) 1927 Cal 644 (646) : 28 Cri L Jour 805 (DB) \* (Vol 33) 1946 Cal 493 (494) (DB).

[4] Omission to split up the charge into two parts is not a material error, unless the accused is prejudiced in defence. (Vol 17) 1930 Cal 209 (210, 211) : 57 Cal 1074 : 31 Cri L Jour 903 (DB) \* (Vol 20) 1933 Cal 676 (677) : 60 Cal 1394 : 34 Cri L Jour 1219 (DB) \* (Vol 21) 1934 Sind 164 (166, 167) : 36 Cri L Jour 231.

9. Sentence.—[1] Conviction in the alternative in respect of two offences—Sentence should be considered from the point of view of maximum sentence provided for the lesser offence. (Vol 4) 1917 All 29 (30) : 18 Cri L Jour 790 \* (Vol 7) 1920 All 110 (111) : 42 All 302 : 21 Cri L Jour 783 (DB) \* ('88) 1888 Pun Re No. 32 Cr, p. 65 (70) (DB) \* ('03) 1903 Pun L R No. 60, p. 245 (246, 247) (DB) \* (Vol 17) 1930 Mad 870 (873) : 54 Mad 68 : 32 Cri L Jour 263 (DB) \* ('90) 1890 Pun Re No. 27 Cr, p. 90 (93). (Even where a person is charged under two parts of the Section, one carrying a higher and the other a lighter punishment.) \* ('99) 1899 Pun Re No. 3 Cr, p. 7 (8, 9) (Do.)

[2] Common object to dispossess complainant specified in charge and accused convicted under S. 147, I. P. C.—Conviction for common object to cause hurt cannot be substituted in appeal. (Vol 33) 1946 Cal 305 (305).

10. "Series of acts," meaning of.—[1] The section cannot apply when there are more than one separate single acts or separate series of acts each of which constitutes a separate offence although it may be doubtful as to which offence will be constituted. (Vol 31) 1944 Cal 224 (228) : 45 Cri L Jour 666 : I LR (1944) 1 Cal 398 (D B).

[2] A statement made in the evidence in a civil suit and a statement made in the evidence in a criminal case cannot be considered to be a "series of acts." (Vol 11) 1924 Sind 1 (3, 4) : 16 Sind L R 285 : 25 Cri L Jour 1195.

## Section 237—Note 1

[1] This section is an exception to the general rule that the accused person cannot be convicted of an offence of which he was not charged. (Vol 33) 1946 Bom 38 (41) : 47 Cri L Jour 378 (F B) \* (Vol 31) 1944 All 137 (143) : 46 Cri L Jour 38 : I L R (1944) All 403 (F B).

[2] This section applies only in cases falling within S. 236. (Vol 32) 1945 All 81 (84) : 46 Cri L Jour 750 : I L R (1945) All 558 \* (Vol 32) 1945 Pat 376 (379) (DB) \* (Vol 26) 1939 All 665 (667) : 40 Cri L Jour 948 \* (Vol 25) 1938 Cal 51 (68) : I L R (1938) 1 Cal 290 : 39 Cri L Jour 161 (DB) \* (Vol 23) 1936 Cal 796 (799) : 62 Cal 956 : 37 Cri L Jour 701 (DB).

[3] In cases where there is no doubt on the facts which can be proved as to which of the several offences the facts will constitute, this section has no application. (Vol 32) 1945 All 81 (85) : I L R (1945) All 558 : 46 Cri L Jour 750 \* (Vol 23) 1936 Cal 796 (799) : 62 Cal 956 : 37 Cri L Jour 701 (DB).

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

<sup>a</sup>[(2A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.]

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

#### Illustrations.

(a) A is charged, under section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under section 406.

(b) A is charged, under section 325 of the Indian Penal Code, with causing grievous hurt. He proves it was acted on grave and sudden provocation. He may be convicted under section 335 of that Code.

[1882—S. 238; 1872—S. 457.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 64.

#### Section 237—Note 1 (contd.)

[4] Even though a conviction may be legal under S. 237, it may be set aside under S. 535 if it has prejudiced the accused. (Vol 14) 1927 Cal 520 (521) : 54 Cal 476; 28 Cri L Jour 404 (DB).

[See also (40) 44 Cal W N 651 (652) (DB). (Whether the accused can be convicted under S. 326 when the only charge was one under S. 304 read with S. 149, must turn upon the question whether any prejudice was caused to them.)]

[5] Sections 227 and 237 necessarily go together and in cases under S. 237 a Court is not empowered to convict a person of an offence of which he has not been told anything. (Vol 12) 1925 All 448 (448); 26 Cri L Jour 1057 \* (Vol 13) 1926 All 227 (228); 27 Cri L Jour 152 \* (Vol 20) 1933 All 30 (31) : 34 Cri L Jour 445. (Charge for murder—Conviction under S. 194, Penal Code, not illegal as it falls under S. 237, but the accused should nevertheless be asked to plead to the charge.)

[6] In convicting a person under this section the question to be decided is whether the accused has or has not been prejudiced in his trial by the fact that the charge was framed under the wrong section. (Vol 25) 1938 Oudh 263 (263); 39 Cri L Jour 937.

[7] Where a Court finds it necessary to convict an accused under this section, it should be particularly careful to formulate in its own mind the charge upon which had it been duly framed, it would be prepared to convict. (Vol 3) 1916 All 294 (294); 17 Cri L Jour 64.

[8] A totally different common object from the one specified in the charge and under which accused were convicted, cannot be substituted for the first time in appellate Court's judgment. (Vol 33) 1946 Cal 305 (306); 47 Cri L Jour 943.

[9] Accused charged with principal offence—He can be convicted of abetment without distinct charge. (46) 47 Cri L Jour 968 (969) (DB) (Nag).

[10] Accused charged with murder can be convicted under S. 411, Penal Code, even if not charged under it. (Vol 34) 1947 Mad 114 (115) (DB).

[11] The illustration to the section does not refer to cases in which there is no doubt as to what offence has been committed on the facts relied on by the prosecution but it is merely doubtful which offence will be proved and this section is, therefore, no authority for holding that in such cases, on a charge of one offence, a person can be convicted of a different offence. (Vol 23) 1936 Cal 796 (801); 62 Cal 956; 37 Cri L Jour 701 (DB).

[12] A conviction for a substantive offence can be

altered to a conviction for abetment of the same offence in revision without any charge for it, if the accused is not prejudiced. (46) 25 Pat 562 (570).

[13] Person charged with one offence—He could not be charged of another offence on the same facts. Court cannot take cognizance of latter offence without complaint—That person, held, cannot be convicted of latter offence without such complaint. (Vol 27) 1920 201 (201); 41 Cri L Jour 499 \* (Vol 5) 1918 La 385, 386; 1918 Pun Re No. 2 Cr: 19 Cri L Jour 131 \* (Vol 13) 1926 Rang 169 (171); 4 Rang 131 : 131 L Jour 1075 (DB).

#### SECTION 238 — SYNOPSIS.

1. Scope and principle of the section.
2. "Minor offence."
3. Attempt—Sub-section (2A).
4. When minor offence requires complaint—section (3).
5. Powers of appellate Courts and High Courts.

1. Scope and principle of the section. — Charge under S. 353, Penal Code of assaulting a public servant — Magistrate finding that person assaulted not public servant—*Held* he can be convicted under S. 352, Penal Code. (Vol 25) 1938 Rang 281 (282); Rang L R 139 : 39 Cri L Jour 761. (Dissenting from Cal W N 202.)

[2] Charge of murder—Judge can ask jury to return verdict, if they thought fit, of lesser offences with which accused was not specifically charged. (Vol 32) 1945 110 (111).

[3] Accused inflicted a wound with stabbing instrument in the abdomen of a person—Wound caused of that person—The question being whether the offence was murder or grievous hurt with a dangerous weapon held, the only difference between the two offences is of the degree of intention and S. 238 does not apply. 30) 1943 Mad 737 (738, 739) : 45 Cri L Jour 518.

[4] Murder and grievous hurt are regarded as major and minor offences so as to treat a charge for murder as including a charge for grievous hurt. (Vol 33) : Bom 38 (42) : 47 Cri L Jour 378 (FB) \* (Vol 29) 1 Pat 446 (449) : 43 Cri L Jour 205 : 21 Pat 138 (DE).

[5] When the circumstances constituting the major offence do not necessarily constitute the minor offence also, this section does not apply. (1900) 13 C P L R 167 (168). (Charge of murder—Conviction for dishonest misappropriation of property possessed by the deceased is not good, if the charge for the offence has not been

**Section 238 — Note 1 (contd.)**

framed.) \* (Vol 11) 1924 Bom 502 (504, 507) : 49 Bom 84 : 26 Cri L Jour 1000 (DB). (Conviction of accused under S. 307 read with S. 34 or S. 114 is legal though they were charged only with offences under Ss. 304, 148 and 149, Penal Code.) \* (Vol 11) 1924 Bom 432 (432) : 25 Cri L Jour 1135 (DB). (Charge under principal offence — Conviction for abetment cannot stand.)

[6] The section is an exception to the rule that a person cannot be convicted of an offence with which he is not charged. (Vol 33) 1946 Bom 38 (41) : 47 Cri L Jour 378 (FB) \* (Vol 31) 1944 All 137 (143) : 46 Cri L Jour 38 : I L R (1944) All 304 (FB) \* (Vol 12) 1925 Cal 903 (904) : 26 Cri L Jour 594 (DB).

[7] An accused person can be convicted of an offence different from that he was accused of, only in cases where the accused is not prejudiced in any way by the conviction on the new charge. (Vol 9) 1923 Pat 5 (7) : 23 Cri L Jour 114 \* (Vol 4) 1917 Cal 824 (825) : 44 Cal 358 : 17 Cri L Jour 424 \* (Vol 8) 1921 Pat 217 (218). (But if the accused is prejudiced, he must be retried.) \* ('13) 14 Cri L Jour 212 (213) (DB) (Cal) \* (Vol 9) 1922 Pat 5 (7) : 23 Cri L Jour 114 \* (Vol 1) 1914 Cal 663 (663) : 41 Cal 743 : 15 Cri L Jour 190 (DB).

[8] It is sufficient for conviction under this section if a guilty intention is proved such as is contemplated in S. 441, Penal Code. (Vol 4) 1917 Cal 824 (825) : 44 Cal 358 : 17 Cri L Jour 424.

[9] There is no provision of law which allows the conviction for a major offence on a charge of a minor one. ('98) 1 Bom L R 513 (514) (DB) \* ('11) 13 Cri L Jour 429 (430) : 1911 Upp Bur Rul 98 \* (Vol 8) 1921 Low Bur 36 (37) : 11 Low Bur Rul 45.

[10] The powers given by this section are not controlled by the sections of the Code which prescribe the procedure to be followed in trying the offence charged and have nothing to do with the form of the trial nor with the convicting authority. (Vol 8) 1921 Bom 59 (60, 61) : 45 Bom 619 : 22 Cri L Jour 51 (DB) \* (Vol 13) 1926 Bom 134 (135) : 27 Cri L Jour 650 (DB).

[11] The section invests a jury, empanelled to try an offence triable by a jury, to find as an incident that the facts proved amount to a minor offence and return a verdict of guilty or not guilty of such offence. (Vol 33) 1946 Bom 38 (42) : 47 Cri L Jour 378 (FB) \* (Vol 24) 1937 Pat 662 (664) : 39 Cri L Jour 156 (DB).

[12] Jury empanelled to try an offence—Facts proved amount to a minor offence which is triable with assessors only—Jury can return a verdict in respect of minor offence. (Vol 24) 1937 Pat 662 (664) : 39 Cri L Jour 156 (DB) \* ('01) 25 Bom 680 (689, 693, 694) (FB) \* (Vol 13) 1926 Bom 134 (135) : 27 Cri L Jour 650 (DB) \* (Vol 15) 1928 Mad 275 (275) : 29 Cri L Jour 351 \* (Vol 1) 1914 Mad 425 (428) : 37 Mad 236 : 13 Cri L Jour 739 (DB) \* (Vol 16) 1929 Nag 295 (296) : 31 Cri L Jour 557 \* ('10) 11 Cri L Jour 630 (630) : 13 Oudh Cas 295 \* (Vol 2) 1915 Low Bur 39 (45) : 16 Cri L Jour 676 : 8 Low Bur Rul 274 (DB).

[13] The section empowers a Court trying an accused person for an offence with the aid of assessors to convict him for a minor offence triable by jury. (Vol 8) 1921 Bom 59 (60, 61) : 45 Bom 619 : 22 Cri L Jour 51 (DB).

[14] Charge under S. 304, Penal Code—Jury returned verdict of not guilty but returned verdict of "guilty but not voluntarily" under S. 326—Verdict amounts to "not guilty" under S. 326, Penal Code—This section does not apply. ('08) 7 Cri L Jour 362 (366, 367) (DB).

[15] Charge under Ss. 120B/161, Penal Code—Charge under S. 161 not proved but case under S. 165 made out—Court bound to convict the accused under Ss. 120B and 165. (Vol 34) 1947 Cal 162 (167) (DB).

2. "Minor offence." — [1] The words "minor offence" ought to be taken in their ordinary sense and

not in any technical sense. ('95) 22 Cal 1006 (1010) (DB).

[2] Sub-section (1) of S. 238 does not refer to the gravity of punishment at all; it merely refers to the number of particulars constituting the offence. (Vol 23) 1936 Bom 193 (196) : 60 Bom 485 : 37 Cri L Jour 753.

[3] The major and minor offences must be cognate offences which have the main ingredients in common. (Vol 32) 1945 All 51 (35) : 1 L R (1945) All 558 : 46 Cri L Jour 750. (Person charged with an offence of murder cannot be convicted for forgery or misappropriation.) \* (Vol 32) 1945 Pat 378 (380) (DB).

[4] In the following cases the first is a minor offence and the second offence charged is a major one:

(a) Grievous hurt and murder. (Vol 33) 1946 Bom 38 (42) : 47 Cri L Jour 378 (FB) \* (Vol 29) 1942 Pat 446 (449) : 21 Pat 138 : 43 Cri L Jour 205 (DB).

(b) Sections 411 and 395, Penal Code. (Vol 32) 1945 Nag 1 (7) : I L R (1945) Nag 151 : 46 Cri L Jour 448 (DB).

(c) Section 147 or Ss. 395 and 396, Penal Code. (Vol 31) 1944 Sind 113 (114, 121) : I L R (1943) Kar 371 : 45 Cri L Jour 704 (DB).

(d) Sections 323 and 332, Penal Code. (Vol 27) 1940 Cal 321 (321) : 41 Cri L Jour 744 (DB).

(e) Sections 143 and 147, Penal Code. (Vol 19) 1932 Mad 501 (501) : 33 Cri L Jour 598.

(f) Sections 323 and 302 and 149, Penal Code. (Vol 18) 1931 Lah 566 (568) : 33 Cri L Jour 315 (DB).

[5] The following are not major and minor offences : (a) Sections 395 and 458 or S. 323, Penal Code. (Vol 32) 1945 All 81 (85) : 1 L R (1945) All 558 : 46 Cri L Jour 750.

(b) Sections 395 and 147 or S. 148, Penal Code. (Vol 32) 1945 Pat 376 (379, 380) (DB).

(c) Conspiracy with two different objects alleged—It is not certain that a conspiracy with only one of these objects is a minor offence. (Vol 25) 1938 Cal 51 (69) : I L R (1938) 1 Cal 290 : 39 Cri L Jour 161 (DB).

(d) Section 160 and Ss. 147 and 323, Penal Code. (Vol 11) 1924 Mad 375 (376) : 47 Mad 61 : 25 Cri L Jour 554.

(e) Sections 369 and 392, Penal Code. (Vol 17) 1930 Lah 544 (544) : 32 Cri L Jour 301.

(f) Sections 427 and 409, Penal Code. (Vol 17) 1930 Rang 158 (159) : 8 Rang 13 : 31 Cri L Jour 799.

[6] Abetment is not a minor offence coming under this section. (Vol 22) 1935 Pesh 67 (68) : 36 Cri L Jour 1438 \* (Vol 14) 1927 Cal 63 (64) : 28 Cri L Jour 2 (DB) \* (Vol 14) 1927 All 35 (36) : 49 All 120 : 27 Cri L Jour 1118 \* (Vol 11) 1924 Bom 432 (432) : 25 Cri L Jour 1135 (DB).

[But see (Vol 27) 1940 Lah 112 (113) : 41 Cri L Jour 540 \* (Vol 22) 1935 All 935 (937) : 37 Cri L Jour 247.]

[7] A charge of rioting under S. 147 or of being a member of an unlawful assembly under S. 149, does not by itself or by being charged together with a charge of hurt, include as a minor offence an act of violence by an individual accused so as to authorise under this section a conviction under Ss. 323, 325, 326, 352 or for criminal trespass. ('36) 19 Nag L Jour 18 (21). (S. 323.) \* (Vol 5) 1918 Mad 496 (496, 497) : 18 Cri L Jour 860 (DB). (Do.) \* ('07) 5 Cri L Jour 427 (432) : 34 Cal 698 (DB). (S. 325.) \* (Vol 7) 1920 Pat 216 (218, 219) : 21 Cri L Jour 439 (DB). (Do.) \* (Vol 2) 1915 Cal 292 (294) : 41 Cal 662 : 15 Cri L Jour 155 (DB). (S. 326.) \* (Vol 16) 1929 Pat 712 (713) : 9 Pat 642 : 30 Cri L Jour 691 (DB). (S. 352.) \* (Vol 1) 1914 Cal 631 (632) : 15 Cri L Jour 188 (DB). (Criminal trespass.) \* (Vol 5) 1918 Mad 496 (496) : 18 Cri L Jour 860 (DB). (Do.)

[See however (Vol 28) 1941 Nag 10 (11, 12) : I L R (1941) Nag 139 : 42 Cri L Jour 203. (May be convicted under S. 323.)]

[8] A conviction on the substantive charge only or a charge coupled with S. 149, Penal Code, is not neces-

What persons may be charged jointly.

238. The following persons may be charged and tried together, namely:—

- (a) persons accused of the same offence committed in the course of the same transaction;
- (b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;
- (c) persons accused of more than one offence of the same kind, within the meaning of section 234 committed by them jointly within the period of twelve months;
- (d) persons accused of different offences committed in the course of the same transaction;
- (e) persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;
- (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and
- (g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter

#### Section 238 — Note 2 (contd.)

sarily bad, the legality of the conviction depending on whether the accused has or has not been materially prejudiced by the form of the charge. (Vol 12) 1925 Mad 1 (6): 47 Mad 746: 25 Cri L Jour 1297 (FB)\* (36) 19 Nag L Jour 18 (21)\* (Vol 12) 1925 Lah 286 (286): 26 Cri L Jour 820.

3. Attempt — Sub-section (2A). — [1] Charge under S. 420, Penal Code — Conviction for attempt to cheat under S. 511, Penal Code, is legal. (Vol 29) 1942 All 337 (337): 13 Cri L Jour 858: I L R (1942) All 889.

[2] Accused acquitted of offence under S. 302, Penal Code—Appellate Court can convict him under S. 307, Penal Code, although not separately charged. (Vol 23) 1936 Oudh 44 (47): 37 Cri L Jour 12 (DB).

[3] The sub-section does not permit a conviction for an attempt to commit a different offence with which the accused was never charged. (Vol 28) 1941 Lah 214 (215): 42 Cri L Jour 660: I L R (1941) Lah 423 (DB).

4. When minor offence requires complaint — Sub-section (3).—[1] A prosecution for adultery under S. 497 or for enticing away a married woman under S. 498 requires a complaint by the husband and, therefore, a person charged with rape or abduction cannot be convicted either under S. 497 or under S. 498 in the absence of a complaint by the husband. ('83) 5 All 233 (235). (S. 497.)\* ('03) 30 Cal 910 (915, 916) (FB). (Ss. 497 and 498.)\* ('13) 14 Cri L Jour 284 (286): 1912 Upp Bur Rul 155. (Do.)\* (Vol 27) 1940 All 201 (201): 41 Cri L Jour 499. (S. 498.)\* ('07) 5 Cri L Jour 164 (167): 31 Bom 218 (DB). (Do.)\* ('04) 27 Mad 61 (62) (DB). (Do.)

[2] No conviction can be made under S. 498 when the complaint was specifically made under S. 497 only. ('73) 1873 Pun Re No. 18 Cr, p. 20 (21) (DB).

[3] No conviction can be made under S. 500 for defamation in the absence of a complaint by the person aggrieved where the complaint was under Ss. 353 and 504 or under S. 501, Penal Code. ('87) 10 All 39 (42, 43). (Complaint under S. 504.)\* ('89) 1889 Pun Re No. 18 Cr, p. 67 (69). (Complaint under S. 501.)\* (Vol 10) 1923 Oudh 4 (6): 26 Oudh Cas 44: 23 Cri L Jour 641. (Do.)

[4] The Court cannot convict an accused person of a minor offence for the taking cognizance of which a complaint under S. 195 is necessary, without such complaint. (Vol 12) 1925 All 129 (130): 47 All 114: 26 Cri L Jour 448.

#### 5. Powers of appellate Courts and High Court.—

[1] An appellate Court may under this section alter a conviction for a major offence into one for a minor offence. (Vol 31) 1944 All 137 (143, 156): I L R (1944) All 304: 46 Cri L Jour 38 (FB)\* (Vol 26) 1939 All 710 (712): 41 Cri L Jour 111\* (Vol 25) 1938 Rang 281 (282): 1938 Rang L R 139: 39 Cri L Jour 761\* (Vol 23) 1936 Oudh 44 (47): 37 Cri L Jour 12 (DB)\* (Vol 14) 1927 Oudh 296 (296): 2 Luck 503: 28 Cri L Jour 673.

[2] The High Court can even in a reference under S. 307 of the Code, convict the accused of any offence of which the jury could have convicted him. ('08) 8 Cri L Jour 143 (144) (DB)\* ('95) 22 Cal 1006 (1009) (DB)\* (Vol 1) 1914 Mad 425 (428): 37 Mad 236: 13 Cri L Jour 730 (DB).

#### SECTION 239 — SYNOPSIS.

1. Scope.
2. Whether Ss. 234, 235, 236 and 239 are mutually exclusive.
- 2a. Clauses of S. 239, if mutually exclusive.
3. "May be tried together."
4. "Accused of the same offence"—Clause (a).
5. Abetment and attempt — Clause (b).
- 5a. Offences of the same kind—Clause (c).
6. "Same transactions — Clauses (a) and (d).
7. Acts done in pursuance of conspiracy.
8. Acts in prosecution of a common object.
9. Several persons giving false evidence in the same case.
10. Printing and publishing seditious matter.
11. Defamation by different persons.
12. Continuing offence.
13. Kidnapping and abduction.
14. Keeping gaming house and using it.
15. Charge need not refer to transaction being same.
16. Clause (e).
17. Clause (f).
18. Clause (g).
19. Simultaneous trials.
20. Criminal breach of trust and receiving stolen property.
21. Objection as to joinder.

1. Scope. — [1] It is only under this section that the joint trial of several accused persons is permissible. (Vol 32) 1945 Lah 286 (288): 47 Cri L Jour 269: I L R

relating to the same coin, or of abetment of or attempting to commit any such offence;

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges.]

[1882—S. 239; 1872—S. 458.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 65.

#### Objects and Reasons.

We consider that the re-draft of Section 239 proposed by this clause is a great improvement on the existing Section. We have discussed the various criticisms which have been levelled against the clause and have not seen our way to make any amendment of substance. We think it would be dangerous, if not impossible, to attempt any definition of the phrase 'in the course of the same transaction.' An exhaustive definition is not feasible, and if the phraseology is altered, the Courts would be

deprived of the guidance which they now have from a long series of rulings on the point. We do not find that there has been any pronounced conflict of opinion, the reason being that the Courts, instead of attempting to lay down general principles, as a rule discuss each case on its merits. We have adopted a suggestion to substitute the words 'is alleged to have been transferred' for the words 'has been transferred' in Clause (e)."

— S. C. R. [XVIII of 1923].

#### Section 239 — Note 1 (*contd.*)

(1946) Lah 483 (F B) \* (Vol 25) 1938 P C 130 (133): 39 Cri L Jour 452 : 65 Ind App 158 : 32 Sind L R 476 : I L R (1938) 2 Cal 295 (P C).

[2] It is not illegal to jointly commit several accused persons for offences not falling within the provisions of this section. (Vol 29) 1942 Bom 212 (213) : 43 Cri L Jour 773 : I L R (1943) Bom 534 \* (Vol 6) 1919 Mad 45 (47) : 20 Cri L Jour 379 : 42 Mad 561 (D B).

[But see ('97) 1897 Rat 925 (926).]

[3] Joint commitment of accused should as a matter of prudence be avoided. ('81) 1881 Pun Re No. 22 Cr, p. 47 (49) (D B).

[4] A joint inquiry in cases not permitted by the law was held illegal and not merely irregular. ('04) 1 Cri L Jour 58 (60, 61) (D B) (Cal) \* ('07) 5 Cri L Jour 197 (199) (D B) (Cal).

[5] A Magistrate cannot try persons for offences committed outside his jurisdiction, though otherwise the case may fall within the provisions of this section. (Vol 33) 1946 Sind 1 (6) : ILR (1945) Kar 275 : 47 Cri L Jour 455 \* (Vol 16) 1929 Mad 839 (840) : 30 Cri L Jour 1161 : 52 Mad 991.

[6] A joint trial of several persons — At the end of the trial facts found are different from those on which charge was framed — Acquittal of some of the accused does not render trial invalid. (Vol 34) 1947 Sind 49 (55) \* (Vol 27) 1940 Nag 249 (250) : 41 Cri L Jour 734 : I L R (1942) Nag 208 \* (Vol 27) 1940 Pat 499 (501) : 41 Cri L Jour 452 (DB) \* (Vol 25) 1938 P C 130 (133) : 39 Cri L Jour 452 : 65 Ind App 158 : 32 Sind L R 476 : I L R (1938) 2 Cal 295 (P C) \* (Vol 9) 1922 Cal 107 (113) : 49 Cal 573 : 23 Cri L Jour 657 (DB).

2. Whether Ss. 234, 235, 236 and 239 are mutually exclusive.—[1] Where two or more persons can be jointly tried under this section for certain offences, it is not permissible to add as against one of such persons charges which could be added under Ss. 234 to 236 if he were being tried alone. (Vol 25) 1938 P C 130 (133) 39 Cri L Jour 452 : 65 Ind App 152 : ILR (1938) 2 Cal 295 : 32 Sind L R 476 (P C) \* (Vol 28) 1941 Rang 337 (339) : 1941 Rang L R 559 : 43 Cri L Jour 448 \* (Vol 16) 1929 All 202 (203) : 30 Cri L Jour 687 : 51 All 544.

[But see (Vol 23) 1936 All 337 (342, 343) : 37 Cri L Jour 794 : 58 All 695 (DB) \* (Vol 30) 1943 Lah 220 (221) : 45 Cri L Jour 80 : I L R (1944) Lah 145 (DB).] (Vol 16) 1929 Lah 142 : 29 Cri L Jour 1080, Overruled.]

[2] The provisions of this section are not controlled by Ss. 234 to 236. (Vol 25) 1938 Bom 481 (483) : I L R (1939) Bom 42 : 40 Cri L Jour 118 (DB) \* (Vol 13) 1926 Oudh 161 (165) : 26 Cri L Jour 1602.

[3] Where several charges have been rightly joined against the same accused under S. 235, there can be no

objection to one of such charges being in the alternative under S. 236. (Vol 19) 1932 All 25 (26) : 33 Cri L Jour 122 : 54 All 337 \* (Vol 18) 1931 All 49 (50) : 53 All 233 : 32 Cri L Jour 1007.

[See however (Vol 21) 1934 Mad 673 (674) : 35 Cri L Jour 1503 : 58 Mad 178.]

[4] A, B and C are offences of same kind—Offence D forms part of the same transaction as A — Offences E and F are parts of the same transaction as B and C respectively — All these offences cannot be tried together in the same trial by virtue of Ss. 234 and 235 read together. (Vol 24) 1937 Sind 1 (2) : 30 Sind L R 391 : 38 Cri L Jour 324 (DB) \* (Vol 22) 1935 Nag 178 (180) : 31 Nag L R 337 : 36 Cri L Jour 1216 \* (Vol 18) 1931 Oudh 86 (87) : 32 Cri L Jour 540 : 6 Luck 441 \* (Vol 13) 1926 All 261 (261, 262) : 27 Cri L Jour 143 : 48 All 236 \* (Vol 13) 1926 Bom 110 (111) : 27 Cri L Jour 305 : 49 Bom 892 (DB) \* (Vol 2) 1915 Cal 296 (296) : 41 Cal 722 : 15 Cri L Jour 153 (DB).

[But see (Vol 29) 1942 Pat 401 (405) : 43 Cri L Jour 625 : 21 Pat 113 (DB) \* (Vol 21) 1934 Pat 232 (234) : 35 Cri L Jour 876 : 13 Pat 170 (DB).]

[5] Acts of falsification of accounts committed for the purpose of concealing the offence of misappropriation will constitute parts of the same transaction as such offence and can be tried at the same trial. (Vol 22) 1935 Cal 312 (315) : 62 Cal 808 (DB) \* (Vol 13) 1931 Pat 349 (350) : 10 Pat 463 : 32 Cri L Jour 1026 (DB).

[But see (Vol 22) 1935 Nag 178 (181) : 31 Nag L R 337 : 36 Cri L Jour 1216.]

(6) Where a person is charged with several offences under S. 234 there is no objection to his being tried on additional charges framed under S. 235 (2) or 236. (Vol 31) 1944 Bom 306 (311) : ILR (1944) Bom 728 (DB) \* ('09) 9 Cri L Jour 226 (244) : 33 Bom 221 (DB).

2a. Clauses of section 239, if mutually exclusive.—[1] Where A is accused of an offence and B of the abetment thereof, the case comes under clause (b) but if the offence and the abetment forms part of the same transaction, the case will also fall under clause (d). (Vol 25) 1938 Sind 164 (167) : 39 Cri L Jour 881 : I L R (1939) Kar 64 (DB).

3. "May be tried together."—[1] It is in the discretion of the Court either to try jointly or separately as it thinks best. (Vol 32) 1945 Lah 286 (288) : 47 Cri L Jour 269 : ILR (1946) Lah 483 (F B) \* (Vol 25) 1938 Bom 481 (483) : 40 Cri L Jour 118 : ILR (1939) Bom 42 (DB) \* (Vol 24) 1937 Cal 22 (22) : 38 Cri L Jour 750 (DB) \* (Vol 23) 1936 Cal 753 (759) : 38 Cri L Jour 545 (DB) \* (Vol 23) 1936 Sind 47 (48) : 37 Cri L Jour 716 (DB).

[2] The manner in which discretion to hold joint or separate trial should be exercised depends on the facts of each case. (Vol 23) 1936 Cal 753 (759) : 38 Cri

**Section 239 — Note 3 (contd.)**

L Jour 545 (DB) \* (Vol 2) 1915 Cal 712 (713); 16 Cri L Jour 348 (DB).

[3] Wherever the applicability of the section is doubtful, it is far better that it should not be applied than that it should. (Vol 23) 1936 Rang 474 (175); 38 Cri L Jour 185 (DB); \* (Vol 14) 1927 Mad 177 (178); 50 Mad 735; 27 Cri L Jour 1381.

[4] Joinder of charges should not be resorted to when here is a risk of embarrassing the defence by such joinder. (Vol 32) 1945 Lah 286 (288, 289); 47 Cri L Jour 269; ILR (1946) Lah 483 (F B) \* (Vol 28) 1941 Cal 707 (713); 43 Cri L Jour 389; ILR (1942) 2 Cal 319 (DB) \* (Vol 28) 1941 Mad 339 (342); 42 Cri L Jour 14 \* (Vol 26) 1939 Cal 321 (322); 40 Cri L Jour 619 (DB).

[5] Four dacoities committed at four different places within two years — Accused, fourteen in all, took part in one or more of these dacoities — Held, the accused would be tried separately for the dacoities in which they participated. ('11) 12 Cri L Jour 260 (261) (D B) (ah).

[6] An exercise of discretion under the section, even improper, will not be interfered with, unless it has occasioned a failure of justice. (Vol 23) 1936 Sind 478; 37 Cri L Jour 716 (D B) \* (Vol 9) 1922 Cal 107 (12); 49 Cal 573; 23 Cri L Jour 657 (D B).

**4. "Accused of the same offence"—Clause (a).**

[1] The words "same offence" signify one and the same physical act of crime and not different acts constituting crimes called by the same name or punishable under the same section. (Vol 26) 1939 Rang 390 (391);

Cri L Jour 153; 1940 Rang L R 203 (D B) \* (Vol 3) 16 Nag 73 (75); 18 Cri L Jour 339; 13 Nag L R 35.

[2] Several persons being together in possession of the same stolen property commit the same offence. (21) 1934 All 811 (812); 35 Cri L Jour 1224 \* (84) 84 All W N 52 (53). (Several persons subscribing their names to a false written statement, commit the same offence.) \* (Vol 29) 1942 Oudh 89 (92); 43 Cri L Jour 3; 17 Luck 353 \* (Vol 25) 1938 Mad 615 (616); 39 Cri L Jour 816 \* (Vol 6) 1919 Cal 367 (368); 46 Cal 712; Cri L Jour 122 (D B) \* (Vol 11) 1924 All 233 (234); Cri L Jour 193 (D B) \* (Vol 22) 1935 Rang 299 (0); 36 Cri L Jour 1380.

[3] Where five or more persons actuated by a single motive made several attacks against certain persons, it is held that they committed a single riot and not a number of separate riots. (Vol 12) 1925 Oudh 65 (66); Cri L Jour 1169.

[4] The term "offence" under this section has been held to include minor and alternative offences. (Vol 25) 38 Sind 164 (165); 39 Cri L Jour 881; I L R (1939) 64 (D B).

[5] A made a false charge against X of stealing goats; next day B made a false charge against X of stealing the same goats, held that A and B committed the same offence. ('03) 27 Mad 127 (129) \* (Vol 4) 1917 Pat (523); 18 Cri L Jour 687. (Where five tenants who are in concert are charged with the offence of mischief committed in respect of different plots in their respective possessions, they can be said to have committed one offence.)

[6] Single offence committed — Prosecution alleged that A or B committed it—A and B have not committed same offence and cannot be tried together. (Vol 26) 9 Rang 390 (391); 41 Cri L Jour 153; 1940 Rang L R 203 (D B) \* ('13) 14 Cri L Jour 563 (564); 7 Low Rul 68 \* (Vol 21) 1934 Rang 193 (194); 35 Cri L R 1312 \* (Vol 10) 1923 Rang 67 (68); 24 Cri L Jour

[7] A charged with committing murder by stabbing X—B charged in the alternative with abetting A or himself stabbing X—A and B should be tried separately. (Vol 24) 1937 Rang 512 (512); 39 Cri L Jour 198 (D B).

[8] Two sets of accused committed for trial by different Magistrates for the same offence committed during same transaction — Accused made aware of the offence—Evidence discloses that same offence committed jointly — No prejudice to the accused caused—Held, they can be tried jointly. (Vol 32) 1945 Lah 286 (286); 47 Cri L Jour 269; I L R (1946) Lah 483 (F B).

**5. Abetment and attempt — Clause (b). — [1]**

The trial of offenders and their accomplices comes under this clause and may be joint. (Vol 13) 1926 Mad 638 (640); 50 Mad 274; 27 Cri L Jour 394 \* (Vol 31) 1944 Cal 388 (389); 46 Cri L Jour 151; I L R (1944) 1 Cal 109 (DB). (Persons accused of offence and persons accused of abetment.) \* (Vol 29) 1942 Oudh 89 (92); 43 Cri L Jour 153; 17 Luck 353 (Do.) \* (Vol 17) 1930 Mad 102 (103); 31 Cri L Jour 457 (Do.) \* (Vol 7) 1920 Lah 364 (365); 1919 Pun Re No. 30 Cr; 21 Cri L Jour 306 (DB). (Persons accused of offence and persons accused of attempt to commit that offence.) \* ('11) 12 Cri L Jour 106 (107); 38 Cal 453 (D B). (One person accused for attempt to commit an offence and another for abetment of it.)

[But see (Vol 7) 1920 All 358 (358); 42 All 24; 20 Cri L Jour 634]. (User of forged document — Abetment of forgery.)]

[2] Where the principal offence and abetment constitute the same transaction a joint trial of the principal offender and abettor will be justified under clause (a). (Vol 29) 1942 Oudh 89 (92); 17 Luck 353; 43 Cri L Jour 153 \* (Vol 25) 1938 Sind 164 (167); 39 Cri L Jour 881; I L R (1939) Kar 64 (D B).

**5a. Offences of the same kind — Clause (c). —**

[1] Two persons accused of jointly committing two distinct offences of the same kind but not forming part of the same transaction—They can be tried together. ('39) 1939 Mad W N 1253 (1253).

[2] Offences under S. 41 (h) and (j) of the Factories Act, 1911, are offences of the same kind within the meaning of this section. (Vol 19) 1932 Pat 188 (189); 33 Cri L Jour 274.

[3] Two persons accused of two offences committed jointly during the same year—For each offence charge framed in the same alternative form — Held, offences charged are not of the same kind though transactions are. (Vol 30) 1943 Mad 209 (209); 44 Cri L Jour 413.

**6. "Same transaction"—Clauses (a) and (d)—[1]**

Where A commits offence P, B commits offence Y and C commits offence Z, Y and Z form parts of the same transaction. A, B and C can, at one trial, be tried for the offences X, Y and Z respectively. (Vol 29) 1942 Bom 121 (122); 43 Cri L Jour 621 (F B) \* (Vol 27) 1940 Nag 249 (250); I L R (1942) Nag 208; 41 Cri L Jour 734 \* (Vol 25) 1938 All 91 (95); 39 Cri L Jour 364 \* (Vol 22) 1935 Rang 299 (300); 36 Cri L Jour 1380 \* (Vol 16) 1929 Mad 450 (450); 52 Mad 532; 30 Cri L Jour 983 (DB).

[2] Any number of offences can be charged when they come under clause (d) of this section. (Vol 25) 1938 P C 130 (133); 39 Cri L Jour 452; 65 Ind App 158; 32 Sind L R 476; I L R (1938) 2 Cal 295 (P C) \* (Vol 28) 1941 Sind 121 (126); 42 Cri L Jour 715 (DB). (Offences coming under clause (d) should all form part of the same transaction.)

[3] The words "same transaction" have the same meaning as they have in S. 235. (Vol 18) 1931 Pat 52 (53); 32 Cri L Jour 478 (D B).

[4] The test whether the several offences are parts of the same transaction is to see whether they are so relat-

See ('99) 3 Cal W N colxxvii (colxxviii).]



**Section 239 — Note 6 (contd.)**

ed to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. (Vol 29) 1942 Oudh 100 (103) : 42 Cri L Jour 833 (Vol 28) 1941 Sind 121 (126, 127) : 42 Cri L Jour 715 (D B) (Vol 27) 1940 Nag 249 (250) : 41 Cri L Jour 734 : I L R (1942) Nag 208 (Vol 27) 1940 Pat 499 (501) : 41 Cri L Jour 452 (D B) (Vol 24) 1937 Lah 793 (794) : 39 Cri L Jour 141 (D B).

[5] Where there is continuity of purpose or design and continuity of action, the different acts may be regarded as a transaction. (Vol 33) 1946 Pat 40 (43, 44) : 24 Pat 501 : 48 Cri L Jour 99 (D B) (Vol 29) 1942 Oudh 89 (92) : 43 Cri L Jour 153 : 17 Luck 353 (Vol 26) 1939 Nag 263 (264) : I L R (1939) Nag 644 : 41 Cri L Jour 27 (Vol 25) 1938 Oudh 216 (216) : 39 Cri L Jour 853 (Vol 23) 1936 Nag 250 (251) : I L R (1937) Nag 165 : 38 Cri L Jour 492 (Vol 5) 1918 Bom 117 (121) : 43 Bom 147 : 20 Cri L Jour 71 (D B) (Vol 4) 1917 Lah 78 (79, 80) : 18 Cri L Jour 282 : 1917 Pun Re No. 17 Cr (D B) (Vol 6) 1919 Mad 487 (493) : 20 Cri L Jour 354 (D B).

[6] Where there is no identity or community of purpose and no concert but the accused persons separately commit offences, whether of the same kind or not, they cannot be regarded as parts of the same transaction and a joint trial is bad. (Vol 32) 1945 Pat 838 (839) : 24 Pat 303 : 47 Cri L Jour 154 (DB) (Vol 23) 1941 Mad 910 (910) : 43 Cri L Jour 215 : I L R (1942) Mad 322 (Vol 28) 1941 Mad 339 (342) : 42 Cri L Jour 414 (Vol 27) 1940 Pat 499 (501) : 41 Cri L Jour 452 (Vol 27) 1940 Rang 113 (113) : 41 Cri L Jour 790 (Vol 25) 1938 Cal 769 (770) : 40 Cri L Jour 280 (DB) (Vol 24) 1937 Nag 138 (139) : 38 Cri L Jour 542 : I L R (1939) Nag 297 (Vol 10) 1923 Rang 132 (132) : 4 Upp Bur Rul 127 : 25 Cri L Jour 319 (Vol 20) 1933 Nag 368 (369) : 34 Cri L Jour 1175 (Vol 13) 1926 Lah 248 (249) : 7 Lah 168 : 27 Cri L Jour 465 (Vol 20) 1933 Sind 352 (353) : 35 Cri L Jour 153 (DB) (Vol 21) 1934 Pesh 112 (113, 114) : 35 Cri L Jour 1410 (DB) (Vol 17) 1930 Rang 114 (116, 117) : 7 Rang 821 : 31 Cri L Jour 387 (Vol 21) 1934 Lah 630 (631) : 36 Cri L Jour 676.

[7] Proximity of time is not essential to constitute the acts parts of the same transaction. (Vol 33) 1946 Pat 40 (44) : 24 Pat 501 : 48 Cri L Jour 99 (DB) (Vol 29) 1942 Bom 121 (122) : 43 Cri L Jour 621 (FB) (Vol 23) 1936 Nag 250 (251) : I L R (1937) Nag 165 : 38 Cri L Jour 482 (Vol 12) 1925 Mad 690 (692) : 26 Cri L Jour 1513 : 49 Mad 74 (Vol 4) 1917 Lah 78 (79) : 18 Cri L Jour 282 : 1917 Pun Re No. 17 Cr (DB).

[8] It is not necessary that the accused should have acted together from start to finish. (11) 12 Cri L Jour 268 (269) (DB) (Mad).

[9] The mere fact that several offences of the same kind, such as dacoity, are committed at about a particular time, will not necessarily make them parts of the same transaction. (Vol 21) 1934 Oudh 325 (326) : 35 Cri L Jour 1048.

[10] What does or does not form part of the same transaction is a question of fact in each particular case. (Vol 33) 1946 Pat 40 (43) : 24 Pat 501 : 48 Cri L Jour 99 (DB) (Vol 25) 1938 Sind 164 (166) : 39 Cri L Jour 881 : I L R (1939) Kar 64 (DB) (Vol 24) 1937 All 714 (717) : I L R (1937) All 779 : 39 Cri L Jour 38 (DB) (Vol 14) 1927 Cal 330 (331) : 28 Cri L Jour 347 (DB) (Vol 12) 1925 Mad 690 (699) : 26 Cri L Jour 1513 : 49 Mad 74.

[11] In determining whether several persons can be jointly tried as having committed offences forming parts of the same transaction, the Court need not consider what the final result of the case would be. (Vol 32) 1945 Nag 1 (3) : 46 Cri L Jour 448 : I L R (1945) Nag 151 (DB) (Vol 33) 1946 Pat 40 (43) : 24 Pat 501 : 48

Cri L Jour 99 (DB) (Vol 25) 1938 P C 130 (132, 134) : 39 Cri L Jour 452 : 65 Ind App 158 : 32 Sind L R 476 : I L R (1938) 2 Cal 295 (P C) (Vol 25) 1938 Cal 258 (261) : I L R (1938) 1 Cal 588 : 39 Cri L Jour 596 (DB).

[But see (Vol 26) 1939 Mad 406 (407) : 40 Cri L Jour 855 (Vol 23) 1936 Nag 97 (99) : 38 Cri L Jour 106 : I L R (1936) Nag 152.]

[12] Where the accusation is not that the several offences were committed in the course of the same transaction a joint trial cannot be justified under this clause merely because the offences are subsequently found to have been committed in the course of the same transaction. (Vol 28) 1941 Cal 707 (712) : I L R (1941) 2 Cal 219 : 43 Cri L Jour 389 (DB).

[13] "Same transaction" comprises all acts of all persons done in carrying through the affair in question and the *prima facie* test is community and continuity of purpose. (Vol 34) 1947 Pat 212 (218) : 25 Pat 503 (DB).

**7. Acts done in pursuance of conspiracy.**—[1] Where there is a conspiracy having a definite object in view, and several offences are committed in pursuance of such conspiracy, the several offences will form parts of the same transaction even when they are committed by different persons. (Vol 27) 1940 Pat 499 (503) : 41 Cri L Jour 452 (DB) (Vol 26) 1939 Bom 129 (140) : 40 Cri L Jour 579 (DB) (Vol 24) 1937 Cal 269 (271) : 38 Cri L Jour 1018 (DB) (Vol 23) 1936 Cal 753 (759, 760) : 38 Cri L Jour 545 (DB) (Vol 2) 1915 Tab 16 (22) : 16 Cri L Jour 354 : 1915 Pun Re No. 17 Cr (DB) (Vol 11) 1924 Rang 98 (99) : 25 Cri L Jour 270 : 1 Rang 604.

[2] The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it. (Vol 25) 1938 P C 130 (133) : 39 Cri L Jour 452 : 32 Sind L R 476 : 65 Ind App 158 : I L R (1938) 2 Cal 295 (P C).

[3] The offence of conspiracy and acts done in pursuance of the conspiracy form one and the same transaction. (Vol 25) 1938 Cal 258 (260) : 39 Cri L Jour 596 : I L R (1938) 1 Cal 588 (DB) (Vol 25) 1938 Sind 171 (174) : 39 Cri L Jour 890 : I L R (1939) Kar 204 (DB) (Vol 23) 1936 Cal 753 (760) : 38 Cri L Jour 545 (DB) (Vol 21) 1934 All 61 (65) : 35 Cri L Jour 1349 (DB) (1933) 1933 Mad W N 528 (534) (Vol 17) 1930 Rang 114 (116, 117) : 7 Rang 821 : 31 Cri L Jour 387.

[4] The transaction continues so long as the conspiracy continues. (Vol 33) 1946 Pat 40 (43, 45, 46) : 24 Pat 501 : 48 Cri L Jour 99 (DB) (Vol 2) 1915 Cal 719 (724) : 16 Cri L Jour 9 : 42 Cal 1153 (DB).

[5] A conspiracy and acts done in furtherance of its common object have no community with separate acts which may be committed by a conspirator for individual gain. (Vol 24) 1937 All 714 (717, 718) : I L R (1937) All 779 : 39 Cri L Jour 38 (DB).

**8. Acts in prosecution of a common object.**—[1] All offences committed in prosecution of a common object will generally be parts of the same transaction. (Vol 26) 1939 Nag 263 (264) : I L R (1939) Nag 644 : 41 Cri L Jour 27 (Vol 25) 1938 Nag 283 (285, 286) : 40 Cri L Jour 197 : I L R (1939) Nag 686 (Vol 24) 1937 Lah 793 (794) : 39 Cri L Jour 141 (DB) (Vol 23) 1936 Bom 379 (382) : 38 Cri L Jour 9 (DB) (Vol 23) 1936 Pat 20 (23) : 37 Cri L Jour 240 : 15 Pat 138 (DB) (Vol 11) 1924 All 233 (234) : 27 Cri L Jour 193 (DB) (Vol 15) 1928 All 222 (227) : 30 Cri L Jour 530 (DB). (Successive articles were written in a newspaper in pursuance of a common policy. All the persons who had a hand in the publication are jointly triable.) (Vol 11) 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cri L Jour 1082 (DB) (Vol 12) 1925 Cal 580 (581) : 26 Cri L Jour 369 (DB) (Vol 18) 1931 Mad 225 (226) : 32 Cri L Jour 753.

Section 239—Note 8 (*contd.*)

[But see (Vol 39) 1941 Mad 207 (237): 44 Cri L Jour 272 \* (Vol 16) 1928 Bom 296 (298): 53 Bom 479: 31 Cri L Jour 65 (DB).]

[2] Where two opposite parties, each consisting of five or more persons, attack each other, each of the parties forms an unlawful assembly, with a different common object and they cannot be tried together as one unlawful assembly. ('69) 12 Suth W R Cr 75 (76) (DB) \* (Vol 12) 1925 Lah 149 (150): 25 Cri L Jour 551 \* ('67) 8 Suth W R Cr 47 (52) (FB) \* (Vol 28) 1941 Mad 339 (341, 342): 42 Cri L Jour 414 \* ('03) 2 Low Bur Rule 106 (107). (A and B cause hurt to each other, they cannot be tried together for causing hurt.)

[3] The fighting cannot be considered as a "transaction." ('93) 20 Cal 537 (517, 550) (SB).

[4] Where the object of two opposite parties is to take forcible possession of the same piece of land, they could both be tried together in one trial. (Vol 7) 1920 All 135 (135): 21 Cri L Jour 562 (DB).]

[But see (Vol 19) 1932 Bom 277 (278): 33 Cri L Jour 619 (DB).]

[5] Two buses coming from opposite directions, collided and some persons injured.—The accused drivers had no identical purposes.—Still the transaction was the same and they could be tried together. ('31) 1931 Mad W N 556 (557, 558) (D B).

[6] Several persons charged with being members of unlawful assembly and having in prosecution of common object committed various offences.—Common object not established.—*Held*, joint trial of accused not justified. Vol 26) 1939 Mad 406 (407): 40 Cri L Jour 855.

9. Several persons giving false evidence in the same case.—[1] If the offences of giving false evidence by each of several persons form parts of the same transaction they can be tried together. (Vol 23) 1936 lag 263 (264): 38 Cri L Jour 455 : I L R (1937) Nag 02 \* (Vol 14) 1927 Bom 177 (181, 183): 51 Bom 310: 8 Cri L Jour 373 (DB) \* (Vol 13) 1926 All 334 (336, 37): 48 All 325: 27 Cri L Jour 445 (DB) \* ('84) 10 al 405 (407) (DB) \* (Vol 10) 1923 Lah 89 (90): 23 ri L Jour 439 \* ('03) 26 Mad 592 (594) (D B) \* ('12) 3 Cri L Jour 833 (839) (DB) (Bom). (A and B giving false evidence in furtherance of one sustained and continuous plot for screening the offender and is an incident in the whole transaction.—A and B can be tried together.)

## 10. Printing and publishing seditious matter.—

[1] In cases of sedition, the printer and publisher are concerned in the same transaction in regard to the publication of the seditious matter and can be tried at once. (Vol 15) 1928 Bom 139 (139): 29 Cri L Jour 683.

11. Defamation by different persons.—[1] A and B each filed a petition making the same defamatory allegations against the complainant.—Both the petitions signed by the same pleader.—*Held*, the acts formed part of the same transaction. (Vol 9) 1922 Cal 76 (77): 23 ri L Jour 685 (D B).

[2] Where A and B associate together in circulating at different occasions defamatory statements, the object both of them being to defame the complainant about the same matter, they can be tried jointly at one trial under this section. ('42) 1942 Nag L Jour 336 (337) \* (Vol 27) 1940 Nag 249 (250): 41 Cri L Jour 734: I L R 942) Nag 208 \* (Vol 17) 1930 Sind 62 (63): 30 Cri L Jour 1078 (DB) \* (Vol 22) 1935 All 769 (770): 36 Cri L Jour 1296.

[3] Where two different persons were tried for no fewer than six offences of defamation, but in only one they were alleged to have acted jointly, their joint trial as held to be illegal. (Vol 30) 1943 Cal 564 (564): 45 ri L Jour 123 (DB).

12. Continuing offence.—[1] A continuing offence may or may not be a single transaction and the question whether the various incidents form parts of the same transaction is to be judged on the facts of each case. (Vol 12) 1925 Mad 690 (692, 697): 49 Mad 71: 26 Cri L Jour 1513. (Waging war against the king.)

13. Kidnapping and abduction.—[1] P charged under S. 366 and K under S. 368, Penal Code.—Offences committed in the course of same transaction.—*Held*, joint trial not illegal. (Vol 28) 1941 Cal 315 (317): 42 Cri L Jour 619 (DB) \* (Vol 23) 1936 All 253 (254): 37 Cri L Jour 496 \* (Vol 19) 1932 Oudh 28 (29): 33 Cri L Jour 275 (DB) \* (Vol 15) 1928 Lah 751 (751): 29 Cri L Jour 496.

[But see (Vol 20) 1933 Cal 563 (561): 34 Cri L Jour 682 (D B) \* (Vol 16) 1929 Lah 496 (496).]

[2] Accused abducting a woman and removing her from place to place.—Others joining him later on.—The accused and those other persons can be tried together if the offences committed by all were in the course of the same transaction. (Vol 34) 1947 Pat 17 (20): 25 Pat 241 (DB).

## 14. Keeping gaming house and using it.—

[1] A person keeping a common gaming house and persons using it could be tried together. (Vol 16) 1929 All 937 (938, 939): 31 Cri L Jour 35 \* (Vol 6) 1919 Pat 139 (139): 20 Cri L Jour 768 \* (Vol 14) 1927 Lah 699 (700): 28 Cri L Jour 825.

15. Charge need not refer to transaction being same.—[1] It is the tenor of the accusation and not the wording of the charge that must be considered as the test. ('42) 1942 Nag L Jour 336 (337) \* ('05) 2 Cri L Jour 578 (580, 581): 30 Bom 49 (DB).

[See however (Vol 26) 1939 Bom 129 (140): 40 Cri L Jour 579 (DB).]

16. Clause (e).—[1] Persons charged under S. 380, Penal Code, can be tried along with persons charged under S. 411, Penal Code. ('36) 37 Cri L Jour 728 (729): 32 Cal 946 (DB).

[2] A receiver from a receiver of stolen property should not be tried with the receiver of the property and the thieves, as the former is likely to be prejudiced by the course adopted. (Vol 20) 1933 Sind 390 (390): 27 Sind L R 461: 35 Cri L Jour 205 (DB).

[3] An offence which includes theft means an offence of which theft is a necessary and essential ingredient. (Vol 23) 1936 All 337 (342): 37 Cri L Jour 794: 58 All 695 (DB).

[4] Accused charged under S. 413, Penal Code.—Others charged under S. 401, Penal Code.—*Held*, this clause does not apply. (Vol 12) 1925 Lah 537 (538): 26 Cri L Jour 1097.

[5] Persons charged under Ss. 457 and 460, Penal Code, are not persons charged with offences which include theft, and cannot be properly tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the other offences. (Vol 23) 1936 All 337 (342): 37 Cri L Jour 794: 58 All 695 (DB).

[But see (Vol 24) 1937 Lah 463 (463, 464): I L R (1937) Lah 62: 30 Cri L Jour 1061. (Section 457, Penal Code, includes theft).]

[6] An offence of dacoity includes theft and a joint trial of several persons for offences under Ss. 395 and 412 is legal. (Vol 30) 1943 Bom 458 (461): 45 Cri L Jour 221: I L R (1944) Bom 25 (DB) \* (Vol 23) 1936 Oudh 108 (109): 36 Cri L Jour 1467 (DB).

[7] Accused charged under S. 380, Penal Code and in alternative under S. 420, Penal Code.—Co-accused charged under S. 414, Penal Code.—Their joint trial not illegal. (Vol 30) 1943 Lah 220 (221): 45 Cri L Jour 80: I L R (1944) Lah 145 (DB). (Vol 16) 1929 Lah 142: 29 Cri L Jour 1080, Overruled.)



**240.** When a charge containing more heads than one is framed against the same person, and

*Withdrawal of remaining charges on conviction on one of several charges.*

when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

[1882—S. 240; 1872—S. 459.]

#### Section 239 (contd.)

**17. Clause (f).** — [1] Clause (f) was intended to meet cases where there may be one theft and several persons may have received the property at different times and a joint trial is permissible. (Vol 15) 1928 Pat 38 (39) : 6 Pat 583 : 28 Cri L Jour 962 (DB) & (Vol 19) 1932 Bom 201 (202) : 33 Cri L Jour 394 (DB) & (Vol 22) 1935 Oudh 475 (476) : 26 Cri L Jour 1206.

[2] The phrase "possession of which has been transferred by one offence," refers to the original theft of stolen property and not to the transfer of possession from the thief to the person receiving stolen property. (Vol 19) 1932 Bom 201 (202) : 33 Cri L Jour 394 (DB).

[3] The provisions of this clause cannot, however, be extended by analogy to a trial of persons accused of offences other than those specifically mentioned therein. (Vol 12) 1925 Oudh 452 (452) : 26 Cri L Jour 1291. (Joint trial of accused, both charged under S. 412, Penal Code, is illegal.) & (Vol 12) 1925 Cal 248 (248) : 25 Cri L Jour 807 (DB) (Joint trial of a person charged under S. 411, Penal Code and another charged of purchasing stolen property from the accused is illegal.)

**18. Clause (g).** — [1] Where two persons are charged, one with uttering a counterfeit coin and the other with being in possession of different counterfeit coins, they cannot be jointly tried together under this clause. (Vol 20) 1933 Lah 228 (229) : 34 Cri L Jour 1253.

**19. Simultaneous trials.** — [1] Simultaneous but separate trials of different accused persons for offences committed by them and not forming part of the same transaction are not bad unless the accused are prejudiced by the course adopted. (Vol 12) 1925 Pat 152 (153) : 25 Cri L Jour 1018 & (Vol 7) 1920 Pat 177 (179) : 21 Cri L Jour 739 & ('04) 1 Cri L Jour 199 (204) (DB) (Cal.)

[See however ('83) 13 Cal L R 275 (278, 279).]

**20. Criminal breach of trust and receiving stolen property.** — [1] A person committing a criminal breach of trust and another who receives the stolen property can be tried together. ('04) 1 Cri L Jour 584 (585) (DB) (Bom.)

**21. Objection as to joinder.** — [1] An objection as to joinder can be taken in a Court of revision or appeal though it was never taken in the Court of first instance. ('37) 41 Cal W N 251 (254.)

[2] When an objection as to joint trial is made and it appears likely that the objecting parties will be prejudiced by such joint trial it is advisable for the Court

to accept the objection, even if the joint trial would in fact be legal. (Vol 24) 1937 Cal 22 (22) : 38 Cri L Jour 750 (DB.)

#### Section 240 — Note 1

[1] Charges framed under more offences than one — Judge recording some of them must record reasons — Withdrawal of some charges before conviction based on others is premature. (Vol 26) 1939 Pat 35 (36) : 39 Cri L Jour 997 : 18 Pat 82 (DB).

[2] This section applies only to case where person is accused of several distinct offences. ('89) 1889 Pun Re No. 24 Cr, p. 79 (80).

[But see (Vol 16) 1929 All 899 (900) : 51 All 977 : 30 Cri L Jour 1089.]

[3] Prosecution cannot, on conviction of accused in one case, withdraw charge against him in another case. ('88) 1888 Rat 362 (362) & ('97) 10 C P L R Cr. 1 (6).

[4] Court pending appeal against conviction in one case cannot stay trial of charges in respect of other cases. ('09) 9 Cri L Jour 495 (496) (Mad) & ('98) 1898 Rat 977 (978).

[5] Accused charged under S. 302 and S. 201, Penal Code — Prosecution withdrawing charge under S. 201 before conviction but no order of acquittal — Accused acquitted in appeal — He cannot be tried for offence under S. 201. ('05) 2 Cal L Jour 182 (182).

[6] When all the charges have been tried and the accused found guilty no withdrawal can be made of any charge. ('86) 1886 Rat 288 (288) & ('86) 1886 Rat 286 (286, 287).

[7] "Court" in section includes every grade of Court including High Court in revision and in appeal. (Vol 16) 1929 All 899 (900) : 51 All 977 : 30 Cri L Jour 1089.

[8] Accused charged with offence under S. 408, Penal Code, in respect of ten receipts and tried and convicted in respect of three of them — High Court's direction in appeal that no further proceedings be taken in respect of other receipts amounts to stay of trial with regard to those charges. ('09) 10 Cri L Jour 482 (483) (DB) (Cal).

[9] When there are two charges one for murder and one against property, it is not desirable to allow withdrawal of one of the charges until the appeal time expires. (Vol 2) 947 Mad 89 (90) (DB).

[10] Withdrawal of charges under this section amounts to acquittal on such charges. (Vol 16) 1929 All 899 (900) : 51 All 977 : 30 Cri L Jour 1089.

[11] Stay of enquiry into or trial of charges under this section amounts to acquittal on such charges unless conviction be set aside. (Vol 12) 1925 Pat 623 (624) : 4 Pat 503 : 27 Cri L Jour 359.

[But see ('89) 1889 All W N 8 (9).]

## CHAPTER XX.

## OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

*Procedure in summons-cases.* 241. The following procedure shall be observed by Magistrates in the trial of summons-cases.

[1882—S. 241; 1872—S. 203, Para. 1.]

242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

[1882—S. 242; 1872—Ss. 203, Para. 2, 206; 1861—S. 265.]

*Conviction on admission of truth of accusation.* 243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as

## Section 241 — Note 1

[1] Joint trial of two offences, one triable as summons-case and other as warrant-case — Magistrate must follow procedure of warrant-cases with regard to both offences. (Vol 5) 1918 Mad 371 (372); 41 Mad 727; Cri L Jour 613 (DB) & (06) 3 Cri L Jour 350 (350); Low Bur Rul 113 & (Vol 2) 1915 Mad 1200 (1200); Cri L Jour 540; 39 Mad 503 & (02) 29 Cal 481 (2) (DB) & (Vol 16) 1929 Cal 401 (402); 31 Cri L Jour (DB).

[2] Principles underlying provisions of Chapter XIX apply to trial of summons-cases. (05) 2 Cri L Jour 739 (3, 744); 3 Low Bur Rul 52 (FB).

[3] Magistrate trying summons-case tries it as warrant-case and finds that no case is made out against accused and lets him go unconditionally — He must be seen to have acquitted him. (10) 11 Cri L Jour 350 (4) (Mad).

[4] If Magistrate begins trial as summons-case and finds offence triable under warrant-case committed, must apply warrant-case procedure thenceforward. 25) 1938 Mad 815 (816); 39 Cri L Jour 958; ILR 8) Mad 814 & (Vol 34) 1947 Mad 120 (120).

*See also* (Vol 24) 1937 Mad 944 (944, 945); I L R 8) Mad 343; 39 Cri L Jour 153.]

But see (Vol 23) 1936 Mad 341 (341); 59 Mad 442; Cri L Jour 501.]

[5] Complaint alleges offence triable under warrant — Magistrate considers offence as minor to which summons-case procedure could be applied — He cannot try summons-case procedure and may proceed with as if complaint was one of minor charge. (Vol 29) Mad 594 (595); 43 Cri L Jour 760.

## Section 242 — Note 1

[1] Object of proceeding prescribed by this section is to determine whether accused pleads guilty to the charge or demands to be tried. (Vol 28) 1941 Pesh 9 (42) Cri L Jour 420.

General reference to terms of marginal note of this section is not sufficient for accused who must be stated particulars of offence. (03) 28 Bom 129 (142) (DB) & (92) 1872-92 Low Bur Rul 594 (594).

What Magistrate has stated to accused in explanation need not be recorded. (Vol 23) 1936 Pat 501 (160) & (Vol 14) 1927 Cal 196 (196, 197); 54 Cal 359; 28 Cri L Jour 155 (DB) & (Vol 15) 1928 Cal 339 (340); 29 Cri L Jour 795.]

There must be some indication in record to show that provisions of this section were complied with.

(Vol 25) 1938 Pat 55 (57); 16 Pat 97; 39 Cri L Jour 321 & (Vol 23) 1936 Pat 501 (502); 38 Cri L Jour 22.

[5] Omission to make note that particulars of offence were explained to accused is irregularity. (Vol 19) 1932 Nag 127 (127); 28 Nag L R 163; 33 Cri L Jour 938.

[6] Accused sent up by police on allegations — Allegations found not amounting to offence — Magistrate cannot proceed on other footing which would inculpate accused. (1900) 1 Low Bur Rul 43 (44).

[7] Accused prosecuted for offence of which he is not proved guilty — He cannot be convicted for another offence without being called upon to show cause why he should not be convicted of such other offence. (Vol 27) 1940 Cal 328 (329); 41 Cri L Jour 736 (DB).

[8] Prosecution for offence under Act of recent date — Litigants and lawyers not quite familiar with Act — Magistrate should frame formal charge. (Vol 25) 1938 Pat 440 (442); 39 Cri L Jour 610.

[9] In summons-cases Magistrate must record accused's plea at commencement of trial. (12) 13 Cri L Jour 488 (489); 40 Cal 71 (DB) & (Vol 17) 1930 Sind 64 (65); 30 Cri L Jour 1077.

[10] Provisions of Code relating to joinder of charges and joint trial of accused persons apply to trial of summons-cases. (05) 2 Cri L Jour 739 (744); 3 Low Bur Rul 52 (FB) & (Vol 1) 1911 Cal 603 (606); 41 Cal 694; 15 Cri L Jour 73 (DB).

[11] Omission to state particulars of offence to accused is irregularity not vitiating trial under S. 537 unless failure of justice has been occasioned. (Vol 6) 1919 Mad 52 (52); 42 Mad 787; 20 Cri L Jour 395 (DB) & (Vol 19) 1932 Nag 127 (128); 28 Nag L R 163; 33 Cri L Jour 938 & (Vol 14) 1927 Nag 210 (211); 28 Cri L Jour 511 & (Vol 28) 1941 Pesh 9 (10); 42 Cri L Jour 420 & (Vol 25) 1938 Pat 55 (57); 16 Pat 97; 39 Cri L Jour 321.

[See also (Vol 29) 1942 Pat 130 (131); 43 Cri L Jour 160 & (Vol 14) 1927 Cal 196 (196, 197); 54 Cal 359; 28 Cri L Jour 155 (DB) & (Vol 15) 1928 Cal 339 (340); 29 Cri L Jour 795.]

[But see (Vol 23) 1936 Pat 501 (502); 38 Cri L Jour 22.]

## Section 243 — Note 1

[1] A mere admission of the truth of all or any of the facts alleged — Such facts not constituting an offence — The accused cannot be convicted on such an admission. (Vol 19) 1932 Lah 363 (364); 33 Cri L Jour 646 & (Vol 13) 1926 Lah 406 (406); 7 Lah 359; 27 Cri L Jour 907 (DB) & (Vol 2) 1915 Cal 153 (153); 15 Cri L

ble in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate <sup>a</sup>[may convict] him accordingly.

[1882—S. 243; 1872—S. 206, Para. 1; 1861—S. 265.]

] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 56 for *li* convict."

244. (1) <sup>a</sup>[If the Magistrate does not convict the accused under the preceding section or] if *procedure when no such* the accused does not make such admission, the Magistrate shall proceed *admission is made.* to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as produces in his defence :

<sup>a</sup>[Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.]

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue <sup>b</sup>[a summons to any witness directing him to attend or to produce] any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

[1882—S. 244; 1872—Ss. 207, 361; 1861—Ss. 262, 266.]

[<sup>a</sup> *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 67. [<sup>b</sup> *Substituted, ibid.*, "for process to compel the attendance of any witness or the production of."]

ction 243 — Note 1 (*contd.*)

or 703 (DB) ✕ (Vol 7) 1920 All. 203 (204) : 21 Cri Jour 665 ✕ (Vol 18) 1931 Nag 100 (101) : 32 Cri Jour 1132 ✕ ('08) 7 Cri L Jour 208 (209) : 1907 pp Bur Rul 9.

[2] Where there has been no plea of "guilty" before a trying Magistrate, he cannot rely upon an admission alleged to have been made by the accused in some other case and at some other time. ('05) 2 Cri L Jour 2 (534) : 29 Cal 595 (DB).

[3] Magistrate not accepting accused's plea of guilty—Evidence not proving charge — It is not open for the Magistrate to go back to the plea of guilty and convict him. (Vol 18) 1931 Bom 195 (196) : 32 Cri L Jour 719 (FB).

[4] Magistrate once not accepting accused's plea of guilty—It is not open to him to take from the accused a further plea of guilty and relieve himself of the duty of examining the remaining witnesses cited on behalf of the prosecution. (Vol 15) 1928 Cal 243 (244).

[5] A Magistrate may call for evidence even after he has accepted the plea of guilty made by the accused, with the object of acquainting himself with the facts of the case in order to pass an adequate sentence. (Vol 18) 1931 Bom 195 (196) : 32 Cri L Jour 719 (FB).

[6] A plea of "guilty" can be allowed to be withdrawn if the accused was, at the time of making it, enfeebled by illness and undefended. (Vol 2) 1915 Lah 487 (493) : 16 Cri L Jour 257 (FB).

[7] An admission should be recorded immediately it is made and not afterwards from rough notes or memory. ('92) 15 Mad 83 (87) (DB).

[8] Where a Magistrate records one admission for a number of accused persons, the admission is bad. (Vol 19) 1932 Sind 211 (212) : 26 Sind L R 345 : 34 Cri L Jour 67 (DB).

[9] Where an accused does not admit his guilt, he cannot be convicted merely because he does not show sufficient cause against his conviction. ('02) 1 Low Bur Rul 95 (96).

#### SECTION 244 — SYNOPSIS.

1. "Shall proceed to hear the complainant"
2. Evidence in support of the prosecution.
3. Duty of prosecution.
4. Cross-examination.
5. Extra-judicial information.
6. Evidence of the accused.
7. "May issue summons ....."
8. Re-issue of summons.
9. Adjournment for procuring attendance of witnesses.

1. "Shall proceed to hear the complainant."— [1] Accused denying the truth of the complaint made against him—Magistrate ought to hear the complainant and his witnesses in support of the prosecution, and also the accused and his witnesses. ('71) 6 Beng L R App 83 (84) (DB) ✕ (Vol 8) 1921 Oudh 147 (147) : 24 Oudh Cas 267 : 22 Cri L Jour 765 ✕ ('07) 6 Cri L Jour 424 (425) (DB) (Bom).

[2] The Magistrate is bound to hear the complainant and take all evidence that he produces in support of the prosecution before he can acquit the accused. ('91) 1891 Rat 539 (539) (DB) ✕ ('95) 2 Weir 305 (305) (DB) ✕ ('97) 20 Mad 388 (389) (DB). (The case was not disposed of under S. 203 and summonses were issued to the complainant's witnesses). ✕ ('71) 16 Suth W R Cr 48 (49) (DB) ✕ ('74) 21 Suth W R Cr 21 (21, 22) (DB).

[3] The accused cannot be convicted except upon the evidence that he did commit the offence. ('01) 1 Low Bur Rule 95 (96).

[4] A conviction is illegal which is arrived at without the recording of the prosecution evidence. ('05) 2 Cri L Jour 532 (534) (DB) (Cal) ✕ (Vol 16) 1929 Pat 406 (406) : 30 Cri L Jour 517.

[5] Where the accused was convicted upon a statement of the complainant not made on oath before a Magistrate, the conviction was held to be illegal. ('73) 20 Suth W R Cr 55 (55) (DB).

**Section 244—Note 1 (contd.)**

[6] The section does not make the examination of the complainant himself absolutely necessary, so as to vitiate a conviction if such examination does not take place. (Vol 32) 1945 Nag 127 (128); I L R (1945) Nag 41 : 47 Cri L Jour 240. (Obitor.) \* (Vol 7) 1920 Cal 68 (69) : 21 Cri L Jour 252 (DB).

[7] The common practice of not examining the complainant at the trial but only under S. 200 of the Code is contrary to law. ('97-01) 1 Upp Bur Rul 67.

[8] Where the complainant is to be convicted it can only be in separate proceedings taken against him. ('88) 1888 Rat 403 (404) (DB).

[9] Criminal Courts have no authority to order the accused to pay the complainant costs of an adjournment on the failure of the accused to appear on the day fixed for hearing of the complaint. (Vol 9) 1922 All 184 (184) : 23 Cri L Jour 243.

**2. Evidence in support of the prosecution.—**

[1] The Magistrate is bound to take all such evidence as may be produced in support of the prosecution. (Vol 19) 1932 All 188 (188) : 54 All 416 : 34 Cri L Jour 18.

[2] Where the complainant declines to be examined, it is the duty of the Magistrate to proceed to take the evidence of his other witnesses before dismissing the complaint. (Vol 14) 1927 Nag 210(211) : 28 Cri L J 511.

[3] In summons-cases, the parties have an undoubted right to examine their witnesses and their right could only be curtailed by the Court upon the ground that the examination of these witnesses will delay and possibly defeat the ends of justice. (Vol 8) 1921 Pat 308 (310) : 22 Cri L Jour 430.

[4] Complainant after examining some of the witnesses named by him not applying to Magistrate to issue summons to other witnesses. *Held*, Magistrate was not wrong in deciding the case on evidence before him. ('71) 15 Suth W R Cr 87 (87) (DB).

[5] Magistrate refusing to examine a witness who is deaf but who is able to speak and write—Such refusal is materially prejudicial and vitiates the trial. (Vol 11) 1924 Cal 541 (541) : 24 Cri L Jour 688 (DB).

[6] A Magistrate should always be chary of taking upon himself the duty of deciding on behalf of the parties which witnesses should be examined. (Vol 2) 1915 Mad 825 (825) : 16 Cri L Jour 156.

[7] Generally it is not the province of the Court to examine the witnesses. (Vol 11) 1924 Oudh 371 (372) : 27 Oudh Cas 246 : 25 Cri L Jour 1226.

[8] Documents on file not formally exhibited and put on record as evidence. Magistrate should, before the close of the prosecution case, ascertain whether they are to be regarded as having been produced as evidence for the prosecution. ('09) 10 Cri L Jour 408 (409) : 3 Sind L R 84 (DB).

[9] A Magistrate cannot after the trial is closed and while writing judgment, admit in evidence a document without giving the accused an opportunity of raising objection to its relevancy and admissibility. (Vol 3) 1916 Mad 1084 (1085) : 16 Cri L Jour 453.

[10] The prosecution cannot reopen the case and make additions to it except such voluntary addition as the accused can himself make. (Vol 10) 1923 All 322 (323) : 45 All 323 : 25 Cri L Jour 305.

[11] Statement by a party closing his case—Statement not bearing the signature of the party—There is no presumption of its correctness. (Vol 13) 1926 Lah 656 (656) : 27 Cri L Jour 1071.

[12] Statements made by a defence witness against accused person other than the one who called him as a witness cannot be considered as if it were evidence led on behalf of the complainant. ('40) 42 Pun L R 378 (379) \* (Vol 18) 1931 Lah 57 (58) : 12 Lah 385 : 32 Cri L Jour 672.

[13] In connected cases it is not proper to take the depositions in one case and have them copied and used in the other. (Vol 10) 1923 Cal 196 (197) : 50 Cal 223 : 24 Cri L Jour 188 (DB).

**3. Duty of prosecution.—**[1] The duty of the prosecution is to prove all the relevant facts essential to establish the guilt of the accused. (Vol 10) 1923 All 322 (324) : 45 All 323 : 25 Cri L Jour 305.

[2] Irrelevant evidence should be excluded—Prosecution must be confined to simple and true evidence—No attempt should be made to hide essential facts or to embroider the case. (Vol 23) 1936 Lah 341 (344) : 16 Lah 345 : 37 Cri L Jour 504 (DB).

[3] The prosecution cannot be permitted at the last moment to change its ground. (Vol 15) 1928 All 696 (697) : 51 All 463 : 29 Cri L Jour 1084.

**4. Cross-examination.—**[1] The right of cross-examination is exercisable under the section. (Vol 18) 1931 All 621 (623) : 54 All 212 : 33 Cri L Jour 310.

[2] Summons-case—Cross examination by accused of prosecution witness postponed in accordance with the direction of the Magistrate—Magistrate bound to give the accused further opportunity of cross-examination—Evidence admitted without such opportunity will amount to an irregularity which will vitiate the trial. (Vol 9) 1922 Pat 296 (298) : 23 Cri L Jour 440.

**5. Extra-judicial information.—**[1] It is extremely improper for a Magistrate in disposing of a case to rely in any way on statements made to him out of Court. ('90) 14 Bom 572 (573) (DB).

**6. Evidence of the accused.—**[1] The evidence of the accused should be taken after that of the complainant. (Vol 12) 1925 All 614 (614) : 47 All 341 : 26 Cri L Jour 905.

[2] Deputy Magistrate recording some evidence of the defence before the close of the case for the prosecution—No prejudice caused—*Held*, there was no ground for reversing his decision. ('82) 8 Cal 154 (156) (DB).

[3] The section makes it obligatory on the Magistrate to hear the accused and record the evidence which he adduces in his defence after the prosecution evidence is recorded. (Vol 8) 1921 Bom 374 (375, 377) : 45 Bom 672 : 22 Cri L Jour 17 (D B) \* ('70) 13 Suth W R Cr 63 (64) (DB).

[4] The Magistrate should ask the accused what he has to say in his own defence against the charge which has been brought against him, and in explanation of the evidence which has been led to support the charge. (Vol 32) 1945 Nag 127 (129) : I L R (1945) Nag 419 : 47 Cri L Jour 240. (Obitor.) \* (Vol 9) 1922 Bom 290 (291) : 46 Bom 441 : 23 Cri L Jour 45 (DB).

[5] The examination need not be recorded with the same formality as in warrant-cases or preliminary enquiries. ('70) 14 Suth W R Cr 76 (76) (DB).

[6] No Criminal Court can shut its eyes to the statement of an accused person when that statement refers to certain documents to which the accused is a party. (Vol 15) 1928 Mad 1135 (1136) : 29 Cri L Jour 1041.

[7] Where, after closing hours, the Magistrate insisted on going on with the case and the accused's counsel wanted an adjournment to examine the witnesses who were in attendance and the adjournment was refused, one ground being that no defence list had been filed, it was held that the ground for refusal was wrong and the convictions were set aside. ('02-03) 7 Cal W N 714 (716) (D B).

[8] It is the duty of Magistrates when dealing with ignorant individuals accused of technical offences to go very thoroughly into the evidence, and where they are not defended by advocates, to give them some assistance in putting up obvious defensive pleas. (Vol 17) 1930 Rang 349 (350) : 32 Cri L Jour 206.

245. (1) If the Magistrate upon taking the evidence referred to in section 244 and such further *initial* evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks examining the accused, finds the accused not guilty, he shall record an order of acquittal.

<sup>a</sup>[(2) Where the Magistrate does not proceed in accordance with the provisions of section 349 *defence* or section 562, he shall, if he finds the accused guilty, pass sentence upon him according *aw.*]

[1882—S. 245; 1872—S. 211 Paras 1. 2; 1861—S. 272.]

a] *Substituted by the Code of Criminal Procedure (Amendment) Act, 1928 [XVIII] of 1928, S. 58.*

246. A Magistrate may, under section 243 or section 245, convict the accused of any offence *Finding not limited by* triable under this Chapter which from the facts admitted or proved *complaint or summons.* appears to have committed, whatever may be the nature of the complaint summons.

[1882—S. 246; 1872—S. 203 Para 2.]

section 244 (*contd.*)

7. "May issue summons . . . . ."—[1] he Magistrate is under no obligation to issue process compel the attendance of any witness either on the application of the complainant or the accused. (Vol 32) 345 Sind 281 (232) : I L R (1945) Kar 107 (DB) \* Vol 7) 1920 All 209 (210) : 21 Cri L Jour 335.

[2] The Magistrate must consider the application. He must not ignore it completely. (Vol 27) 1940 Lah 58 (59) : 1 Cri L Jour 340.

[3] The Magistrate cannot exercise the discretion to the detriment of the applicant in an arbitrary manner. '03) 30 Cal 508 (514).

[4] Where the refusal to issue process amounts to a denial of justice, the High Court would interfere. ('03) 30 Cal 508 (515) \* ('05) 2 Cri L Jour 679 (683, 686) : 32 Cal 1093 (DB). (Obiter) \* ('11) 12 Cri L Jour 566 (567) (DB) (Mad).

[5] Where the accused was a police constable and it was not improbable that the witnesses for the prosecution would not voluntarily appear, it was held that it was just such a case in which the Magistrate should have exercised his discretion and issued summonses. ('68) 9 Suth W R Cr 3 (3) (DB).

[6] Witnesses residing in a foreign territory — Magistrate is bound to make all reasonable efforts to procure their attendance. ('73) 1873 Pun Re No. 4 Cr. p. 5 (5).

[7] Accused called upon to let in evidence applied for obtaining the summoning of his witnesses on his behalf. *Held*, all that he could do was to move the Magistrate to summon any other witnesses whom he might deem necessary under S. 540. (Vol 1) 1914 All 197 (198) : 36 All 13 : 15 Cri L Jour 164.

[8] An application for summoning witnesses cannot be granted by a Magistrate not seized of the case. (Vol 1) 1914 All 197 (198) : 36 All 13 : 15 Cri L Jour 164.

[9] A Magistrate will be justified in refusing an application for summons made after undue delay. (Vol 32) 1945 Sind 281 (232) : I L R (1945) Kar 107 (DB).

8. Re-issue of summons. — [1] There is no discretionary power given to a Magistrate to refuse to compel the attendance of witnesses upon whom processes had already been issued. (Vol 20) 1933 Pat 494 (495) : 34 Cri L Jour 1203.

[But see (Vol 13) 1926 Mad 361 (361) : 27 Cri L Jour 76].

[2] Every endeavour should be made to secure attendance of witnesses who have been summoned. ('82) 4 All 53 (54.)

[3] Court should see that its summonses and warrants are duly executed. (Vol 8) 1921 All 142 (142) : 23 Cri L Jour 124.

[4] Magistrate unable to record evidence on date fixed though witnesses present — Case adjourned—Witnesses

should be told to appear on adjourned date. ('12) 13 Cri L Jour 176 (176) (Lah).

9. Adjournment for procuring attendance of witnesses. — [1] The law intends that as a general rule the prisoner should have his witnesses present on the day of trial. ('08) 7 Cri L Jour 344 (345) (DB) (Cal).

[2] Application for summons to procure attendance of witness not made before date fixed for hearing — Magistrate held, does not exercise his discretion wrongly in refusing an adjournment asked for. ('87) 1887 Rat 355 (355, 356) (DB) \* ('70) 14 Suth W R Cr 76 (76) (DB) \* ('71) 7 Beng L R 564 (574, 575) (DB).

[3] It is not an irregularity to adjourn a trial for the purpose of enabling accused to procure the attendance of his witnesses. ('71) 16 Suth W R Cr 21 (22) (DB).

#### Section 245 — Note 1

[1] Order of acquittal passed before evidence on both sides is over, is not in accordance with law and liable to be set aside. (Vol 29) 1942 Mad 452 (452) : 43 Cri L Jour 770 \* ('91) 1891 Rat 539 (539) (DB). (No evidence for prosecution taken.) \* ('67) 7 Suth W R Cr 45 (45) (DB) \* ('96) 18 All 221 (222, 223) (DB) \* ('13) 14 Cri L Jour 177 (178) : 1912 Upp Bur Rul 148 \* (Vol 19) 1932 Mad 25 (26) : 33 Cri L Jour 274.

[2] Magistrate refusing to proceed with complaint on legal objection raised by defence — His order is not one of acquittal. (Vol 11) 1924 Mad 487 (487) : 25 Cri L Jour 442 (DB).

[3] Magistrate holding alleged encroachment not proved, proceeds to record order that he acquits accused under S. 245—His order is wrong. (Vol 28) 1941 Pat 548 (549) : 43 Cri L Jour 110.

[4] Magistrate acquitting accused in law may style his order as order of discharge. ('10) 11 Cri L Jour 350 (350) (Mad).

[5] Warrant-case tried as summons-case and accused acquitted under this section — Acquittal amounts to discharge under S. 253 and can be dealt with under S. 436. ('86) 1886 All W N 260 (260) \* ('88) 1888 All W N 96 (97) \* ('05) 2 Cri L Jour 382 (382, 383) (DB).

[6] When Court convicts accused person of offence it must pass sentence unless it acts under S. 349 or S. 562. (1900) 2 Bom L R 611 (612) (DB) \* (Vol 21) 1934 Rang 338 (339) : 12 Rang 419 : 36 Cri L Jour 460 (DB) \* ('95) 22 Cal 805 (809) (DB) \* (Vol 21) 1934 Nag 117 (117) : 35 Cri L Jour 760.

[7] It is illegal to adjourn passing of sentence for indefinite period. ('12) 13 Cri L Jour 288 (288) (DB) (Bom).

#### Section 246 — Note 1

[1] This section applies if original offence and offence of which accused is sought to be convicted are triable as summons-case. (Vol 29) 1942 Mad 354 (356) : 43 Cri L Jour 851 \* (Vol 23) 1936 Mad 341 (341) : 59 Mad 442 : 37 Cri L Jour 501.

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing of complainant. may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day :

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

[1882—S. 247; 1872—Ss. 205, 208 Para 3, 212; 1861—Ss. 259, 269.]

#### Section 246 — Note 1 (contd.)

[2] The fact that offence originally charged was one under local or special law and offence of which accused is sought to be convicted is under Penal Code, does not affect applicability of section provided both are triable as summons-cases. ('04) 1 All L Jour 206n (206n) & (Vol 13) 1926 Bom 255 (255) : 27 Cri L Jour 496 (DB).

[3] When convicting accused person for different offence from original charge, trial need not be re-opened and procedure under Ss. 243 and 244 need not be followed. (Vol 27) 1940 Rang 109 (109, 110) : 1940 Rang L R 219 : 41 Cri L Jour 541 & ('10) 10 Cri L Jour 557 (559, 560) : 36 Cal 869 (DB).

[4] Magistrate cannot convict accused person of offence in respect of which he has had no opportunity of defending himself. ('90) 1890 Rat 529 (530) (DB) & ('01) 5 Cal W N 567 (568) (DB) & ('82) 8 Cal 195 (197) (DB).

[5] Magistrate in summons-case cannot convict accused person of offence alleged to have been committed on a date different from that of offence originally charged. ('21) 22 Cri L Jour 559 (560) (DB) (Cal).

#### SECTION 247 — SYNOPSIS.

1. Scope, object and applicability of the section.
2. Applicability of section to cases consisting both of offences triable as summons-cases and offences triable as warrant-cases.
3. "Upon the day . . . . adjourned."
4. "The complainant does not appear."
5. Death of complainant.
6. "The Magistrate shall . . . . some other day."
7. Complaints by public servants — Proviso.
8. Revision.

1. Scope, object and applicability of the section. — [1] Object of section is to prevent complainant from being dilatory in prosecution of case. (Vol 13) 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988 (DB).

[2] In warrant-cases, Magistrate cannot acquit accused on ground of absence of complainant. (Vol 29) 1942 Mad 594 (595) : 43 Cri L Jour 760 & (Vol 28) 1941 Rang 202 (203) : 42 Cri L Jour 801 : 1941 Rang L R 224 & (Vol 21) 1934 All 340 (341) : 56 All 750 : 36 Cri L Jour 65 & (1900) 4 Cal W N 26 (27) (DB) & (Vol 10) 1923 Mad 439 (439, 440) : 24 Cri L Jour 469.

[3] Magistrate treating case as summons-case and following its procedure — He can acquit accused under this section. (Vol 29) 1942 Mad 594 (595) : 43 Cri L Jour 760 & ('74) 22 Suth W R Cr 40 (41) (DB).

[4] Section does not apply unless proceedings have been instituted on complaint. (Vol 11) 1924 All 528 (528) : 26 Cri L Jour 170.

[5] Section does not apply to inquiries under S. 1 of Workman's Breach of Contract Act, 1859. ('13) 14 Cri L Jour 404 (404) : 9 Low Bur Rul 35 & (Vol 10) 1923 Mad 719 (720) : 46 Mad 723 : 24 Cri L Jour 465 (DB).

2. Applicability of section to cases consisting both of offences triable as summons-cases and offences triable as warrant-cases. — [1] Case consisting of two charges, summons-case and warrant-case — Complainant absent on date of hearing — Magistrate cannot acquit accused under this section but can discharge him under S. 259. (Vol 27) 1940 Bom 413 (413);

42 Cri L Jour 153 (DB) & ('85) 11 Cal 91 (92) (DB) & (Vol 5) 1918 Mad 371 (373) : 41 Mad 727 : 19 Cri L Jour 613 (DB).

[2] Case begun as warrant-case — Charge framed for offence triable as summons-case — Accused held entitled to acquittal on complainant's absence on the day of hearing. (Vol 10) 1923 Mad 439 (439, 440) : 24 Cri L Jour 469.

3. "Upon the day . . . . adjourned." — [1] Magistrate under mistake taking up case on day to which it was not posted and dismissing complaint — Section does not apply. (Vol 21) 1934 All 1025 (1026) : 36 Cri L Jour 328.

[2] Section applies though case has been posted only for arguments. (Vol 1) 1914 Cal 768 (769) : 15 Cri L Jour 163 (DB).

[3] Hearing of case finished — Case posted for judgment — Section does not apply if complainant is absent on such day. (Vol 27) 1940 Nag 357 (359) : 1940 Nag L Jour 399 : 41 Cri L Jour 919 (DB) & (Vol 25) 1938 Lah 121 (121) : 39 Cri L Jour 293 & (Vol 6) 1919 Cal 201 (201) : 46 Cal 867 : 20 Cri L Jour 492 (DB) & (Vol 10) 1923 Nag 158 (158) : 19 Nag L R 48 : 24 Cri L Jour 205.

[4] Case nominally fixed for hearing but not reached during the day — Section does not apply and accused cannot be acquitted on ground of complainant's absence. (Vol 21) 1934 Bom 130 (132) : 35 Cri L Jour 1139 (DB).

[5] Court can acquit accused on ground of complainant's absence at hearing though accused is not present. (Vol 11) 1924 Pat 140 (141) : 24 Cri L Jour 815 & (Vol 16) 1929 Bom 408 (409) : 53 Bom 693 : 31 Cri L Jour 1000 (DB) & ('11) 12 Cri L Jour 41 (42) : 34 Mad 253 & (Vol 19) 1932 Mad 563 (563, 564) : 33 Cri L Jour 579.

[See (1865) 3 Suth W R Cr. 36 (36) (DB).]

[6] Court can acquit accused on ground of complainant's absence at hearing though process was not served on him. (Vol 11) 1924 Pat 140 (141) : 24 Cri L Jour 815 & (Vol 16) 1929 Bom 408 (409) : 53 Bom 693 : 31 Cri L Jour 1000 (DB).

[See also (Vol 27) 1940 Nag 357 (359) : 1940 Nag L Jour 399 : 41 Cri L Jour 919.]

[But see ('92) 2 Weir 307 (307) (DB).]

4. "The complainant does not appear." — [1] Appearance of complainant must be in person. (Vol 23) 1936 All 658 (658, 659) : 37 Cri L Jour 1028 & (Vol 13) 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988 (DB).

[2] Complainant must be present when case is called. ('84) 7 Mad 356 (357) & (Vol 13) 1926 Mad 1009 (1010) : 49 Mad 883 : 27 Cri L Jour 988 (DB) & (Vol 14) 1927 Mad 172 (173) : 28 Cri L Jour 118.

[But see (Vol 14) 1927 Mad 393 (394) : 28 Cri L Jour 208.]

[3] Case posted for the day not taken up — Complainant cannot be said to have failed to appear though he does not attend Court on such date. (Vol 13) 1926 Cal 102 (103) : 26 Cri L Jour 1050 (DB).

[4] Date of hearing not communicated to complainant — His absence cannot be regarded as failure to appear for purposes of this section. (Vol 15)

248. If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

[1882—S. 248; 1872—S. 210; 1861—S. 271.]

#### Section 247 — Note 4 (contd.)

1924 Mad 1158 (1162, 1164) : 30 Cri L Jour 191 : 52 Mad 695 (DB).

[5] Failure by complainant to pay process-fees is no ground for acquitting accused. (Vol 12) 1925 All 393 (393) : 26 Cri L Jour 963 \* (82) 5 Mad 160 (160) (DB).

[6] In joint charge for three offences under S. 234 where there are three complainants, absence of one of the complainants can be ground for acquitting accused of offence against particular complainant who was absent and does not affect charge as regards others. (Vol 2) 1915 Cal 366 (368) : 16 Cri L Jour 332 : 43 Cal 13 (DB).

5. Death of complainant. — [1] Death of complainant does not *ipso facto* terminate criminal prosecution. (Vol 30) 1943 Pat 379 (380) : 45 Cri L Jour 331 \* (Vol 13) 1926 Bom 178 (179) : 27 Cri L Jour 491 (DB) \* (Vol 9) 1922 Lah 227 (229) : 2 Lah 27 : 22 Cri L Jour 166 (DB) \* (Vol 11) 1924 Lah 72 (73) : 4 Lah 7 : 24 Cri L Jour 29 (DB) \* (Vol 11) 1924 All 666 (667) : 25 Cri L Jour 1007 \* (Vol 8) 1931 Mad 278 (278, 279) : 44 Mad 417 : 23 Cri L Jour 117 (DB) \* (Vol 18) 1931 Mad 772 (772) : 54 Mad 768 : 33 Cri L Jour 14 \* (08) 8 Cri L Jour 190 (190) : 1 Sind L R 72 (DB).

[2] This section applies to cases where absence of complainant on day of hearing is due to his death. (Vol 2) 1915 Cal 708 (708) : 16 Cri L Jour 322 (DB) \* (Vol 15) 1928 Mad 167 (168) : 51 Mad 339 : 29 Cri L Jour 257 \* (Vol 9) 1922 Lah 227 (229) : 2 Lah 27 : 22 Cri Jour 166 (DB).

[But see (Vol 13) 1926 Bom 178 (179) : 27 Cri L Jour 491 (DB) \* (Vol 3) 1916 Pat 152 (153) : 1 Pat L Jour 264 : 18 Cri L Jour 151 (DB) \* (Vol 30) 1943 Pat 379 (380) : 45 Cri L Jour 331 \* (Vol 2) 1915 Cal 263 (263) : 15 Cri L Jour 726 \* (Vol 19) 1932 Nag 72 (73) : 28 Nag L R 49 : 33 Cri L Jour 407.]

6. "The Magistrate shall . . . some other day."

[1] General procedure is to acquit accused but Magistrate has discretion to adjourn in proper cases. (Vol 33) 1946 Oudh 15 (17) : 47 Cri L Jour 22 \* (Vol 28) 1941 Rang 202 (203) : 42 Cri L Jour 801 : 1941 Rang L R 224 \* (Vol 27) 1940 Nag 357 (359) : 41 Cri L Jour 919 (DB) \* (Vol 23) 1936 All 658 (659) : 37 Cr L J 1028.

[2] Magistrate cannot dispense with appearance of complainant. (Vol 29) 1942 Pat 46 (47) : 43 Cri L Jour 27 \* (Vol 13) 1926 Lah 628 (628) : 27 Cri L Jour 1022.

[3] Magistrate cannot compel complainant to appear and go on with case. (75) 24 Suth W R Cr. 32(33)(DB).

[4] Magistrate neither acquitting accused nor adjourning case but going on with trial — Procedure is illegal. (Vol 29) 1942 Pat 46 (47) : 43 Cri L Jour 27.

[See however (Vol 30) 1943 Pat 379 (380) : 45 Cri L Jour 331.]

[5] Unless order of acquittal is passed by Magistrate mere absence of complainant on the day of hearing does not *ipso facto* result in acquittal of accused. (Vol 10) 1923 Cal 725 (727) : 25 Cri L Jour 492.

[6] Hearing adjourned once in favour of complainant—Magistrate can acquit accused on non-appearance of complainant at later hearing. (90) 2 Weir 308 (308) (DB).

[7] In following cases Magistrate will adjourn case and give complainant further opportunity instead of acquitting accused:—

(a) When complainant is not definitely informed of place of trial. (82) 1882 All W N 229 (229).

(b) When case is transferred from file of one Magistrate to another without notice to complainant and he is present in original Court in ignorance of transfer. (Vol 6) 1919 Cal 1 (2) : 47 Cal 147 : 20 Cri L Jour 782 (FB) \* (Vol 4) 1917 Cal 314 (315) : 18 Cri L Jour 104 (DB).

(c) When the complainant is prevented by illness from appearing. (91) 1891 All W N 120 (121).

[8] Case posted at 7 p. m. and taken up at 8 a. m. — Complainant, being absent, case dismissed — Shortly after complainant appeared — *Held*, Magistrate should have given short adjournment. (Vol 14) 1927 Mad 139 (140) : 27 Cri L Jour 1391.

[9] Where complainant has gone abroad and will not be available for some time, Magistrate should acquit accused instead of adjourning case. (Vol 13) 1926 Lah 628 (628) : 27 Cri L Jour 1022.

[10] Order striking off case or dismissing complaint is not within terms of section. (84) 1884 All W N 115 (115) \* (85) 1885 All W N 43 (43) \* (Vol 4) 1917 Lah 143 (143) : 18 Cri L Jour 324 \* (Vol 12) 1925 Oudh 44 (45) : 25 Cri L Jour 359.

[But see (08) 8 Cri L Jour 139 (140) (DB) (Bom).]

[11] Where case is adjourned, the fact that Magistrate examined some witnesses on that day does not vitiate proceedings. (Vol 7) 1920 Cal 68 (69) : 21 Cri L Jour 252 (DB).

7. Complaints by public servants — Proviso.

— [1] Section does not apply to cases where complainant is public servant, and his attendance is dispensable. (Vol 23) 1936 All 658 (659) : 37 Cri L Jour 1028 \* (Vol 17) 1930 Nag 33 (34) : 25 Nag L R 194 : 31 Cr L J 382.

8. Revision. — [1] High Court can interfere in revision with order of acquittal under this section. (Vol 26) 1939 Sind 75 (75, 76) : 1 L R (1939) Kar 385 : 40 Cri L Jour 524 (DB) \* (Vol 25) 1938 Lah 121 (122) : 39 Cri L Jour 293 \* (Vol 23) 1936 All 658 (659) : 37 Cri L Jour 1028 \* (Vol 11) 1924 Oudh 64 (64) : 26 Oudh Cas 282 : 25 Cri L Jour 794 \* (Vol 14) 1927 Mad 172 (173) : 28 Cri L Jour 118 (DB) \* (30) 1930 Mad W N 190 (190).

[2] High Court cannot convert order of acquittal into one of conviction but can only direct case to proceed according to law. (Vol 26) 1939 Sind 75 (75, 76) : 1 L R (1939) Kar 385 : 40 Cri L Jour 524 (DB) \* (Vol 23) 1936 All 658 (658, 659) : 37 Cri L Jour 1028.

[3] High Court will rarely interfere and set aside acquittal especially when there is no error of law on face of record. (Vol 27) 1940 Nag 357 (360) : 41 Cri L Jour 919 (DB) \* (Vol 26) 1939 Pat 186 (186) : 40 Cri L Jour 514 \* (Vol 14) 1927 Mad 473 (474) : 28 Cri L Jour 270.

#### SECTION 248 — SYNOPSIS.

1. Scope.
2. Withdrawal of complaint and compounding of offences — Difference between.
3. "Complaint."
4. "At any time before a final order is passed."
5. "In any case under this Chapter."
6. "Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint."
7. "Shall thereupon acquit the accused."
8. Withdrawal of complaint against one of several accused — Effect.

1. Scope. — [1] Section 537 of the Calcutta Municipal Act, 1923, must be read subject of the provisions



249. In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

[1882—S. 249.]

Section 248 — Note 1 (*contd.*)

of this section. (Vol 13) 1926 Cal 786 (788): 53 Cal 631: 27 Cri L Jour 984 (DB).

[2] Prosecution under S. 575, Calcutta Municipal Act, kept pending for nearly three years for negotiation with corporation — Prosecution revived and daily fine for some period during pendency imposed — Fine held invalid. (Vol 7) 1920 Cal 345 (346): 21 Cri L Jour 558 (DB).

[3] Interval of three years between filing of complaint and trial — Procedure held defective, though not illegal. (Vol 10) 1923 Cal 725 (727): 25 Cri L Jour 492 (DB). ((Vol 7) 1920 Cal 345: 21 Cri L Jour 558, Disting.)

2. Withdrawal of complaint and compounding of offences — Difference between.—[1] "Compounding" implies the consent of the accused whereas such consent is not necessary for the withdrawal of a complaint. ('92-96) 1 Upp Bar Rul 219 (220) & ('94) 21 Cal 103 (112, 113) (DB) & (Vol 3) 1916 Pat 200 (201): 18 Cri L Jour 107 (DB) & (Vol 11) 1924 Lah 595 (598): 5 Lah 239: 25 Cri L Jour 629 (SB).

3. "Complaint."—[1] Where the sanction of a certain public servant is necessary for the criminal proceedings in question and a complaint is filed with the sanction of such public servant, the complaint can be withdrawn by the person filing it. Sanction of the public servant is not necessary for such withdrawal. ('71) 1871 Rat 45(45) (DB).

[But see (1878) 2 Bom 653 (653, 654) (DB). (Complaint can be withdrawn only by the public servant.)]

[2] Complaint with reference to an offence under the Municipal law filed by the Municipal Secretary — Complaint cannot be withdrawn by the Municipal Council. (Vol 1) 1914 Mad 387 (387): 15 Cri L Jour 299 (DB).

[3] Where a person makes a complaint to the police and the police makes a report to the Magistrate who takes cognizance of the offence on such report, he cannot acquit the accused on the application for "withdrawal" by the person who made the complaint to the police. (Vol 27) 1940 Sind 112 (112): 1 L R (1940) Kar 429: 41 Cri L Jour 694 (DB) & (1900) 23 Mad 626 (627, 628) (DB).

4. "At any time before a final order is passed." — [1] Complaint withdrawn and accused acquitted — There is no bar to a re-trial of the accused under S. 403, even before any process is issued against the accused. ('13) 14 Cri L Jour 559 (561, 562): 36 Mad 315 (DB).

5. "In any case under this Chapter." — [1] The section applies only to offences triable as summons-cases and not to offences triable as warrant-cases. (Vol 14) 1927 Rang 174 (174, 175): 5 Rang 136: 28 Cri L Jour 649 & ('94) 21 Cal 103 (113) (DB) & ('13) 14 Cri L Jour 77 (77, 78): 37 Bom 369 (DB) & (Vol 20) 1933 Lah 323 (324): 34 Cri L Jour 718 & (Vol 16) 1929 Mad 7 (8).

[But see ('87) 1887 Rat 330 (330) (DB) & ('68) 5 Bom H C R Cr 27 (28) (DB).]

[2] Offence under S. 24 of the Cattle-trespass Act — Complaint can be withdrawn. (Vol 6) 1919 All 31 (31): 42 All 202: 21 Cri L Jour 305.

6. "Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint." — [1] The withdrawal of a complaint is permissible only if the Magistrate is satisfied that there are "sufficient grounds" for permitting such withdrawal. (Vol 13) 1926 Cal 786 (788): 53 Cal 631: 27 Cri L Jour 984 (DB).

[2] Where a complaint of offences under Ss. 183 and 185 of the Penal Code is made by a Court and such Court subsequently finds that it made a mistake in filing the complaint and wishes to withdraw it, the Magistrate will scarcely be justified in refusing to allow a withdrawal. (Vol 14) 1927 Oudh 51 (51): 2 Luck 395: 27 Cri L Jour 1247.

[3] The police have no power to entertain an application for withdrawal of a complaint. ('75) 1875 Rat 91 (91).

[4] It is competent to a Magistrate in a proper case to treat an application to the effect that the offence has been compounded as an application for withdrawal of complaint. (Vol 6) 1919 All 31 (31): 42 All 202: 21 Cri L Jour 305.

7. "Shall thereupon acquit the accused". — [1] Upon the withdrawal of a complaint, the Magistrate has no power to dismiss the case or discharge the accused but must acquit the accused. (Vol 11) 1924 Lah 595 (596): 5 Lah 239: 25 Cri L Jour 629 (DB). (Per Harrison J.) & ('01) 25 Bom 422 (428) (SB).

8. Withdrawal of complaint against one of several accused — Effect. — [1] Several accused in a case — Complaint allowed to withdraw as against one of the accused — The other accused are not entitled to acquittal. (Vol 27) 1940 Mad 623 (624): 41 Cri L Jour 454 & (Vol 9) 1922 Oudh 145 (146): 23 Cri L Jour 271. ((Vol 8) 1921 All 35: 22 Cri L Jour 668 (DB), followed; 7 Cal W N 176, distinguished.) & (Vol 11) 1924 Lah 595 (599): 5 Lah 239: 25 Cri L Jour 629 (DB). (Per Le Rossignol J.; Harrison J. *contra*.)

Section 249 — Note 1

[1] Case started on police report — Section applies. (Vol 7) 1920 Pat 469 (469, 470): 21 Cri L Jour 184.

[2] A Magistrate can proceed under this section only in summons cases. (Vol 13) 1926 Pat 292 (293): 5 Pat 243: 27 Cri L Jour 698 (DB).

[3] Magistrate proceeding under the section in a warrant case — Magistrate's order is void — The case will be deemed to continue on the file of the Court. (Vol 13) 1926 Pat 292 (294, 295): 5 Pat 243: 27 Cri L Jour 698 (DB).

[4] Magistrate passing order of stay may, for sufficient reasons, remove the stay and proceed further. ('06) 3 Cri L Jour 274 (287, 288): 29 Mad 126 (FB).

[5] Order stopping further proceedings does not operate as an order of discharge. ('12) 13 Cri L Jour 860 (861): 1913 Pun Re. No. 9 Cr (DB.) & (Vol 21) 1934 All 17 (19): 35 Cri L Jour 564.

[6] Order of stay does not act as a bar to fresh proceedings against the accused with reference to the same matter. ('12) 13 Cri L Jour 860 (861): 1913 Pun Re No. 9 Cr (DB).



*Frivolous Accusations in Summons and Warrant Cases.*

"Clause 250. — We have inserted a heading to this clause to show that it applies to proceedings under the following chapters as well as under Chapter XX." —S. C. R., 1898.

250. <sup>a</sup>[(1) If in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid.]

(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(2A) The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.

(2B) When any person is imprisoned under sub-section (2A), the provisions of sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply.

(2C) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him :

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.]

(3) A complainant or informant who has been ordered under <sup>b</sup>[sub-section (2)] by a Magistrate of the second or third class to pay compensation <sup>c</sup>[or has been so ordered by any other

## SECTION 250 — SYNOPSIS.

1. Object and applicability.
2. "Upon complaint or upon information given to a police-officer or to a Magistrate."
3. "Accused of an offence."
4. "Triable by a Magistrate."
5. Magistrate by whom the case is heard.
6. "Discharges or acquits."
7. False and either frivolous or vexatious.
8. "By his order."
9. "Call upon him to show cause."
10. "Shall record and consider any cause"—Sub-section (2).
11. "For reasons to be recorded."
12. Amount and nature of compensation.
13. Who can be ordered to pay compensation.
14. To whom compensation can be awarded.
15. Imprisonment in default of compensation—Sub-sections (2A) and (2B).
16. No exemption from civil or criminal liability—Sub-section. (2C).
17. Abatement.
18. Appeal—Sub-section (3).
19. Revision.

1. Object and applicability.—[1] The object of the section is :

[a] To award some compensation to person against whom a frivolous or vexatious accusation is brought by a summary order. ('03) 30 Cal 123 (129) (FB).

[See (Vol 27) 1940 Sind 134 (136) : 41 Cri L Jour 789 ; 1 L R (1940) Kar 470 (FB).]

[b] To deter persons from making vexatious and

frivolous complaints. ('02) 15 C P L R 194 (196) ✕ ('98) 21 Mad 237 (239) (DB) ✕ ('04) 1 Cri L Jour 433 (434) : 26 All 512.

[2] The powers should never be used as a punitive measure. ('81) 1881 All W N 167 (168) ✕ ('70) 7 Bom H C R Cr 58 (58, 59) (DB) ✕ (1874) 22 Suth W R Cr 12 (13, 14) (DB) ✕ ('87) 1887 Pun Re No. 17 Cr. p. 34 (35) (DB) ✕ ('71) 6 Mad H C R App xlix (xlix).

[3] The section is applicable to any case triable by a Magistrate. (Vol 31) 1944 Oudh 272 (272) : 45 Cri L Jour 665 : 20 Luck 48 ✕ (Vol 28) 1941 Pesh 24 (24) : 42 Cri L Jour 423 ✕ (Vol 14) 1927 Oudh 175 (175) : 28 Cri L Jour 450 (DB).

[4] The section is applicable to cases triable summarily whether tried summarily or not. ('81) 11 Mad 142 (143) (DB).

2. "Upon complaint or upon information given to a police-officer or to a Magistrate."—[1] A case instituted "upon information given to a police-officer or to a Magistrate" is within the section. (Vol 26) 1939 Oudh 101 (102) ✕ (Vol 13) 1926 All 165 (166) : 27 Cri L Jour 35 ✕ (Vol 13) 1926 All 295 (296) : 27 Cri L Jour 702 ✕ ('10) 11 Cri L Jour 201 (201, 202) (DB) (Cal) ✕ (Vol 12) 1925 Oudh 558 (558) : 26 Cr L J 527.

[2] Compensation cannot be awarded in a case instituted on a police-report. (Vol 27) 1940 Sind 134 (135) : 41 Cri L Jour 789 : 1 L R (1940) Kar 470 (FB) ✕ (Vol 34) 1947 Bom 36 (37) (DB) ✕ ('98) 22 Bom 934 (935) (DB) ✕ ('94) 21 Cal 979 (984) (DB).

[See ('41) 53 Mad L W 63 (64).]

[3] The words "information given to a police-officer" mean information given and entered in the register of

Magistrate to pay compensation exceeding fifty rupees] may appeal from the order, in so far as order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided<sup>d</sup> [and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.]

e[\*                    ::                    \*                    \*                    \*                    \*                    \*]

[1882—S. 250; 1872—S. 209; 1861—S. 270.]

[a] Sub-sections (1) to (2c) were substituted by the Code of Criminal Procedure (Amendment) Act, 1923 [XVIII] of 1923, S. 69, for sub-ss. (1) and (2). [b] Substituted, *ibid.*, for "sub-s. (1)". [c] Substituted, *ibid.*, for "to an accused person". [d] Inserted, *ibid.* [e] Sub-section (5) was repealed, *ibid.*

#### Objects and Reasons.

"We think that the words 'or to a Magistrate' near the beginning of this clause were left out on the ground that information to a Magistrate from any person other than a police officer must be a complaint. We think that this view overlooks the words 'with a view to his taking action under this Code' which occur in the definition of 'complaint'. We also think that there is some force in the fact pointed out by the Calcutta High Court that section 190 (1) (c) seems to draw a distinction between information received and a complaint. We have therefore restored the words 'or to a Magistrate.'

Sub-section (1) as re-drafted does not provide for the case where the complainant is absent at the time judgment is delivered, and we think power should be given in such a case to summon him to appear and show cause.

We think that there is some anomaly in enabling a Magistrate who cannot impose a fine of more than Rs. 50 to award compensation up to Rs. 100 and we have, therefore, proposed to reduce the amount of

compensation which Third Class Magistrates can award to Rs. 50.

In view of section 547, we do not see any necessity to provide in the new sub-section (2d) that compensation should be recoverable as if it were a fine.

We have re-drafted the proposed addition to section (4) to make the intention clearer.

We discussed at some length the various merits of the phrases — 'frivolous or vexatious' as in the present Code, 'false and either frivolous or vexatious' as in the Bill, and 'false or vexatious, to the knowledge of the party' as in Act IX of 1922 recently passed to provide for compensatory costs in respect of false claims and defences. On the whole, we are in favour of the phrase as drafted. We do not think that the procedure under section 250 should be used in every false case or that the case is also either frivolous or vexatious. In serious cases it is desirable that the Magistrate should act under section 476 with a view to the institution of a prosecution." —S. C. R. [XVIII] of 1923

#### Section 250—Note 2 (contd.)

recognizable cases under S. 154. (Vol 7) 1920 Sind 73 (74): 13 Sind L R 166: 21 Cri L Jour 49 (DB).

[4] The words "information given to a Magistrate" refer to such information as falls within S. 190 (1), cl. (c). (Vol 27) 1940 Sind 134 (135): 41 Cri L Jour 789: 1 L R (1940) Kar 470 (FB).

[5] A case instituted on the basis of a statement by a person to a police-officer in the course of a police enquiry is not within the section. (Vol 7) 1920 Sind 73 (73, 74): 13 Sind L R 166: 21 Cri L Jour 49 (DB) & (Vol 3) 1916 Pat 211 (212): 1 Pat L Jour 106: 17 Cri L Jour 336 (DB).

[6] Where a person points out two persons to the police as those who assaulted him and the police treats this as first information, the case falls under the section. (Vol 7) 1920 Sind 41 (42): 14 Sind L R 168: 22 Cri L Jour 120 (DB).

[7] Civil Court Amin reporting to Court that he has been obstructed in the execution of the process entrusted to him—Court directing a prosecution on the basis of such report—Amin cannot be ordered to pay compensation. ('03) 26 All 183 (184) & ('75) 1 Bom 175 (176, 177) (DB) & ('93) 20 Cal 481 (482, 483) (DB) & ('10) 11 Cri L Jour 634 (634): 1910 Pun Re No. 25 Cr & ('13) 14 Cri L Jour 1 (1, 2) (DB) (Bom).

[8] (a) Where A tells B and B tells C and C tells the police, no order can be made against A. ('29) 1929 Mad 785 (785).

[See also (Vol 27) 1940 Sind 134 (136): 41 Cri L Jour 789: 1 L R (1940) Kar 470 (FB).]

(b) Where A tells B about C with a view to punishing the punishment of C and B informs the Magistrate A can be ordered to pay compensation. (Vol 5) All 111 (111): 40 All 79: 19 Cri L Jour 76.

[9] Information given by A to a person whose duty it is to report the same to the police or the Magistrate A can be ordered to pay compensation. (Vol 11) Mad 91 (92): 24 Cri L Jour 717 & (Vol 1) 1914 694 (695): 39 Mad 1006: 15 Cri L Jour 431 (DB).

[But see ('01) 25 Mad 667 (668, 669) (DB). (A complaint to village Magistrate who sent a report to police who submitted charge-sheet—Accused discharged and A ordered to pay compensation—*Held*, v Magistrate not being Magistrate within S. 250, A not be ordered to pay compensation.)]

[10] Application under S. 476—The section does not apply. (Vol 30) 1943 Lah 26 (27): 43 Cri L Jour 5

3. "Accused of an offence."—[1] The section does not apply where there is no accusation of any offence. (Vol 10) 1923 All 332 (332): 45 All 363: 24 Cri L Jour 228. (Security proceedings under S. 107.) & (Vol 14) All 531 (532): 49 All 750: 28 Cri L Jour 604. (Prisoners under S. 107.) & (Vol 22) 1935 Lah 29 (30). & (Vol 6) 1919 All 395 (395, 396): 41 All 322: 20 Jour 570. (Complaints under S. 1, Workmen's Act of Contract Act, 13 [XIII] of 1859.) & (Vol 7) 1920 350 (350): 44 Bom 463: 21 Cri L Jour 380. (Complaint under S. 28, Bombay Police Convention Act.) & ('13) 14 Cri L Jour 320 (320): 6 Sind 254 (DB). (Complaint under S. 41, Bombay Police Act.)

## Section 250 (contd.)

4. "Triable by a Magistrate."—[1] The offence must be one which is shown as triable by a Magistrate in column 8 of Sch. II. (Vol 17) 1930 Lah 482 (483); 11 Lah 558; 31 Cri L Jour 1133 (DB).

[2] The section does not apply to cases where the offence is triable exclusively by the Court of Session but is enquired into by the Magistrate under Chapter XVIII of the Code. (37) 1937 Mad W N 96 (96) (Vol 5) 1918 All 126 (126); 40 All 615; 19 Cri L Jour 706 (Vol 18) 1931 All 355 (355); 53 All 461; 32 Cri L Jour 670 (Vol 3) 1916 Bom 96 (96); 19 Cri L Jour 463 (DB) (Vol 17) 1930 Lah 482 (483); 11 Lah 558; 31 Cri L Jour 1133 (DB).

[3] Offence tried by Magistrate acting under s. 30 of the Code—The section does not apply. (Vol 6) 1919 Lah 192 (193); 1919 Pun Re No. 1 Cr: 20 Cri L Jour 141 (Vol 10) 1923 Rang 15 (15); 11 Low Bur Rul 151; 23 Cri L Jour 289 (Vol 17) 1930 Lah 482 (483); 11 Lah 558; 31 Cri L Jour 1133 (DB).

[But see (Vol 28) 1941 Lah 19 (21, 22): 42 Cri L Jour 266 (Vol 23) 1936 Rang 230 (231): 37 Cri L Jour 778; 14 Rang 378 (DB).]

[4] Offences—Some triable by the Magistrate and some by the Sessions Court—Accused discharged in respect of all offences—An order for compensation can be passed in respect of the offences triable by the Magistrate. (Vol 31) 1944 Oudh 272 (272); 45 Cri L Jour 665; 20 Luck 48 (Vol 5) 1918 All 126 (126); 40 All 615; 19 Cri L Jour 706. (Compensation in respect of offences triable in sessions cannot be given by the Magistrate.) (Vol 17) 1930 Lah 482 (483); 11 Lah 558; 31 Cri L Jour 1133 (DB) (Vol 6) 1919 Lah 227 (228); 1919 Pun Re No. 15 Cr: 20 Cri L Jour 495.

[See however (Vol 13) 1926 All 159 (160); 48 All 166; 27 Cri L Jour 6.]

[5] The mere fact that the complaint charges the accused with an offence which is not triable by a Magistrate does not oust the jurisdiction of the Magistrate to pass an order if after enquiry the Magistrate finds that the accusation is really one in respect of an offence triable by him. (Vol 26) 1939 Lah 122 (123); 1 L R (1938) Lah 619; 40 Cri L Jour 515 (Vol 8) 1921 Sind 105 (106); 16 Sind L R 205; 26 Cri L Jour 265 (DB) (Vol 18) 1931 All 355 (356); 53 All 461; 32 Cri L Jour 670.

[6] Magistrate trying accused for offence *prima facie* triable by him—Facts proving the offence to be one triable by a Court of Session—Magistrate's order under this section held, was not illegal. (Vol 9) 1922 Mad 223 (223, 224); 45 Mad 29; 23 Cri L Jour 232 (DB) (Vol 17) 1930 All 280 (280); 31 Cri L Jour 563.

[7] The criterion for deciding if offence is triable by Magistrate is whether proceedings are conducted under Chapter XVIII or Chapter XXI. (Vol 18) 1931 All 355 (356); 53 All 461; 32 Cri L Jour 670.

[8] Particular Magistrate having no power to try a case even though it is triable by a Magistrate—He cannot award compensation. (09) 9 Cri L Jour 502 (502) (Mad).

5. Magistrate by whom the case is heard.—[1] It is only the Magistrate by whom the "case is heard" that can pass an order under this section. (Vol 27) 1940 Rang 278 (279); 1940 Rang L R 502; 42 Cri L Jour 218 (Vol 26) 1939 Sind 321 (321); 41 Cri L Jour 53; 1 L R (1940) Kar 119 (DB) (Vol 11) 1924 All 224 (224); 46 All 80; 25 Cri L Jour 967 (Vol 11) 12 Cri L Jour 529 (531); 39 Cal 157 (F B) (Vol 13) 1926 Lah 427 (427); 7 Lah 152; 27 Cri L Jour 570.

[2] An appellate Court cannot, when reversing a conviction, act under the section. (Vol 27) 1940 Rang 278 (279); 1940 Rang L R 502; 42 Cri L Jour 218 (

(Vol 11) 1924 All 224 (224); 46 All 80; 25 Cri L Jour 967 (Vol 11) 3 Bom L R 841 (842) (DB) (Vol 11) 12 Cri L Jour 529 (531, 532); 39 Cal 157 (F B). (Overruling 11 Cri L Jour 46 (Cal).) (Vol 13) 1926 Lah 427 (427); 7 Lah 152; 27 Cri L Jour 570.

[3] High Court cannot in revision pass an order for compensation. (Vol 27) 1940 Rang 278 (279); 1940 Rang L R 502; 42 Cri L Jour 218 (Vol 26) 1939 Sind 321 (322); 41 Cri L Jour 53; 1 L R (1940) Kar 119 (DB) (Vol 15) 1928 All 95 (96); 29 Cri L Jour 274.

[4] Where part of the evidence is heard by one Magistrate and the rest of the evidence is heard and the case is decided by another, the latter is competent to order compensation. (Vol 31) 1944 Lah 10 (11, 12); 45 Cri L Jour 265 (Vol 8) 1921 All 122 (122); 22 Cri L Jour 406.

[5] A Magistrate by whom a case is "heard" need not be the one before whom it was instituted. (Vol 26) 1939 Lah 122 (123); 1 L R (1938) Lah 619; 40 Cri L Jour 515.

6. "Discharges or acquits."—[1] Magistrate can act under the section when he either discharges or acquits an accused: See (Vol 24) 1937 Rang 398 (399); 1937 Rang L R 159; 39 Cri L Jour 29.

[2] Accused neither discharged nor acquitted—No compensation can be awarded to him. (Vol 16) 1929 Lah 623 (624); 30 Cri L Jour 854.

[3] Complaint dismissed under S. 203—No compensation can be awarded. (06) 4 Cri L Jour 451 (451); 29 All 137 (06) 4 Cri L Jour 36 (37); 1906 Pun Re No. 6 Cr.

[4] Accused charged with two offences convicted under one and acquitted under another section held, will not apply. (97) 24 Cal 53 (55) (DB) (Vol 5) 1918 All 109 (109); 40 All 610; 19 Cri L Jour 670 (Vol 5) 1918 Sind 24 (24); 12 Sind L R 87; 20 Cri L Jour 106 (DB).

7. False and either frivolous or vexatious.—[1] The case must be false and either frivolous or vexatious. (Vol 27) 1940 Rang 110 (111); 41 Cri L Jour 506 (Vol 23) 1936 All 363 (363); 37 Cri L Jour 424 (Vol 13) 1926 Sind 19 (19); 19 Sind L R 66; 26 Cri L Jour 1295 (Vol 13) 1926 All 141 (142); 27 Cri L Jour 300 (Vol 7) 1920 Nag 78 (78); 21 Cri L Jour 41.

[2] There must be a definite finding to the effect that the case is false and either frivolous or vexatious before an order for compensation can be passed. (Vol 27) 1940 Rang 110 (111); 41 Cri L Jour 506 (Vol 25) 1938 Rang 209 (209); 39 Cri L Jour 704 (Vol 19) 1932 Lah 554 (554, 555); 34 Cri L Jour 80 (Vol 13) 1926 Nag 31 (32, 33); 26 Cri L Jour 1033 (Vol 20) 1933 Sind 226 (226); 27 Sind L R 78; 34 Cri L Jour 767 (DB) (Vol 19) 1932 Sind 156 (157); 26 Sind L R 299; 33 Cri L Jour 644 (DB).

[But see (Vol 28) 1941 Lah 19 (21); 42 Cri L Jour 266.]

[3] The fact that a Magistrate has framed a charge does not of itself prevent him from holding, after inquiry, that the charge is false and frivolous or vexatious. (Vol 31) 1944 Lah 10 (12); 45 Cri L Jour 265.

[4] Accusation of a trivial nature—Accusation held is frivolous. (03) 30 Cal 123 (129) (F B).

[5] Accusation is frivolous if it is "trifling," "silly," or "without due foundation". (Vol 7) 1920 Nag 78 (78); 21 Cri L Jour 41.

[6] Accusation one that ought not to have been made and intended to "harass" accused—Accusation, held is vexatious. (03) 30 Cal 123 (129) (F B) (Vol 7) 1920 Nag 108 (109); 21 Cri L Jour 226.

[7] Accusation which is intended to "annoy" the accused is vexatious. (Vol 13) 1926 Lah 365 (365); 27 Cri L Jour 607 (Vol 8) 1921 Lah 233 (234); 23 Cri

**Section 250 — Note 7 (contd.)**

L Jour 1 ✱ (Vol 4) 1917 Sind 73 (73) : 18 Cri L Jour 1005 : 11 Sind L R 55 (DB).

[8] Magistrate is justified in acting under the section where criminal prosecution is launched :

(a) On mere suspicion. (Vol 19) 1932 Bom 177 (178) : 33 Cri L Jour 392 (DB).

(b) With a view to put pressure on an opponent in a civil suit. (Vol 20) 1933 Bom 233 (234) : 24 Cri L Jour 878 (DB) ✱ (Vol 13) 1926 Bom 163 (164) : 27 Cri L Jour 448 (DB).

[9] A false accusation of rape is vexatious to the person accused. (Vol 28) 1941 Jah 19 (21) : 42 Cri L Jour 266.

[10] It is not proper to hold the complaint false and vexatious where :—

(a) The complainant's case is not an improbable one. ('05) 3 Cri L Jour 123 (124) : 1905 Pun Re No. 57 Cr.

(b) The complainant is merely unable to prove his case. (Vol 31) 1944 Oudh 25 (27) : 45 Cri L Jour 137 ✱ (Vol 8) 1921 Oudh 247 (247, 248) : 24 Oudh Cas 261 ✱ (Vol 21) 1934 Sind 18 (19) : 35 Cri L Jour 1038 (DB).

[See (Vol 23) 1936 All 363 (364) : 37 Cri L Jour 424.]  
(c) There is nothing to show that it is wilfully false or that there is any perversion or exaggeration of evidence. (Vol 16) 1929 Rang 14 (14) : 30 Cri L Jour 539.

[See (Vol 22) 1935 Pesh 178 (179) : 37 Cri L Jour 298.]

[See also (Vol 28) 1941 Mad 884 (885) : 43 Cri L Jour 156 ✱ (Vol 23) 1936 Lah 702 (703) : 37 Cri L Jour 935.]

[11] The fact that the complainant and the accused are on bad terms is not a sufficient ground for holding that the complaint is a false one. (Vol 25) 1938 Rang 209 (209) : 39 Cri L Jour 704.

8. "By his order."—[1] The order of discharge or acquittal should contain only the order to show cause. (Vol 23) 1936 Sind 240 (242) : 38 Cri L Jour 121 : 30 Sind L R 359 (DB).

[See also (Vol 24) 1937 Rang 301 (302) : 38 Cri L Jour 999.]

[2] Actual order for compensation is a subsequent order. (Vol 13) 1926 Lah 298 (299) : 7 Lah 121 : 27 Cri L Jour 752 ✱ ('28) 29 Cri L Jour 680 (680) (Lah) ✱ (Vol 16) 1929 Bom 287 (288) : 30 Cri L Jour 1112.

[3] Order of compensation made along with order of discharge or acquittal—Provision of law complied with if order to show cause made simultaneously with order of discharge. (Vol 16) 1929 Cal 332 (332, 333) : 31 Cri L Jour 411.

[See also (Vol 23) 1936 Sind 240 (242) : 38 Cri L Jour 121 : 30 Sind L R 359.]

[4] Order to show cause cannot precede order of discharge or acquittal. ('29) 1929 Mad W N 277 (278, 279).

[5] Order to show cause cannot be made after the order of discharge or acquittal. (Vol 20) 1933 Nag 296 (296, 297) : 30 Nag L R 15 : 34 Cri L Jour 1163.

[6] Order to show cause not made part of judgment of discharge or acquittal—Order passed and signed immediately after judgment—Order is not illegal. (Vol 23) 1936 Rang 230 (232) : 37 Cri L Jour 773 : 14 Rang 378 (DB) ✱ (Vol 13) 1926 All 165 (166) : 27 Cri L Jour 35 ✱ (Vol 14) 1927 Lah 515 (516) : 28 Cri L Jour 592 ✱ (Vol 17) 1930 Pat 292 (293) : 9 Pat 100 : 31 Cri L Jour 875 (DB).

[7] Where there are two accused, and one of them is discharged on one day and the other acquitted on a later day, the Magistrate cannot call upon the complainant, in so far as the payment of compensation to the discharged accused is concerned, to show cause on the day of the acquittal of the other accused. (Vol 12) 1925 Cal 264 (265) : 26 Cri L Jour 449 (DB).

[8] Where the same accused is charged with two offences, and he is discharged on one charge first, and acquitted of other charges at a later date, it is not illegal

to pass an order to show cause on the later date. (Vol 1) 1926 Bom 163 (164, 165) : 27 Cri L Jour 148.

9. "Call upon him to show cause."—[1] Where the accused is not present, the Magistrate has to direct the issue of a summons to him to appear and show cause. (Vol 25) 1938 Rang 161 (164) : 39 Cri L Jour 6 (DB) ✱ (Vol 25) 1938 Rang 247 (248) : 39 Cri L Jour 743 : 1938 Rang L R 163 ✱ (Vol 16) 1929 Bom 2 (288) : 30 Cri L Jour 1112 ✱ (Vol 20) 1933 All 8 (816) : 35 Cri L Jour 175 ✱ (Vol 13) 1926 All 241 (242) : 27 Cri L Jour 128 ✱ (Vol 16) 1929 Cal 762 (764) : 31 Cri L Jour 828 ✱ (Vol 20) 1933 Sind 226 (226) : 27 Sind L R 78 : 34 Cri L Jour 767 (DB).

[2] An order for compensation made without giving the complainant an opportunity to show cause is illegal and must be set aside. (Vol 23) 1938 Rang 247 (248) : 39 Cri L Jour 743 : 1938 Rang L R 163 ✱ (Vol 23) 1938 Lah 702 (703) : 37 Cri L Jour 935 ✱ (Vol 13) 1926 All 241 (242) : 27 Cri L Jour 128 ✱ (Vol 9) 1922 Bom 4 (410) : 23 Cri L Jour 574 (DB) ✱ (11) 12 Cri L Jour 7 : 38 Cal 302 (DB) ✱ (Vol 20) 1933 Oudh 37 (38) : 31 Cri L Jour 44 ✱ (Vol 7) 1920 Pat 211 (211) : 21 Cri L Jour 751 ✱ ('09) 10 Cri L Jour 220 (220) : 2 Sind L R 1 (DB).

[3] Complainant present—He cannot insist upon the grant of an adjournment for showing cause. (Vol 1) 1929 Bom 287 (288) : 30 Cri L Jour 1112 ✱ (Vol 1) 1926 Bom 225 (225) : 27 Cri L Jour 430 (DB) ✱ (Vol 19) 1914 All 86 (87) : 36 All 132 : 15 Cri L Jour 193 (D) ✱ (Vol 16) 1929 Cal 762 (763) : 31 Cri L Jour 828.

[4] Though Magistrate can discharge accused at a stage, he is not entitled to order compensation without examining all evidence which complainant wants adduced. (Vol 15) 1928 Mad 169 (169) : 51 Mad 337 : 37 Cri L Jour 114 ✱ (Vol 11) 1924 Rang 293 (293) : 25 Cri L Jour 1280 ✱ (Vol 22) 1935 Pesh 178 (179) : 37 Cri L Jour 298.

[See however (Vol 24) 1937 Rang 398 (399) : 19 Rang L R 159 : 39 Cri L Jour 29.]

[5] Compensation, without examining all witness on behalf of complainant, can be awarded only in exceptional circumstances. ('33) 1933 Mad W N 9 (902) ✱ (Vol 8) 1921 Mad 597 (597) : 44 Mad 51 : 31 Cri L Jour 161 (DB) ✱ (Vol 10) 1923 Lah 194 (195) : 24 Cri L Jour 251.

[6] Failure to record evidence in summary trial, he does not affect validity of proceedings for compensation. (Vol 21) 1934 Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841 (DB).

10. "Shall record and consider any cause"

Sub-section (2).—[1] An order for compensation without recording and considering any objection to the complainant makes or any cause he may show is illegal and the defect is not cured by S. 537. (Vol 25) 1938 Rang 161 (164, 165) : 39 Cri L Jour 642 (DB) ✱ (Vol 1) 1926 Bom 247 (248) : 39 Cri L Jour 743 : 1938 Rang L R 163 ✱ (Vol 16) 1929 Sind 113 (113) : 30 Cri L Jour 458 (DB) ✱ ('02) 2 Weir 310 (311) ✱ (Vol 9) 1922 I 157 (158) : 23 Cri L Jour 261 ✱ (Vol 19) 1932 Sind 1 (156, 157) : 26 Sind L R 299 : 33 Cri L Jour 644 (D) [But see ('95) 2 Weir 711 (711) (D B).]

[2] Cause may be shown with reference to the evidence already recorded, why complaint should not be held frivolous or vexatious. ('98) 1898 All W N 1 (199) ✱ (Vol 1) 1914 All 86 (87) : 36 All 132 : 15 Cri L Jour 193 (DB).

[3] Where the complainant says nothing more than that the evidence let in is true, the Magistrate should note in his judgment that the complainant had explanation to offer. (Vol 29) 1942 Mad 241 (241) : 37 Cri L Jour 336.

11. "For reasons to be recorded."—[1] The record of reasons is almost a condition precedent to

**Section 250 — Note 11 (contd.)**

proper exercise of the power. (Vol 25) 1938 Oudh 99 (99); 39 Cri L Jour 378 \* (Vol 24) 1937 Oudh 269 (270); 38 Cri L Jour 191 \* (Vol 24) 1937 Rang 301 (302); 38 Cri L Jour 999 \* (Vol 12) 1925 Mad 1139 (1139, 1140); 26 Cri L Jour 1501 \* ('06) 3 Cri L Jour 390 (391) (DB) (Cal) \* (Vol 19) 1932 Sind 156 (156, 157); 26 Sind L R 299; 33 Cri L Jour 644 (DB) \* (Vol 20) 1933 Sind 226 (226); 27 Sind L R 78; 34 Cri L Jour 767 (DB).

2. Summary cases — Reasons must be recorded. (Vol 17) 1930 Mad 929 (929); 32 Cri L Jour 207.

3. The reasons must show why it is a fit case for awarding compensation. (Vol 12) 1925 Mad 1139 (1140); 26 Cri L Jour 1501.

4. The object in recording reasons is to afford opportunity to appellate or revising tribunal to consider sufficiency of reasons. (Vol 25) 1938 Oudh 99 (99, 100); 39 Cri L Jour 378 \* (Vol 24) 1937 Oudh 269 (270); 38 Cri L Jour 191 \* (Vol 12) 1925 Mad 1139 (1139, 1140); 26 Cri L Jour 1501.

5. The following statements in the order of the Magistrate have been held to be not good reasons for making an order under the section:

(a) That "in his opinion the evidence is highly unsatisfactory." ('06) 3 Cri L Jour 390 (391) (DB) (Cal) \* (Vol 16) 1929 Sind 113 (113, 114); 30 Cri L Jour 459 (DB).

(b) That he "finds nothing in the explanation to justify that the complaint was not false and either frivolous or vexatious." (Vol 27) 1940 Rang 110 (111); 41 Cri L Jour 506 \* (Vol 25) 1938 Oudh 99 (100); 39 Cri L Jour 378 \* (Vol 19) 1932 Sind 156 (156, 157); 26 Sind L R 299; 33 Cri L Jour 644 (DB).

[See (Vol 24) 1937 Rang 301 (301, 302); 38 Cri L Jour 999.]

(c) That "no case is made out against the accused and some of the accused were added vexatiously." (Vol 12) 1925 Mad 1139 (1139, 1140); 26 Cri L Jour 1501.

6. Magistrate is only bound to give reasons for ordering compensation and not for his finding that the accusation is false and frivolous or vexatious. (Vol 23) 1936 Rang 230 (232); 37 Cri L Jour 773; 14 Rang 378 (DB) \* (Vol 23) 1936 Sind 240 (242); 38 Cri L Jour 121; 30 Sind L R 359 (DB).

[But see (Vol 12) 1925 Mad 1139 (1140); 26 Cri L Jour 1501.]

12. Amount and nature of compensation. — [1] The section does not mean that if there are a number of accused, the total amount awarded to all must not exceed one hundred rupees. (Vol 13) 1926 All 295 (296); 27 Cri L Jour 702.

[2] Compensation made under this section is recoverable under S. 547 as if it were a fine. (Vol 19) 1932 Pat 301 (301); 33 Cri L Jour 958 (FB) \* ('94) 21 Cal 979 (984) (DB) \* ('01) 28 Cal 164 (166) (DB).

[3] Compensation should not be credited to the Government. (Vol 20) 1933 Nag 296 (296); 30 Nag L R 15; 34 Cri L Jour 1163.

[4] Compensation should not be awarded as a punitive measure and in awarding it the Magistrate should be strictly guided by the loss or inconvenience which the accused has sustained. ('81) 1881 All W N 167 (168).

[5] Any misconduct of the accused may disentitle him to compensation. ('01) 1901 Pun L R No. 22, p. 65 (66).

[6] Compensation should be awarded only in fit and proper cases and not indiscriminately in every case in which the accused is discharged. (Vol 25) 1938 Rang 200 (201); 39 Cri L Jour 587 \* (Vol 19) 1932 Sind 156 (157); 26 Sind L R 299; 33 Cri L Jour 644 (DB).

13. Who can be ordered to pay compensation. — [1] Compensation cannot be awarded against a person

who did not institute the proceedings but was only examined as a witness. ('93-1900) 1893-1900 Low Bur Rul 443 (443).

[2] Where a judicial officer makes a complaint under S. 476 acting in his judicial capacity no compensation should be awarded against him. ('71) 15 Suth W R Civ. 506 (507) \* ('75) 1 Bom 175 (176) (DB).

[3] Public officers are not exempted from liability to pay compensation. ('99) 2 Weir 317 (318) (DB) \* (Vol 14) 1927 Cal 405 (406); 54 Cal 871; 24 Cri L Jour 316.

[4] A police-officer making a report in a non-cognizable case is not exempt from liability under the section. (Vol 27) 1940 Sind 134 (135); 41 Cri L Jour 789; I L R (1940) Kar 470 (FB) \* ('02) 26 Bom 150 (157, 158) (FB).

[5] A Municipal Committee may be ordered to pay compensation. (Vol 10) 1923 Lah 31 (31); 24 Cri L Jour 463.

[6] The section is applicable to the case of the Crown. (Vol 17) 1930 All 206 (209); 52 All 263; 31 Cri L Jour 485 (FB).

[7] Servant lodging information on behalf of master — Servant joining the master in the accusation — Servant is liable. ('10) 11 Cri L Jour 201 (201, 202) (DB) (Cal) \* ('11) 12 Cri L Jour 482 (482) (DB) (Mad).

[8] A guardian or next friend of a minor complainant cannot be ordered to pay compensation. ('12) 13 Cri L Jour 136 (137) (Lab).

[9] Person who only instigates the giving of false information but who does not himself make the complaint or give the information cannot be ordered to pay compensation. (Vol 27) 1940 Sind 134 (136); 41 Cri L Jour 789; I L R (1940) Kar 470 (FB).

**14. To whom compensation can be awarded. —**

[1] Where a Magistrate discharges one of the accused and convicts the other accused, he can award compensation to the accused who is discharged. ('82) 5 Mad 381 (382) (DB) \* ('77) 1877 Pun Re No. 15 Cr, p. 31 (32) (DB).

**15. Imprisonment in default of compensation —**

**Sub-sections (2A) and (2B). —**[1] The Magistrate has no power to order that the sentence of imprisonment in default shall take effect after a term of civil detention which the complainant was undergoing at the time. (Vol 12) 1925 Rang 202 (203); 3 Rang 93; 26 Cr L J 821.

[2] The term of thirty days' imprisonment can be imposed in respect of each of several accused though the aggregate term of imprisonment exceeds thirty days. (Vol 27) 1940 Rang 110 (110); 41 Cri L Jour 506 \* (Vol 12) 1925 Rang 202 (202, 203); 3 Rang 93; 26 Cri L Jour 821.

[3] Portion of compensation recovered — Person, held, is liable to imprisonment only for a proportionate part of the period. ('93-1900) 1893-1900 Low Bur Rul 320 (320).

**16. No exemption from civil or criminal liability —**

**Sub-section (2C). —**[1] An order for payment of compensation does not debar the Magistrate from directing the prosecution of the complainant under S. 476 for an offence under S. 211, Penal Code. (Vol 12) 1925 Oudh 558 (558); 26 Cri L Jour 527 \* ('98) 21 Mad 237 (239) \* (Vol 4) 1917 Sind 19 (20); 18 Cri L Jour 414; 10 Sind L R 162 (DB).

[But see ('95) 22 Cal 586 (588) (DB).]

[2] The starting of the prosecution of the complainant does not bar an order for compensation. ('71) 15 Suth W R Cr 9 (10) (DB) \* ('04) 1 Cri L Jour 597 (598); 1904 Pun Re No. 6 Cr \* ('08) 7 Cri L Jour 231 (232) (Lab) \* ('13) 14 Cri L Jour 437 (437); 7 Sind L R 10 (DB) \* ('98) 21 Mad 237 (239) (DB).

[3] Prosecution unnecessary on grounds of public policy — Order for compensation instead of prosecution will not be wrong. ('04) 1 Cri L Jour 280 (281); 27 Mad 59 (DB).

## CHAPTER XXI.

## OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

*Procedure in warrant-cases.*

251. The following procedure shall be observed by Magistrates in the trial of warrant-cases.

[1882—S. 251: 1872—S. 213.]

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution :

<sup>a</sup>[Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.]

Section 250—Note 16 (*contd.*)

[See also (Vol 6) 1919 Pat 81 (83) : 20 Cri L Jour 223.]

[4] The fact that the Magistrate did not desire to award compensation cannot preclude him from directing the prosecution of the complainant. ('11) 12 Cri L Jour 521 (522) (Upp Bur).

[5] Compensation awarded will be taken into consideration while passing sentence in the event of conviction. ('04) 1 Cri L Jour 597 (598) : 1904 Pun Re No. 6 Cr.

17. Abatement.—[1] Accused awarded compensation—Accused dying just after complainant has filed his revision—No order can be passed on the petition. ('93) 1893 Rat 634 (634) (DB).

[2] Where the complainant dies, after filing a revision against an order of compensation, the application does not abate. ('09) 9 Cri L Jour 103 (103, 104) : 1908 Pun Re No. 24.

18. Appeal—Sub-section (3).—[1] No appeal lies against the order of a single Judge of the High Court in revision from an order under the section. (Vol 5) 1918 Mad 418 (418, 419) : 19 Cri L Jour 208 (DB).

[2] An appeal lies when the total amount ordered to be paid exceeds rupees fifty even though the amount to be paid to each of the accused, where there are more than one, does not exceed that sum. (Vol 13) 1926 All 247 (248) : 27 Cri L Jour 146 \* (Vol 12) 1925 Bom 129 (129) : 49 Bom 440 : 26 Cri L Jour 480 (DB)\* (Vol 15) 1928 Lah 638 (638): 9 Lah 462 : 29 Cri L Jour 413\* (Vol 13) 1926 Pat 70 (70, 71) : 26 Cri L Jour 1504 (DB)\* (Vol 13) 1926 Sind 19 (20) : 19 Sind L R 66 : 26 Cri L Jour 1295\* (Vol 16) 1929 Sind 176 (177) : 30 Cri L Jour 905 (DB).

[3] Order for compensation appealed against—Accused should receive notice thereof—Court hearing the appeal would be exercising a proper discretion to give notice to the accused in such cases. (Vol 11) 1924 Lah 675 (675, 676) : 25 Cri L Jour 209\* (Vol 20) 1933 Lah 545 (546) : 34 Cri L Jour 533 \* (Vol 2) 1915 Mad 940 (940, 942) : 16 Cri L Jour 128 : 38 Mad 1091 (DB) \* (Vol 8) 1921 Mad 281 (281) : 22 Cri L Jour 583. (9 Cri L Jour 150 : 33 Mad 89, Followed.) \* (Vol 13) 1926 Sind 143 (144) : 20 Sind L R 41 : 27 Cri L Jour 248.

[See (Vol 13) 1926 Cal 1054 (1055) : 53 Cal 969 : 27 Cri L Jour 1086 (DB).]

[But see (Vol 14) 1927 Lah 357 (357) : 8 Lah 568 : 28 Cri L Jour 416. (In such cases Crown being the real respondent notice to accused is not necessary.)]

[4] An appellate Court can go into all the facts of the case, in order to determine whether the case is false and vexatious. (Vol 19) 1932 Cal 120 (121) : 58 Cal 1436 : 33 Cri L Jour 269.

[5] An appellate Court will not set aside an order for compensation except for very cogent reasons. (Vol 25) 1938 Rang 200 (201) : 39 Cri L Jour 587.

19. Revision.—[1] The High Court has ample jurisdiction to revise and examine an order under the

section, in the exercise of its ordinary revisional powers and under S. 435. (Vol 24) 1937 Ondh 269 (270): 33 Cri L Jour 191\* (Vol 7) 1920 All 351 (351): 21 Cri L Jour 787.

[2] High Court will not interfere when no prejudice is caused. (Vol 11) 1924 All 674 (675).

[3] High Court can entertain a revision petition in the first instance without its being presented to the Sessions Judge or the District Magistrate. ('12) 13 Cri L Jour 268 (269) (All).

[4] Cross cases—Revisional Court, held, can take into consideration evidence in connected case. (Vol 31) 1944 Ondh 25 (27) : 45 Cri L Jour 137.

## Section 251—Note 1

[1] Summons instead of warrant issued under S. 204—Offence cannot be tried as summons-case. ('63) 10 Suth W R Cr 31 (31) (DB).

[2] Offence triable as warrant-case—Magistrate cannot split it up into component parts to try case as summons-case. (Vol 8) 1921 All 282 (284) : 22 Cri L Jour 146.

[3] Offence charged triable as warrant-case—Trial commenced as warrant-case—Magistrate cannot abandon this procedure and adopt that of summons-cases on ground that accused committed offence triable as summons-case. (Vol 8) 1921 All 282 (284) : 22 Cri L Jour 146 \* (Vol 14) 1927 All 270 (270) : 28 Cri L Jour 227 \* (Vol 3) 1916 Mad 610 (610) : 16 Cri L Jour 250 \* (Vol 15) 1928 Lah 291 (295) : 29 Cri L Jour 285 \* ('21) 22 Cri L Jour 683 (683, 684) (Pat).

[See also (Vol 12) 1925 Ondh 200 (200) : 25 Cri L Jour 1271.]

[See however ('84) 7 Mad 454 (457) (DB).]

[But see (Vol 10) 1923 Mad 439 (440) : 24 Cri L Jour 469.]

[4] Procedure adopted under Chapter 21 cannot be changed to one under Chapter 22. (Vol 10) 1923 Cal 105 (106) : 24 Cri L Jour 157 (DB).

[See also (Vol 30) 1943 Pesh 89 (90) : 45 Cri L Jour 167 (DB).]

[But see ('99) 22 Mad 459 (460) \* ('04) 1 All L Jour 272n (273n).]

[5] Procedure under Chapter 21 changed to one under Chapter 22—No failure of justice—Trial is not invalidated. (Vol 4) 1917 Sind 69 (70) : 18 Cri L Jour 621 : 10 Sind L R 185 (DB).

[6] Provisions of this Chapter are applicable to trials before Presidency Magistrates except where they are specifically excluded. (Vol 19) 1932 Cal 865 (865) : 33 Cri L Jour 828 (DB)\* (Vol 2) 1915 Bom 14 (15) : 16 Cri L Jour 538 (DB) \* ('91) 1891 Rat 539 (540).

## SECTION 252—SYNOPSIS.

1. Scope.
2. "Appears or is brought."
3. "Shall proceed to hear the complainant."
4. "Take all such evidence as may be produced in support of the prosecution."

(2) The Magistrate shall ascertain, from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

[1882—S. 252: 1872—Ss. 214, 190, 362, Para. 1; 1861—Ss. 249, 186, 193.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 70.

#### SECTION 252 — SYNOPSIS (*contd.*)

5. "Shall ascertain"—Sub-section (2).

6. Production and inspection of documents.

7. Cross-examination of witnesses.

8. Revision.

1. Scope.—[1] Magistrate cannot forthwith require accused to state his plea and on his admission of his guilt, convict him without taking evidence as in summons-case. ('06) 4 Cri L Jour 231 (231, 232); 29 Mad 372.

[2] This section applies to case started on police challan. (Vol 32) 1945 Lah 201 (204); 47 Cri L Jour 143 (FB) \* (Vol 27) 1940 Nag 390 (391); 1 L R (1942) Nag 333; 42 Cri L Jour 208.

[See (Vol 25) 1938 Nag 103 (104); 39 Cri L Jour 62.]

2. "Appears or is brought".—[1] Legality or otherwise of arrest under which accused is brought before Magistrate does not affect jurisdiction of Magistrate to try accused. ('11) 12 Cri L Jour 356 (356); 35 Bom 225 (S B) \* ('04) 1 Cri L Jour 535 (537); 31 Cal 557 (DB) \* ('99) 1899 Pun Re No. 6 Cr, p. 17 (18) \* (Vol 15) 1928 Sind 161 (163, 164); 29 Cri L Jour 1088 (DB) \* ('03) 26 Mad 124 (125) (DB).

[See however (Vol 12) 1925 Bom 131 (133, 134); 49 Bom 212; 26 Cri L Jour 441 (DB).]

3. "Shall proceed to hear the complainant".—[1] Section does not require examination of complainant on oath. (Vol 9) 1922 Mad 126 (128); 23 Cri L Jour 203 (DB) \* (Vol 16) 1929 Cal 229 (230); 30 Cri L Jour 942 (DB).

[See (Vol 32) 1945 Nag 127 (129); 1 L R (1945) Nag 419; 47 Cri L Jour 240.]

[See also (Vol 22) 1935 Pat 515 (520); 36 Cri L Jour 1354; 15 Pat 69 (DB) \* (Vol 25) 1938 Nag 103 (104); 39 Cri L Jour 62.]

[2] Magistrate must hear case though complainant wishes to withdraw his complaint. (Vol 16) 1929 Mad 7 (8) \* (Vol 14) 1927 Rang 174 (174, 175); 5 Rang 136; 28 Cri L Jour 649 \* ('89) 13 Bom 600 (603) (DB).

4. "Take all such evidence as may be produced in support of the prosecution".—[1] Magistrate must take all evidence produced on behalf of prosecution unless it is irrelevant. ('08) 7 Cri L Jour 272 (273) (Lah) \* ('13) 14 Cri L Jour 412 (412) (All) \* (Vol 2) 1915 Mad 825 (825); 16 Cri L Jour 156.

[See (Vol 20) 1933 Nag 374 (377); 30 Nag L R 76; 35 Cri L Jour 404.]

[2] Magistrate is not bound to go on taking evidence offered subsequently from time to time. (Vol 25) 1938 Nag 103 (104); 39 Cri L Jour 62 \* (Vol 1) 1914 All 430 (431); 15 Cri L Jour 363 \* (Vol 13) 1926 Mad 989 (990); 49 Mad 978; 27 Cri L Jour 1123.

[3] Refusal to issue commission does not amount to refusal to take evidence. (Vol 24) 1937 Rang 398 (399); 1937 Rang L R 159; 39 Cri L Jour 29.

[4] Witnesses common to number of cases—Evidence in each case should be taken separately. (Vol 10) 1923 Cal 196 (197); 50 Cal 223; 24 Cri L Jour 198 (DB).

[5] Prosecution must produce all witnesses acquainted with facts of case unless their evidence is unnecessary or they are not likely to tell truth. (Vol 28) 1941 Rang 209 (212); 43 Cri L Jour 157; 1941 Rang L R 346 (DB) \* ('04) 1 Cri L Jour 305 (308, 309); 28 Bom 479 (DB) \* (Vol 20) 1933 Cal 600 (602); 60 Cal 1361; 35 Cri L Jour 133 (DB) \* (Vol 1) 1914 Lah 565 (566); 16 Cri L Jour 266 \* (Vol 5) 1918 Cal 314 (315); 19 Cri L

Jour 81 (DB) \* (Vol 15) 1928 Pat 46 (48); 28 Cri L Jour 868 (DB).

[6] Material witness withheld by prosecution without sufficient cause—Court can draw inference that his evidence if produced will be against prosecution. (Vol 6) 1919 Lah 158 (159); 20 Cri L Jour 519 (DB) \* (Vol 15) 1928 Pat 98 (100); 28 Cri L Jour 506.

[7] Adverse inference cannot be drawn from the fact that the prosecution examined a particular witness last especially when it has not caused any prejudice to the accused. (Vol 30) 1943 Pat 424 (425); 45 Cri L Jour 172 (DB).

5. "Shall ascertain"—Sub-section (2).—[1] Provisions relating to the ascertainment of the names of persons who are likely to be acquainted with the facts of the case are mandatory and should be strictly carried out before the charge is framed. (Vol 32) 1945 Lah 201 (204); 47 Cri L Jour 143 (F B). (Prosecution stating after examination of the witnesses that their case is closed—Specific question need not be put.) \* (Vol 30) 1943 All 9 (9); 44 Cri L Jour 196; 1 L R (1943) All 31 \* (Vol 28) 1941 Sind 198 (201, 202); 43 Cri L Jour 73; 1 L R (1941) Kar 345 \* (Vol 27) 1940 Pat 355 (358); 19 Pat 413; 41 Cri L Jour 931 (DB) \* (Vol 23) 1936 Nag 392 (197); 1 L R (1936) Nag 205; 38 Cri L Jour 307 \* (Vol 13) 1926 Mad 989 (990); 49 Mad 978; 27 Cri L Jour 1123. (Magistrate need not question more than once—Proper stage to question is when the evidence already produced has been examined.) \* ('13) 14 Cri L Jour 682 (682) (All) \* (Vol 12) 1925 Oudh 667 (667); 26 Cri L Jour 1266 (DB).

[2] Magistrate is not bound to summon every one of witnesses named by complainant. (Vol 27) 1940 Pat 355 (358); 19 Pat 413; 41 Cri L Jour 931 (DB) \* (Vol 25) 1938 Nag 103 (105); 39 Cri L Jour 621 \* (Vol 25) 1938 Lah 444 (445); 39 Cri L Jour 624 \* (Vol 1) 1914 All 526 (526); 14 Cri L Jour 682 \* (Vol 13) 1926 Mad 989 (990); 49 Mad 978; 27 Cri L Jour 1123. (The discretion should not be exercised arbitrarily.) \* (Vol 1) 1914 All 430 (431); 15 Cri L Jour 363.

[3] Power of summoning witnesses named by complainant may be exercised from time to time. (Vol 27) 1940 Nag 390 (391); 1 L R (1942) Nag 333; 42 Cri L Jour 208.

[4] Warrant for arrest of witness can be issued only if conditions laid down in S. 90 are satisfied. ('07) 6 Cri L Jour 275 (275) (Lah).

[5] Magistrate can take such evidence as he considers necessary to find whether offence has really been committed or not, even if complainant is unwilling to proceed with complaint. ('37) 1937 Mad W N 727 (727, 728).

6. Production and inspection of documents.—[1] Accused should be allowed to inspect documents admitted and marked as exhibits in the case during the examination of the complainant. ('99) 1 Bom L R 433 (433) (DB) \* ('82) 10 Cal L Rep 54 (55) (DB).

7. Cross-examination of witnesses.—[1] On general principles and under S. 133, Evidence Act, liability to cross-examination by adverse party is part of the conception of legal evidence. (Vol 19) 1932 Oudh 298 (299); 34 Cri L Jour 58; 8 Luck 135 (DB). (Per Srivastava, J.)

[2] Accused is entitled as of right under S. 256 to cross-examine prosecution witnesses before charge is framed as well as afterwards. (Vol 10) 1923 Mad 609 (610); 46



253. (1) If, upon taking all the evidence referred to in section 252, and making such examination of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

[1882—S. 253; 1872—S. 215, para. 1 and Explanation 3; 1861—S. 250.]

**Section 252 — Note 7 (contd.)**

Mad 449 : 24 Cri L Jour 547 (FB) \* (Vol 7) 1920 Pat 149 (150) : 21 Cri L Jour 814 : 5 Pat L Jour 94 \* (11) 12 Cri L Jour 277 (279) (Low Bur) \* (97-01) 1 Upp Bur Rul 74 (74) \* (Vol 22) 1935 Sind 13 (19) : 29 Sind L R 92 : 36 Cri L Jour 581 (FB) \* (Vol 22) 1935 Nag 8 (9 to 11) : 31 Nag L R 276 : 36 Cri L Jour 578.

[But see (Vol 18) 1931 All 621 (623, 624) : 54 All 212 : 33 Cri L Jour 310. (Magistrate has discretion to allow accused to cross-examine before charge is framed.) \* (Vol 16) 1929 Cal 822 (823, 824) : 31 Cri L Jour 809 \* (Vol 10) 1923 Cal 727 (728) : 50 Cal 939 : 25 Cri L Jour 27 (DB). (Per Rankin and Buckland, JJ.; Cuning J., dissenting.) \* (Vol 3) 1916 Lah 445 (445) : 17 Cri L Jour 278 \* (Vol 19) 1932 Oudh 298 (299, 305) : 34 Cri L Jour 58 : 8 Luck 135 (DB). (Per Shrivastava, J., Kisch J. contra.)]

[3] Accused can decline to exercise his right of cross-examination. (Vol 10) 1923 Cal 727 (728) : 50 Cal 939 : 25 Cri L Jour 27 (DB).

[4] Object of cross-examination is to test truth of evidence given in chief. (Vol 30) 1943 Pat 446 (452) : 22 Pat 614 : 45 Cri L Jour 557 (DB).

[5] Fact that certain evidence has not been tested by cross-examination does not affect its admissibility but only its probative value. (Vol 12) 1925 Mad 497 (537) : 48 Mad 1 (DB) \* (Vol 16) 1929 Lah 840 (842) : 30 Cri L Jour 951 \* (13) 14 Cri L Jour 70 (71) (DB) (Cal) \* (03) 1903 Pun Re No. 5 Cr, p. 15 (16) \* (10) 11 Cri L Jour 145 (145) (DB) (Mad) \* (Vol 12) 1925 Oudh 726 (727) : 26 Cri L Jour 1236 \* (Vol 10) 1923 Pat 53 (55) : 24 Cri L Jour 595 (DB) \* (Vol 19) 1932 Oudh 298 (299) : 34 Cri L Jour 58 : 8 Luck 135 (DB).

[See (Vol 24) 1937 Oudh 168 (169) : 37 Cri L Jour 1144 : 12 Luck 553.]

8. Revision. — [1] Court of revision will not interfere with discretion of Magistrate to summon prosecution witnesses unless there are strong and exceptional reasons for doing so. (Vol 15) 1928 All 684 (685) : 30 Cri L Jour 631.

**SECTION 253 — SYNOPSIS.**

1. "If, upon taking all the evidence referred to in Section 252."
2. Examination of accused (if any) as he thinks necessary.
3. "The Magistrate shall discharge him."
4. Grounds of discharge.
5. Sub-section (2).
6. "For reasons to be recorded."

1. "If, upon taking all the evidence referred to in section 252." — [1] This section makes it incumbent on Magistrate to take all evidence offered on behalf of prosecution before he discharges accused. (Vol 17) 1930 Cal 515 (517) : 31 Cri L Jour 1055 : 58 Cal 346 (DB) \* (37) 1937 Mad W N 991 (992) \* (Vol 16) 1929 Cal 479 (480) : 31 Cri L Jour 128 (DB) \* (13) 14 Cri L Jour 412 (412, 413) (All) \* (08) 7 Cri L Jour 272 (273) (Lah) \* (Vol 33) 1946 Mad 415 (415) : 47 Cri L Jour 898.

[2] Magistrate can discharge accused on basis of evidence of witness called at the instance of accused

under S. 540, though this section refers only to evidence for prosecution. (Vol 20) 1933 Lah 561 (566, 567) : 34 Cri L Jour 735.

2. Examination of accused (if any) as he thinks necessary. — [1] Magistrate in warrant-case can examine accused before charge is framed. (193-1900) 1898-1900 Low Bur Rul 642 (645) \* (Vol 14) 1927 All 475 (475) : 49 All 551 : 28 Cri L Jour 899 \* (Vol 9) 1922 Mad 512 (512) : 45 Mad 820 : 24 Cri L Jour 124 (DB). (Examination discretionary — Overruled on another point in (Vol 10) 1923 Mad 609 : 46 Mad 449 : 24 Cri L Jour 547 (FB).) \* (Vol 13) 1926 Nag 459 (460) : 27 Cri L Jour 830.

3. "The Magistrate shall discharge him." — [1] Order dismissing complaint is not proper order to be passed under the section. (13) 14 Cri L Jour 412 (412) (All) \* (Vol 21) 1934 Pat 548 (549, 550) : 36 Cri L Jour 285.

[2] Person accused of major offence but Magistrate framing charge only for minor offence — There is implied discharge in respect of major offence. (Vol 23) 1936 Nag 87 (88) : 37 Cri L Jour 715 : 1 L R (1936) Nag 54 \* (Vol 20) 1933 Mad 65 (66) : 33 Cri L Jour 825 \* (Vol 18) 1931 Lah 402 (403, 404) : 32 Cri L Jour 1029.

[But see (Vol 13) 1926 Oudh 194 (195) : 27 Cri L Jour 417.]

[3] To determine whether particular order is one of discharge, substance of order and not its form should be taken into consideration. (Vol 4) 1917 Low Bur 88 (89) : 18 Cri L Jour 1006 \* (Vol 12) 1925 Oudh 60 (60) : 25 Cri L Jour 39 \* (03) 1903 Pun Re No. 14 Cr, p. 35 (39) \* (Vol 2) 1915 Mad 23 (24) : 15 Cri L Jour 673 : 38 Mad 585 (DB) \* (Vol 22) 1935 All 834 (835) : 36 Cri L Jour 912.

[See (73) 19 Suth W R Cr 55 (55) (DB).]

[4] Where the Magistrate considers that no case has been made out against the accused the proper procedure is to discharge the accused and not to acquit him after framing charge. (Vol 21) 1934 Oudh 321 (323) : 10 Luck 82 : 35 Cri L Jour 939 (DB).

[5] If prosecution does not put the correct version of the facts before the Court and itself attempts to spoil a case by adducing false and perjured evidence, a Magistrate cannot but discharge the accused. (Vol 14) 1927 All 804 (805) : 49 All 879 : 28 Cri L Jour 601.

4. Grounds of discharge. — [1] Magistrate cannot discharge accused merely on following grounds:

(a) That civil suit touching same dispute is pending between parties. (Vol 12) 1925 All 298 (299) : 26 Cri L Jour 73.

(b) That complaint is vague. (76) 25 Suth W R Cr 35 (35) (DB).

(c) That it is desirable to try accused with another co-accused whose attendance could not be procured. (Vol 9) 1922 Cal 334 (335) : 49 Cal 182 : 22 Cri L Jour 465 (DB).

[2] Accused escaping into foreign territory — Magistrate reporting that there are no sufficient grounds for extraditing — Such is not a ground for discharge. (05) 2 Cri L Jour 211 (212) (Kathiawar).

[3] Though an order merely discharges the accused without giving reasons it will operate as a final order



**254.** If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused.

[1882—S. 254; 1872—S. 216; 1861—S. 250.]

**Section 253 — Note 4 (contd.)**

and the discharge will be effective from the date of the order. (Vol 32) 1945 Mad 288 (288, 289).

5. Sub-section (2). — [1] Accused can be discharged before any evidence for prosecution is taken or When such evidence is being taken. (Vol 28) 1941 Sind 198 (201) : 43 Cri L Jour 73 : I L R (1941) Kar 345 \* (Vol 17) 1930 Cal 515 (517, 518) : 58 Cal 346 : 31 Cri L Jour 1055 (DB) \* (Vol 26) 1939 Cal 329 (330) : I L R (1939) 1 Cal 474 : 40 Cri L Jour 658 (DB) \* (Vol 17) 1930 Lah 158 (159) : 31 Cri L Jour 239 \* (Vol 13) 1926 All 461 (461, 462) : 27 Cri L Jour 541 \* (11) 12 Cri L Jour 105 (106) (Mad) \* (Vol 21) 1934 All 51 (52) : 56 All 285 : 35 Cri L Jour 418.

[2] Accused can be discharged before complainant is heard under section 252. (Vol 27) 1940 Lah 40 (41) : 41 Cri L Jour 354.

[3] Accused can be discharged before date of hearing. (Vol 12) 1925 Pat 154 (155) : 25 Cri L Jour 696.

[4] Order refusing to issue process for appearance of accused may amount to order of discharge. (1905) 2 Cri L Jour 524 (530) : 32 Cal 783 (DB) \* (Vol 8) 1921 Pat 474 (475).

[5] Order of discharge or of acquittal cannot be passed in case where accused has not been directed to appear. (13) 14 Cri L Jour 559 (561) : 36 Mad 315 (DB).

[6] Order refusing to take cognizance of offence is not an order of discharge. *See* (1904) 1 Cri L Jour 980 (981, 982) (All).

[7] Magistrate cancelling process under S. 120-B and issuing fresh process under S. 109 — Such order may be construed as discharge of accused under this section. (Vol 32) 1945 Sind 51 (54) : I L R (1944) Kar 411 : 47 Cri L Jour 84 (DB).

[8] Finding that charge is groundless is not same as finding under sub-s. (1) that no case has been made out against accused. (Vol 15) 1928 Mad 129 (129) : 51 Mad 185 : 28 Cri L Jour 995 \* (Vol 17) 1930 Lah 461 (462) : 31 Cri L Jour 481 \* (Vol 22) 1935 Pesh 23 (24) : 36 Cri L Jour 632.

[9] Charge may be said to be groundless when there are no good grounds for charge. (Vol 28) 1941 Sind 198 (201) : 43 Cri L Jour 73 : I L R (1941) Kar 345.

6. "For reasons to be recorded." — [1] Magistrate should arrive at his conclusion judicially and not capriciously. (Vol 28) 1941 Sind 198 (201) : 43 Cri L Jour 73 : I L R (1941) Kar 345.

[2] Magistrate coming to conclusion that charge must fail, can discharge accused without taking evidence for prosecution. (Vol 16) 1929 Mad 754 (755) : 52 Mad 987 : 31 Cri L Jour 275 (DB).

[3] In arriving at his conclusion Magistrate can take into account police-report. (Vol 13) 1926 All 461 (461) : 27 Cri L Jour 541 \* (Vol 17) 1930 Cal 515 (518) : 58 Cal 346 : 31 Cri L Jour 1055 (DB).

[4] In arriving at his conclusion Magistrate can take into account civil Court's judgment touching dispute. (Vol 3) 1916 Bom 163 (163, 164) : 17 Cri L Jour 153 : 41 Bom 1 (DB).

[5] Story related by prosecutor does not disclose criminal offence — Magistrate can discharge accused without taking evidence for prosecution. (Vol 27) 1940 Lah 40 (42) : 41 Cri L Jour 354 \* (84) 1884 Rat 201 (201) \* (Vol 15) 1928 Lah 945 (946) : 30 Cri L Jour 162.

[6] Magistrate arriving at conclusion that defects in complainant's case could not be made good even if all his witnesses said everything in his favour. Magistrate can discharge accused without examining witnesses named by him in complaint. (Vol 28) 1941 Sind 198 (201, 202) : 43 Cri L Jour 73 : I L R (1941) Kar 345.

[7] Complaint disclosing *prima facie* case against accused — Magistrate cannot discharge accused unless he knows what sort of evidence is going to be adduced in support of charge and unless he considers that even if such evidence were taken into consideration charge would be groundless. (Vol 15) 1928 Mad 129 (129) : 51 Mad 185 : 28 Cri L Jour 995 \* (Vol 17) 1930 Lah 461 (462) : 31 Cri L Jour 481.

[8] Magistrate discharging accused without considering evidence on ground that whereabouts of accused are not known and it is useless to drag on case indefinitely — Order of discharge is illegal. (Vol 29) 1942 Cal 428 (129) : 48 Cri L Jour 491 (DB).

[9] Mere fact that matter is one of rendition or accounts does not justify Magistrate in holding charge of criminal breach of trust to be groundless. (Vol 17) 1930 Lah 461 (462) : 31 Cri L Jour 481.

[10] Order of discharge after examination of some of prosecution witnesses, on ground that case is of civil nature, is premature. (Vol 26) 1939 Rang 377 (378) : 41 Cri L Jour 25.

[11] Discharge of accused on statement of prosecution witness that complainant had previously admitted that case was false one is not proper exercise of discretion. (Vol 16) 1929 Lah 623 (624) : 30 Cri L Jour 854.

[12] Magistrate discharging some of accused without giving reasons — He can give reasons at any time until charge against remaining accused is disposed of by final order. (Vol 25) 1938 Mad 396 (398) : 39 Cri L Jour 335.

**SECTION 254 — SYNOPSIS.**

1. "When such evidence and examination have been taken and made."
2. "Or at any previous stage."
3. "Ground for presuming."
4. "Offence triable under this Chapter."
5. "Which, in his opinion could be adequately punished by him."
6. Magistrate shall frame a charge.

1. "When such evidence and examination have been taken and made." — [1] The Magistrate should take the evidence for the prosecution before framing a charge. (Vol 11) 1924 Cal 63 (64) : 25 Cri L Jour 1270 (DB).

[2] The Magistrate will be within his powers in framing a charge on the mere statement of the accused himself. (Vol 3) 1916 All 293 (299) : 17 Cri L Jour 70.

2. "Or at any previous stage." — [1] The Magistrate is entitled to frame a charge at any moment he is satisfied that a *prima facie* case has been made out against the accused. (Vol 31) 1944 Mad 169 (170) : 45 Cri L Jour 401 : I L R (1944) Mad 759 \* (Vol 27) 1940 Nag 283 (283) : 41 Cri L Jour 585 \* (Vol 23) 1936 Pesh 211 (211) : 35 Cri L Jour 399 (DB).

3. "Ground for presuming." — [1] The Magistrate need not give reasons for holding that there are good grounds for framing a charge. (Vol 22) 1935 Sind 223 (223) : 37 Cri L Jour 152 : 29 Sind L R 339.

- 255.** (1) The charge shall then be read and explained to the accused, and he shall be asked *Plea.* whether he is guilty or has any defence to make.
- (2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

[1882—S. 255; 1872—Ss. 217, 324; 1861—S. 231.]

**Section 254 — Note 3 (contd.)**

[2] Merely because the prosecution witnesses depose to the guilt of the accused, the Magistrate, if he disbelieves them, need not frame a charge. (Vol 17) 1930 Lah 543 (543) : 32 Cri L Jour 302.

[3] When the evidence recorded does not lead to a presumption that the accused has committed an offence but merely raises a doubt, the Magistrate should give the benefit of doubt to the accused and discharge him. (06) 3 Cri L Jour 345 (346) : 1906 Pun Re No. 2 Cr, p. 6 \* (Vol 17) 1930 Lah 543 (544) : 32 Cri L Jour 302.

[4] The Magistrate may acquit an accused against whom he has framed a charge though the accused has failed to adduce any satisfactory evidence to rebut the evidence for the prosecution. (93) 1896 Rat 854 (854) \* (Vol 13) 1926 Nag 115 (116) : 23 Nag L R 99 : 26 Cri L Jour 1348.

[5] The discretion of the Magistrate in framing a charge under this section should not be lightly interfered with in revision. (Vol 22) 1935 Rang 292 (293) : 36 Cri L Jour 1293.

**4. "Offence triable under this Chapter." —**

[1] Where a Magistrate commences a case as a warrant-case, he can convict the accused of an offence triable as a summons-case when he finds that only such an offence has been committed. (01) 3 Bom L R 675 (676) (DB).

[2] The Magistrate should frame a charge in cases which he commenced as warrant cases but convicted the accused of offence triable as a summons case. (Vol 8) 1921 All 282 (283) : 22 Cri L Jour 146 \* (Vol 14) 1927 All 270 (270) : 28 Cri L Jour 227 \* (87) 1887 Pun Re No 17 Cr, p. 34 (35, 36) \* (Vol 20) 1923 Sind 173 (174) : 34 Cri L Jour 1044 (DB) \* (10) 11 Cri L Jour 154 (155) (Mad).

[But see (Vol 18) 1931 All 7 (7) : 53 All 206 : 32 Cri L Jour 313 \* (31) 1931 Mad W N 1319 (1319, 1320).]

[3] Joint trial of two offences, one triable as warrant case, other as summons-case—Charge should be framed even in the latter case. (04) 3 Cri L Jour 350 (350) : 3 Low Bur Rul 113 \* (Vol 2) 1915 Mad 1200 (1200) : 16 Cri L Jour 540 : 39 Mad 503 \* (02) 29 Cal 481 (482) (DB) \* (Vol 5) 1918 Pat 628 (630) : 19 Cri L Jour 202.

[4] A Magistrate can and ought to frame a charge for the offence made out on the evidence though it may be different from the one alleged in the complaint or police-report provided that the other conditions mentioned in the section are present. (1900-1902) 1 Low Bur Rul 286 (287) \* (98) 11 C P L R Cr. 9 (10) \* (Vol 16) 1929 Lah 838 (839) : 30 Cri L Jour 957 \* (Vol 12) 1925 Lah 631 (632) : 6 Lah 375 : 27 Cri L Jour 769 (DB).

**5. "Which, in his opinion could be adequately punished by him." —** [1] Magistrate feeling he cannot award adequate punishment — He cannot frame a charge and try the case. (92) 16 Bom 580 (584, 585) (DB) \* (90) 1890 Rat 499 (499) \* (Vol 16) 1929 Bom 313 (319) : 53 Bom 611 : 30 Cri L Jour 1090 (DB) \* (97) 24 Cal 429 (431, 432) (DB).

[See however (Vol 3) 1916 Low Bur 65 (66) : 17 Cri L Jour 201. (Provisions of this section are subject to those of S. 349.) \* (04) 1 Cri L Jour 1010 (1015) : 2 Low Bur Rul 285 (FB). (Do.) \* (05) 2 Cri L Jour 464 (465) : 1905 Upp Bur Rul 33. (Do.)]

[2] The Magistrate must dispose of the case triable

by him and cannot commit it to Court of Session except on the ground that he is unable to inflict adequate sentence. (Vol 33) 1946 All 365 (371) : 47 Cri L Jour 804 : 1 L R (1946) All 520 (DB).

**6. Magistrate shall frame a charge. —** [1] In warrant-cases it is obligatory on the Magistrate to draw up a formal charge. (Vol 25) 1938 Cal 205 (205) : 39 Cri L Jour 438 \* (Vol 19) 1932 Cal 865 (865) : 33 Cri L Jour 828 (DB) \* (92-96) 1 Upp Bur Rul 37 (37).

[2] The prosecution is entitled to insist that the charge be so framed by the Court as not to cast on it any unnecessary burden. (89) 1889 Pun Re No. 26 Cr, p. 85 (89, 90) (FB).

[3] In framing a charge the Magistrate must be solely guided by the offence disclosed on the evidence and should not be influenced by any other considerations. (01) 1901 Pun Re No. 5 Cr, p. 11 (16).

[4] The Magistrate can in the exercise of his inherent powers order a *de novo* trial with regard to some of the accused if he feels that there would be misjoinder of charges if charges are framed against all the accused. (Vol 25) 1938 Cal 258 (261) : 1 L R (1938) 1 Cal 588 : 39 Cri L Jour 596 (DB).

**SECTION 255 — SYNOPSIS.**

1. Applicability of the section to security cases.
2. "Read and explained."
3. "Shall be asked."
4. Plea of guilty, what is.
5. Plea of guilty—Value to be attached to.
6. Admission by pleader.
7. Plea of guilty by one of several co-accused—Effect of such admission.
8. Shall be recorded.
9. "May in his discretion convict."
10. Effect of non-compliance with the section.

**1. Applicability of the section to security cases. —** [1] The Magistrate may ask the accused if he pleads guilty in security proceedings for good behaviour. (Vol 14) 1927 All 660 (661, 662) : 50 All 71 : 28 Cri L Jour 792.

**2. "Read and explained." —** [1] The charge must be read and explained by the Magistrate himself and not by his clerk or *Amilak*. (71) 16 Suth W R Cr 43 (43) (DB). (This was a summons-case.)

[2] The accused is entitled to know with certainty and accuracy the charge brought against him. (Vol 3) 1916 Cal 188 (192) : 16 Cri L Jour 497 : 42 Cal 957 (DB) \* (Vol 10) 1923 Rang 141 (142) : 24 Cri L Jour 871.

[3] The charge should be so explained as to make the accused clearly understand its nature. (88) 5 Cal 826 (827) (DB) \* (Vol 10) 1923 All 285 (286) : 25 Cri L Jour 592.

[4] The aggravating circumstances of the offence, if any, must also be made known to the accused. (71) 1871 Rat 55 (56).

**3. "Shall be asked." —** [1] Where a Magistrate convicts the accused on his own admission without recording evidence and without framing a charge, the conviction is liable to be set aside. (06) 4 Cri L Jour 231 (231) : 29 Mad 372.

**4. Plea of guilty, what is. —** [1] A plea of guilty is an admission of all the facts on which the charge is founded, as well as an admission of guilt in respect of them. (06) 4 Cri L Jour 471 (475) : 3 Low Bur Rul

<sup>a</sup>[255A. In a case where a previous conviction is charged under the provisions of section 221, *Procedure in case of* sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under section 255, sub-section (2), or section 253, take evidence in respect of the alleged previous conviction, and shall record a finding thereon.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act. 1923 (18 [XVIII] of 1923), S. 71.*

#### Objects and Reasons.

"It was suggested to us that the new Section 255A is unnecessary, on the ground that though a procedure for the proof of previous convictions is necessary in a Sessions Court to prevent the Jury or the Assessors from being prejudiced by anything they may hear as to the

accused's previous record yet in warrant cases the same considerations do not apply. On the whole however, we think the new section may serve a useful purpose and we have retained it."

— S. C. R. [XVIII of 1923].

#### Section 255—Note 4 (*contd.*)

208 (FB) (Vol 12) 1925 Lah 153 (154, 155) : 25 Cri L Jour 707.

[2] An informal admission as to guilt does not amount to a formal plea of guilty and such an admission has not in fact or law the same binding effect as a plea of guilty. (Vol 23) 1936 Cal 292 (293) : 37 Cri L Jour 818 (DB).

[3] Where the accused pleads guilty to a particular offence, he cannot be convicted for a different offence. ('70) 13 Suth W R Cr 55 (56) : 4 Beng L R App 101.

[4] The plea of guilty with qualifications does not amount to a plea of guilty to the charge. (Vol 7) 1920 Cal 522 (523, 524) : 21 Cri L Jour 547 (DB) (Vol 7) 1920 All 203 (204) : 21 Cri L Jour 665 (97) 19 All 119 (120) (DB) (Vol 2) 1915 Cal 153 (153) : 15 Cri L Jour 703 (DB) (Vol 17) 1930 Bom 176 (176) : 31 Cri L Jour 926 (DB) (Vol 6) 1919 Bom 160 (160) : 43 Bom 842 : 20 Cri L Jour 681 (DB).

[5] A plea of guilty refers not to any section of the criminal statute but to acts alleged against the accused. (Vol 13) 1926 Lah 406 (406) : 7 Lah 359 : 27 Cri L Jour 907 (DB) (Vol 19) 1932 Lah 363 (364) : 33 Cri L J 646.

5. *Plea of guilty—Value to be attached to.*—[1] A plea of guilty, no less than a confession, must be received with caution. ('66) 1866 Pun Re No. 47 Cr, p 55 (56) (DB) (Vol 22) 1935 Rang 49 (51) : 12 Rang 616 : 36 Cri L Jour 336 (DB). (Court should carefully consider if the accused understood the nature of the charge to which he pleaded guilty.) (97-01) 1 Upp Bur Rul 72 (72). (Accused ignorant of elementary principles of law—Plea of guilty should be admitted with closest scrutiny.)

[See also (Vol 29) 1942 Sind 51 (51) : 43 Cri L Jour 476 : 1 LR (1941) Kar 551 (DB). (Do).]

6. *Admission by pleader.*—[1] A plea of guilty must ordinarily be made by the accused himself and not by his pleader. ('71) 15 Suth W R Cr 42 (42) (94) 1 Cri L Jour 939 (939) (DB) (Bom.).

[2] Accused permitted under S. 205 to appear by his pleader—Pleader can make a plea of guilty. ('13) 14 Cri L Jour 272 (272) : 6 Sind L R 206 (DB) (Vol 13) 1926 Bom 218 (221) : 50 Bom 250 : 27 Cr L J 440 (DB).

[3] Where the accused pleads not guilty and in the course of the argument his pleader advances the plea of self-defence, the Court should admit the plea and say upon the facts of the case what offence, if any, has been committed. (Vol 23) 1936 Rang 1 (2) : 37 Cri L Jour 293 (96-97) 1 Cal W N 545 (547) (DB).

[4] Though the Court could not at the trial convict an accused merely upon the admission of his pleader, yet the appellate Court could act upon an admission of fact made in the appeal by his pleader, where it does not cause prejudice to the accused. (Vol 15) 1928 Bom 241 (242, 243) : 52 Bom 686 : 29 Cri L Jour 990 (DB).

7. *Plea of guilty by one of several co-accused—Effect of such admission.*—[1] In a warrant case all the accused may be said to be tried jointly and the plea

of one accused may be considered against the other—also. (Vol 1) 1914 Mad 45 (46) : 38 Mad 302 : 15 Cr LJ 13.

[2] Where some of the accused jointly tried plead guilty and are convicted and sentenced on their plea, they can be examined as witnesses against the other accused and it is not for the latter to object that the plea of guilty of the former should not have been accepted. (Vol 22) 1935 Cal 580 (585) : 36 Cri L Jour 1322 (S B).

8. *Shall be recorded.*—[1] A conviction based upon a plea not recorded is bad. ('04-05) 9 Cal W N lxxvi (lxxvi).

[2] Where there is an exculpatory statement before the charge, the exact words of a plea of guilty should be recorded by question and answer. ('03) 5 Bom L R 999 (1000) (DB).

[3] The whole and not part of the accused's statement accompanying the plea should be recorded. (Vol 7) 1920 Cal 522 (523) : 21 Cri L Jour 547 (DB).

[4] Where the plea of the accused is interpreted to the Court, it should be recorded in the language in which it is conveyed to the Court by the interpreter. ('80) 5 Cal 826 (829) (D B).

9. *"May in his discretion convict."*—[1] The Magistrate is not bound to convict the accused on his plea of guilty without calling upon him to enter upon his defence. ('07) 5 Cri L Jour 416 (416) : 3 Low Bur Rul 279 (Vol 20) 1933 Oudh 86 (89) : 8 Luck 286 : 34 Cri L Jour 124 (Vol 8) 1921 Cal 260 (260) : 22 Cri L Jour 574 (DB) (Vol 2) 1915 All 221 (224) : 37 All 247 : 16 Cri L Jour 327 (DB).

[2] It would be a waste of public time to hold an elaborate inquiry in cases where the accused pleads guilty. (Vol 15) 1928 All 270 (270) : 50 All 599 : 30 Cri L Jour 6 (DB) (Vol 21) 1934 Lah 89 (90) : 35 Cri L Jour 1453.

[3] Where the accused admits some or all the facts alleged by the prosecution but pleads "not guilty" the Court should proceed with the trial. ('07) 6 Cri L Jour 424 (425) (DB) (Bom.).

[4] Where the offence is not proved upon the evidence, the accused cannot be convicted even though he does not deny the offence. (Vol 20) 1933 All 612 (613, 614) : 55 All 857 : 34 Cri L Jour 1053.

[5] The accused cannot be convicted merely on his plea of guilty. (Vol 28) 1941 Lah 301 (303) : 1 I R (1941) Lah 796 : 42 Cri L Jour 765.

10. *Effect of non-compliance with the section.*—[1] Where the record does not show that the charge was read and explained to the accused the conviction is liable to be set aside on the ground of prejudice to the accused. ('81) 7 Cal 96 (97) (DB) (96) 9 Mad 61 (63) (DB). (Charge not explained.) (Vol 2) 1915 Bom 14 (15) : 16 Cri L Jour 538 (DB). (Accused not asked to plead.)

#### Section 255A — Note 1

[1] The purpose of this section is to approximate a trial in a case of previous conviction in a Magistrate's

256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, "at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith", whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

[1892—S. 256; 1872—S. 218; 1861—S. 252.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 72.

#### Objects and Reasons.

"Clauses 256 and 257. — After careful consideration we have adopted the redraft of these clauses suggested by the Judges of the Calcutta High Court. Even under these amended clauses, the right of cross-examination may be abused and witnesses unnecessarily harassed; but we think, on the whole, that the possible abuse of the system does not justify us in making any severer restriction on the existing right of the accused."

— S. C. R., 1898.

Amendment made in 1923. — "The criticisms of the amendment introduced by this Clause go to two

extremes. On the one hand it is suggested that the accused should have a right to postpone his decision as to the cross-examination of the prosecution witnesses till the commencement of the next hearing of the case. On the other hand, it has been suggested that this provision is likely to be grossly abused for purposes of the defence, and that the introduction of the words 'if the Magistrate thinks fit' is an inadequate safeguard. We think that the amendment proposed by the Clause is a reasonable compromise between these divergent views and we therefore propose no change."

— S. C. R. [XVIII of 1923].

#### Section 255A — Note 1 (contd.)

Court, so far as this can be done, to the procedure in a Court of Session when such further charge is to be tried according to S. 310. (Vol 28) 1941 Sind 173 (176) : 43 Cri L Jour 12 : 1 L R (1941) Kar 308 (DB).

[2] The procedure prescribed in this section has to be followed by the Courts, notwithstanding the inconvenience or difficulty that may arise in following it. (Vol 24) 1937 Pat 131 (132) : 38 Cri L Jour 484.

[3] It is illegal to take evidence under this section before the conviction. (03) 5 Bom L R 1034 (1035) (DB) & (92-96) 1 Upp Bur Rul 82 (82).

[4] This section read with S. 221 (7) shows that for the purpose of framing a charge in respect of a previous conviction no evidence need be taken about the previous conviction. (Vol 31) 1944 Lah 25 (28) : 1 L R (1943) Lah 477 : 45 Cri L Jour 364 (FB) & (Vol 28) 1941 Sind 173 (176) : 1 L R (1941) Kar 308 : 43 Cri L Jour 12 (DB).

[5] The necessity for taking evidence about previous conviction will arise only where the accused has been convicted on the substantive charge and does not admit the previous conviction. (Vol 31) 1944 Lah 25 (26) : 1 L R (1943) Lah 477 : 45 Cri L Jour 364 (FB). (Per Division Bench in Order of Reference.)

[6] If the previous convictions are set forth in the charge which has been read over and explained to the accused and he pleads guilty to it without any reservation, he is admitting the previous convictions within the meaning of the section. (Vol 31) 1944 Lah 25 (28) : 1 L R (1943) Lah 477 : 45 Cri L Jour 364 (FB).

[7] The mere admission by the accused that he had been in jail once is not sufficient to show that he pleaded guilty to a previous conviction for an offence rendering him liable to enhanced punishment. (02) 4 Bom L R 177 (177) (DB).

[8] Whenever it is required to prove a previous conviction against an accused for the purpose of enhancement of punishment, such previous conviction must be proved strictly and in accordance with law. (Vol 3) 1916 Cal 344 (345) : 17 Cri L Jour 185 : 43 Cal 1128 (DB). & (Vol 4) 1917 Mad 186 (187) : 17 Cri L Jour 179 (DB).

[9] The accused must also be called upon to plead to the charge of previous conviction. (02) 4 Bom L R 177 (177) (DB) & (Vol 19) 1932 Sind 107 (111) : 33 Cri L Jour 902.

#### SECTION 256. — SYNOPSIS.

1. Scope and applicability of the section.
2. "Refuses to plead, or does not plead, or claims to be tried."
3. The accused shall be required to state.
4. "At the commencement of the next hearing."
5. Right of accused to cross-examine the prosecution witnesses.
6. Waiver of the right under this section.
7. Recall and discharge of the witnesses.
8. Examination of the remaining witnesses.
9. Production of documents by prosecution during cross-examination of prosecution witnesses.
10. "The accused shall then be called upon to enter upon his defence and produce his evidence."
11. Written statement of accused.

#### 1. Scope and applicability of the section. —

[1] The reason for providing an opportunity to the accused to cross-examine prosecution witnesses after the charge is framed is that in warrant-cases the accused is in a position to know the exact case he has to meet only after the charge is framed. (Vol 3) 1916 Lah 295 (296) : 17 Cri L Jour 84 : 1916 Pun Re No. 1 Cr & (Vol 1) 1914 Lah 556 (557) : 1914 Pun Re No. 11 Cr : 16 Cri L Jour 146 & (Vol 20) 1933 Rang 29 (29, 30) : 34 Cri L Jour 468.

[2] Where a case is commenced as a warrant-case but subsequently it appears that only an offence triable as a summons-case has been committed, the Magistrate is bound to allow the accused further opportunity of cross-examining the prosecution witnesses if he so desires. (Vol 3) 1916 Mad 610 (610) : 16 Cri L Jour 250 & (Vol 15) 1928 Lah 294 (295) : 29 Cri L Jour 235 & (Vol 12) 1925 Oudh 200 (200) : 25 Cri L Jour 1271 & (21) 22 Cri L Jour 683 (684) (Pat) & (Vol 2) 1915 Mad 1200 (1200) : 16 Cri L Jour 540 : 39 Mad 503. (Summons case and warrant case tried together — Proceedings in respect of warrant case dropped — Still, further cross-examination should be allowed.)

**Section 256 — Note 1 (contd.)**

[3] This section applies to warrant cases tried summarily in which a charge is not framed. (Vol 7) 1920 Cal 769 (770) : 22 Cri L Jour 271 (DB) \* (Vol 29) 1942 Mad 672 (673) : 44 Cri L Jour 16 \* (Vol 26) 1939 Nag 87 (88) : 1 L R (1939) Nag 457 : 40 Cri L Jour 846 \* (Vol 7) 1920 Pat 492 (493) : 21 Cri L Jour 630 \* (Vol 17) 1930 Sind 146 (147) : 24 Sind L R 336 : 31 Cri L Jour 633 (DB).

[But see (Vol 13) 1926 Bom 226 (226, 227) : 27 Cri L Jour 431 (DB) \* (Vol 19) 1932 Oudh 242 (242, 244) : 7 Luck 699 : 33 Cri L Jour 506 (DB).]

[4] This section entitles an accused person in a warrant-case to defer the cross-examination of the prosecution witnesses till the witnesses have been examined and a charge is framed. (Vol 25) 1938 Cal 205 (205) : 39 Cri L Jour 438 \* (10) 11 Cri L Jour 156 (156) (DB) (Mad).

[5] The section applies to cases where the charge is framed after all the prosecution witnesses have been examined-in-chief. (Vol 19) 1932 Mad 559 (559) : 33 Cri L Jour 738.

[But see (Vol 12) 1925 Nag 147 (151) : 25 Cri L Jour 1152.]

2. "Refuses to plead, or does not plead, or claims to be tried." — [1] Where the accused denies the charge and pleads not guilty he is entitled to be dealt with under this section although he may omit all or any of the allegations of the prosecution. ('07) 6 Cri L Jour 424 (425) (DB) (Bom).

[2] By declining to plead, the accused does not commit any offence under S. 179, Penal Code. (Vol 11) 1924 Mad 540 (540) : 47 Mad 396 : 25 Cri L Jour 374 (DB).

3. The accused shall be required to state. —

[1] The accused should in all cases be asked at the appropriate time if he wishes to cross-examine the prosecution witnesses. (Vol 1) 1914 Lah 556 (556, 557) : 1914 Pun Re No 11 Cr : 16 Cri L Jour 146.

[2] It is a safe and sound rule that the Magistrate should record the fact that he has complied with the provisions of this section though the Code does not explicitly require it. (1900-02) 1 Low Bur Rul 238 (240).

[3] The record must show that the Magistrate has complied with the provisions of the section by questioning the accused in the manner laid down therein. (Vol 24) 1937 All 127 (128) : 38 Cri L Jour 361 \* (11) 12 Cri L Jour 89 (89) (Low Bur) \* ('01) 14 C P L R 137 (137).

[But see (Vol 18) 1931 Oudh 73 (74) : 32 Cri L Jour 330 (DB).]

4. "At the commencement of the next hearing."

—[1] The object of this provision is to give the accused sufficient time to consider whether he should cross-examine the prosecution witnesses. (Vol 26) 1939 All 238 (239) : 40 Cri L Jour 549 \* (Vol 12) 1925 Lah 339 (340) : 26 Cri L Jour 1158 \* (Vol 14) 1927 Mad 78 (79) : 50 Mad 740 : 28 Cri L Jour 12 \* (Vol 19) 1932 Oudh 298 (300) : 34 Cri L Jour 58 : 8 Luck 135 (DB) \* (Vol 13) 1926 Pat 214 (215) : 5 Pat 110 : 27 Cri L Jour 499 (DB).

[2] Case adjourned for asking the accused if he wishes to cross-examine the prosecution witnesses—Proceedings on the adjourned date are "hearing" though no other action is taken. (Vol 26) 1939 All 238 (239) : 40 Cri L Jour 549.

[3] Magistrate requiring the accused to state, on the same day the charge is framed, whether he wishes to cross-examine prosecution witnesses—Magistrate should record his reasons. (Vol 26) 1939 Pat 172 (173, 174) : 40 Cri L Jour 419 (DB) \* (Vol 24) 1937 All 127 (128) : 38 Cri L Jour 361 \* (Vol 14) 1927 All 217 (218) : 49 All 316 : 28 Cri L Jour 229 \* (Vol 16) 1929 Bom 309 (310,

312) : 53 Bom 578 : 31 Cri L Jour 309 (DB). (That it is the usual practice of the Magistrate is no sufficient reason.) \* (Vol 17) 1930 Mad 977 (978) : 32 Cri L Jour 221 \* (Vol 17) 1930 Bom 241 (241) : 31 Cri L Jour 743 (DB).

[4] It is only in special cases that the Magistrate can require the accused to state forthwith if he wishes to cross-examine prosecution witnesses. (Vol 17) 1930 Nag 255 (257) : 31 Cri L Jour 765. (That the Magistrate had to go out for urgent work of the prosecution witnesses had to leave the place of trial immediately is a good reason.)

[5] The fact that the prosecution witnesses come from a Native State and it would take a long time to secure their attendance again was held to be a sufficient reason. (Vol 13) 1926 Lah 434 (434) : 27 Cri L Jour 720.

[6] Accused not represented by pleader — Accused asked forthwith if he wishes to cross-examine prosecution witnesses — Omission to record reasons vitiates trial. (Vol 14) 1927 Mad 78 (79) : 50 Mad 740 : 28 Cri L Jour 12.

[But see (Vol 17) 1930 Mad 977 (978) : 32 Cri L Jour 221. (Accused not represented by lawyer nor appeared desirous of engaging one — Magistrate's reason that as he was unrepresented he was asked to cross-examine the same day held valid.)]

[7] It was held in the circumstances of this case that it would make no difference to the accused if the question is put to him on the date when the charge is framed and not on the next date when the witnesses for prosecution were present and were in fact cross-examined. (Vol 23) 1936 All 319 (320) : 37 Cri L Jour 710.

[8] The counsel of the accused can waive his right to adjournment to decide what prosecution witnesses he should cross-examine and if he does so, failure to adjourn the case cannot be objected to later on. (Vol 21) 1934 Nag 209 (210) : 36 Cri L Jour 41 : 31 Nag L R 117.

5. Right of accused to cross-examine the prosecution witnesses.—[1] In warrant-cases an accused can cross-examine the prosecution witnesses : before the charge is framed under S. 252, after charge under this section and after the accused enters on his defence under S. 257. (Vol 7) 1920 Mad 201 (203) : 43 Mad 411 : 21 Cri L Jour 297 (DB) \* (Vol 10) 1923 Mad 609 (613) : 46 Mad 449 : 24 Cri L Jour 547 (FB).

[2] Right to cross-examine under this section is an absolute right and the Magistrate has no power to disallow such cross-examination. (Vol 7) 1920 Mad 201 (203) : 43 Mad 411 : 21 Cri L Jour 297 (DB) \* (Vol 11) 1924 Nag 114 (114) : 25 Cri L Jour 912 \* (Vol 16) 1929 Bom 309 (311) : 53 Bom 578 : 31 Cri L Jour 912.

[3] The accused is not bound to give any reasons for exercising his right under the section. ('74) 21 Suth W R Cr 29 (30) (DB).

[4] Cross-examination before charge conducted on the distinct understanding that the accused would not cross-examine the witnesses after charge — This does not deprive the accused of his rights under this section. ('02) 6 Cal W N 424 (425) (DB) \* (Vol 13) 1926 Pat 214 (215) : 5 Pat 110 : 27 Cri L Jour 499 (DB) \* (Vol 7) 1920 Mad 201 (202) : 43 Mad 411 : 21 Cri L Jour 297 (DB).

[5] If there are more than one accused, each of them should be given an opportunity to cross-examine the witnesses. ('07) 11 Cal W N cxi (cxi).

[6] The accused should be allowed sufficient time to engage a pleader to cross-examine the witnesses. (Vol 12) 1925 All 285 (286) : 47 All 147 : 26 Cri L Jour 575 \* (Vol 3) 1916 Lah 445 (445) : 17 Cri L Jour 278 \* ('11) 12 Cri L Jour 548 (549) (Mad) \* (Vol 3) 1916 Mad 932 (934) : 16 Cri L Jour 786 \* (Vol 13) 1926 Pat 214 (215) : 5 Pat 110 : 27 Cri L Jour 499 (DB).

Section 256 — Note 5 (*contd.*)

[7] The Magistrate in a proper case may allow the accused to cross-examine the witnesses in any order he chooses. (Vol 20) 1933 Cal 189 (190): 34 Cri L Jour 347.

[8] Where a witness for the prosecution is examined on commission, it is open to an accused person to apply, after the charge has been framed against him for re-issue of the commission together with his cross-interrogatories for the purpose of the cross-examination of the witness. (Vol 21) 1934 Cal 698 (698, 699): 61 Cal 821: 36 Cri L Jour 239 (DB).

[9] Too much interruption and undue interruption and undue interference in cross-examination must be avoided by presiding Judge. (Vol 24) 1937 All 171 (173): 38 Cri L Jour 416 ✱ (Vol 6) 1919 Pat 565 (565): 20 Cri L Jour 559.

[10] Court has no discretion to forbid even scandalous or indecent questions if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. (Vol 6) 1919 Pat 515 (516): 20 Cri L Jour 566.

[11] A counsel cannot be compelled to disclose the questions which he desires to put in cross-examination because one of the factors of successful cross-examination is that questions should be put suddenly to the witness. (Vol 18) 1931 Sind 38 (38, 39): 32 Cri L Jour 666 (DB).

[12] Where the defence alleged that certain statements made by certain witnesses before the Judge were not mentioned to the police, the defence has a right to cross-examine the witnesses as to such statements and seek their explanation. (Vol 20) 1933 Nag 136 (144): 29 Nag L R 251: 34 Cri L Jour 505 (DB).

## 6. Waiver of the right under this section. —

[1] Accused failing to cross-examine at the proper time and leading his evidence — He would be deemed to have waived his right and cannot claim it afterwards (Vol 16) 1929 Mad 201 (202, 203): 52 Mad 355: 30 Cri L Jour 908.

[2] Several accused represented by different counsels — One of them cross-examining and others helping him with questions to be put — Questions not asked on behalf of one of the accused who was present — He would be inferred to have waived the right. (Vol 22) 1935 All 627 (628): 36 Cri L Jour 499.

[3] Statement by accused himself or his pleader before charge that witnesses are not wanted — *Held*, it cannot be deemed that he has waived the right. (Vol 13) 1926 Pat 214 (215): 5 Pat 110: 27 Cri L Jour 499 (DB) ✱ ('02) 6 Cal W N 424 (425) (DB) ✱ (Vol 7) 1920 Mad 201 (202): 43 Mad 411: 21 Cri L Jour 297 (DB).

7. Recall and discharge of the witnesses. — [1] This section applies only to cases where the prosecution witnesses required for cross-examination have not been discharged. (Vol 7) 1920 Mad 201 (203, 205): 43 Mad 411: 21 Cri L Jour 297 (DB) ✱ ('11) 12 Cri L Jour 471 (472) (All) ✱ (Vol 17) 1930 All 495 (496): 31 Cri L Jour 764.

[But see (Vol 24) 1937 All 127 (128): 38 Cri L Jour 361. ('Recalled' means that if the witnesses are not present Magistrate should issue process to ensure their attendance — It does not mean calling out their names by chaprasi.) ✱ (1900) 4 Cal W N 351 (351) (DB).]

[2] The ideal procedure under this section would be to examine all prosecution witnesses on one day or perhaps on two consecutive days, so that all would be present and ready to be cross-examined if the accused exercised his right under this section. ('39) 1939 Nag L Jour 201 (201).

[3] It is not open to a Magistrate to direct a complainant to bring his witnesses for cross-examination before the statement of the accused pleading guilty or not guilty has been recorded. (Vol 30) 1943 Oudh 157 (158, 159): 44 Cri L Jour 174.

## 8. Examination of the remaining witnesses. —

[1] The words "remaining" witnesses include any witness who according to the prosecution is able to support its case, though he has not been summoned or named by the prosecution before the framing of the charge. (Vol 31) 1944 Mad 169 (170): 45 Cri L Jour 401: 1 L R (1944) Mad 759 ✱ (Vol 29) 1942 Bom 214 (215): 43 Cri L Jour 761: 1 L R (1942) Bom 540 (DB) ✱ ('09) 10 Cri L Jour 530 (531) (DB) (Bom) ✱ (Vol 27) 1940 Nag 390 (392): 1 L R (1942) Nag 335: 42 Cri L Jour 208.

[But see (Vol 24) 1937 All 189 (190): 38 Cri L Jour 394 ✱ (Vol 32) 1945 Lah 201 (206): 47 Cri L Jour 143 (FB) ✱ (Vol 32) 1945 Nag 286 (287): 1 L R (1945) Nag 995.]

[2] The prosecution is not entitled to get an adjournment of the case as of right in order to secure the attendance of witnesses not summoned or named before framing of the charge. (Vol 12) 1925 Sind 315 (315, 316): 26 Cri L Jour 958 (DB).

[3] There is no obligation on the prosecution to tender witnesses, who were cited but who were not called to give evidence, for cross-examination of the defence. (Vol 32) 1945 P C 42 (45): 46 Cri L Jour 394 (P C).

## 9. Production of documents by prosecution during cross-examination of prosecution witnesses.

— [1] It is not illegal for a Magistrate to allow documents to be produced by the prosecution while the prosecution witnesses are being cross-examined by the accused. (Vol 25) 1938 All 637 (638): 1 L R (1938) All 968: 40 Cri L Jour 145.

## 10. "The accused shall then be called upon to enter upon his defence and produce his evidence".

— [1] Court ordering further cross-examination of prosecution witnesses and production of defence evidence on same day — Order is illegal. (Vol 27) 1940 Pesh 9 (9): 41 Cri L Jour 590.

[2] Accused asked to summon their witnesses before prosecution case was closed — Trial is vitiated. (Vol 27) 1940 Pat 295 (297): 41 Cri L Jour 267 (DB).

[3] Defence witnesses should not be asked to be summoned before ascertaining whether further cross-examination of prosecution witnesses is necessary. (Vol 26) 1939 All 238 (239): 40 Cri L Jour 549 ✱ (Vol 13) 1926 Rang 13 (13): 27 Cri L Jour 415.

[4] It is irregular to call upon the accused to submit his list of witnesses before the cross-examination of all the prosecution witnesses is finished. (Vol 24) 1937 Pat 131 (133, 134): 38 Cri L Jour 484.

[5] Accused must wait for his defence till he is charged. (Vol 18) 1931 Mad 240 (240): 54 Mad 251: 32 Cri L Jour 779.

[6] After the accused enters on his defence, no further evidence can be admitted against him except under the provisions of S. 540. (Vol 29) 1942 Oudh 130 (134): 43 Cri L Jour 280 ✱ (Vol 7) 1920 Bom 339 (341): 22 Cri L Jour 58 ✱ (Vol 10) 1923 All 322 (323): 45 All 323: 25 Cri L Jour 305 ✱ ('11) 12 Cri L Jour 7 (8) (DB) (Cal) ✱ (Vol 15) 1928 Lah 953 (953): 29 Cri L Jour 844.

[7] The section does not require the Magistrate to ask the accused if he means to call witnesses or not. ('97) 1897 Rat 938 (938).

[8] An omission to ask the accused to enter upon his defence and produce his evidence is a flaw in the trial. ('68) 10 Suth W R Cr. 7 (7) (DB).

[9] The Magistrate should give every reasonable opportunity to the accused to produce his evidence. (Vol 1) 1914 Lah 84 (84): 15 Cri L Jour 521 ✱ (Vol 12) 1925 All 318 (318): 26 Cri L Jour 703 ✱ ('97) 1 Cal W N 313 (314) (DB) ✱ ('99) 1 Bom L R 856 (856) (DB).

[See however (Vol 30) 1943 Pat 359 (361): 45 Cri L Jour 283.]

257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of

Section 256—Note 10 (contd.)

[10] The nature of the defence is to be gathered from the trend of the cross-examination of the prosecution witnesses and from the argument of the accused's pleader at the close of the trial as well from the accused's statement. (Vol 17) 1930 Cal 442 (442, 443) : 31 Cri L Jour 1203; (DB).

[11] Accused cannot be convicted on the ground that he had failed to raise defence or having raised it failed to substantiate it. (Vol 27) 1940 Pat 701 (701) : 41 Cri L Jour 795. \* (Vol 24) 1937 Mad 968 (969) : 39 Cri L Jour 144.

[12] Where the prosecution has not established a *prima facie* case against the accused the failure of the accused to produce any evidence in his defence cannot give rise to any adverse inference against him. ('84) 10 Cal 140 (149) (DB).

[13] Where the evidence for the prosecution established a *prima facie* case against the accused, the fact that he has not produced any evidence of rebuttal enhances the weight of the prosecution evidence. ('04) 1 Cri L Jour 568(576) (DB) (Bom) \* (Vol 15) 1928 Pat 100 (101) : 6 Pat. 627 : 29 Cri L Jour 239 (DB)\* (Vol 21) 1934 Oudh. 401 (405) : 35 Cri L Jour 1244.

[14] If the defence evidence is not believed, the prosecution is left just where it was before the defence witnesses were called. (Vol 24) 1937 Mad 975 (975) : 39 Cal L Jour 147.

[15] The accused is entitled to raise any defence technical or otherwise and the Court is bound to pronounce judgment on it. (Vol 1) 1914 Cal 456 (459) : 41 Cal 350: 15 Cri L Jour 385 (DB.)

[16] An accused can raise inconsistent defences in the alternative and such defence cannot be disallowed by the Court (Vol 7) 1920 Pat 843 (844) : 5 Pat L Jour 64 : 21 Cri L Jour 799 (DB) \* (Vol 14) 1927 Lah 710 (712) : 29 Cri L Jour 117 (DB) \* (Vol 11) 1924 Lah 733 (734) : 25 Cri L Jour 1005 (DB) \* (Vol 6) 1919 Cal 439 (441) : 20 Cri L Jour 661 (DB) \* (Vol 10) 1923 Cal 717 (718) : 25 Cri L Jour 190 (DB). (Inconsistent defences make the accused's case weaker.) \* (Vol 20) 1933 Pat 481 (482, 483) : 34 Cri L Jour 828 (Do.) \* (Vol 5) 1918 All 189 (190) : 19 Cri L Jour 371: 40 All 284.

[17] The burden of proving the guilt of the accused is on the prosecution and it cannot succeed merely because of the weakness or falseness of the case for the defence. (Vol 33) 1946 All 191 (195) : 47 Cri L Jour 611 (DB). (Weakness of the case.) \* (Vol 30) 1943 Pat 361 (363) : 22 Pat 423 : 45 Cri L Jour 301 (DB). (Do.) \* (Vol 23) 1936 Cal 73 (84) : 63 Cal 929 : 37 Cri L Jour 394 (DB). (Do.) \* (Vol 12) 1925 Oudh 73 (88) : 27 Oudh Cas 188 : 26 Cri L Jour 225 (DB). (Do.) \* (Vol 27) 1940 Lah 54 (57) : 41 Cri L Jour 447 (DB). (Falseness of the case.) \* (Vol 27) 1940 Pat 365 (370) : 41 Cri Jour 114 (DB). (Do.) \* (Vol 24) 1937 Mad 968 (969) : 39 Cri L Jour 144. (Do.) \* (Vol 9) 1922 Lah 1 (25) : 3 Lah 144 : 23 Cri L Jour 513 (DB). (Do.)

[18] A Court is bound to consider the plea of private defence as appearing from the prosecution evidence even though it is not specifically pleaded by the accused. (Vol 23) 1936 Rang 1 (2) : 37 Cri L Jour 293 \* (Vol 27) 1940 Lah 54 (57) : 41 Cri L Jour 447 (DB) \* (Vol 14) 1927 Mad 97 (97) : 27 Cri L Jour 1198 (DB) \* (Vol 2) 1915 Mad 532 (533) : 15 Cri L Jour 710.

[19] If the accused when asked to produce his evi-

dence has said that he has no witnesses to examine, he will not afterwards be entitled to let in any evidence. (Vol 11) 1924 All 673 (674).

[20] The accused is entitled to produce witnesses in Court without its assistance. (Vol 29) 1942 Bom 214 (215) : 43 Cri L Jour 761: 1 L R (1942) Bom 540 (DB).

[21] The Magistrate should allow the accused to select the order in which the defence witnesses are to appear. (Vol 27) 1940 Lah 354 (356) : 41 Cri L Jour 948. (But if there are important official witnesses they must be consulted and their convenience taken into account.)

[22] Witnesses to prove alibi must be called by accused who takes such defence. (Vol 22) 1935 Cal 518 (520) : 62 Cal 238 : 36 Cri L Jour 1115 (SB).

11. Written statement of accused.—[1] Under this section the Court is bound to receive and file the written statement submitted by the accused. (Vol 15) 1928 Mad 1135 (1136) : 29 Cri L Jour 1041.

[But see (Vol 4) 1917 Cal 687 (692) : 17 Cri L Jour 9 (D B).]

[2] Great weight should be attached to the written statement filed by the accused. (Vol 15) 1928 All 222 (228) : 30 Cri L Jour 530 (DB).

[3] The written statement is not like a pleading in a civil suit and does not preclude the raising of any defence not mentioned in it. ('11) 12 Cri L Jour 585 (587) (DB) (Mad).

[4] The right to file a written statement carries with it the right to file any documents to which the accused was a party and the Court is bound to consider such documents, though not proved in the regular way. (Vol 15) 1928 Mad 1135 (1136) : 29 Cri L Jour 1041.

[See however (Vol 33) 1946 Pat 373 (378, 380) : 25 Pat 33: 47 Cri L Jour 937.

[5] The written statement is to be filed at the time of recording the accused's plea to the charge. ('25) 29 Cal W N cxviii (cxviii).

[6] The fact that a written statement has been filed may be taken into consideration in determining whether the accused was prejudiced by the failure to comply with the provisions of S. 342. (Vol 15) 1928 All 222 (228) : 30 Cri L Jour 530 (DB).

[7] A written statement put in by the accused can be used to fill up gaps in the prosecution case. (Vol 23) 1936 Lah 28 (29) : 37 Cri L Jour 428.

[8] This section does not apply to disciplinary proceedings against legal practitioners under the Letters Patent and the legal practitioner is not entitled to file any written statement. (Vol 11) 1924 Lah 123 (124) : 4 Lah 271: 25 Cri L Jour 161 (SB).

SECTION 257 — SYNOPSIS.

1. Scope and applicability of the section.
2. "After he has entered upon his defence."
3. Right of prosecution to lead evidence after accused has entered on his defence.
4. Right of accused to apply for process for compelling attendance of witnesses.
5. Reasons for refusal to issue process.
6. Production of documentary evidence by accused.
7. Right of accused to cross-examine prosecution witnesses.
8. Proviso to sub-section (1).
9. Examination of witness present in Court though not summoned.



vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

[1882—S. 257; 1872—Ss. 359, 362, Para. 2; 1861—S. 253.]

#### Section 257 (contd.)

##### 1. Scope and applicability of the section.—[1]

An accused cannot be convicted merely by reason of his failure to produce any evidence in his defence. ('66) 1866 Rat 5 (5) (D1).

[2] Where the prosecution has established a *prima facie* case against the accused, he is liable to be convicted unless he rebuts the presumption raised by the prosecution evidence. (Vol 15) 1928 Cal 27 (39); 29 Cri L Jour 49 (SB) \* (Vol 5) 1918 Cal 314 (315); 19 Cri L Jour 81 (DE).

[3] The accused is entitled to a sufficient opportunity to defend himself and to prove his innocence. ('99) 9 Cri L Jour 583 (584); 5 Low Bur Rul 20\* (Vol 1) 1914 Lah 84 (84); 15 Cri L Jour 521.

[4] The Court is bound to take the evidence which he offers in his defence subject to the provisions of the Evidence Act. ('02) 4 Bom L R 461 (463) (DB) \* (Vol 2) 1915 Mad 825 (825); 16 Cri L Jour 156 \* ('12) 13 Cri L Jour 523 (523) (DB) (Bom).

[5] The section applies also to warrant cases tried summarily. ('09) 9 Cri L Jour 583 (584); 5 Low Bur Rul 20.

[6] The principle of the section applies to summons cases. (Vol 15) 1928 Pat 253 (255); 29 Cri L Jour 308.

[7] Evidence of defence witnesses produced by one accused cannot be treated as prosecution evidence against other accused. (Vol 18) 1931 Lah 57 (58); 12 Lah 385; 32 Cri L Jour 672.

[8] Where number of respectable persons have given evidence in favour of accused their evidence should not be rejected. (Vol 12) 1925 Oudh 501 (501); 27 Oudh Cas 327; 26 Cri L Jour 530.

##### 2. "After he has entered upon his defence."—

[1] This section comes into play only after the accused has entered on his defence. (Vol 27) 1940 Pesh 9 (9); 41 Cri L Jour 590 \* (Vol 1) 1914 Sind 135 (135); 8 Sind L R 267; 16 Cri L Jour 245 (DB) \* (Vol 12) 1925 Nag 44 (47); 20 Nag L R 174; 26 Cri L Jour 971 (FB).

[2] The accused is entitled to a reasonable interval for considering what evidence he should produce. (Vol 7) 1920 Pat 25 (28); 21 Cri L Jour 321 (DB).

[3] It depends on the circumstances of each case whether a belated application for the production of evidence should be granted or not. ('11) 12 Cri L Jour 150 (150) (SB) (Mad).

[4] Where, after the close of the evidence for his defence, the Magistrate examines witnesses on the side of the prosecution the accused is entitled to an opportunity to rebut the new evidence. (Vol 12) 1925 Lah 531 (532); 26 Cri L Jour 1035\* ('81) 6 Cal 714 (715) (DB).

3. Right of prosecution to lead evidence after accused has entered on his defence.—[1] The Magistrate may, in his discretion, allow the prosecution to lead rebutting evidence where the accused leads evidence of good character by way of defence. (Vol 17) 1930 Mad 448 (448); 31 Cri L Jour 1198.

4. Right of accused to apply for process for compelling attendance of witnesses.—[1] The section makes it obligatory on the part of the Magistrate, except in the cases specified therein, to issue process at the instance of the accused to compel the attendance of

the witnesses named by him. (Vol 27) 1940 Lah 354 (356); 41 Cri L Jour 948\* (Vol 24) 1937 Pat 131 (133); 38 Cri L Jour 481 \* (Vol 20) 1933 Lah 1020 (1021); 35 Cri L Jour 396 \* ('02) 26 Bom 418 (421) (DB) \* ('09) 10 Cri L Jour 207 (207); 2 Sind L R 5 \* (Vol 12) 1925 Cal 80 (80); 25 Cri L Jour 310 (D13) \* (Vol 16) 1929 All 914 (915); 30 Cri L Jour 1155 \* (Vol 18) 1931 Oudh 386 (387); 32 Cri L Jour 1176 \* (Vol 20) 1933 Rang 29 (30); 34 Cri L Jour 168 \* (Vol 11) 1924 Pat 142 (143); 24 Cri L Jour 831.

[2] A non-compliance with the section in this respect is not a mere irregularity curable by the application of S. 537 of the Code. ('11) 12 Cri L Jour 548 (549) (Mad) \* ('08) 7 Cri L Jour 425 (427); 31 Mad 131 (DB) \* (Vol 16) 1929 All 914 (916); 30 Cri L Jour 1155 \* (Vol 12) 1925 Cal 411 (411); 51 Cal 1044; 26 Cri L Jour 384 \* ('09) 10 Cri L Jour 207 (207); 2 Sind L R 5.

[3] A non-compliance with the section is *prima facie* an illegality which will cause serious prejudice to the accused and hence the conviction will be set aside in such cases. (Vol 12) 1925 Cal 80 (80); 25 Cri L Jour 310 (D13).

[4] Accused failing to exercise this right cannot afterwards complain that he was not given an opportunity. ('12) 13 Cri L Jour 828 (829) (Mad).

[5] The Magistrate should secure the attendance of the witness unless the accused decides that he does not want to examine him. (Vol 29) 1912 Pat 185 (185); 43 Cri L Jour 337.

[6] If the process first issued fails, the accused is entitled to call upon the Court to issue further processes. ('32) 1932 Mad W N 1349 (1350) \* (Vol 9) 1922 Lah 71 (71); 22 Cri L Jour 497 \* (Vol 9) 1922 Lah 143 (144); 22 Cri L Jour 501 \* (Vol 11) 1924 Cal 196 (197); 25 Cri L Jour 293 (DB) \* (Vol 13) 1926 Cal 1088 (1088); 27 Cri L Jour 841 (DB) \* (Vol 7) 1920 All 59 (60); 21 Cri L Jour 340 \* (Vol 18) 1931 Pat 207 (208); 32 Cri L Jour 613 \* (Vol 13) 1926 Pat 139 (140); 26 Cri L Jour 1627 \* (Vol 8) 1921 All 142 (142); 23 Cri L Jour 124.

[But compare (Vol 13) 1926 All 298 (298); 27 Cri L Jour 383.]

[7] The Magistrate in exceptional cases may refuse to compel the attendance of a witness as when he finds that the application for process is made for purpose of vexation or delay. (Vol 17) 1930 Mad 632 (632); 31 Cri L Jour 720 \* (Vol 13) 1926 Pat 139 (140); 26 Cri L Jour 1627 \* (Vol 15) 1928 Mad 652 (652); 29 Cri L Jour 725 \* (Vol 18) 1931 Pat 207 (208); 32 Cri L Jour 613.

[8] A Court should not order the accused to pay adjournment costs on the absence of a witness summoned on his behalf. (Vol 24) 1937 Pat 131 (133); 38 Cri L Jour 484.

[9] Accused citing complainant as principal witness for defence — Complainant not available being in a Native State — Accused acquitted on the ground of absence of statement of principal witness for defence — *Held*, Magistrate acted wrongly in acquitting accused — Judgment should have been pronounced upon the evidence on record. ('81) 1881 All W N 38 (38).



Section 257—Note 4 (*contd.*)

[10] Even the trying Magistrate can be demanded as a witness by the accused. In such cases on the application of the accused the case should be transferred to another Court. (Vol 1) 1914 All 197 (195); 35 All 13; 15 Cri L Jour 161.

[11] The Magistrate who is seized of the case cannot issue process. (Vol 1) 1914 All 197 (195); 35 All 13; 15 Cri L Jour 161.

[12] The Magistrate must either refuse or grant the application but cannot keep it pending. (Vol 22) 1935 Sind 69 (70); 29 Sind L R 64; 33 Cri L Jour 89 (DB).

5. Reasons for refusal to issue process. — [1] The Magistrate can refuse to issue process at the instance of the accused if he considers that the application for process has been made for the purpose of vexation or delay or for defeating the ends of justice. (Vol 28) 1941 Oudh 33 (36); 42 Cri L Jour 40; (Vol 27) 1940 Sind 193 (194); 42 Cri L Jour 80; I L R (1940) Kar 498 (DB); (Vol 1) 1914 All 382 (386); 35 All 239; 15 Cri L Jour 212; (Vol 12) 1926 Lah 454 (454); 27 Cri L Jour 543; (Vol 21) 1934 Lah 136 (126); 36 Cri L Jour 559 (DB); (Vol 93) 20 Cal 469 (473) (DB); (1900) 27 Cal 370 (372) (DB).

[2] The Magistrate must consider the case of each witness individually before deciding that the application with reference to him has been made for any of the purposes specified in the section. (Vol 28) 1941 Sind 177 (178); 43 Cri L Jour 265; I L R (1941) Kar 66 (DB); (Vol 2) 26 Bom 418 (421) (DB).

[3] The Magistrate must record his reasons for refusing to issue process in compliance with the accused's application. (Vol 11) 1924 Pat 142 (143); 24 Cri L Jour 931; (Vol 12) 1925 Cal 411 (411); 51 Cal 1044; 26 Cri L Jour 384; (Vol 2) 26 Bom 418 (421) (DB); (Vol 8) 10 Cri L Jour 207 (207); 2 Sind L R 5; (Vol 16) 1929 All 914 (916); 30 Cri L Jour 1155.

[4] The order need not expressly state that the application is for causing vexation or delay. It is enough if it states facts which lead to that inference. (Vol 7) 6 Cri L Jour 1 (6) (DB); (Vol 12) 1925 Mad 106 (107); 25 Cri L Jour 401 (DB).

[5] The mere fact that the Magistrate thinks that the evidence of the proposed witness will not be material is not sufficient for refusing the application for process. (Vol 29) 1942 Sind 122 (129); 44 Cri L Jour 367; I L R (1942) Kar 252 (DB). (Probable irrelevancy of the evidence is not sufficient ground.) (Vol 24) 1937 Rang 528 (530); 39 Cri L Jour 211; (Vol 11) 12 Cri L Jour 548 (549) (Mad); (Vol 10) 1923 Lah 420 (421); 24 Cri L Jour 686.

[But see (Vol 12) 1925 Mad 106 (110); 25 Cri L Jour 401 (DB).]

[6] The Magistrate cannot take upon himself the responsibility of selecting the witnesses for the defence. (Vol 15) 1928 Lah 125 (131); 15 Lah 407; 29 Cri L Jour 212.

[7] Whether the application for summoning a large number of witnesses is vexatious or not is a question of fact. (Vol 19) 1932 All 125 (126); 54 All 331; 33 Cri L Jour 528. (Large number of witnesses summoned — Magistrate may conclude that application is vexatious.) (Vol 8) 7 Cri L Jour 146 (153); 35 Cal 243 (DB). (Do.) (Vol 28) 1941 Sind 177 (177); 43 Cri L Jour 265; I L R (1941) Kar 66; (DB). (Magistrate does not think the application for process to be vexatious — He must issue process to all witnesses — He cannot arbitrarily restrict the number of witnesses to be summoned.) (Vol 19) 1932 All 125 (126); 54 All 331; 33 Cri L Jour 528; (Vol 13) 1926 Lah 454 (454); 27 Cri L Jour 543. (Magistrate cannot restrict number of witnesses to be summoned.) (Vol 6) 1919 Cal 69 (69); 20 Cri L

Jour 261. (Do.); (Vol 7) 17 Mad L Jour (NRC) 62 (62) (DB). (Do.)

[8] Under this section what is the decisive ground for refusing an accused's application to call witnesses is not the fact that the witnesses would be delayed but that a witness is called for that purpose. (Vol 28) 1941 Sind 177 (177); 43 Cri L Jour 265; I L R (1941) Kar 66 (DB).

[9] The mere fact that an application for process is made that a witness is being produced is not by itself a ground for refusing it. (Vol 24) 1937 Rang 528 (528); 39 Cri L Jour 484; (Vol 11) 12 Cri L Jour 550 (551) (SB) (Mad).

[10] An unduly delayed application for process is liable to be construed as made for the purpose of delay or vexation. (Vol 13) 1926 Cal 411 (411); 51 Cal 1044; 26 Cri L Jour 384; (Vol 11) 12 Cri L Jour 550 (551) (SB) (Mad).

[11] First application for some witnesses—Second for some more—No presumption that latter is made for purposes of delaying or that it is vexatious. (Vol 18) 1931 Oudh 386 (387); 32 Cri L Jour 1176.

[See however (Vol 1) 1914 All 197 (198); 15 Cri L Jour 164; 35 All 13.]

[12] Number of witnesses summoned by Magistrate — He cannot arbitrarily curtail the number to be examined. (Vol 22) 1935 All 668 (669); 36 Cri L Jour 1442.

[13] Court refusing to summon witnesses on ground of their being called to delay case — Accused as protest giving up those witnesses—Accused cannot subsequently contend that Court wrongly refused to summon his witnesses. (Vol 28) 1941 Oudh 35 (36); 43 Cri L Jour 40.

[14] The inconvenience and expense to the State entailed by the conveyance of three convicts from Coimbatore to Calicut was held to be not so serious that application for the attendance of these witnesses should be deemed to be made for the purpose of vexation or delay or defeating the ends of justice. (Vol 11) 1924 Mad 243 (244); 24 Cri L Jour 840 (DB).

[15] Witness, a clerk of the Canal department summoned, unable to prove a document—Accused is entitled to have another summoned to prove it. (Vol 28) 1941 Lah 546 (547); 43 Cri L Jour 101.

6. Production of documentary evidence by accused. — [1] The Magistrate should inspect the documents offered by the accused before excluding them. (Vol 10) 1923 Lah 492 (493) (DB) (Cal).

[2] Before issuing process to compel production of documents, the Magistrate should satisfy himself that the documents called for are relevant to the case. (Vol 1) 1914 Sind 135 (136); 8 Sind L R 267; 16 Cri L Jour 245 (DB).

[3] The accused is entitled to production of Court records instead of being put to the expense of obtaining copies. (Vol 10) 1923 Lah 420 (422); 24 Cri L Jour 686.

[4] The Magistrate can summon the production of a document at the instance of the accused if the conditions laid down in S. 94 are satisfied even before the case has reached the stage indicated by this section. (Vol 22) 1935 Sind 13 (18); 29 Sind L R 92; 36 Cri L Jour 581 (FB).

[5] Under S. 139 of the Evidence Act a person merely summoned to produce a document cannot be cross-examined unless and until he is called as a witness. (Vol 24) 1937 Oudh 331 (337); 38 Cri L Jour 491.

7. Right of accused to cross-examine prosecution witnesses. — [1] Subject to the restrictions contained in this section, an accused is entitled, even after he has entered upon his defence, to have re-summoned for cross-examination any prosecution witness that he may name. (Vol 7) 1920 Pat 149 (150); 21 Cri L Jour

**258.** (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.]

[1882—S. 258; 1872—S. 220; 1861—S. 255.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 73.

**Section 257 — Note 7 (contd.)**

814 : 5 Pat L Jour 94 \* (Vol 12) 1925 Cal 411 (411) : 51 Cal 1044 : 26 Cri L Jour 384 (DB) \* (Vol 10) 1923 Mad 609 (613) : 46 Mad 449 : 24 Cri L Jour 547 (F13) \* (Vol 16) 1929 Lah 578 (579) : 30 Cri L Jour 380 \* (Vol 17) 1930 Mad 632 (632) : 31 Cri L Jour 720.

[2] The right of the accused to recall and cross-examine prosecution witnesses under this section is subject to the discretion of the Magistrate. (Vol 7) 1920 Mad 201 (205) : 43 Mad 411 : 21 Cri L Jour 297 (DB) \* (1900) 27 Cal 370 (372) (DB).

[3] Where a prosecution witness is re-summoned under this section at the instance of the accused, he does not thereby lose his character as a prosecution witness and can be cross-examined by him. ('97) 1 Cal W N 19 (21) (DB) \* ('01) 28 Cal 594 (596) (DB) \* (Vol 9) 1922 Mad 32 (32) : 23 Cri L Jour 192 \* (Vol 14) 1927 Mad 129 (129, 130) : 28 Cri L Jour 32.

[4] Where there are two accused in a case and their cases are adverse to each other, the witnesses called by one of the accused in his defence can be cross-examined by the other accused. (Vol 27) 1940 Lah 210 (215) : 41 Cri L Jour 639 \* ('94) 21 Cal 401 (403) (DB).

[But see ('69) 12 Sath W R Cr 75 (76) (DB).]

**8. Proviso to sub-section (1).—**[1] Opportunity given to accused to cross-examine witnesses for prosecution after charge not availed of—Magistrate is justified in declining to resummon witnesses for cross-examination. (Vol 26) 1939 Pat 24 (25) : 39 Cri L Jour 950 \* (Vol 23) 1936 Lah 914 (915) : 17 Lah 284 : 38 Cri L J 24.

[2] It lies upon the party who thinks himself aggrieved to show that the ends of justice would be frustrated in consequence of the refusal to recall the witnesses. ('93) 20 Cal 469 (473) (DB).

[3] Mere fact that an accused's lawyers decline to cross-examine such witnesses or the mere fact that such witnesses were not cross-examined does not compel Court to summon. (Vol 12) 1925 Pat 696 (697) : 27 Cri L Jour 353 (DB).

[4] Where the accused has not had a sufficient opportunity of cross-examining a prosecution witness after the framing of the charge, his attendance may be compelled under this section. (Vol 18) 1931 Lah 186 (186) : 32 Cri L Jour 1202 \* (Vol 19) 1932 Nag 71 (72) : 33 Cri L Jour 731 \* ('21) 22 Cri L Jour 572 (573) (Pat) \* (Vol 14) 1927 Nag 240 (240) : 28 Cri L Jour 425.

[5] The proviso does not restrict the cross-examination of witnesses who are present in Court. (Vol 19) 1932 Nag 137 (137) : 28 Nag L R 254 : 33 Cri L Jour 940.

[6] The Magistrate is not required by the proviso to record his reasons for not being satisfied that it is necessary for the ends of justice to compel the attendance of any witness. (Vol 12) 1925 Pat 696 (700) : 27 Cri L Jour 353 (DB).

**9. Examination of witness present in Court though not summoned.—**[1] A witness present in Court without summons can be examined by the Court under S. 540, but there is no obligation on the Court to examine him. ('34) 1934 Mad W N 97 (98).

**Section 258—Note 1**

[1] The mere fact that a charge has not been framed does not invalidate the proceedings unless a failure of

justice has in fact been occasioned thereby. ('79) 3 Cal L Rep 131 (133) (D13) \* ('81) 1881 All W N 112 (142) \* (Vol 4) 1917 Low Bur 88 (89) : 18 Cri L Jour 1006.

[2] In warrant-cases tried summarily, the absence of a charge is no bar to an order of acquittal or conviction. (1900-02) 1 Low Bur Rul 9 (10).

[3] Magistrate proceeding without framing a charge—After taking all the evidence for the defence discharging the accused on finding that he cannot be convicted—The order of discharge amounts to an acquittal—Court of revision not justified in ordering further enquiry in case. ('89) 2 C P L R 82 (83, 84) \* ('83) 1883 Pun Re No. 29 Cr, p. 76 (77).

[4] A *de novo* trial ordered under S. 350—Charge cancelled by operation of law—Magistrate cannot pass an order of acquittal. (Vol 23) 1936 Nag 153 (156) : ILR (1936) Nag 92 : 37 Cri L Jour 983.

[5] The Magistrate cannot acquit the accused merely because the complainant or his witnesses are absent on the date of hearing. (Vol 24) 1937 All 127 (129) : 38 Cri L Jour 361 \* (Vol 20) 1933 Cal 358 (358) : 34 Cri L Jour 498 (DB) \* (Vol 12) 1925 Oudh 306 (306) : 27 Oudh Cas 316 : 26 Cri L Jour 264 \* ('21) 22 Cri L Jour 312 (312) (Lah).

[But see (Vol 17) 1930 All 795 (796) : 53 All 39 : 32 Cri L Jour 366.]

[6] Complainant offering to withdraw complaint—Accused cannot be acquitted. ('13) 14 Cri L Jour 77 (77) : 37 Bom 369 (DB).

[7] Where the Court finds that it has no jurisdiction to try the case, the proper order to pass is one of discharge and not of acquittal. ('10) 11 Cri L Jour 253 (254) : 1910 Pun Re No. 7 Cr.

[8] Once a charge is framed in a warrant-case the Magistrate has no power to discharge the accused. ('03) 1903 Pun Re No. 14 Cr, p. 35 (39) (DB) \* (Vol 17) 1930 All 795 (796) : 53 All 39 : 32 Cri L Jour 366.

[9] Where an order dismissing the complaint or discharging the accused is passed and the meaning of the Magistrate is clear, the effect of the order is only that of acquittal. ('80) 5 Cal L Rep 359 (360) (DB).

[See also (Vol 22) 1935 All 834 (835) : 36 Cri L Jour 912.]

[10] Other persons tried along with the accused—Other persons guilty in opinion of Magistrate—Their case Magistrate deciding to refer under S. 349—The accused must be acquitted if found not guilty. (Vol 13) 1926 All 176 (176) : 26 Cri L Jour 1630.

[11] No order about acquittal or conviction in judgment.—Order-sheet of even date mentioning that a certain person had been acquitted—Held there was a flagrant disregard of the mandatory provisions of the section. (Vol 28) 1941 Oudh 575 (576) : 42 Cri L Jour 633.

[12] The Magistrate is bound to pass some sentence on the accused when he records a verdict of guilty, however light the sentence may be. (Vol 21) 1934 Rang 338 (339) : 12 Rang 419 : 36 Cri L Jour 460 (DB).

[But see (Vol 15) 1928 Nag 188 (189) : 24 Nag L R 110 : 29 Cri L Jour 506.]

**259.** When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, <sup>a</sup>[or is not a cognizable offence,] the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

[1882—S. 259; 1872—S. 215, Explanation.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 74.

## CHAPTER XXII.

### OF SUMMARY TRIALS.

*Power to try summarily.* **260.** (1) Notwithstanding anything contained in this Code,—

- (a) the District Magistrate,
  - (b) any Magistrate of the first class specially empowered in this behalf by the <sup>a</sup>[Provincial Government], and
  - (c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the <sup>a</sup>[Provincial Government],
- may, if he or they think fit, try in a summary way all or any of the following offences :
- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;

#### SECTION 259 — SYNOPSIS.

1. Scope and applicability.
2. "Instituted upon complaint."
3. "The offence may be lawfully compounded, or is not a cognizable offence."
4. "May in his discretion."
5. "At any time before the charge is framed."
6. Discharge the accused.

1. Scope and applicability. — [1] This section provides only for discharge of accused. (Vol 21) 1934 All 340 (341) : 56 All 750 : 36 Cri L Jour 65.

[2] Accused can be discharged on the ground that complainant is absent on date of hearing only under this section, provided other conditions for its applicability are fulfilled. (Vol 4) 1917 Cal 525 (525) : 17 Cri L Jour 193 (DB) \* (91) 1891 All W N 116 (116).

[See also (Vol 10) 1923 Cal 403 (404) (DB)].

2. "Instituted upon complaint." — [1] Proceedings not instituted upon complaint — Magistrate cannot invoke provisions of this section for discharging accused on ground of absence of prosecuting officer on date of hearing. (Vol 14) 1927 Oudh 352 (352) : 28 Cri L Jour 816.

3. "The offence may be lawfully compounded, or is not a cognizable offence." — [1] Offence neither compoundable nor non-cognizable—Section does not apply. (Vol 30) 1943 All 9 (9) : 44 Cri L Jour 196 : ILR (1943) All 31 \* (Vol 11) 1924 Lah 627 (627) : 25 Cri L Jour 87 (DB) \* (Vol 22) 1935 Bom 76 (78) : 59 Bom 171 : 36 Cri L Jour 433.

[2] Several offences charged against accused—All of them should be compoundable or non-cognizable for applicability of section. (Vol 26) 1939 Bom 89 (89) : 40 Cri L Jour 346 (DB).

[See (Vol 14) 1927 Oudh 352 (352) : 28 Cr L J 816.]

4. "May in his discretion." — [1] Under this section, Magistrate is not bound to discharge accused on absence of complainant on date of hearing. (Vol 13) 1926 Bom 178 (179) : 27 Cri L Jour 491 (DB).

[2] Section confers discretion on Magistrate to discharge accused in circumstances specified in it. (Vol 28) 1941 Rang 202 (203) : 1941 Rang L R 224 : 42 Cri L Jour 801 \* (Vol 16) 1929 Rang 14 (15) : 6 Rang 664 : 30 Cri L Jour 345.

[3] Magistrate should exercise discretion sparingly and discharge accused. See (81) 6 Cal 523 (523) (DB).

[4] Absence of complainant due to reasonable cause — Magistrate ought not to discharge accused under this section. (Vol 10) 1923 Cal 403 (404) (DB) \* (11) 12 Cri L Jour 184 (184) (Sind).

5. "At any time before the charge is framed." — [1] Complainant absents himself after charge is framed—Magistrate cannot discharge accused on ground of absence of complainant. (Vol 12) 1925 Oudh 306 (306) : 27 Oudh Cas 316 : 26 Cri L Jour 264 \* (Vol 12) 1925 Oudh 314 (314) : 26 Cri L Jour 400 (DB) \* (Vol 20) 1933 Pesh 78 (78) : 35 Cri L Jour 170 (DB) \* (Vol 5) 1918 Nag 76 (76) : 20 Cri L Jour 763 \* (46) 1946-2 Mad L Jour 251 (253) : 48 Cr L J 97.

[But see (Vol 17) 1930 All 795 (796) : 53 All 39 : 32 Cri L Jour 366.]

[2] Magistrate must proceed with case even in the absence of complainant after charge is framed. (Vol 30) 1943 All 9 (9) : I L R (1943) All 31 : 44 Cri L Jour 196 \* (Vol 30) 1943 Sind 148 (148) : 44 Cri L Jour 768 : I L R (1943) Kar 103 (DB) \* (Vol 29) 1942 Mad 552 (552) : 44 Cri L Jour 171 \* (Vol 24) 1937 All 127 (129) : 38 Cri L Jour 361. (Magistrate must proceed with case in absence of complainant after charge is framed, unless he decides to adjourn it.) \* (Vol 20) 1933 Cal 358 (358) : 34 Cri L Jour 498 (DB) \* (Vol 11) 1924 Lah 627 (627) : 25 Cri L Jour 87.

6. Discharge the accused.—[1] Section does not provide for acquittal of accused in absence of complainant. (Vol 30) 1943 Sind 148 (148) : 44 Cri L Jour 768 : I L R (1943) Kar 103 (DB).

[2] Code does not provide for passing of order striking off a case, though such order may, be construed and treated as order of discharge. (Vol 1) 1914 Oudh 264 (264) : 17 Oudh Cas 18 : 15 Cri L Jour 230.

#### SECTION 260 — SYNOPSIS.

1. Scope and object of the section.
2. Magistrates empowered to try cases summarily.
3. "May, if he or they think fit."
4. Offences to which the section applies.

1. Scope and object of the section.—[1] Object of this section is not to deprive accused person of any of the rights under Chapter XX or Chapter XXI, but only to shorten the record and the work of the Magistrate recording. (Vol 26) 1939 Nag 87 (88) : I L R (1939) Nag 457 : 40 Cri L Jour 846.

- (b) offences relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code;
- (c) hurt, under section 323 of the same Code;
- (d) theft, under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees;
- (e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees;
- (f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed fifty rupees;
- (g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees;
- (h) mischief under section 427 of the same Code;
- (i) house-trespass, under section 448, and offences under sections 451, <sup>b</sup>[453, 454], 456 and 457 of the same Code;
- (j) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, of the same Code;
- (k) abetment of any of the foregoing offences;
- (l) an attempt to commit any of the foregoing offences, when such attempt is an offence;
- (m) offences under section 20 of the Cattle-trespass Act, 1871:

Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

[1882—S. 260; 1872—Ss. 222 to 224.]

[a] *Substituted* by A. O. for "Local Government."

[b] *Inserted* by the Amending Act, 1903 (1 [I] of 1903), S. 3 and Sch. II, Pt. II.

#### Section 260 (contd.)

2. Magistrates empowered to try cases summarily.—[1] The District Magistrate of the Civil and military station of Bangalore has no power to try European British subjects summarily. (Vol 3) 1916 Mad 589 (539): 39 Mad 942: 16 Cri L Jour 773 (DB).

3 "May, if he or they think fit."—[1] Procedure under this section is inappropriate to cases of complicated or serious nature. (Vol 8) 1921 Bom 370 (371): 23 Cri L Jour 21 (DB) \* (13) 14 Cri L Jour 105 (107): 35 All 173.

[2] Following cases should not be tried in a summary way:—

(a) Cases hotly contested. (Vol 18) 1931 Mad 233 (233): 32 Cri L Jour 689.

[See (Vol 26) 1939 Lah 467 (468): I L R (1939) Lah 221: 41 Cri L Jour 19.]

(b) Cases involving intricate questions of title and possession. ('76) 25 Suth W R Cr. 65 (66) (DB) \* (1900) 4 Cal W N 247 (249) (DB) \* ('12) 13 Cri L Jour 771 (771): 6 Sind L R 120 (DB) \* (Vol 9) 1922 Pat 265 (265, 267): 21 Cri L Jour 374 \* (Vol 9) 1922 Pat 296 (297): 23 Cri L Jour 440 \* (Vol 10) 1923 Rang 157 (157): 24 Cri L Jour 929.

[But see (Vol 13) 1926 Oudh 63 (63): 26 Cri L Jour 1452.]

(c) Cases necessitating taking of lengthy evidence. (Vol 26) 1939 Lah 467 (468): I L R (1939) Lah 221: 41 Cri L Jour 19 \* ('91) 1891 All W N 183 (183) \* (Vol 21) 1934 Lah 243 (245): 15 Lah 610: 35 Cr L J 1094. [But see (Vol 14) 1927 All 136 (137): 28 Cri L Jour 140 \* ('92) 1892 All W N 30 (30).]

(d) Cases requiring local inquiry to be made. ('91) 1891 All W N 183 (183).

(e) Warrant cases in which prosecution includes evidence given on commission in other presidencies. (Vol 26) 1939 Nag 87 (88): I L R (1939) Nag 457: 40 Cri L Jour 846.

(f) Cases in which Magistrate cannot keep in mind evidence of important facts. (Vol 12) 1925 Sind 284 (284): 19 Sind L R 136: 26 Cri L Jour 1026 (DB).

(g) Serious cases where heavy sentence would be deserved in case of conviction. (Vol 3) 1916 All 53 (54): 17 Cri L Jour 413: 38 All 506 \* ('93) 7 C P L R App Cr. 6 (8) \* ('98-1900) 1898-1900 Low Bur Rul 198 (198) \* ('12) 13 Cri L Jour 780 (781): 6 Sind L R 101 (DB) \* (Vol 14) 1927 Sind 257(257): 28 Cri L Jour 959(DB).

(h) Cases where result of trial would have further consequences of serious nature. (Vol 16) 1929 All 267 (268): 30 Cri L Jour 505 (DB) \* (Vol 8) 1921 Bom 370 (371): 23 Cri L Jour 21 (DB).

(i) Cases against public servants in which whole career of accused would depend on result of trial. ('11) 12 Cri L Jour 143 (144) (Lah) \* (Vol 19) 1932 Lah 188 (189): 33 Cri L Jour 108 \* ('32) 1932 Mad W N 478 (480) \* ('95) 1895 Rat 778 (779) (DB) \* ('95) 1895 Rat 784 (785) (DB).

[But see (Vol 26) 1939 Lah 467 (468): I L R (1939) Lah 221: 41 Cri L Jour 19 \* (Vol 13) 1926 Oudh 63 (63): 26 Cri L Jour 1452 \* (Vol 16) 1929 Pat 716 (717): 30 Cri L Jour 869.]

(j) Case where owner of flour mill is prosecuted for public nuisance and result of trial would compel him to permanently close his business. (Vol 8) 1921 Bom 370 (371): 23 Cri L Jour 21 (DB).

(k) Cases where Magistrate takes cognizance upon his knowledge. ('76) 25 Suth W R Cr. 69 (71) (DB) \* ('99) 3 Cal W N cccxxx.

*Power to invest Bench of Magistrates invested with less power.*

**261.** The "[Provincial Government] may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences :

- (a) offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, <sup>b</sup>[447 and 504] ;
- (b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month <sup>c</sup>[with or without fine] ;
- (c) abetment of any of the foregoing offences ;
- (d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

[1882—S. 261; 1872—S. 225.]

[a] *Substituted* by A. O. for "Local Government." [b] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 75, for "and S. 447." [c] *Inserted, ibid.*

#### Section 260 — Note 3 (*contd.*)

[1] Cases where accused is deaf and dumb. ('06) 4 Cri L Jour 444 (445) (DB) (Bom).

[3] Mere fact that there are a number of accused persons is not conclusive reason against trying case summarily. (Vol 14) 1927 All 136 (137) : 28 Cri L Jour 140.

[But see (Vol 8) 1921 Lah 236 (236) : 22 Cr. L Jour 145.]

[4] Whether procedure adopted is summary or ordinary is to be seen from record. ('41) 45 Cal W N 139 (140).

**4. Offences to which the section applies.**—[1] Section applies to offences under other Acts also, provided they are not offences punishable with death, transportation or imprisonment for a term exceeding six months. ('94) 1 Weir 906 (907) \* (Vol 15) 1928 All 719 (720) : 50 All 718 : 30 Cri L Jour 214 (DB) \* (Vol 6) 1919 Bom 173 (174) : 43 Bom 888 : 20 Cri L Jour 699 \* (Vol 21) 1934 All 331 (332) : 35 Cri L Jour 677.

[2] Summary procedure cannot be extended to offences not mentioned in section. ('74) 21 Suth W R Cr. 12 (13) (DB) \* (Vol 9) 1922 Pat 227 (228) : 25 Cri L Jour 545 \* (Vol 26) 1939 All 693 (693) : I L R (1939) All 931 : 41 Cri L Jour 91 \* (Vol 15) 1928 Bom 142 (143) : 52 Bom 254 : 29 Cri L Jour 492 (DB) \* (Vol 17) 1930 Cal 711 (712) : 32 Cri L Jour 110 \* ('32) 1932 M W N 478 (480).

[3] Consent of accused will not enable Magistrate to try summarily offence not covered by section. ('72-92) 1 Low Bur Rul 63 (63).

[4] Several accused persons—One of them not triable summarily—Summary procedure is inapplicable to all of them. ('24) 25 Cri L Jour 528 (528) (DB) (Cal).

[5] Number of offences charged against accused person—He cannot be tried summarily unless all offences are capable of being tried in summary way. (Vol 15) 1928 Bom 142 (142) : 52 Bom 254 : 29 Cri L Jour 492 (DB) \* ('84) 10 Cal 408 (409) \* ('76) 25 Suth W R Cr 5 (6) (DB).

[6] Number of offences of receiving or retaining stolen property charged against accused—To determine whether accused can be tried summarily, value of property in respect of each offence separately and not aggregate value of property should be taken into account. (Vol 21) 1934 Sind 155 (156) : 28 Sind L R 336 : 36 Cri L Jour 608 (DB).

[7] Offences mentioned in other clauses can be tried summarily though they do not fall within purview of clause (a). ('92) 1892 Rat 600 (600) (DB).

[8] In determining whether case relates to offence triable summarily, Magistrate should have regard to allegations with which his help is sought. ('07) 11 Cal W N civ (civ) \* (Vol 12) 1925 All 290 (291) : 47 All 64 : 26 Cri L Jour 586 \* (Vol 13) 1926 Cal 1202 (1203) : 53 Cal 738 : 27 Cri L Jour 1295 (DB).

[9] Magistrate can go behind exaggerated allegation

and try accused for offence which seems to have been committed. ('87) 10 All 55 (58) \* ('87) 1887 All W N 103 (103) (D B) \* ('99) 1 Bom L R 683 (684) (DB) \* ('89) 16 Cal 715 (724) (DB) \* (Vol 20) 1933 Oudh 50 (51) : 34 Cri L Jour 547.

[See also (Vol 14) 1927 Cal 505 (509) : 28 Cri L Jour 697 (DB).]

[But see ('76) 25 Suth W R Cr 19 (20) (DB) \* ('78) 2 Cal L Rep 374 (375) (DB).]

[10] No exaggerated allegations—Magistrate should not ignore aggravating features of case to enable him to adopt summary procedure. ('98) 1898 Rat 988 (989) \* ('87) 1887 Pun Re No. 5 Cr. p. 9 (9) (DB) \* ('97-01) 1 Upp Bur Rul 75 (75) \* (Vol 16) 1929 All 349 (350) : 51 All 540 : 30 Cri L Jour 686 \* ('32) 1932 Mad W N 478 (480) \* ('07) 5 Cri L Jour 21 (22) (Lah) \* ('08) 8 Cri L Jour 227 (229) : 36 Cal 67 (DB) \* ('13) 14 Cri L Jour 462 (463) (Low Bur) \* ('02) 29 Cal 40\* (410) (DB).

[See also (Vol 26) 1939 All 693 (693) : I L R (1939) All 931 : 41 Cri L Jour 91 \* (Vol 5) 1918 Nag 150 (151) : 14 Nag L R 190 : 19 Cri L Jour 1003.]

[11] Magistrate taking cognizance of offence on police report can adopt summary procedure notwithstanding aggravating allegations in first information given in police-station. (Vol 18) 1931 All 51 (52) : 32 Cri L Jour 556 : 53 All 218.

[12] Police-report pointing to offence not triable summarily and evidence also disclosing such offence—Magistrate cannot ignore aggravating circumstances and proceed in regard to offence triable summarily. (Vol 21) 1934 Lah 243 (244) : 15 Lah 610 : 35 Cri L Jour 1094.

[13] Proceedings under Chapter XXXVI cannot be conducted in summary way. ('75) 24 Suth W R Cr 61 (62) (DB) \* ('93) 20 Cal 351 (352) (DB).

[14] Accused liable to enhanced punishment by reason of previous convictions—Offence tried for, covered by section—Previous convictions set out in charge as required by S. 221.—The offence cannot be tried summarily ('78) 2 Weir 324 (324) \* ('72-92) 1872-92 Low Bur Rul 336 (337).

[15] Special jurisdiction of High Court to punish summarily contempt of its authority is not affected by this Code. (Vol 13) 1926 Lah 1 (2) : 6 Lah 528 : 26 Cri L Jour 1409 (F B) \* (Vol 14) 1927 Lah 610 (611) : 28 Cri L Jour 727 (SB) \* (Vol 13) 1926 Rang 188 (189) : 4 Rang 257 : 27 Cri L Jour 1241 (DB).

[16] Under S. 67 of Forest Act of 1927 Magistrates of classes mentioned therein can try summarily offences of kind specified in section. See ('02) 1902 Pun L R No. 128 p. 536 (537).

#### Section 261—Note 1

[1] Bench of Magistrates with second or third class powers cannot try summarily any offences except those mentioned in this section. ('11) 12 Cri L Jour 383 (384) : 1 Upp Bur Rul 70 \* ('74) 21 Suth W R Cr 12 (13) (DB).

*Procedure for summons and warrant-cases applicable.*

262. (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as

hereinafter mentioned.

*Limit of imprisonment.*

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

[1882—S. 262; 1872—S. 226.]

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the [Provincial Government] may direct the following particulars:

- (a) the serial number;
- (b) the date of the commission of the offence;
- (c) the date of the report or complaint;
- (d) the name of the complainant (if any);
- (e) the name, parentage and residence of the accused:

#### Section 261—Note 1 (*contd.*)

[2] Section 48 of General Police Act, 24 [XXIV] of 1859. (Corresponding to S. 34 of the General Police Act, 5 [v] of 1861) is a conservancy clause within the meaning of this section. ('90) 13 Mad 142 (143) (SB).

#### Section 262—Note 1

[1] Breach of the provisions of the section is not a mere irregularity but illegality. (Vol 32) 1945 All 98 (99); 46 Cri L Jour 539: 1 L R (1945) All 131.

[2] The following provisions have been held to apply to summary trials equally with ordinary trials:—

(a) Section 191. ('05) 2 Cri L Jour 187 (188) (Lab).

(b) Section 243. ('92) 15 Mad 83 (87, 88) (DB).

(c) Section 257. ('09) 9 Cri L Jour 583 (584): 5 Low Bur Rul 20 \* ('95) 1895 Rat 768 (769).

(d) Section 342. (Vol 27) 1940 Bom 314 (314): 42 Cri L Jour 71 (DB) \* (Vol 23) 1936 Oudh 16 (17): 36 Cri L Jour 1303: 11 Luck 461 \* (Vol 22) 1935 All 217 (219): 57 All 666: 36 Cri L Jour 1290 (DB) \* (Vol 13) 1926 Nag 300 (301): 27 Cri L Jour 632: 22 Nag L R 65 \* (Vol 13) 1926 Sind 1 (2): 20 Sind L R 34: 26 Cri L Jour 1554 (FB) \* (Vol 9) 1922 Pat 5 (6): 23 Cri L Jour 114 \* (Vol 14) 1927 Cal 250 (252): 54 Cal 286: 28 Cri L Jour 297 (DB).

[But see (Vol 11) 1924 Mad 30 (30): 46 Mad 766: 24 Cri L Jour 847 (FB).]

(e) Section 250. (Vol 17) 1930 Mad 929 (929): 32 Cri L Jour 207 \* ('88) 11 Mad 142 (144) (SB).

[3] The object of the section is to restrict the passing of sentences of imprisonment of considerable length where the right of appeal is greatly restricted. (Vol 21) 1934 Rang 116 (117): 12 Rang 122: 35 Cri L Jour 1413.

[4] Accused convicted of a number of offences in a summary trial—Separate sentence must be passed in respect of each offence. (Vol 21) 1934 Sind 185 (186, 187: 28 Sind L R 336: 36 Cri L Jour 608 (DB).

[5] Accused sentenced to imprisonment for a term of three months in respect of each of the separate offences he is convicted of—Sentences must be ordered to run concurrently and not consecutively. (Vol 21) 1934 Rang 116 (117): 12 Rang 122: 35 Cri L Jour 1413.

[6] Case tried summarily and referred to a superior Magistrate under S. 349—Superior Magistrate not trying case anew—Superior Magistrate cannot pass sentence of imprisonment exceeding three months. (Vol 19) 1932 All 507 (507, 508): 33 Cri L Jour 472.

[7] The prohibition applies only to substantive sentences of imprisonment. (Vol 27) 1940 Rang 171 (172): 1940 Rang L R 223: 41 Cri L Jour 768.

[8] Where imprisonment is ordered in default of fine

the term for which such imprisonment is ordered may exceed the limits imposed by the section. (Vol 30) 1943 Sind 124 (126): 44 Cri L Jour 637: 1 L R (1944) Kar 1 (DB) \* ('83) 6 All 61 (61).

[But see (Vol 8) 1921 Lah 236 (236): 22 Cr L J 145.]

[9] The section does not affect the jurisdiction of a Magistrate to order security for keeping peace under S. 106. ('86) 1886 All W N 181 (181) \* ('04) 1 Cri L Jour 1054 (1055): 7 Oudh Cas 338.

[10] Security ordered under S. 106—The power to commit to prison in default of furnishing security under S. 123 is not affected by this section. ('86) 1886 All W N 181 (181) \* ('04) 1 Cri L Jour 1054 (1055): 7 Oudh Cas 338.

[11] The section does not set any limits to the amount of fine that can be imposed on the convicted person. ('13) 14 Cri L Jour 105 (106): 35 All 173.

[12] The power of the Magistrate to sentence the convicted person to solitary confinement under S. 73 of the Penal Code is not affected by the section. ('83) 6 All 83 (83).

#### SECTION 263 — SYNOPSIS.

1. Scope and applicability.
2. "The Magistrate or Bench of Magistrates need not record the evidence of the witnesses."
3. "He or they shall enter . . . particulars."
4. Clause (f) — Particulars of offence charged and proved.
5. Clause (g) — Plea of accused and his examination (if any).
6. Clause (h) — Finding and, in case of conviction, brief statement of reasons therefor.

1. Scope and applicability. — [1] The form prescribed under the section will not be the only record of the case for all purposes. (Vol 27) 1940 Pat 272 (274): 41 Cri L Jour 233.

[2] The section does not dispense with the hearing of evidence. Finding based on a refusal or failure to hear evidence is liable to be upset. (Vol 25) 1938 Sind 70 (71): 32 Sind L R 684: 39 Cri L Jour 474 (DB) \* ('12) 13 Cri L Jour 759 (760): 39 Cal 931 (DB) \* ('05) 2 Cri L Jour 187 (188) (Lab) \* ('13) 14 Cri L Jour 122 (123): 35 All 136.

[3] The scanty provisions of the section must be strictly complied with and the record must be sufficiently exact and full to enable the revisional Court to say whether the law has been complied with or not on the points to be recorded. (Vol 21) 1934 Lah 596 (597): 15 Lah 277: 35 Cri L Jour 1464 \* (1906) 3 Cri L Jour 178 (180) (DB) (Cal).

- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f) or clause (g) of sub-section (1) of section 260 the value of the property in respect of which the offence has been committed ;
- (g) the plea of the accused and his examination (if any) ;
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor ;
- (i) the sentence or other final order ; and
- (j) the date on which the proceedings terminated.

[1882—S. 263; 1872—S. 227.]

[a] *Substituted by A. O. for "Local Government".*

### Section 263 — Note 1 (*contd.*)

[See also (Vol 25) 1938 Sind 70 (71) : 32 Sind L R 684 : 39 Cri L Jour 474 (DB).]

2. "The Magistrate or Bench of Magistrates need not record the evidence of the witnesses." — [1] The section exempts the Magistrate or Bench of Magistrates holding a summary trial from recording the evidence of witnesses as in ordinary trials. (Val 27) 1940 Pat 272 (274) : 41 Cri L Jour 283 \* (Vol 25) 1938 Sind 70 (71) : 32 Sind L R 684 : 39 Cri L Jour 474 (DB) \* (Vol 23) 1936 All 319 (319) : 37 Cri L Jour 710 \* ('06) 10 Cal W N cclxxix (cclxxix) \* (Vol 14) 1927 All 124 (124, 125) : 49 All 261 : 28 Cri L Jour 97 (DB) \* (Vol 19) 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cri L Jour 342 \* (Vol 21) 1934 Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841 (DB) \* (Vol 22) 1935 Rang 106 (107) : 13 Rang 225 : 36 Cri L Jour 892 (DB) \* (Vol 14) 1927 Oudh 42 (43) : 28 Cri L Jour 76.

[But see ('36) 37 Cri L Jour 292 (292) (Nag) \* (Vol 9) 1922 Pat 5 (6, 7) : 23 Cri L Jour 114 \* (Vol 15) 1928 Mad 928 (928) : 29 Cri L Jour 584. (Court trying case summarily is not relieved of the duty of making a precise record of the evidence adduced before it).]

[2] In cases of importance, Magistrates held would do well to record the evidence. (Vol 23) 1936 Sind 40 (40) : 37 Cri L Jour 455 (DB) \* ('91) 14 Mad 223 (224) (DB).

[3] Evidence recorded will not form part of the record. (Vol 23) 1936 Sind 40 (40) : 37 Cri L Jour 455 (DB).

[4] Where a case is likely to be adjourned to a long date, the Magistrate ought to take notes of the evidence. (Vol 18) 1931 Bom 142 (143) : 32 Cri L Jour 276 (DB).

[See also (Vol 29) 1942 Mad 669 (670) : 44 Cri L Jour 85.]

[5] Notes of evidence do not form part of the record — The notes can be destroyed by the Magistrate at his option. (Vol 14) 1927 All 124 (124, 125) : 49 All 261 : 28 Cri L Jour 97 (DB) \* (Vol 14) 1927 All 480 (481) : 49 All 562 : 28 Cri L Jour 442 \* (Vol 21) 1934 Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841 (DB) \* (Vol 22) 1935 Rang 106 (107) : 13 Rang 225 : 36 Cri L Jour 892 (DB) \* (Vol 14) 1927 Oudh 42 (43) : 28 Cri L Jour 76 \* (Vol 12) 1925 Sind 284 (284) : 19 Sind L R 136 : 26 Cri L Jour 1026 (DB).

[But see (Vol 1) 1921 Cal 165 (165, 166) : 48 Cal 280 : 22 Cri L Jour 482 (DB) \* (Vol 13) 1926 Nag 79 (79) : 26 Cri L Jour 1454.]

[6] The failure of the Magistrate to sign the memorandum of evidence, assuming that the Magistrate is bound to make such memorandum, is not by itself sufficient to vitiate the trial and conviction. (Vol 27) 1940 Pat 272 (274) : 41 Cri L Jour 283.

3. "He or they shall enter... particulars." — [1] The section by implication, dispenses with the recording of a judgment in the form laid down by S. 367. (Vol 7) 1920 All 79 (80) : 21 Cri L Jour 442.

[2] The record prescribed must be prepared scrupulously and carefully and must be complete in all the particulars specified. ('74) 22 Suth W R Cr 28 (28) (DB).

\* ('06) 4 Cri L Jour 40 (41) (Low Bur) \* ('99) 21 All 189 (192).

[3] Lumping together in the same column all the particulars is not proper. ('22) 23 Cri L Jour 161 (162) (Lab).

[4] The record must be prepared at the time of the trial; its preparation after the close of the trial is not sufficient ('95) 15 Mad 83 (87) (DB).

[5] Presiding officer of the Court cannot depute a clerk to prepare the record except in cases where he is authorised to use the services of an officer appointed for the purpose under S. 265, sub-s. (2) ('83) 6 Mad 396 (399) (DB).

[6] The failure of the Magistrate to prepare the record as required will not by itself justify the quashing of the conviction unless it has caused prejudice or occasioned failure of justice. (Vol 27) 1940 Pat 272 (273) : 41 Cri L Jour 283.

[7] The register prepared under the section forms part of the record and under S. 548 the accused is entitled to copies of it if he applies for them. ('10) 11 Cri L Jour 17 (18) : 1909 Pun Re No 9 Cr.

4. Clause (f) — Particulars of offence charged and proved. — [1] The accused is entitled to know clearly the offence with which he is charged to the same extent as in ordinary trials. ('82) 1882 All W N 59 (59).

[See (Vol 26) 1939 Nag 87 (88) : I L R (1939) Nag 457 : 40 Cri L Jour 846.]

[2] The specification of the offence in the record should be sufficiently full and clear to give the accused sufficient notice of what he is charged with and what he has to meet. ('82) 1882 All W N 59 (59) \* ('12) 13 Cri L Jour 224 (224) (DB).

[3] Principles which regulate the framing of charges in warrant cases apply to the particulars to be recorded under this section. (1912) 13 Cri L Jour 224 (224) (DB) (Cal).

[4] The mere mention of the section under which the accused is charged is not enough. ('03-04) 2 Low Bur 43 (44) \* ('06) 4 Cri L Jour 40 (41) (Low Bur).

[5] The prohibition of misjoinder of charges applies to summary trials—The record must show that there was no misjoinder. ('12) 13 Cri L Jour 224 (224) (DB) (Cal).

[6] Where there are several accused the offences charged against each should be distinctly stated. ('03-04) 2 Low Bur 43 (44).

[7] The object in mentioning value of property where offence is one under clauses (d) to (g) of sub-section (1) of S. 260 is to make it clear that the offence was one which could be tried in a summary way. (Vol 6) 1919 All 64 (64) : 21 Cri L Jour 28 \* ('06) 10 Cal W N cccxxiii (cccxxiv) \* (Vol 9) 1922 Pat 227 (228) : 25 Cri L Jour 545.

[8] Defect of jurisdiction by reason of the property exceeding Rs. 50 in value—Case held, warranted setting aside of conviction. (Vol 27) 1940 Pat 272 (274) : 41 Cri L Jour 283.

5. Clause (g) — Plea of accused and his examination (if any). — [1] The accused must be examined



*Record in appeal-  
able cases.*

264. (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing

**Section 263 — Note 5 (contd.)**

under S. 342 with a view to enable him to explain any circumstances appearing against him after the case for the prosecution has been closed and before the accused is called on to enter upon his defence. (Vol 25) 1938 Sind 70 (71) : 32 Sind L R 684 : 39 Cri L Jour 474 (DB) \* (Vol 23) 1936 Oudh 16 (17) : 11 Luck 461 : 36 Cri L Jour 1303 \* (Vol 13) 1926 Nag 300 (300, 301) : 23 Nag L R 65 : 27 Cri L Jour 632 \* (Vol 9) 1922 Pat 296 (297) : 23 Cri L Jour 440 \* (Vol 8) 1921 Pat 11 (12) : 6 Pat L Jour 174 : 22 Cri L Jour 427 (DB) \* (Vol 13) 1926 Sind 1 (2) : 20 Sind L R 31 : 26 Cri L Jour 1551 (FB) \* (Vol 1) 1914 Cal 663 (663) : 41 Cal 713 : 15 Cri L Jour 190 (DB) \* (Vol 9) 1922 Lah 45 (47) : 23 Cri L Jour 154.

[2] Court is bound to examine the accused under S. 342 whether the trial is of summons-cases or of warrant-cases. (Vol 27) 1940 Bom 314 (314, 315) : 42 Cri L Jour 71 (DB) \* (Vol 23) 1936 Oudh 16 (17) : 36 Cri L Jour 1303 : 11 Luck 461 \* (Vol 22) 1935 All 217 (218) : 36 Cri L Jour 1290 : 57 All 666 (DB) \* (Vol 22) 1935 Sind 193 (193) : 36 Cri L Jour 1484 (DB) (Warrant-case.) \* (Vol 21) 1934 Lah 96 (96) : 15 Lah 60 : 35 Cri L Jour 1391. (Summons-case.) \* (Vol 18) 1931 Lah 153 (154) : 32 Cri L Jour 708. (Do.) \* (30) 31 Cri L Jour 613 (614) (Cal). (Do.) \* (Vol 14) 1927 Pat 369 (370) : 6 Pat 504 : 28 Cri L Jour 1037 (DB). (Do.) \* (Vol 9) 1922 Pat 296 (297) : 23 Cri L Jour 440. (Do.) \* (Vol 1) 1914 Cal 663 (663) : 41 Cal 743 : 15 Cri L Jour 190 (DB). (Warrant-case.)

[But see (Vol 11) 1924 Mad 30 (31) : 46 Mad 766 : 24 Cri L Jour 847 (FB). (Summons-case.) \* (93 1900) 1893-1900 Low Bur Rul 638.]

[3] The words "if any" in the clause does not make it optional with the Court to apply the provisions of S. 342 to summary trials. (Vol 24) 1937 Nag 67 (67) : 1 L R (1937) Nag 228 : 38 Cri L Jour 351 \* (Vol 13) 1926 Nag 300 (300) : 22 Nag L R 65 : 27 Cri L Jour 632 \* (Vol 13) 1926 Sind 1 (2) : 20 Sind L R 34 : 26 Cri L Jour 1554 (FB) \* (Vol 22) 1935 All 217 (219) : 57 All 666 : 36 Cri L Jour 1290 (DB).

[4] The words "if any" cover cases where the accused pleads guilty or owing to the weakness of the prosecution evidence the accused can be acquitted without his being examined under S. 342. (Vol 24) 1937 Nag 67 (67) : 1 L R (1937) Nag 228 : 38 Cri L Jour 354 \* (Vol 13) 1926 Sind 1 (2) : 20 Sind L R 34 : 26 Cri L Jour 1554 (FB) \* (Vol 13) 1926 Nag 300 (300) : 22 Nag L R 65 : 27 Cri L Jour 632.

[See (Vol 27) 1940 Bom 314 (315) : 42 Cri L Jour 71 (DB).]

[5] Examination of the accused need not be recorded in the manner laid down in S. 364. (Vol 23) 1936 Oudh 16 (17) : 11 Luck 461 : 36 Cri L Jour 1303 \* (Vol 14) 1927 Pat 369 (370) : 6 Pat 504 : 28 Cri L Jour 1037 (DB) \* (Vol 22) 1935 Sind 193 (193) : 36 Cri L Jour 1484.

[6] Failure to record the particulars of the examination is only an irregularity covered by S. 537 and does not vitiate the trial where the accused has not been prejudiced. (Vol 22) 1935 All 217 (219) : 36 Cri L Jour 1290 : 57 All 666 (DB).

6. Clause (h)—Finding and, in case of conviction, brief statement of reasons therefor.—[1] Finding one of conviction — Record must contain a brief statement of the reasons for conviction. (Vol 27) 1940 All 195 (195) : 41 Cri L Jour 498 \* (Vol 26) 1939 Oudh 37 (38) : 40 Cri L Jour 141 : 14 Luck 325 \* (Vol 24) 1937 Mad 480 (480) : 38 Cri L Jour 581 \* (Vol 14) 1927 Nag 250 (251) : 28 Cri L Jour 495 \* (Vol 19) 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cri L Jour 342 \* (Vol 7) 1920

Pat 158 (158) : 21 Cri L Jour 676 (DB) \* (Vol 10) 1923 Pat 56 (56) : 24 Cri L Jour 91 \* (Vol 15) 1928 Mad 197 (197) : 51 Mad 338 : 29 Cri L Jour 207 \* (79) 1879 Pat Re No. 6 Cr. p. 11 (41, 12) (193) \* (93) 9 Cal W N lxxv (lxxv) \* (82) 8 Cal 195 (197, 198) (D13).

[2] The statement of reasons may be brief. (Vol 26) 1939 Oudh 37 (38) : 40 Cri L Jour 141 : 14 Luck 325 \* (Vol 7) 1920 All 79 (80) : 21 Cri L Jour 442 \* (99) 21 All 189 (192).

[3] The brevity of statement must not tend to obscurity. (Vol 26) 1939 Oudh 37 (38) : 40 Cri L Jour 141 : 14 Luck 325 \* (99) 21 All 189 (192).

[4] The statement must be sufficient to enable a Court of revision to judge whether the lower Court had sufficient material before it for convicting the accused. (Vol 11) 1921 Oudh 297 (299) : 24 Cri L Jour 916 \* (95) 2 Cri L Jour 375 (376) : 3 Low Bur Rul 3 \* (11) 12 Cri L Jour 280 (280) (Low Bur) \* (99) 10 Cri L Jour 216 (216) : 2 Sind L R 3 (DB) \* (Vol 2) 1915 Sind 53 (53) : 16 Cri L Jour 713 : 9 Sind L R 89 (DB) \* (12) 13 Cri L Jour 708 (709) (All) \* (Vol 16) 1929 Lah 378 (379) : 10 Lah 231 : 29 Cri L Jour 877 \* (Vol 10) 1923 Mad 185 (186) : 46 Mad 232 : 24 Cri L Jour 84 \* (Vol 5) 1918 Pat 481 (485) : 19 Cri L Jour 719 \* (81) 6 Cal 579 (580, 581) (DB) \* (94) 18 Bom 97 (98) (DB) \* (1900) 27 Cal 450 (451) (DB) \* (Vol 15) 1928 All 266 (267) : 29 Cri L Jour 265 \* (Vol 19) 1932 Oudh 98 (98) : 7 Luck 498 : 33 Cri L Jour 342 \* (Vol 21) 1934 Lah 596 (597) : 15 Lah 277 : 35 Cri L Jour 1461.

[See also (Vol 27) 1940 All 195 (195) : 41 Cr L J 498.]

[5] The reasons must refer briefly to the evidence in support of the conclusions of the Court. (96) 10 Cal W N cclxxix (cclxxix) \* (99) 21 All 189 (190) \* (Vol 17) 1930 Lah 481 (482) : 32 Cri Jour 50 \* (1900-02) 1 Low Bur Rul 45 (46) \* (Vol 22) 1935 Sind 144 (144) : 37 Cri L Jour 715 (DB).

[See (Vol 18) 1931 Bom 142 (143) : 32 Cri L Jour 276 (DB).]

[See also (Vol 29) 1942 Mad 669 (670) : 44 Cri L Jour 850.]

[6] Merely saying "I believe the prosecution" is not enough. (Vol 21) 1934 Lah 596 (598) : 15 Lah 277 : 35 Cri L Jour 1461.

[7] Reasons for conviction not properly recorded.—The Court of revision feeling doubt as to the guilt of the accused—*Held*, benefit of doubt must go to the accused. (Vol 18) 1931 Lah 33 (38) : 32 Cri L Jour 532.

[8] Omission to briefly record reasons for finding is a mere irregularity curable under S. 537 where there is clear evidence justifying the conviction. (Vol 12) 1925 Bom 138 (139) : 26 Cri L Jour 466 (DB).

[9] Reasons for conviction not recorded.—Matter going up before Court of revision—Lower Court cannot send any written statement of reasons for its decision for the consideration of the Court of revision. (95) 9 Cal W N lxxv (lxxv).

[10] No reasons need be recorded for an acquittal. (Vol 29) 1942 Sind 52 (52) : 43 Cri L Jour 473 : 1 L R (1941) Kar 545 (DB) \* (96) 3 Cri L Jour 433 (436) (Low Bur).

[11] No reasons need be recorded for a sentence. (Vol 27) 1940 Nag 264 (265) : 41 Cri L Jour 544.

**Section 264—Note 1**

[1] The judgment ought to embody the substance of the evidence adduced on both sides. (Vol. 11) 1924 Oudh 167 (167) : 24 Cri L Jour 484 \* (99) 9 Cri L Jour 23 (23) : 4 Low Bur Rul 338 \* (Vol 15) 1928 Bom 433 (433) : 29 Cri L Jour 1005 (DB) \* (Vol 21) 1934 Oudh 177 (178) : 35 Cri L Jour 677.

[2] The substance of every separate deposition need not be recorded but only the substance of the evidence.



ence, record judgment embodying the substance of the evidence and also the particulars tioned in section 263.

(2) Such judgment shall be the only record in cases coming within this section.  
[1882—S. 264; 1872—S. 228.]

**265. (1)** Records made under section 263 and judgments recorded under section 264 shall be *language of record* written by the presiding officer, either in English or in the language of the *judgment*. Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue.

(2) The <sup>a</sup>[Provincial Government] may authorize any Bench of Magistrates empowered to *bench may be authorized* try offences summarily to prepare the aforesaid record or judgment *employ clerk*.

by means of an officer appointed in this behalf by the Court to which Bench is immediately subordinate, and the record or judgment so prepared shall be signed each member of such Bench present taking part in the proceedings.

(3) If no such authorization be given, the record prepared by a member of the Bench and ed as aforesaid shall be the proper record.

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.  
[1882—S. 265; 1872—Ss. 229, 230.]

| Substituted by A. O. for "Local Government."

on 264—Note 1 (*contd.*)

whole need be given. (Vol 16) 1929 Oudh 151 (152); ri L Jour 557.

ut see ('09) 9 Cri L Jour 23 (23) : 4 Low Bur Rul ]

] It is not sufficient compliance with the law to that "the witnesses for the prosecution support the ment of the complainant" and "the statement of the sses examined by the accused is very conflicting". 11) 1924 Oudh 167 (167) : 24 Cri L Jour 484.

] A mere statement of the facts which the evidence rtain witnesses is considered to have proved is not dent. ('09) 9 Cri L Jour 23 (23) : 4 Low Bur Rul ]

] The substance must be stated plainly and must e left to be deduced by inference. (Vol 15) 1928 433 (433) : 29 Cri L Jour 1005 (DB).

] The substance of the evidence should be so recor- s to enable the appellate Court to judge if there are ient materials for the decision. ('09) 9 Cri L Jour 33) : 4 Low Bur Rul 338 \* (Vol 16) 1929 Oudh 151 : 30 Cri L Jour 557.

ut see (Vol 18) 1931 Mad 233 (233) : 32 Cri L 689].

] The failure to set forth the substance of the e- is fatal to the case. (Vol 15) 1928 Bom 433 (433) Cri L Jour 1005 (DB). (It prejudices accused as it nts proper disposal of appeal.) \* ('74) 1874 Pun Re : Or, p. 2 (3) (DB) \* ('82) 1882 All W N 178 (179). ut see ('78) 1 All 680 (682) (DB).]

] The Magistrate need not record the substance of vidence in the case of acquittal. (Vol 29) 1942 Sind 32) : 43 Cri L Jour 473 : I L R (1941) Kar 545

] This sub-section dispenses with the recording of vidence of witnesses in cases coming under this n. (Vol 14) 1927 All 124 (124, 125) : 49 All 261 : ri L Jour 97 (DB) \* (Vol 14) 1927 Bom 426 (428) : ri L Jour 537 \* ('05) 2 Cri L Jour 375 (376) : 3 Bur Rul 3 \* (Vol 12) 1925 Sind 284 (284) : 19 L R 136 : 26 Cri L Jour 1026 (DB) \* (Vol 18) Mad 233 (233) : 32 Cri L Jour 689 (DB) \* (Vol 21) Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841 (DB). ut see (Vol 8) 1921 Cal 165 (165) : 48 Cal 280 : 22 Jour 462 (DB).]

0]. The effect of the provision in sub-section (2) is the framing of a formal charge is not necessary in

respect of cases under this section. (Vol 13) 1926 Lah. 301 (301, 302) : 7 Lah 303 : 27 Cri L Jour 639 \* (Vol 12) 1925 Oudh 722 (722) : 26 Cri L Jour 1334.

[But see (Vol 11) 1924 Cal 63 (64) : 25 Cri L Jour 1270 (DB).]

[11] Evidence of witnesses recorded or rough notes of vidence taken by Court cannot form part of the record in view of the express provision of sub-s. (2). (Vol 23) 1936 Sind 40 (40) : 37 Cri L Jour 455 (DB) \* (Vol 12) 1925 Sind 284 (284) : 19 Sind L R 136 : 26 Cri L Jour 1026 (DB) \* (Vol 31) 1944 Mad 168 (169) : 45 Cri L Jour 524.

[12] The appellate Court cannot travel beyond the judgment to any other material in order to test the substance of the evidence forming part of the judgment. (Vol 15) 1928 Mad 597 (597, 598) : 29 Cri L Jour 625.

[13] The appellate Court is not prohibited from looking at the complaint as it is not excluded from the record of the case. (Vol 31) 1944 Mad 168 (169) : 45 Cri L Jour 524.

#### Section 265 — Note 1

[1] The preparation of record is the duty of the Magistrate himself and he cannot depute a clerk to do it. ('83) 6 Mad 396 (399) (DB).

[2] A record or judgment prepared by the Chairman of the Bench in the absence of the other Magistrates is not valid in law, even though the others may have concurred in the decision. (Vol 15) 1928 Mad 1172 (1173) : 52 Mad 237 : 29 Cri L Jour 978.

[3] Where one of the three members of a Bench trying a case summarily merely initials the judgment, he cannot be held to have "signed" the judgment as required by the section. (Vol 17) 1930 Mad 867 (868) : 54 Mad 252 : 32 Cri L Jour 430.

[4] The signature should be made with a pen and not with a stamp. ('83) 6 Mad 396 (398) (DB.)

[5] The fact that the record or judgment has been written and signed by the Chairman of a Bench does not dispense with the signatures of the other members of the Bench. (Vol 17) 1930 Mad 187 (187, 188) : 53 Mad 165 : 31 Cri L Jour 715 (DB).

[6] A copy of the judgment wherein is given the signature of only the Chairman of the Bench, is incorrect and defective. (Vol 17) 1930 Mad 867 (868) : 54 Mad 252 : 32 Cri L Jour 430.

## CHAPTER XXIII.

## OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

## A.—Preliminary.

266. In this Chapter, except in sections 276 and 307, and in Chapter XVIII, the expression “High Court” “High Court” <sup>a</sup>[means a High Court within the meaning<sup>b</sup> of the Government defined.]

India Act, 1935, and includes such other Courts as the Provincial Governor may by notification in the Official Gazette], declare to be High Courts for the purposes of Chapter [and of chapter XVIII].

[1882—S. 266.]

[a] Substituted by A. O. for “means a High Court of Judicature, established under the Indian High Courts 1861, or the Government of India Act, 1915, and includes the Chief Court of Oudh, the Court of Judicature of the Commissioner of Sind, and such other Courts as the Governor-General in Council may by notification in the Gazette of India.” [b] See the Government of India Act, 1935, S. 219. [c] Inserted by the Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 76.

*Trials before High Court to be by jury.* 267. All trials under this Chapter before a High Court shall be by jury.

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, <sup>a</sup>[for the Government of India Act, 1915,] <sup>b</sup>[for the Government of India, 1935], the trial may, if the High Court so directs, be by jury.

[1882—S. 267.]

[a] Inserted by the Amending Act, 1916 (13 [XIII] of 1916), S. 2 and Schedule. [b] Inserted by A. O.

*Trials before Court of Session to be by jury, or with assessors.* 268. All trials before a Court of Session shall be either by jury or with the aid of assessors.

[1882—S. 268; 1872—S. 232; 1861—S. 324.]

## Provincial Amendment.

## PUNJAB.

For the purpose of trials under the Punjab Public Safety Ordinance, 1946 (No. XIV of 1946), S. 268 deemed to have been omitted; see S. 34 (2) of that Ordinance. [19-11-1946.]

## Section 266 — Note 1

[1] A High Court exercising original criminal jurisdiction is not a Sessions Court within the meaning of the Code. (Vol 19) 1932 Cal 867 (868) : 59 Cal 1248 : 34 Cri L Jour 107.

[2] In the trial of sessions cases, the Judicial Commissioner's Court of Sind is deemed to be a High Court to the extent prescribed in this section. (Vol 26) 1939 Sind 209 (218) : 41 Cri L Jour 28 : I L R (1940) Kar 249 (DB) \* (Vol 12) 1925 Sind 249 (249) : 19 Sind L R 309 : 26 Cri L Jour 562 (FB).

[3] When a Judicial Commissioner in a sessions trial disagrees with the verdict of the jury, the procedure to be adopted is that of a High Court as provided in S. 305 of this chapter and the Judge has no power of reference under S. 307. (Vol 15) 1928 Sind 149 (152, 157, 161) : 22 Sind L R 349 : 29 Cri L Jour 945 (FB). \* (Vol 12) 1925 Sind 34 (35) : 25 Cri L Jour 428.

[4] The Court of a Judicial Commissioner, as for example, of Sind, is a High Court only for the purposes of Chap. xxiii (and of Chap. xviii) and remains a Sessions Court for other purposes notwithstanding S. 266 and an appeal lies under S. 418 of the Code from the decision of a Judge of that Court in a Sessions trial. (Vol 26) 1939 Sind 209 (211) : I L R (1940) Kar 249 : 41 Cri L Jour 28 (DB) \* (Vol 12) 1925 Sind 249 (250 to 252) : 19 Sind L R 309 : 26 Cri L Jour 562 (FB).

[5] Trial by Judge of Sind Chief Court exercising Sessions jurisdiction — Appeal and revision lie to Chief Court. (Vol 31) 1944 Sind 65 (66) : 45 Cri L Jour 505 : I L R (1944) Kar 239 (DB).

## Section 267 — Note 1

[1] No man here has an inalienable right to be tried by jury as in England. ('69) 11 Suth W R Cr 29 (29, 30) (FB). (Trial by jury is a mode of trial prescribed by the Legislature in certain cases.)

[2] Trial by jury is only a creation of statute. (19 Bom 749 (762) (DB)).

[3] Any repugnancy in the verdict is not in itself sufficient to justify the quashing of a conviction based on such verdict. (Vol 1) 1914 Cal 886 (887) : 41 754 : 15 Cri L Jour 402 (DB).

## Section 268 — Note 1

[1] In the absence of a notification under S. 268, trials before Sessions Courts must be with the aid of assessors. (Vol 23) 1936 Cal 527 (528) : 38 Cri L J 212 : I L R (1937) 1 Cal 306 (DB) \* ('96) 1896 I Re No. 11 Cr, p. 29 (32) (SB).

[2] This section as applicable to the cantonment Secunderabad has been modified by Notification 260-1, dated 24th April 1929, in exercise of power conferred by the Indian (Foreign Jurisdiction) Order Council and gives a Sessions Judge the discretion of dispensing with jury or assessors — An additional Sessions Judge can also exercise such discretion. (Vol 1937 P C 119 (120) : 38 Cri L Jour 498 : 64 App 148 : I L R (1937) Bom 711 (P C).

[3] Sessions Judge can commence a trial only after choosing the requisite number of assessors and continue it and give a finding or sentence only if one out of them at least was present throughout the trial. Finding and sentence in contravention of these requisites will not be valid. (Vol 21) 106 (107) (FB) \* ('94) 1894 All W N 207 (207) (I) \* ('02) 6 Cal W N 715 (716) (DB) \* ('12) 13 Cri Jour 473 (473, 474) (Mad) \* ('91) 15 Bom 514 (514) (DB) \* (Vol 11) 1924 Nag 187 (187) : 20 Nag L R 125 (125) (DB) \* (Defect not curable under S. 537, ('10) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337. (I) \* ('01) 24 Mad 523 (535) (SB.) (Do.) \* ('01) 25 B 694 (696) (DB). (Do.)

[4] It is less advantageous to an accused to be tried by jury than by a Judge.

269. (1) The <sup>a</sup>[Provincial Government] may, b[\* \* \* \*] by order in the Official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, c[\* \* \*] revoke or alter such order.

(2) The <sup>a</sup>[Provincial Government], by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

[1882—S. 269; 1872—S. 233; 1861—S. 322.]

[a] Substituted by A. O. for "Local Government." [b] The words "with the previous sanction of the Governor-General in Council" were repealed by the Devolution Act, 1920 (38 [XXXVIII] of 1920), S. 2 and Sch. I. [c] The words "with the like sanction" were repealed by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 3 and Sch. II.

#### Section 268—Note 1 (contd.)

Bom 313 (318) : 55 Bom 576 : 32 Cri L Jour 1147 (SB).

[5] In cases tried by jury, the jury is the first tribunal for deciding facts aided by the Judge. (Vol 33) 1946 P C 151 (153) : 47 Cri L Jour 905 (P C).

[6] The jury are invested with a special status and given special powers and the ultimate responsibility for all decisions within their sphere is meant to be theirs alone. (Vol 27) 1940 Nag 17 (19) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB). (Per Niyogi and Bose JJ. in Order of Reference).

[7] The assessors are only to assist the Judge and take no part in the judgment. The Judge is the sole Judge of law and fact and the responsibility for the decision rests only with him. (Vol 27) 1940 Nag 17 (19) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB) \* (Vol 33) 1946 P C 151 (153) : 47 Cri L Jour 905 (P C).

[8] An assessor does not form an essential part of the Sessions Court. (Vol 26) 1939 Lah 475 (477) : I L R (1939) Lah 243 : 41 Cri L Jour 55 \* ('01) 24 Mad 523 (538) (SB).

[9] In the absence of a specific prohibition, an objection that could not be upheld regarding a juror would be ruled out in the case of an assessor. (Vol 26) 1939 Lah 475 (476, 477) : I L R (1939) Lah 243 : 41 Cri L Jour 55 (DB).

[10] In trials by jury, the Judge is bound to sum up the whole case to the jury and record their verdict (S. 297), while in trials with the aid of assessors, the Judge may sum up the case and should record their opinion (S. 309). ('71) 7 Beng L R 63 (67, 68) (DB).

[11] Court has no jurisdiction to record material evidence after the discharge of the assessors. ('93) 15 All 136 (136, 137) (DB).

[12] The assessors form part of the Court. (Vol 8) 1921 All 284 (285) : 43 All 125 : 22 Cri L Jour 127 (DB) \* ('93) 15 All 136 (136, 137) (DB) \* ('6) 3 Cri L Jour 42 (43) (DB) (Cal).

#### SECTION 269—SYNOPSIS.

1. Scope.
2. "Trial of . . . shall be by jury in any district."
3. Trial for substantive offence read with section 149 of the Penal Code.
4. "Or of any particular class of offences."
5. Charge for offences, some triable by jury and others with assessors—Sub-section (3).
6. "Same trial."
7. Judgment in cases tried under sub-section (3).
8. "With the aid of the jurors as assessors."

1. Scope.—[1] The section does not offend against S. 22 of Indian Councils Act, 1861, and is *intra vires* of the Indian Legislature. ('01) 11 Cri L Jour 453 (456) : 37 Cal 467 (DB).

[2] Section does not empower the Government to direct that all classes of offences not punishable with death shall be tried by jury before Sessions Court and not by Magistrates invested with power under S. 30. (Vol 25) 1938 Nag 56 (58) : I L R (1938) Nag 248 : 39 Cri L Jour 660.

[3] The notifications, as issued at present by the Bengal Government under S. 269 (1), give rise to an anomaly in as much as, whereas, certain offences are made triable by jury, a mere conspiracy to commit any of them is not made so triable. (Vol 26) 1939 Cal 335 (336, 337) : I L R (1939) 1 Cal 511 : 40 Cr L J 667 (DB).

2. "Trial of . . . shall be by jury in any district."—[1] District in a division to which a direction under this section has been made ceasing to be a part of the division—Right to trial by jury in the district also ceases. ('67) 8 Suth W R Cr 39 (39) (DB).

[2] There is no prohibition against the trial being otherwise than by jury in a district not affected by a notification, under this section. (Vol 4) 1917 Sind 42 (43) : 18 Cri L Jour 51 : 10 Sind L R 154.

[3] A trial in a Court of Session must, in the absence of a notification under this section, be with the aid of assessors. (Vol 23) 1936 Cal 527 (528) : 38 Cri L Jour 212 : I L R (1937) 1 Cal 306 (DB) \* (Vol 6) 1919 Oudh 193 (194) : 22 Oudh Cas 130 : 20 Cri L Jour 691 (DB).

[4] Major offence charged for and tried with assessors—Assessors holding accused not guilty in respect of it but guilty in respect of a minor offence triable by jury and not charged—Conviction can be given on that opinion. (Vol 8) 1921 Bom 59 (59, 60, 61) : 45 Bom 619 : 22 Cri L Jour 51 (DB).

[5] Charge for offence triable by jury—Jury can find accused guilty of minor offence triable by assessors though there is no charge. (Vol 13) 1926 Bom 134 (135) : 27 Cri L Jour 650 (DB).

[6] Offence not triable by jury tried by them—Trial is still one by jury and appeal will lie only on a point of law. ('31) 1931 Mad W N 129 (129, 130) \* ('03) 26 Mad 243n (247n, 248n) (DB). (Per Bhashyam Iyengar, J.) \* ('79) 4 Cal L Rep 405 (409, 410) (DB). (Judge cannot treat verdict of jury as opinion of assessors.) \* ('98) 25 Cal 555 (557) (DB). (Do.)

[7] The trial of an offence which would in the ordinary course be by jury in a particular district, may be transferred to another district where it would be held with the aid of assessors only. (Vol 22) 1935 Sind 145 (180) : 28 Sind L R 397 : 36 Cri L Jour 1161.

*Trial before Court of Session to be conducted by Public Prosecutor.* 270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.  
[1882—S. 270; 1872—S. 235; 1861—S. 360.]

### B.—Commencement of Proceedings.

*Commencement of trial.* 271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court

#### Section 259 (contd.)

3. Trial for substantive offence read with section 149 of the Penal Code.—[1] A person charged with an offence triable by jury and an offence under S. 149, should be tried by the Judge with the aid of assessors. (Vol 20) 1923 All 128 (129); 34 Cri L Jour 441; 55 All 68.

[See however (Vol 13) 1926 Pat 253 (254); 5 Pat 238; 27 Cri L Jour 512 (DB).]

4. "Or of any particular class of offences."—[1] A notification withdrawing an order for trial by jury previously notified in respect of certain offenders whose case is pending before a Court is not incompetent. (1900) 23 Mad 632 (635); 2 Weir 331 (DB).

5. Charge for offences, some triable by jury and others with assessors—Sub-section (3).—[1] Under this sub-section, the jury should themselves act as assessors in respect of the offences triable with the aid of assessors. (Vol 15) 1928 Mad 275 (276); 29 Cri L Jour 351 \* (Vol 24) 1937 Pat 662 (664); 39 Cri L Jour 156 (DB). (This system is faulty as leading to unsatisfactory and anomalous results.)

[2] A joint trial for different offences, some of which are and others are not triable by jury, is not illegal. (Vol 2) 1915 Mad 1036 (1037); 16 Cri L Jour 717 (DB).

[3] The procedure at the trial for offences triable by jury and those with assessors is the same up to the point of summing up. ('09) 10 Cri L Jour 30 (31); 33 Bom 423 (DB).

[4] Where the charge to the jury is combined with the summing up to the jurors as assessors, the Judge should clearly explain to the jurors the double capacity of jurors and assessors in which they are acting. ('02) 2 Weir 334 (334) (DB).

[5] The Judge should not take the verdict of the jury as jurors in respect of the offences triable by jurors as assessors. ('08) 7 Cri L Jour 236 (238) (Bom).

[6] If the accused does not intervene when the verdict of the jury or the opinion of assessors is taken and gets the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain subsequently. ('09) 10 Cr L J 30(31); 33 Bom 423 (DB).

[7] Verdict given by jury in respect of the offences triable by jury and an opinion as assessors in respect of other offences—Procedure laid down in Ss. 306 and 307 in respect of the verdict and procedure laid down in S. 309 in respect of the opinion should be followed. (Vol 23) 1936 Cal 527 (529); 38 Cri L Jour 212; 1 L R (1937) 1 Cal 306 (DB) \* (Vol 19) 1932 Bom 61 (62); 33 Cri L Jour 172 (DB) \* (Vol 22) 1935 Bom 165 (166); 37 Cri L Jour 26 (DB) \* (Vol 21) 1934 All 61 (67); 35 Cri L Jour 1349 (DB).

[8] Jury giving verdict of not guilty in respect of offence triable by jury and expressing similar opinion as assessors in respect of other offences—Judge disagreeing with the opinion of assessors convicting the accused and making reference to High Court in respect of the verdict adopts the correct procedure. (Vol 19) 1932 Bom 61 (62); 33 Cri L Jour 172 (DB).

[9] Conviction in respect of offences triable by jury set aside—Conviction in respect of other offences tried by them as assessors need not be set aside. (Vol 23) 1936 Oudh 164 (165, 166); 37 Cri L Jour 182; 11 Luck 687.

[10] Non-observance of procedure laid down in sub-section (3) in a case to which it is applicable does not invalidate the trial or make it one other than a trial by jury. ('99) 23 Bom 626 (627) (DB) \* (01) 25 Bom 680 (688, 689) (FB).

[11] All offences triable by jury—Judge adopting the procedure in sub-section (3) thinking that some of them are triable by assessors without objection being taken—Trial is legal by reason of S. 536 (2). (Vol 21) 1937 Nag 50 (51); 38 Cri L Jour 330 (DB).

[12] The sub-section does not apply to a case where the accused is only charged with an offence triable by a jury but subsequently it is found on the evidence that he has committed a different offence which is triable with the aid of assessors. (Vol 13) 1926 Bom 131 (135); 27 Cri L Jour 650 (DB).

[13] Where one of the accused is charged with murder, an offence triable by jury, and the other is charged with conspiracy to murder, an offence triable with the aid of assessors, the section does not apply and a joint trial of the two accused is bad. (Vol 25) 1938 Cal 364 (365); 39 Cri L Jour 625 (DB).

[14] The sub-section does not apply merely because an offence triable by a jury is included in an offence triable with the aid of assessors or *vice versa*, where only one of the offences is actually charged. (Vol 6) 1919 Oudh 193 (194); 22 Oudh Cas 130; 20 Cri L Jour 691 (DB).

6. "Same trial."—[1] The words "same trial" in subs. (3) must be read in a distributive sense and cannot be read as taking away the right of appeal. (Vol 5) 1918 Mad 821 (823, 824); 18 Cri L Jour 346 (DB).

7. Judgment in cases tried under sub-section (3).—[1] Procedure laid down in the sub-section followed—Judge stating both cases to the jury summed up covering both charges—Failure to write separate judgment held did not vitiate the trial. (Vol 17) 1930 Oudh 57 (57, 58); 4 Luck 721; 31 Cri L Jour 599 (DB) \* (Vol 15) 1928 Mad 275 (275); 29 Cri L J 351.

8. "With the aid of the jurors as assessors."—[1] Charge of distinct offences some triable by jurors and some by assessors—A trial for latter offences with some of the jurors alone as assessors would be illegal. ('03) 26 Mad 598 (599) (DB) \* ('11) 12 Cri L Jour 239 (240) (DB) (Mad) \* (Vol 14) 1927 Pat 13 (16); 6 Pat 208; 27 Cri L Jour 1100 (DB).

#### Section 270—Note 1

[1] Public Prosecutor appointed under S. 492 represents Crown in all trials before Court of Session. ('93) 16 All 84 (86) (FB).

[2] Private prosecutor has no position in litigation. (Vol 11) 1924 Pat 283 (284); 2 Pat 708; 25 Cri L Jour 446 (DB).

[3] Section is directory and not mandatory, and due to his non-appointment absence of Public Prosecutor at the beginning of trial is only irregularity curable by S. 537 of the Code. ('87) 1887 Pun Re No. 35 Cr, p. 77 (78 79) (DB).

#### SECTION 271 — SYNOPSIS.

1. Scope.
2. "Commencement of proceedings."
3. "And the charge shall be read out in Court and explained to him."

and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

*Plea of guilty.* (2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

[1882—S. 271; 1872—S. 237; 1861—S. 362.]

#### SECTION 271 — SYNOPSIS (*contd.*)

4. "He shall be asked whether he is guilty."
5. Alternative charges.
6. "If the accused pleads guilty."
7. "Claims to be tried."
8. Plea must be by the accused himself.
9. Record of the plea.
10. Plea of guilty — When may be accepted.
11. "Thereon" in sub-section (2).
12. Procedure where plea of guilty is not accepted.
13. Plea of guilty by a co-accused.
14. Appeal.

1. Scope. — [1] Under this section, accused can plead guilty or claim to be tried or he can refuse to plead which is taken to be same as claiming to be tried. (Vol 1) 1914 Cal 901 (904) : 41 Cal 1272 : 15 Cri L Jour 460.

2. "Commencement of proceedings." — [1] Offence punishable with death or transportation for life — Trial only commences when case is proceeded with in Sessions Court. (Vol 25) 1938 Sind 9 (11) : 39 Cri L Jour 294 : 32 Sind L R 129 (DB).

3. "And the charge shall be read out in Court and explained to him." — [1] When record is prepared for appeal, it should be seen whether there is on record charge which has been read and explained to accused and if it is absent reason therefor should be ascertained. (Vol 7) 1920 All 72 (72, 73) : 21 Cri L Jour 410 \* ('88) 1888 Rat 386 (386) (DB).

[See also (Vol 22) 1935 Oudh 241 (243) : 36 Cri L Jour 477.]

[2] Mere reading out of charge is not enough; it should be explained to accused. ('01) 3 Bom L R 489 (496) (DB) \* ('86) 9 Mad 61 (63) (DB) \* ('30) 5 Cal 826 (827) (DB) \* ('06) 4 Cri L Jour 346 (351, 352) : 30 Bom 611 (DB) \* (Vol 4) 1917 Oudh 362 (366, 367) : 18 Cri L Jour 742 : 20 Oudh Cas 136 (DB) \* (Vol 10) 1923 All 285 (286) : 25 Cri L Jour 592 \* (Vol 6) 1919 Upp Bur 23 (23) : 5 Upp Bur Rul 137 : 20 Cri L Jour 540 \* ('86) 2 Weir 389 (389) (DB).

[3] Deaf and dumb person convicted of offence without communicating with him charge against him — Conviction set aside. ('70) 6 Mad H C R App vii (vii).

[4] Accused defended by counsel and charge read out — Counsel does not object — Omission to explain is only irregularity if it has not caused prejudice to accused, and is cured by S. 537. ('84) 8 Bom 200 (212) (DB) \* ('86) 1886 Rat 229 (236) (DB).

[5] Before reading out charge Judge should scrutinize it for amendment before accused is called on to plead thereto. (Vol 32) 1945 Lah 1 (3) : 46 Cri L Jour 648 (DB) \* (Vol 32) 1945 Lah 286 (290) : 47 Cri L Jour 269 (FB) \* (Vol 5) 1918 Mad 321 (322) : 18 Cri L Jour 346 (DB).

[6] Two sets of accused persons committed by two different Magistrates to same Court of Session on identical charges in respect of same offences — Judge can reframe charge and charge all accused together to stand their trial jointly. (Vol 32) 1945 Lah 286 (289) : 47 Cri L Jour 269 (FB).

4. "He shall be asked whether he is guilty." — [1] Conviction cannot be supported where accused has not been asked whether he is guilty or claims to be tried. ('05) 9 Cal W N lxxvi (lxxvi) (DB).

[2] Accused person should not be encouraged to plead in hope of receiving lenient punishment. (Vol 3) 1916 Upp Bur 1 (1) : 17 Cri L Jour 402 : 2 Upp Bur Rul 113.

[3] If, before commencement of proceedings, Judge considers that there is no evidence to warrant commitment, he should refer case to High Court for quashing commitment under S. 215. ('01) 5 Cal W N 411 (413) (DB).

[4] Objection as to jurisdiction of Court to try case should be taken before plea is taken and jury sworn. ('71) 1 Beng L R O Cr. 15 (31) (DB) \* ('68) 1 Beng L R O Cr. 1 (7) (SB) \* (1862-63) 1 Mad H C R 31 (36) (DB).

5. Alternative charges. — [1] Accused should never be called on to plead in alternative but only separately as to each of heads of charge. ('87) 1887 Rat 327 (327).

6. "If the accused pleads guilty." — [1] To see whether accused has pleaded guilty or not, whole and not part of his statement should be considered. (Vol 5) 1918 All 353 (354) : 40 All 119 : 19 Cri L Jour 174 \* ('94) 21 Cal 955 (976) (DB) \* ('85) 11 Cal 410 (412) (DB) \* ('86) 9 Mad 61 (63) (DB) \* ('11) 12 Cri L Jour 142 (142) (DB) (Mad) \* ('32) 33 Cri L Jour 570 (571) (Lah).

[2] Accused person cannot be judged in criminal case by how he pleads or fails to plead in proceeding. (Vol 11) 1924 All 299 (300) : 46 All 64 : 25 Cri L Jour 327 \* ('11) 12 Cri L Jour 585 (587) : 36 Mad 457 (SB).

[3] Judge should see whether or not man understood what charge was in order to ascertain what he meant by his plea of guilty. ('98) 1898 All W N 16 (16) (DB).

[4] Accused instead of pleading guilty in words of section makes rambling statement more or less admitting guilt — Judge should record plea of not guilty and proceed to try case in ordinary way. ('08) 7 Cri L Jour 295 (296) (DB) (All).

[5] Informal admission as to guilt does not amount to formal plea of guilty and such admission has not same binding effect as plea of guilty. (Vol 23) 1936 Cal 292 (293) : 37 Cri L Jour 818 (DB).

[6] Plea of guilty must admit each and every fact necessary to constitute offence. ('84) 2 Weir 336 (336) \* ('06) 3 Cri L Jour 337 (338) (DB) (Bom) \* ('78) 25 Suth W R Cr 23 (23) (DB) \* ('70) 2 N W P H C F 479 (480) \* ('90) 14 Bom 564 (566) (DB).

[7] Accused cannot be said to have pleaded guilty from following statements —

(a) That he committed offence under grave and sudden provocation. ('85) 11 Cal 410 (412) (DB) \* ('91) 1891 Rat 532 (532, 533) (DB) \* ('67) 8 Suth W R C 38 (38, 39) (DB) \* ('99-01) 1 Upp Bur Rul 76 (76).

(b) That he was put to instant fear of death by co accused. ('86) 9 Mad 61 (63) (DB).

(c) That he acted while under epileptic fits. ('94) 1894 Rat 698 (698) (DB).

(d) That he acted in struggle arising from fact deceased having first attacked him. ('80) 5 Cal 82 (823) (DB).

(e) That he presented false petition unthinkingly without intention to injure. ('81) 7 Cal 96 (97) (DB).

(f) That he caused death but was not punishable for act committed outside British India. ('83) 1883 P R No. 22 Cr, p. 49 (50) (DB).

**Section 271 — Note 6 (contd.)**

[8] After accused has claimed to be tried, confessional statement made by him at the end of trial is not plea of guilt on which Judge can convict him without taking verdict of jury. ('66) 2 Weir 331 (335) \* ('95) 2 Cri L Jour 609 (610) (DB) (Bom).

[9] Use of expressions like "Your honour will please pardon the fault; in future, no such thing will happen" is not an incriminating statement. ('12) 13 Cri L Jour 62 (63) (DB) (Cal).

[10] Plea in statement which if accepted by Court amounts to waiver on part of accused, of trial in which confession might be utilised in evidence. (Vol 21) 1934 Pat 330 (334) : 35 Cri L Jour 1322 (DB).

7. "Claims to be tried."—[1] Plea of not guilty amounts to claim to be tried. (Vol 1) 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460 \* (Vol 18) 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cri L Jour 667 (DB).

[2] Accused claims to be tried or makes plea amounting to such plea — Court should regularly try accused and cannot convict him on confession before committing Magistrate. ('86) 1886 All W N 22 (23).

[3] Accused claims to be tried or makes plea amounting to such plea—There should be formal trial by jury or with aid of assessors. ('73) 5 N W P H C R 110 (112) \* ('05) 2 Cri L Jour 609 (610) (DB) (Bom) \* ('07) 6 Cri L Jour 424 (425) (DB) (Bom).

[4] Accused, claiming to be tried, pleads that his act comes under general exceptions in Penal Code — He must plead them specifically. (Vol 2) 1915 Cal 773 (778) : 16 Cri L Jour 561 (Fb) \* (Vol 9) 1922 Lah 1 (20) : 3 Lah 144 : 23 Cri L Jour 513 (DB) \* ('04) 1 Cri L Jour 427 (427, 428) (All) \* ('10) 11 Cri L Jour 374 (375, 377) : 32 All 451 (DB) \* ('86) 1886 Rat 229 (230, 231) (DB).

[5] Court can consider whether evidence proves satisfactorily that accused comes within exception. (Vol 16) 1923 All 327 (328) : 45 All 329 : 24 Cri L Jour 225 (DB) \* ('11) 12 Cri L Jour 18 (18) (DB) (Mad) \* ('12) 13 Cri L Jour 905 (911) (DB) (Cal).

[6] Right of private defence not pleaded. Court finding on evidence that accused acted in his right of private defence, must take cognizance of same. (Vol 23) 1936 Rang 1 (2) : 37 Cri L Jour 293 \* (Vol 11) 1924 All 645 (651) : 26 Cri L Jour 501 \* (Vol 11) 1924 All 694 (694) : 25 Cri L Jour 472 \* ('82) 11 Cal L R 232 (233, 234) (DB) \* ('97) 1 Cal W N 545 (547) (DB).

8. Plea must be by the accused himself.—[1] Accused should plead by his own mouth and not by his pleader. ('04) 1 Cri L Jour 939 (939) (DB) (Bom) \* (1900) 2 Bom L R 751 (752) (DB). (Plea of guilty by pleader appointed by Court to defend accused on charge of murder is not binding on accused.)

[2] Accused should not plead by his pleader unless such pleader has been permitted by Court to appear in place of accused. (Vol 13) 1926 Bom 218 (222) : 50 Bom 250 : 27 Cri L Jour 440 (DB).

[3] Admission from counsel should not be taken for defence. (Vol 7) 1920 All 99 (101) : 21 Cri L Jour 777 (DB) \* ('72) 17 Suth W R Cr. 49 (49) (DB) \* ('90) 1890 Pun Re No. 2 Cr. p. 3 (5) (DB).

9. Record of the plea.—[1] Conviction on plea of guilty is discretionary. ('07) 6 Cri L Jour 434 (436) (DB) (Cal) \* ('08) 8 Cri L Jour 380 (381) : 30 All 540 (DB) \* ('10) 11 Cri L Jour 193 (193) (DB) (Mad) \* (1900) 23 Mad 151 (154) (DB) \* (Vol 18) 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cri L Jour 667 (DB) \* (Vol 13) 1926 All 318 (320) : 27 Cri L Jour 449 \* (Vol 4) 1917 Bom 220 (221) : 18 Cri L Jour 699 (DB).

[2] Court is not bound to decide whether statement accompanying plea of guilty is true or false. ('91) 1891 Rat 532 (532) (DB).

[3] Whole of statement made by prisoner should be

recorded in very words used by him. ('80) 5 Cal 826 (829) (DB). (Plea made in language unknown to Court or witnesses. Interpreter used — Recording should be made in the language of the interpreter.)

[4] Plea of guilty should be taken down in form of question and answer and in exact words used by accused. ('63) 5 Bom L R 993 (1000) (DB).

[5] Shortland note of proceedings of Sessions Courts should be maintained to form true and accurate record of what happens in Court. (Vol 11) 1924 Cal 257 (288) : 25 Cri L Jour 847 (Fb).

**10. Plea of guilty — When may be accepted.—**

[1] Plea of guilty may be accepted by Court and accused may be convicted thereon without matter going before a jury or jury. ('68) 10 Suth W R Cr. 43 (43) (Fb) \* (Vol 21) 1934 Pat 330 (334) : 35 Cri L Jour 1322 (DB).

[2] Court must consider whether accused has fully understood nature of charge to which he pleads guilty. (Vol 22) 1935 Rang 49 (51) : 12 Rang 616 : 36 Cri L Jour 336 (DB).

[3] Where by accepting plea of guilty there would be sentence of death, the plea of guilty should not be accepted. (1900) 23 Mad 151 (154) (DB) \* (Vol 15) 1928 Cal 775 (776) : 30 Cri L Jour 508 (DB) \* (Vol 4) 1917 Bom 220 (221) : 18 Cri L Jour 699 (DB) \* ('06) 3 Cri L Jour 337 (338) (DB) \* ('06) 3 Cri L Jour 80 (81) : 1905 Pun Re No. 54 Cr. (DB) \* (Vol 21) 1934 Sind 204 (205) : 28 Sind L R 327 : 36 Cri L Jour 324 (DB).

[4] In murder case unless Court is satisfied that accused knew the meaning of plea of guilty, the plea should not be accepted but case should be tried especially where accused is ignorant person. (15) 16 Cri L Jour 357 (357) (DB) (Nag) \* (Vol 9) 1922 All 266 (267) : 24 Cri L Jour 609 (DB) \* ('97-1901) 1 Upp Bur Rul 78 (79) \* ('05) 2 Cal L Jour 189 (189) (DB) \* (Vol 12) 1925 All 647 (647, 648) : 26 Cri L Jour 1316 (DB) (Vol 12) 1925 Sind 188 (189) : 17 Sind L R 268 : 26 Cri L Jour 177 (DB) \* ('06) 3 Cri L Jour 317 (318) (Kathiawar) \* ('06) 3 Cri L Jour 337 (338) (DB) (Bom).

[5] Accused person does not plead to a section of criminal statute but to fact, alleged that disclose offence under that section. (Vol 2) 1915 Cal 153 (153) : 15 Cri L Jour 703 (DB) \* (Vol 13) 1926 Lah 406 (406) : 7 Lah 359 : 27 Cri L Jour 907 (DB) \* (Vol 19) 1932 Lah 363 (364) : 33 Cri L Jour 646 \* (Vol 6) 1919 Bom 160 (160) : 43 Bom 842 : 20 Cri L Jour 681 (DB) \* (Vol 17) 1930 Bom 176 (176) : 31 Cri L Jour 926 (DB).

[6] Plea of guilty cannot be accepted when offence has not been committed in eye of law. (Vol 15) 1928 Lah 827 (828) : 29 Cri L Jour 615 \* ('08) 8 Cri L Jour 421 (421) (Mad).

[7] Plea of guilty cannot be accepted when offence was not correctly stated to accused. ('93-1900) 1893-1900 Low Bur Rul 328 (328).

[8] Circumstances of each case should be examined to see whether plea of guilty is one which should be acted upon. (Vol 10) 1923 Nag 251 (254) : 24 Cri L Jour 570 (DB).

[9] If at later stage of proceeding accused pleads guilty, Court can record the plea and convict accused on such plea. (Vol 21) 1934 Pat 330 (334) : 35 Cri L Jour 1322 (DB).

11. "Thereon" in Sub-section (2)—[1] If accused makes plea amounting to a claim to be tried before Sessions Judge, he cannot be convicted on confession made before committing Magistrate. ('10) 2 N W P H C R 479 (480) \* ('72-92) 1872-1892 Low Bur Rul 497 (497).

[2] Accused must not be convicted of different offence of which he did not plead guilty and for which he was not tried. ('93) 2 Weir 335 (335, 336)

272. If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall  
*Refusal to plead or claim* proceed to choose jurors or assessors as hereinafter directed and to  
*to be tried.* try the case :

Provided that, subject to the right of objection hereinafter mentioned, the same jury may  
*Trial by same jury or assessors* try, or the same assessors may aid in the trial of, as many  
*of several offenders in succession.* accused persons successively as the Court thinks fit.

[1882—S. 272; 1872—Ss. 238, 265; 1861—Ss. 347, 363.]

#### Section 271 — Note 11 (contd.)

\* ('88) 1888 Rat 413 (413) (DB).

[3] Accused charged of murder but Court finding that there was no evidence under that charge, convicted her of offence under S. 318 of Penal Code considered to have been admitted by accused—Conviction is illegal. ('88) 1888 Rat 386 (386) (DB).

[4] Accused pleading guilty to cut short the proceedings in the hope of getting lenient sentence is not a ground for departing from ordinary tariff of punishment. (Vol 21) 1931 Pat 330 (335): 35 Cri L Jour 1322 (DB).

12. Procedure where plea of guilty is not accepted. — [1] Accused pleads guilty and Court does not accept same—Accused may be treated as if he had pleaded not guilty and trial may be proceeded with in ordinary way. (Vol 30) 1943 Oudh 409 (410) : 44 Cri L Jour 775 : 19 Luck 276 (DB) \* ('09) 10 Cri L Jour 484 (485, 486) (DB) (Cal) \* (Vol 1) 1914 All 558 (558) : 16 Cri L Jour 103 \* (1900) 23 Mad 151 (153, 154) (DB) \* Vol 13 1926 All 318 (320) : 27 Cri L Jour 449 \* (Vol 15) 1928 Cal 775 (776) : 30 Cri L Jour 508 (DB) \* (Vol 4) 1917 Oudh 362 (366) : 18 Cri L Jour 742 : 20 Oudh Cas 136 (DB).

[See however (Vol 18) 1931 Cal 341 (343) : 58 Cal 1214 : 32 Cri L Jour 667 (DB).

[2] "Convicted" in this sub-section means nothing more than 'sentenced.' (1900) 10 Mad L Jour 147 (158, 159) (PB).]

13. Plea of guilty by a co-accused.—[1] Plea of guilty accepted by Court—Conviction should follow and accused will cease to be accused person from that moment and section 30 of Evidence Act will not apply. ('95) 19 Bom 195 (197, 198) (DB) \* ('02) 25 Mad 61 (68) : 28 Ind App 257 (PC) \* (Vol 13) 1926 All 318 (320) : 27 Cri L Jour 449 \* (1900) 1900 Pun Re No. 11 Cr. p. 25 (27) (DB) \* ('01) 23 All 53 (54) \* ('11) 12 Cri Jour 479 (479) : 38 Cal 446 \* ('11) 12 Cri L Jour 605 (605, 606) : 1911 Pun Re No. 15 Cr (DB) \* ('01) 3 Bom L R 437 (438) (DB).

[2] Plea of guilty not accepted by Court and Court proceeds to trial against him—Accused does not cease to be so until end of trial and all accused can be treated as being tried jointly within meaning of S. 30. ('01) 3 Bom L R 437 (438) (1 B) \* ('09) 10 Cri Jour 484 (486) (DB) (Cal) \* (Vol 2) 1915 All 221 (224) : 37 All 217 : 16 Cri L Jour 327 (113) \* ('13) 14 Cri L Jour 506 (507) : 1 Upp Bur Rul 170 (DB) \* (1900) 23 Mad 151 (154) (DB).

[See also (Vol 30) 1943 Oudh 409 (410) : 44 Cri L Jour 775 : 19 Luck 276 (DB).]

[3] If some of accused in sessions trial plead guilty to charge, their conviction should be recorded then and there. (Vol 1) 1914 All 558 (558) : 16 Cri L Jour 103.

[4] Plea of guilty entered by one of co-accused — If Judge convicts accused, he should be removed from dock and can be called as witness against other co-accused. (Vol 4) 1917 Oudh 362 (366) : 18 Cri L Jour 742 : 20 Oudh Cas 136 (DB).

[5] Complete sentence should be passed before calling accused pleading guilty in joint trial to give evidence

against his co-accused. (Vol 18) 1231 Cal 341 (344) : 58 Cal 1214 : 32 Cri L Jour 667 (DB).

[6] Admissibility of evidence of accused pleading guilty in joint trial ought not to be decided on narrow technical ground that he had not been convicted but on broad ground that when he gave his evidence he was not in charge of jury and no issue remained to be tried between him and Crown. ('02) 25 Mad 61 (68) : 28 Ind App 257 (PC).

[7] Joint trial. A charged with murder and B with being accessory after fact—Counsel for B can insist on proof of murder and challenge evidence of it if A has pleaded guilty. (Vol 23) 1936 P C 212 (245) : 37 Cri L Jour 914 (PC).

14 Appeal.—[1] Recording of plea of guilty in a case where accused is represented by Counsel—A accused in appeal denying the plea and challenging the correctness of the recording—The counsel and not the party should file an affidavit for showing that there was no such plea. ('96) 19 Mad 209 (210) (DB).

[2] Conviction on plea of guilty—Notice to show cause why sentence should not be enhanced—Accused cannot go behind the plea or withdraw it. (Vol 16 1929 Cal 747 (749, 751) : 56 Cal 1145 : 30 Cri L Jour 1038 (DB). (Mukherjee, J., *contra.*).

[See however (Vol 22) 1935 Rang 49 (50) : 12 Rang 616 : 36 Cri L Jour 336 (DB).

#### Section 272 — Note 1

[1] Plea of "not guilty" is not recognised by Code, though such plea if made, will be considered as amounting to "claim to be tried." (Vol 1) 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460.

[2] Accused put upon trial pleaded "not guilty" to charge or claimed to be tried—He can have trial proceeded with. ('69) 2 Beng L R 23 (24) (PB) \* ('04) 1 Cri L Jour 772 (773) (DB) (Bom).

[3] Accused cannot be released without trial on ground that there is no case against him. ('81) 1881 All W N 60 (60) (DB).

[4] Accused cannot be convicted without trial solely upon confession before committing Magistrate. ('70) 2 N W P H C R 479 (480).

[But see (Vol 32) 1945 Bom 413 (416) (DB).]

[5] Where several persons are accused of offences in a case they should be tried separately except in cases falling within S. 239. ('87) 9 All 452 (457).

[6] Where the Judge proceeds with the same jury or assessors in the separate trials it is open to the accused to ask for a second jury but the Judge has the discretion to grant or refuse the application. (Vol 13) 1926 All 334 (335, 336) : 48 All 325 : 27 Cri L Jour 445.

[7] Same jury may try or same assessors may aid in trial of any number of accused persons in a case only one after other and not simultaneously. (Vol 18) 1931 Cal 709 (709, 710) : 32 Cri L Jour 1233 (DB).

[8] Where there are number of accused persons in a case a simultaneous trial is an illegality not curable by S. 537 of the Code. (Vol 8) 1921 Low Bur 51 (56) : 11 Low Bur Rul 73 : 23 Cri L Jour 49 \* ('81) 6 Cal 96 (99) (DB).



**273. (1)** In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

**(2)** Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

[1882—S. 273.]

#### C. — Choosing a Jury.

**Number of jury. 274. (1)** In trials before the High Court the jury shall consist of nine persons.

**(2)** In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than <sup>a</sup>[five] or more than nine, as the <sup>b</sup>Provincial Government, by order applicable to any particular district or to any particular class of offences in that district, may direct:

<sup>c</sup>[Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.]

[1882—S. 274; 1872—S. 236; 1861—S. 327.]

[a] *Substituted* by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 13, for "three." [b] *Substituted* by A. O. for "Local Government." [c] *Inserted* by Act (12 [XII] of 1923), S. 13.

**275. (1)** In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such

#### Section 273 — Note 1

[1] The section is intended to provide a short and effective way by which charges which have no merits may be disposed of. (Vol 16) 1929 Cal 756 (760): 57 Cal 1042: 31 Cri L Jour 506 (FB).

[2] The special power is only conferred on the High Courts. (Vol 16) 1929 Cal 756 (760): 57 Cal 1042: 31 Cri L Jour 506 (FB).

[3] The special power cannot be exercised by Sessions Judges. (Vol 22) 1935 Nag 202 (204): 31 Nag L R 360: 36 Cri L Jour 1389.

[4] Where the Court is of opinion that no offence is made out, it is its duty to stay proceedings. (Vol 29) 1942 Bom 212 (213, 214): 43 Cri L Jour 773: 11 L R (1942) Bom 534: (94) 21 Cal 97 (99).

[5] Judge should not take into his own hands the functions of the jury unless the charge is clearly unsustainable. (Vol 16) 1929 Cal 756 (761): 57 Cal 1042: 31 Cri L Jour 506 (FB).

[6] An entry made under the section has not the effect of an acquittal. The accused may again be tried for the same offence. (Vol 19) 1932 Sind 157 (159): 26 Sind L R 407: 34 Cri L Jour 14.

#### Section 274 — Note 1

[1] A trial by a jury consisting of a larger number of men than is authorized by the section is a nullity. (Vol 31) 1944 Bom 17 (18): 45 Cri L Jour 270 (DB): (94) 1 Cri L Jour 43 (44): 26 All 211 (DB).

[2] A trial by a jury consisting of a smaller number of men than that required by law is without jurisdiction. (Vol 30) 1943 Cal 515 (519): 44 Cri L Jour 483: 1 L R (1943) 1 Cal 522 (DB).

[3] Where a lesser number of persons than ought to be summoned under S. 326 is summoned, and some of them do not attend, with the result that seven persons are empanelled, it cannot be said that it is impracticable to get a jury of nine, and consequently the tribunal is not one legally constituted. (Vol 15) 1928 Cal 645 (645, 646): 55 Cal 794: 29 Cri L Jour 927 (DB): (Vol 17) 1930 Cal 716 (717) (DB).

[4] Where only fourteen persons were summoned but eleven of them were present out of whom only seven were empanelled and it was not shown that it was not practicable to get nine persons, it was held that the jury

was illegally constituted and the trial bad. (Vol 17) 1930 Cal 60 (61): 56 Cal 1154: 31 Cri L Jour 377 (DB).

[See also (Vol 30) 1943 Cal 515 (519): 44 Cri L Jour 483: 1 L R (1943) 1 Cal 522 (DB).]

[5] Where eighteen persons were summoned out of whom only eight attended and consequently only a jury of seven was empanelled, it was held that the proceedings were not vitiated. (Vol 31) 1941 Cal 249 (250): 46 Cri L Jour 131 (DB): (Vol 22) 1935 Cal 407 (411): 62 Cal 900: 36 Cri L Jour 914 (S B): (Vol 18) 1931 Cal 261 (262): 32 Cri L Jour 187 (S B).

[See also (Vol 32) 1945 Cal 467 (468): 1 L R (1944) 2 Cal 305 (DB).]

[But see (Vol 18) 1931 Cal 792 (795): 58 Cal 1272: 33 Cri L Jour 129 (DB).]

[6] Where out of eighteen persons summoned only nine were present and the Judge chose seven jurors by lot and did not attempt to empanel the remaining two although no objection was taken to them, it was held that the trial was vitiated *ab initio*. (Vol 30) 1943 Cal 515 (518, 519): 44 Cri L Jour 483: 1 L R (1943) 1 Cal 522 (DB).

[7] Where there is nothing on the record to show whether the trial Court considered the practicability of having nine jurors, the High Court on appeal ought to proceed on the assumption that the trial in the lower Court took place in full accordance with the requirements of law. (Vol 32) 1945 Cal 467 (468, 469): 1 L R (1944) 2 Cal 305 (DB): (Vol 27) 1940 P C 176 (178): 37 Ind App 336: 1 L R (1940) Lach 612: 1 L R (1940) Kar (PC) 302: 41 Cri L Jour 871 (PC): (Vol 22) 1935 Cal 407 (411): 36 Cri L Jour 914: 62 Cal 900 (SB). (Dissenting from (Vol 18) 1931 Cal 793: 58 Cal 1272: 33 Cri L Jour 129 (DB)).

[See however (Vol 30) 1943 Cal 515 (519): 44 Cri L Jour 483: 1 L R (1943) 1 Cal 522 (DB). (Choosing nine jurors practicable — Only seven chosen — Defect held not curable — Presumption of regularity of official acts cannot be invoked.)]

#### Section 275 — Note 1

[1] Claim to be tried as Indian British subject mentioned in Ss. 528-A and 528-B is different from claim to be tried by majority of Indian Jury. (Vol 12) 1925 Cal 384 (387): 51 Cal 980: 26 Cri L Jour 485



person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans.]

[1882—S. 275; 1872—S. 241; 1861—S. 325.]

[a] *Substituted* by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 14.

**276.** The jurors shall be chosen by lot from the persons summoned to act as such in such *Jurors to be chosen by lot.* manner as the High Court may from time to time by rule direct:

Provided that—

*first*, pending the issue under this section of rules for any Court the practice now prevailing *Existing practice maintained;* in such Court in respect to the choosing of jurors shall be followed;

*secondly*, in case of a deficiency of persons summoned, the number of jurors required may, *persons not summoned with the leave of the Court, be chosen from such other persons as may be when eligible;* present;

*thirdly*, <sup>a</sup>[in a trial before any High Court in the town which is the usual place of sitting of trial before special jurors. such High Court]—

(a) if the accused person is charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs,

the jurors shall be chosen from the special jury list hereinafter prescribed; and

*fourthly*, in any district for which the <sup>b</sup>[Provincial Government] has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 925.

[1882—S. 276; 1872—S. 240; 1861—S. 342.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 77, for "in the Presidency Towns." [b] *Substituted* by A. O. for "Local Government."

#### Section 275—Note 1 (*contd.*)

[2] A claim to be tried under this section can validly be made whether the complainant and the accused are both European or Indian British subjects, or one is an European and the other an Indian British subject. (Vol 22) 1935 Rang 67 (68) : 13 Rang 104 : 36 Cri L Jour 595 (FB).

[3] There is no provision that the jurors should be co-religionists with the accused. (1865) 1 Suth W R Cr 2 (2) (DB).

[4] Europeans other than European British subjects or Americans, have no other special privileges than provided by the section or under S. 285A. (Vol 20) 1933 Nag 136 (147) : 34 Cri L Jour 505 : 29 Nag L R 251 (DB).

[5] It is not sufficient for the accused to merely assert that he is an European or Indian British subject. He should have been found under the provisions of this Code to belong to the particular nationality. (Vol 12) 1925 Oudh 469 (470) : 28 Oudh Cas 230 : 26 Cri L Jour 1217 & (Vol 16) 1929 Sind 23 (23) : 22 Sind L R 472 : 29 Cri L Jour 721.

[See (Vol 28) 1941 Pat 163 (164, 165).]

[6] An "Anglo-Indian" is not an European within the meaning of this section. (Vol 21) 1934 Pat 200 (201) : 13 Pat 177 : 35 Cri L Jour 827 (DB).

#### Section 276 — Note 1

[1] Where a Judge fails to obtain a panel as prescribed by this section, it is his duty to postpone the trial until the requisite number of jurors has been obtained

in the manner provided by law. (Vol 24) 1937 Cal 389 (390) : 1 L R (1937) 2 Cal 482 : 38 Cri L Jour 870 (DB) & ('03) 7 Cal W N 188 (191, 192) (DB).

[2] An accused has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided therein to secure perfect impartiality. (Vol 14) 1927 Cal 787 (790) : 28 Cri L Jour 889 (DB) & ('11) 12 Cri L Jour 537 (539) (DB) (Oudh).

[3] This section and the following Ss. 277, 278 and 279 must be read together as prescribing the procedure for empanelling jurors. (Vol 18) 1931 Cal 793 (794) : 58 Cal 1272 : 33 Cri L Jour 129 (DB) & (Vol 20) 1933 All 941 (946) : 56 All 210 : 35 Cri L Jour 668 (DB).

[4] The section deals with the general nature of the procedure and the details of that procedure are given in sections 277, 278 and 279. (Vol 15) 1928 Cal 83 (87) : 55 Cal 371 : 29 Cri L Jour 437 (FB). (Per Mukerji, J.)

[5] Court deciding to choose from persons present — As each person is called the accused should be asked if he has objection to the person and decide any objection — Until deficiency is made up the procedure should be adopted. (Vol 15) 1928 Cal 83 (85, 86) : 55 Cal 371 : 29 Cri L Jour 437 (FB). ((Vol 14) 1927 Cal 242 : 28 Cri L Jour 194 (DB) and (Vol 14) 1927 Cal 787 : 28 Cri L Jour 889 (DB), overruled.)

[6] A jury not empanelled in accordance with principles in Ss. 276 to 279 is not one constituted in accordance with the law. (Vol 15) 1928 Pat 1 (3) : 7 Pat 61 : 28 Cri L Jour 881 (SB) & (Vol 14) 1927 Cal 593 (595) : 54 Cal 1026 : 28 Cri L Jour 615 (DB) & (Vol 10) 1929 Cal 92 (93) : 30 Cri L Jour 484 (DB).

277. (1) As each juror is chosen, his name must be called out and his appearance. Names of jurors to be called. the presence must be ascertained by such juror.

(2) Objection may then be taken to such juror by the accused or the prosecutor and the Objection to jurors. grounds of objection shall be stated:

#### Section 276 — Note 1 (contd.)

[See however (Vol 16) 1929 Oudh 151 (155) : 36 Cri L Jour 384 (DB). (Original selection from the list not objected to — Judge selecting five out of those present without ballot — Accused having no objection to the choice — Held irregularity was covered by S. 357.)]

[7] The manner of choosing by lot provided by the section applies only to jurors attending in obedience to summons and not to persons selected from those present in Court. (Vol 15) 1928 Pat 1 (2) : 28 Cri L Jour 881 : 7 Pat 61 (DB) \* (Vol 1) 1917 Mad 770 (771) : 18 Cri L Jour 15 (DB) \* (Vol 12) 1925 Cal 598 (599) : 26 Cri L Jour 819 (DB).

[8] Judge has to select by lot out of the persons summoned till the panel is constituted and not out of those present actually. Question of deficiency cannot arise till the list is exhausted and no panel is still constituted. (Vol 30) 1943 Cal 515 (519) : 1 ILR (1943) 1 Cal 522 : 44 Cri L Jour 483 (DB). (18 persons summoned but only 9 present — Judge drawing lot and constituting jury of 7 from amongst those present — Held, procedure adopted was not correct and that the constitution of a panel of 9 was possible.)

[9] Where all the jurors have been chosen by lot it is desirable to specifically state that they have been so chosen by lot. (Vol 14) 1927 Nag 117 (117) : 28 Cri L Jour 177.

[10] Where one of the jurors was a person who was not entitled to sit on the jury, having not been summoned, it was held that the Court was not properly constituted. (Vol 14) 1927 Cal 820 (820) : 28 Cri L Jour 874 (DB).

[11] Persons summoned—Judge choosing the required number by lot from amongst those who knew English — Consent of counsel obtained for that. Knowledge of English was desirable to appreciate some evidence in the case — Held, the Court having elected jury by lot, was within its inherent powers in so choosing from amongst English knowing persons. (Vol 17) 1930 Cal 437 (440) : 32 Cri L Jour 455 (DB).

[12] The procedure provided for making up any deficiency in the number of persons summoned applies both to common as well as to special jurors called under the third and fourth provisos to the section. (Vol 19) 1931 Cal 793 (794, 795) : 58 Cal 1272 : 33 Cri L Jour 129 (DB) \* (Vol 20) 1933 Cal 638 (639) : 30 Cal 725 : 34 Cri L Jour 1098 (DB).

[13] Jury, at the end of ballot, were found to be four short — Four suitable gentlemen chosen from the bystanders—The procedure adopted held, was correct. (Vol 18) 1931 Cal 178 (179) : 32 Cri L Jour 490 (DB).

[14] In case of deficiency the Court has discretion to fill up the deficiency or adjourn the trial. (Vol 15) 1928 Cal 83 (86) : 55 Cal 371 : 29 Cri L Jour 437 (DB) \* (Vol 18) 1931 Cal 178 (179) : 32 Cri L Jour 490 (DB).

[15] A trial with a jury consisting of persons chosen when not present in the Court is not a trial by a jury empanelled according to law. (Vol 26) 1939 Sind 209 (219) : 41 Cri L Jour 28 : ILR (1940) Kar 249 (DB) \* (Vol 24) 1937 Cal 389 (390) : 1 ILR (1937) 2 Cal 482 : 38 Cri L Jour 870 (DB) \* (Vol 16) 1929 Cal 728 (729) : 56 Cal 835 : 31 Cri L Jour 281 (DB).

[16] A person is present within the meaning of the section if he is in the precincts of the Court building either because he has been summoned for other cases or by mere chance. (Vol 19) 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cri L Jour 684 (DB).

[17] The number of jurors to be called should be ascertained at the time the persons summoned have attended or not is not ascertained. (Vol 19) 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cri L Jour 684 (DB).

[18] The section is contained in the proviso refers to the number of jurors required to make up the deficiency. S. 274 and not to the deficiency in the number of jurors required for drawing lots. (Vol 20) 1933 Cal 638 (639) : 30 Cal 725 : 34 Cri L Jour 819 (DB).

[19] The word "panel" in the proviso simply means "selected" and not "summoned by lot". (Vol 20) 1933 Cal 638 (639) : 30 Cal 725 : 34 Cri L Jour 819 (DB).

[20] Accused's counsel may inform under S. 124A, Penal Code, High Court allowed to spend jury. (Vol 15) 1928 Pat 1 (2) : 28 Cri L Jour 881.

[21] A Judge of the Chief Court of Sind, exercising jurisdiction as a Session Court, has power to direct a special jury to be summoned under clause (b) of the proviso. (Vol 20) 1933 Cal 638 (639) : 30 Cal 725 : 34 Cri L Jour 819 (DB).

[22] The word "panel" in provisos 3 and 4 means "selected by lot". (Vol 20) 1933 Cal 638 (639) : 30 Cal 725 : 34 Cri L Jour 819 (DB).

[23] A defect of regularity in the constitution of the jury affects the constitution of the Court and its competence and is not curable under S. 537. (Vol 15) 1928 Pat 31 (31) : 28 Cri L Jour 843 (DB) \* (Vol 16) 1929 Cal 437 (440) : 32 Cri L Jour 455 (DB) \* (Vol 24) 1937 Cal 389 (390) : 1 ILR (1937) 2 Cal 482 : 38 Cri L Jour 870 (DB) \* (Vol 19) 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cri L Jour 684 (DB).

[24] Jurors (Vol 1) 1917 Mad 770 (771) : 18 Cri L Jour 15 (DB) \* (Vol 14) 1927 Nag 117 (117) : 28 Cri L Jour 177 (DB) \* (Vol 15) 1928 Cal 83 (86) : 55 Cal 371 : 29 Cri L Jour 437 (DB) \* (Vol 16) 1929 Cal 437 (440) : 32 Cri L Jour 455 (DB).

[25] An objection to the constitution of the jury under S. 276 is to any defect or irregularity in the constitution of the jury under this section cannot be taken after the trial has commenced. (Vol 19) 1932 Cal 750 (751) : 33 Cri L Jour 869 (DB). (Objection as to the constitution of the jury. \* (Vol 17) 1930 Cal 291 (291) : 57 Cal 1002 (DB). (Held 24 Cal 15) 1928 Pat 1 (2) : 28 Cri L Jour 881 : 7 Pat 61 (DB). (Objection as to defect or irregularity. \* (Vol 14) 1927 Nag 770 (771) : 18 Cri L Jour 15 (DB). (Held 15).

[26] See however (Vol 32) 1915 Cal 367 (469) : ILR (1915) 2 Cal 357 (DB). (Proper time to take objection is when the panel is constituted — If taken as substantial objection to the trial, the petition should disclose materials to show that the constitution of jury with full number was practicable.)

[27] But see (Vol 30) 1943 Cal 515 (518) : 44 Cri L Jour 482 : ILR (1943) 1 Cal 522 (DB).]

#### Section 277 — Note 1

[1] The Court cannot, before the names are called, send away the persons summoned, merely on their own representation that they were relations of the accused. (Vol 19) 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cri L Jour 684 (DB).

Provided that, in the High Court, objections without grounds stated shall be allowed to the  
*Objection without* number of eight on behalf of the Crown and eight on behalf of the person or  
*grounds stated.* all the persons charged.

[1882—S. 277; 1872—S. 243; 1861—S. 343.]

**278.** Any objection taken to a juror on any of the following grounds, if made out to the  
*Grounds of objection.* satisfaction of the Court, shall be allowed : —

- (a) some presumed or actual partiality in the juror;
- (b) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years;
- (c) his having by habit or religious vows relinquished all care of worldly affairs;
- (d) his holding any office in or under the Court;
- (e) his executing any duties of police or being entrusted with police duties;
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury;
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

[1882—S. 278; 1872—Ss. 244, 245, 405; 1861—Ss. 334, 344, 345.]

**279. (1)** Every objection taken to a juror shall be decided by the Court, and such decision  
*Decision of objection.* shall be recorded and be final.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror  
*Supply of place of* attending in obedience to a summons and chosen in manner provided by  
*juror against whom* section 276, or if there is no such other juror present, then by any other  
*objection allowed.* person present in the Court whose name is on the list of jurors, or whom the  
 Court considers a proper person to serve on the jury :

Provided that no objection to such juror or other person is taken under section 278 and allowed.

[1882—S. 279; 1872—S. 243; 1861—S. 342.]

#### Section 278 — Note 1

[1] Juror head-master of school and acquaintance of public prosecutor who was the pleader for the manager of the School—Objection on first ground not tenable. (Vol 12) 1925 Cal 729 (730) : 26 Cri L Jour 1009 (D B).

[2] Pending litigation between accused's master and the principal of one of the jurors—Held there was ground for presuming partiality on the part of juror. (Vol 15) 1928 Pat 81 (32) : 7 Pat 50:28 Cri L Jour 813 (DB).

[3] The effect of the incompetence of the juror to understand the language in which evidence is given or in which it is interpreted is to deny to the accused an essential part of the protection accorded to him by law. (Vol 24) 1937 P C 108 (113) : 38 Cri L Jour 503 (P C) \* (Vol 20) 1933 P C 209 (209) : 34 Cri L Jour 843:12 Pat 811:60 Ind App 354 (P C).

[4] A failure to object to a juror when he appears in obedience to a call under S. 277 would amount to a waiver. (Vol 4) 1917 Mad 770 (770, 771) : 18 Cri L Jour 15 (D B).

[5] Where the trial proceeds without any objection to the juror at his appearance, the constitution of the jury cannot be assailed later on. (Vol 19) 1932 Oudh 31 (32) : 33 Cri L Jour 280 (D B) \* (Vol 16) 1929 Cal 1 (6) : 30 Cri L Jour 494 (D B).

[6] One of the jurors empanelled ignorant of the language in which evidence was given, joining the verdict of guilty—Accused not aware of this defect at the time challenging when coming to know of it—The conviction was quashed. (Vol 20) 1933 P C 208 (211) : 34 Cri L Jour 813:12 Pat 811:60 Ind App 354 (P C). (Reversing (Vol 19) 1932 Pat 302:31 Cri L Jour 83 (D B).)

[7] Actual or presumed partiality alleged on the part of certain members of jury—Objection not taken at the time as accused was not aware of facts—Held conviction could not be set aside. (Vol 21) 1937 P C 10 (113) : 38 Cri L Jour 503 (P C).

#### Section 279—Note 1

[1] Sub-section (2) deals with a case where there is no effective lot owing to absence or objection or both and it provides how the number is to be completed. (Vol 15) 1928 Pat 1 (2, 6) : 7 Pat 61:28 Cri L Jour 81 (D B).

[2] Sub-section (2) contemplates the possibility of a person not in the jury list being chosen to serve on the jury in case of emergency. (Vol 12) 1925 Cal 798 (799) : 26 Cri L Jour 819 (D B).

[3] The Court has a wide discretion in the matter of accepting or overruling objections and, in this respect, its decision is final. (Vol 25) 1938 Nag 328 (334) : 1

280. (1) When the jurors have been chosen, they shall appoint one of their number to be *Foreman of jury*. *foreman*.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

[1882—S. 280; 1872—S. 246; 1861—S. 316.]

281. When the foreman has been appointed, the jurors shall be sworn under the Indian *Swearing of jurors*. *Oaths Act, 1843*.

[1882—S. 281.]

282. (1) If, in the course of a trial by jury at any time before the return of the verdict, any *Procedure when juror* juror, from any sufficient cause, is prevented from attending throughout *seases to attend, etc.* the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

(2) In each of such cases the trial shall commence anew.

[1882—S. 282; 1872—S. 254; 1861—S. 350.]

#### Section 279—Note 1 (*concl.*)

R (1938) Nag 516 : 39 Cri L Jour 818 (D B) ✱ (Vol 12) 1925 Cal 798 (799) : 26 Cri L Jour 819 (D B).

[4] Where on objection being taken as to the presumed or actual partiality in a juror, the Court decides that no such partiality has been made out, the decision is absolutely final and cannot be challenged in appeal. (Vol 27) 1940 Cal 277 (279) : 1 I L R (1940) 1 Cal 531 : 41 Cri L Jour 719 (D B).

[5] Objection as to partiality in a juror—Court finding partiality in a juror—Court overruling objection—The decision, held, may perhaps be challenged in appeal. (Vol 27) 1940 Cal 277 (279) : 1 I L R (1940) 1 Cal 531 : 41 Cri L Jour 719 (D B).

[6] Juror objected to and objection upheld—No other juror selected by lot under S. 276 present—Court selecting a person from those present in Court—Such selection need not be by lot. (Vol 15) 1928 Cal 83 (85, 87) : 55 Cal 374 : 29 Cri L Jour 437 (F B) ✱ (Vol 4) 1917 Mad 770 (771) : 18 Cri L Jour 15 (D B).

[7] Selection must only be from among the persons present. (Vol 26) 1939 Sind 209 (210, 220) : 41 Cri L Jour 28 : 1 I L R (1940) Kar 249 (D B).

[8] A requisition of persons from outside for the purpose of choosing jurors is not legal. (Vol 16) 1929 Cal 728 (729) : 56 Cal 835 : 31 Cri L Jour 281 (D B).

#### Section 280—Note 1

[1] Trial by jury—Some accused acquitted and some convicted—Foreman found to have taken bribe in connexion with trial—Held, that verdict of jury could not be sustained and that the conviction should be set aside. (Vol 20) 1933 Cal 639 (640) : 60 Cal 751 : 34 Cri L Jour 1072 (D B).

[2] Verdict set aside on appeal and case remanded for retrial—Jury empanelled on second occasion including foreman of jury at former trial—Judge discharging him and substituting another in his place—Held, that the procedure was not correct and that an entirely new jury should have been constituted. (Vol 28) 1941 Cal 328 (329) : 42 Cri L Jour 674.

#### Section 281—Note 1

[1] An omission on the part of a juror to take oath would not invalidate the proceedings. (75) 20 Sudh W R Cr 19 (20) (D B).

#### Section 282 — Note 1

[1] The section contemplates the addition of a juror after the trial of the case has begun with a jury properly empanelled and not before. (Vol 26) 1939 Sind 209 (220) : 41 Cri L Jour 28 : 1 I L R (1940) Kar 249 (D B).

[2] The Court has an inherent power to discharge jury if the ends of justice so require. (Vol 10) 1923 Cal 724 (724, 725) : 50 Cal 872 : 24 Cri L Jour 677 (D B) ✱ (Vol 24) 1937 Pat 369 (371, 372) : 16 Pat 8 : 38 Cri L Jour 777 (D B) ✱ (Vol 16) 1929 Cal 343 (345) : 56 Cal 1032 : 31 Cri L Jour 366 (D B).

[3] Judge may discharge a jury on the ground that a juror has misconducted himself during the trial. (Vol 24) 1937 Pat 369 (371) : 16 Pat 8 : 38 Cri L Jour 777 (D B) ✱ (Vol 11) 1924 Cal 323 (326) : 51 Cal 418 : 25 Cri L Jour 776 (D B). (Omiter.) ✱ (Vol 21) 1934 Cal 428 (429) : 61 Cal 498 : 35 Cri L Jour 941 (D B).

[4] Jury may be discharged where Judge finds reason for doubting the impartiality of the jury. (Vol 24) 1937 Pat 369 (372) : 16 Pat 8 : 38 Cri L Jour 777 (D B).

[5] The power should be exercised after the Judge has satisfied himself by judicial inquiry that reasonable grounds exist for exercising the same. (Vol 11) 1924 Cal 323 (327) : 51 Cal 418 : 25 Cri L Jour 776 (D B) ✱ (Vol 16) 1929 Cal 343 (345) : 56 Cal 1032 : 31 Cri L Jour 366 (D B).

[6] The question whether the Judge should or should not hold an inquiry is a matter within his discretion. (Vol 23) 1936 Oudh 268 (269) : 37 Cri L Jour 749 : 12 Luck 170.

[7] The Judge has undoubted jurisdiction for the purposes of inquiry to call upon persons to appear before him, to administer oath to them and to require them to give evidence. (Vol 14) 1927 Cal 628 (629) : 55 Cal 279 : 28 Cri L Jour 783 (D B).

[8] A juror may be guilty of misconduct where he is found talking to the Court Inspector when the case is

*Discharge of jury in case of sickness of prisoner.*

**28 .** The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

[1882—S. 283.]

#### *D. — Choosing Assessors.*

**284.** When the trial is to be held with the aid of assessors, <sup>a</sup>[not less than three and, assessors how chosen. practicable, four shall be chosen] from the persons summoned to act as such

[1882—S. 284; 1872—S. 239; 1861—S. 842.]

[a] *Substituted by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 15, for "two or more shall be chosen as the Judge thinks fit."*

#### **Section 282 — Note 1 (contd.)**

called on for hearing. (Vol 16) 1929 Cal 57 (58) : 56 Cal 150 : 30 Cri L Jour 435 (DB).

[9] Where during the progress of the trial, a juror talks to persons connected with the accused or disowns the case which is being tried before him, he is guilty of misconduct. (Vol 14) 1927 Cal 628 (629) : 55 Cal 279 : 28 Cri L Jour 783 (DB) \* (Vol 8) 1921 Cal 631 (631) : 22 Cri L Jour 510 (DB).

[See (Vol 23) 1936 Oudh 263 (269) : 37 Cri L Jour 749 : 12 Luck 170.]

[10] A mere expression of opinion to a friend in a private conversation will not be a ground for discharging the jury. (Vol 19) 1932 Cal 750 (751) : 33 Cri L Jour 869 (DB).

[11] The jury cannot be discharged merely because a witness for the defence does not attend and a postponement of the case is asked for. ('02) 4 Bom L R 939 (940) (DB).

[12] Jury giving out verdict after prosecution evidence was over and before defence evidence was let in—*Held*, that Judge had no power to discharge jury and that he should have proceeded with trial after explaining to jury their error in not waiting until all evidence was over. ('86) 2 Weir 497 (498) (DB).

[See ('03) 7 Cal W N xxxi (xxx). (Advocate-General allowed to enter a *nolle prosequi* under S. 333.)]

[13] Juror found guilty of misconduct during trial—Judge may add a new juror from among the persons present in Court. (Vol 16) 1929 Cal 57 (58) : 56 Cal 150 : 30 Cri L Jour 435 (DB).

[14] A jury can be discharged by the Judge in the exercise of his inherent power even after the verdict has been recorded. (Vol 21) 1931 Cal 428 (429) : 61 Cal 498 : 35 Cri L Jour 941 (DB).

[15] Where an order discharging a jury in the exercise of his inherent power of a Sessions Judge is found to be unjustified the only relief that the High Court can give is to order a fresh trial before another jury. (Vol 24) 1937 Pat 369 (371) : 16 Pat 8 : 38 Cri L Jour 777 (DB).

[16] There is a discretion in the Judge whether to postpone the trial to a date on which the juror should be able to attend or to discharge the jury. If the juror is able to attend in a very short time it is a wrong exercise of discretion to discharge the jury. (Vol 14) 1927 Cal 199 (199, 200) : 28 Cri L Jour 141 (DB).

[17] Where, after the examination of some witnesses a juror was found to be deaf and was consequently discharged, and a new juror added, it was held that the trial should have commenced anew. (Vol 1) 1914 All 91 (92) : 36 All 481 : 15 Cri L Jour 538 (DB).

#### **SECTION 284 — SYNOPSIS.**

1. "Not less than three."
2. "And, if practicable, four."
3. "Shall be chosen," meaning of.
4. "From the persons summoned to act as such."

5. Objections as to assessors.

6. Power of Appellate Court to appoint assessors

7. Effect of non-compliance with the section.

1. "Not less than three."—(1) Minimum number of assessors required, not attending—Court has jurisdiction to try the case. (Vol 11) 1921 Oudh 41 (417) \* (Vol 11) 1921 Nag 247 (287) : 20 Nag L R 121 : 25 Cri L Jour 459 (DB) \* ('01) 25 Bom 694 (694) (DB).

2. "And, if practicable, four."—[1] A trial with three assessors without a record of reasons for choosing a less than four is not irregular. (Vol 12) 1925 Pat 38 (382) : 26 Cri L Jour 718 (DB).

3. "Shall be chosen," meaning of.—[1] The word "chosen" does not necessarily imply that the ought to be a selection from a large number than required for the trial. (Vol 25) 1938 Pat 60 (62) : 39 C L Jour 302 (DB).

[2] Required number of assessors chosen—Some assessors discharged before the trial actually starts Trial goes on with less than the required number assessors—*Held*, requirements of the section are not satisfied. ('91) 15 Bom 514 (515) (DB).

[3] The assessors must be persons of independent condition in life, men of judgment and experience. ('7 23 South W R Cr 35 (39) (DB).

4. "From the persons summoned to act as such."—[1] No person can be asked to act as an assessor unless he had been summoned under Ss. 326 and 327 to act as such. ('91) 1894 All W N 207 (207) (DB) \* ('13) 14 Cri L Jour 651 (654) : 35 All 570 (DB) : ('10) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337 \* (V 5) 1918 Pat 420 (426) : 3 Pat L Jour 141 : 19 Cri L Jour 363 (DB).

[2] Summons to act as assessor can be issued only persons whose names have been included in the list prepared under S. 321. ('86) 1886 Rat 304 (304).

[3] Only three of the assessors summoned present on the date of the trial—Person on the list of assessors and present in Court served with summons and chosen assessor on the date of trial—*Held*, he was properly chosen and that the trial was regular. (Vol 25) 1938 Pat 60 (62) : 39 Cri L Jour 302 (DB).

[4] Person summoned as assessor for a particular trial but appearing on a subsequent date during the same session can be selected as assessor for another trial commencing that day. (Vol 3) 1916 All 54 (56) : 17 C L Jour 17 (DB).

[5] Assessors chosen from persons summoned to act as jurors—*Held*, the trial was illegal. (Vol 20) 19 Oudh 351 (352) : 34 Cri L Jour 1093.

5. Objections as to assessors.—[1] There is a section, corresponding to S. 278, providing for objection to the selection of any particular person as an assessor. (Vol 31) 1944 Nag 320 (322) : 46 Cri L Jour 601 : 1 L (1945) Nag 533 \* (Vol 25) 1938 Pat 352 (357) : 39 C L Jour 725 (DB).

**"284A. (1)** In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.]

[1898 — S. 450.]

[a] Inserted by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 16.

**285. (1)** If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

[1882 — S. 285 ; 1872 — S. 259 ; 1861 — S. 353.]

#### Section 284 — Note 5 (contd.)

[2] An objection of presumed or actual partiality, when it is urged at the time of the selection of assessors, should be allowed. (Vol 31) 1914 Nag 320 (322) : 16 Cri L Jour 601 : 1 L R (1915) Nag 533 & (Vol 16) 1923 Pat 116 (119).

[3] The fact that some documents are in English which the assessor is unable to understand will not go against the competency of the assessor or the lawful constitution of the Court. (Vol 25) 1938 Pat 60 (62, 63) : 39 Cri L Jour 302 (DB).

#### 6. Power of Appellate Court to appoint assessors.

—[1] An appellate Court has no power to appoint the assessors for the purposes of appeal. ('63) 1868 Pun Re No. 17 Cr. p. 42 (42) (DB).

#### 7. Effect of non-compliance with the section.

—[1] Trial commencing and proceeding with less than minimum number of assessors—The Court is not properly constituted and trial is illegal. (Vol 11) 1924 Oudh 417 (417) & (Vol 12) 1925 Oudh 110 (110) : 27 Oudh Cas 213 : 26 Cri L Jour 359 & ('01) 25 Bom 694 (694) (DB) & ('99) 21 All 106 (107).

[2] Where some of the assessors are appointed from persons not summoned to act as such, the trial is not legal. ('94) 1894 All W N 207 (207) (DB) & (Vol 5) 1918 Pat 420 (420) : 3 Pat L Jour 141 : 19 Cri L Jour 363 (DB) & ('13) 14 Cri L Jour 654 (654) : 35 All 570 (DB) & ('10) 11 Cri L Jour 724 (725) : 13 Oudh Cas 337.

[3] Trial commenced with only three assessors of whom one was discharged subsequent to the examination of first witness owing to his disqualification—Trial must be deemed to have commenced only with two assessors. (Vol 29) 1942 All 140 (140) : 43 Cri L Jour 486 : 1 L R (1942) All 182 (DB). (Trial was bad.)

#### SECTION 285 — SYNOPSIS.

##### 1. Scope and applicability.

##### 2. "Prevented from attending, or absent themselves"—Sub-section (2).

3. "Shall proceed with the aid of the other assessor or assessors."

4. All assessors absent—Sub-section (2).

5. If assessor is an interested person—Procedure.

**1. Scope and applicability.**—[1] This section has no application to trials conducted from the start with less than the requisite number of competent assessors. ('99) 21 All 106 (107) & ('91) 15 Bom 511 (515) (DB) & ('91) 1894 All W N 207 (207) (DB) & ('01) 25 Bom 694 (696) (DB) & (Vol 5) 1918 Pat 120 (120) : 3 Pat L Jour 141 : 19 Cri L Jour 363 (DB).

[2] There must be at least one assessor attending throughout the proceedings. ('91) 13 All 337 (338) & ('02) 6 Cal W N 715 (716) (DB) & ('01) 24 Mad 523 (535) (SB). (It is condition precedent to the jurisdiction of the Court.)

[3] This section does not apply to the case where the Judge discharges an assessor as disqualified. (Vol 29) 1942 All 140 (140) : 43 Cri L Jour 486 : 1 L R (1942) All 182 (DB).

**2. "Prevented from attending, or absent themselves"—Sub-section (2).**—[1] Absence or prevention from attending should be throughout the trial. ('91) 13 All 337 (338, 339).

**3. "Shall proceed with the aid of the other assessor or assessors."**—[1] Procedure in the section can be adopted only where it is impracticable to enforce the attendance of the absent assessor—Where the Judge himself permits his absence the trial should be adjourned to a date when he will be present. ('94) 1894 Rat 695 (695) (DB).

[2] An assessor absenting himself should not be permitted to take part in the proceedings at a later stage. ('01) 24 Mad 523 (532, 534) (SB). (Only an irregularity curable under S. 537.) & ('95) 8 C P L R Cr 9 (12). (He ceases to be an assessor.) & ('94) 1894 Rat 695 (695) (DB) & ('02) 6 Cal W N 715 (716) (DB).

[3] Proceeding with the trial without ascertaining whether the assessor's absence was due to sufficient cause

<sup>a</sup>[DD. — *Joint trials.*

285A. In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian; and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 281A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter.]

[Cf. 1882 — Ss. 452, 451 ; 1872 — S. 242 ; 1861 — S. 326.]

[a] Inserted by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 11.

*E. — Trial to close of Cases for Prosecution and Defence.*

286. (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

*Examination of witnesses.* (2) The prosecutor shall then examine his witnesses.

[1882 — S. 286 ; 1872 — S. 247 ; 1861 — S. 361.]

**Section 285 — Note 3 (contd.)**

and enforcing his attendance when otherwise makes the trial illegal. (Vol 33) 1946 All 253 (254) : 17 Cri L Jour 451 : I L R (1946) All 129 (DB).

4. All assessors absent—Sub-section. (2).—[1] If all the assessors are prevented from attending or no one assessor is able to attend throughout the trial the proceedings should be stayed and a new trial held with the aid of fresh assessors. ('91) 13 All 337 (338).

[2] A Sessions Judge is authorised to record evidence in the absence of the jury or the assessors when additional evidence is called for by the appellate Court under S. 428, sub-s. (3). ('93) 15 All 136 (137) (DB).

[3] Evidence recorded after jury or assessors are discharged is without authority. ('93) 15 All 136 (137) (DB) & ('73) 5 N W P H C R 110 (112).

[4] Where there was no assessor present during the address on behalf of the accused it was held that there was no Court properly functioning. ('91) 13 All 337 (338).

[5] The non-compliance with this sub-section affects the jurisdiction of the Court and the irregularity is not curable under section 537. ('93) 15 All 136 (137) (DB).

5. If assessor is an interested person — Procedure.—[1] After trial has commenced one of the assessors found to be an interested person — Trial should be commenced *de novo* with new assessors after getting the original appointment and subsequent proceedings set aside by the High Court. ('12) 13 Cri L Jour 473 (473, 474) (DB) (Mad) & (Vol 20) 1933 Lah 926 (927) : 35 Cri L Jour 107 : 15 Lah 20.

[2] Improper expression of opinion or expression of opinion by assessors influenced by extra-judicial considerations should be ignored by the Judge. (Vol 26) 1939 Lah 475 (479) : 41 Cri L Jour 55 : I L R (1939) Lah 243 (DB).

**Section 285-A—Note 1**

[1] European and Indian accused on being brought before sessions the former claimed trial as European while latter wished to be tried with him—Case transferred to another Sessions Court—Indian accused claiming separate trial there—Held that “so tried” means also “if he is eventually so tried” and so, having once elected, he

could not claim a separate trial subsequently. (Vol 25) 1938 Nag 728 (333) : I L R (1938) Nag 516 : 39 Cri L Jour 818 (DB).

**SECTION 286 — SYNOPSIS.**

1. “When the jurors or assessors have been chosen.”
2. “The prosecutor shall open his case.”
3. “By reading.”
4. Examination of accused before opening of case
5. “Shall then examine his witnesses.”
6. Examination must be oral.
7. Cross-examination to follow examination-in-chief.
8. Questions by Judge, jury or assessors.
9. Duty of prosecution.
10. Trial ought not to be stopped before the close of the prosecution.
11. Treatment of witnesses.

1. “When the jurors or assessors have been chosen.”—[1] After the jurors are sworn, the trial should proceed and cannot be postponed to enable the prosecution to examine a witness on commission. ('92) 19 Cal 113 (122).

[2] Where, after the swearing in of the jury, the Judge is unable to attend, the trial can proceed further before new judge with the same jury provided no evidence has been taken and, if taken, the latter Judge does not act upon it. (Vol 14) 1927 Bom 161 (162) : 28 Cri L Jour 402.

2. “The prosecutor shall open his case.”—[1] Prosecutor in his observations to the jury must avoid any reflection on the character of accused likely to prejudice them. (Vol 16) 1929 Cal 617 (620, 625) : 30 Cri L Jour 993 (S B). (Per Rankin, C. J. and C. J. Ghose, J.)

[2] The examination of additional witnesses should not as a general rule, be sprung as a surprise on the

**Section 286—Note 2 (contd.)**

accused. (Vol 25) 1938 Pat 579 (582): 40 Cri L Jour 147 (DB) \* ('89) 1889 Pun Re No. 1 Cr, p. 1 (4).

[3] The Court should see that the prosecution puts forward a real case from the beginning and sticks to it up to the end. (Vol 14) 1927 Mad 533 (535): 28 Cri L Jour 285 (DB) \* (Vol 15) 1928 All 696 (697): 29 Cri L Jour 1084: 51 All 463.

[4] Summary of the evidence proposed to be called should be given to the Sessions Court and the accused before the trial, if a witness has not been called in the committing Magistrate's Court. (Vol 23) 1936 Lah 533 (537): 37 Cri L Jour 742: 17 Lah 176 (FB).

[See also (Vol 29) 1942 Bom 207 (207, 208).]

3. "By reading."—[1] The accused is entitled to know with certainty and accuracy the exact value of the charge brought against him. (Vol 3) 1916 Cal 188 (192): 16 Cri L Jour 497: 42 Cal 957 (DB).

4. Examination of accused before opening of case.—[1] Court should not, before the prosecutor opens his case and examines his witnesses, examine the accused under S. 342. (Vol 9) 1922 All 266 (267): 24 Cri L Jour 609 (DB).

5. "Shall then examine his witnesses."—[1] The prosecution witnesses should, as far as possible, be called to prove events in their chronological order. (Vol 10) 1923 Cal 579 (581) (DB).

[See also (Vol 28) 1941 Rang 209 (210): 1941 Rang L R 346: 43 Cri L Jour 157 (DB).]

[2] It is entirely in the discretion of the Public Prosecutor to say what witnesses he will examine. (Vol 33) 1946 P C 16 (19, 20): 72 Ind App 305: I L R (1946) Lah 1: 47 Cri L Jour 489 (P C) \* (Vol 32) 1945 P C 42 (45): 46 Cri L Jour 394 (P C) \* (Vol 23) 1936 Lah 533 (536, 537): 37 Cri L Jour 742: 17 Lah 176 (FB) \* ('94) 16 All 84 (86, 87) (FB).

[3] The Judge cannot dictate to the prosecution the order in which the witnesses are to be examined. (Vol 25) 1938 Rang 442 (445): 40 Cri L Jour 265 (DB) \* (Vol 10) 1923 Cal 579 (581, 582) (DB) \* ('05) 2 Cri L Jour 191 (192): 8 Oudh Cas 55 (DB).

[4] As a general rule, the prosecutor is bound to call all available witnesses who prove their connexion with the transaction in question and who also must be able to give important information. (Vol 31) 1944 Pesh 36 (37): 46 Cri L Jour 190 (DB) \* (Vol 28) 1941 Rang 209 (212): 1941 Rang L R 346: 43 Cri L Jour 157 (DB) \* (Vol 25) 1938 Lah 176 (176): 39 Cri L Jour 410 (DB) \* (Vol 25) 1938 Rang 442 (444, 445): 40 Cri L Jour 265 (DB) \* (Vol 24) 1937 All 182 (186): 38 Cri L Jour 401 \* ('93) 15 All 6 (7) (DB) \* (Vol 10) 1923 Cal 517 (519): 50 Cal 318: 25 Cri L Jour 467 (DB) \* (Vol 7) 1920 Pat 366 (371): 21 Cri L Jour 33 \* (Vol 16) 1929 Pat 443 (345, 346): 8 Pat 625: 30 Cri L Jour 1136 (DB) \* ('10) 11 Cri L Jour 410 (411): 3 Sind L R 200 (DB) \* (Vol 19) 1932 Lah 500 (501): 33 Cri L Jour 497 (DB) \* (Vol 14) 1927 Mad 475 (476): 28 Cri L Jour 307 (DB) \* (Vol 16) 1929 Mad 906 (909, 910): 53 Mad 69: 31 Cri L Jour 1006 (DB) \* (Vol 20) 1933 Oudh 265 (267): 34 Cri L Jour 1009 \* (Vol 19) 1932 Cal 118 (119): 58 Cal 335: 33 Cri L Jour 135 (DB).

[5] Prosecutor having reasonable grounds to believe that a witness, if called, would not speak the truth or is unnecessary need not call him. (Vol 29) 1942 Pat 81 (485, 486): 43 Cri L Jour 817: 21 Pat 258 (DB) \* (Vol 25) 1938 Cal 625 (626): 39 Cri L Jour 964 (DB) \* (Vol 25) 1938 Pat 579 (581): 40 Cri L Jour 147 (DB) \* (Vol 25) 1938 Rang 45 (48): 39 Cri L Jour 248 (DB) \* ('36) 14 Rang 45 (52) (DB) \* ('94) 16 All 84 (86, 87) (FB) \* (Vol 14) 1927 Mad 475 (476): 28 Cri L Jour 307 (DB) \* (Vol 10) 1923 Cal 517 (519): 50 Cal 318: 25

Cri L Jour 467 (DB) \* ('31) 1931 Mad W N 727 (728) (DB) \* (Vol 17) 1930 Lah 82 (84): 31 Cri L Jour 176 (DB).

[See (Vol 23) 1936 Lah 533 (533): 37 Cri L Jour 742: 17 Lah 176 (FB).]

[6] Where there are reasonable grounds for believing that a witness is an accomplice, he need not be called. (Vol 5) 1918 Cal 314 (315): 19 Cri L Jour 81 (DB).

[7] It is not proper to refuse to examine material witnesses on the following grounds:

(a) That a witness may be favourable to the accused or may not be favourable to prosecution. (Vol 31) 1944 Pesh 36 (37): 46 Cri L Jour 190 (DB) \* (Vol 28) 1941 Oudh 599 (607, 608): 17 Luck 20: 42 Cri L Jour 815 (DB) \* (Vol 23) 1936 P C 289 (300): 37 Cri L Jour 963 (P C) \* ('94) 16 All 81 (87) (FB).

[See also (Vol 29) 1942 Oudh 45 (47, 48): 17 Luck 150: 42 Cri L Jour 828 (DB).]

(b) That a witness has also been summoned by the defence. ('82) 8 Cal 121 (123) (DB) \* (Vol 7) 1920 Pat 366 (371): 21 Cri L Jour 33.

(c) That a serious charge is made against the witness by the accused. ('74) 21 Suth W R Or 13 (16) (DB).

[8] Prosecution should exercise a careful discrimination and avoid piling up of evidence, overburdening of record and consequent waste of time. (Vol 20) 1933 All 690 (695): 34 Cri L Jour 967: 55 All 1040 (DB).

[9] Witness for prosecution not called—Accused may apply to have such witness examined under S. 291. ('69) 5 Bom H C R Cr 85 (96).

[See also ('87) 14 Cal 245 (248).]

[10] Public Prosecutor in fairness should explain to the Court his reason for not calling his witness and offer to put him in the box for cross-examination by the accused. ('85) 7 All 904 (905) \* ('89) 2 Weir 379 (380) (DB) \* (Vol 9) 1922 Pat 535 (539): 1 Pat 401: 24 Cri L Jour 129 (DB) \* ('09) 10 Cri L Jour 538 (539) (DB) (Bom) \* ('10) 11 Cri L Jour 410 (411): 3 Sind L R 200 (DB) \* (Vol 10) 1923 Cal 717 (718): 25 Cri L Jour 190 (DB) \* (Vol 17) 1930 Cal 134 (135): 31 Cri L Jour 918 (DB).

[See (Vol 32) 1945 P C 42 (45): 46 Cri L Jour 394 (P C) \* ('92) 14 All 521 (524). (Especially when the witness is a material one and whose evidence has been relied upon by committing Magistrate.)]

[11] Where the Public Prosecutor is of opinion that a witness is false, he need not tender him for cross-examination. (Vol 29) 1942 Bom 71 (76): I L R (1942) Bom 384: 43 Cri L Jour 529 (FB) \* ('36) 14 Rang 45 (52) (DB) \* ('94) 16 All 81 (86, 87) (FB).

[See also (Vol 25) 1938 Rang 442 (445): 40 Cri L Jour 265 (DB).]

[12] Where any witness known to the prosecution is able to swear to facts very material to the case, the practice of merely allowing him to be tendered for cross-examination is not proper but he must be examined in the ordinary way as to the facts known to him. (Vol 16) 1929 Mad 906 (909, 910): 53 Mad 69: 31 Cri L Jour 1006 (DB).

[13] In undefended cases the Court should in the interests of justice test the statement of the witnesses for the prosecution by questions in the nature of cross-examination. ('85) 7 All 160 (162) (DB).

[See also (Vol 25) 1938 Pat 153 (158): 39 Cri L Jour 384 (DB).]

[14] The Court cannot take upon itself the role of a prosecutor and ask the prosecution witnesses to explain discrepancies. (Vol 12) 1925 Oudh 726 (727): 26 Cri L Jour 1236.

[15] No inference adverse to the prosecution can necessarily be drawn from its failure to put in the witness box all the possible eye-witnesses in a case.



Section 286 — Note 5 (*contd.*)

(Vol 29) 1942 Pat 481 (485, 486) : 21 Pat 258 : 43 Cri L Jour 817 (DB).

[16] Prosecution failing to examine important witness whose statement was recorded by police under S. 161 — *Held* that omission created serious doubts about good faith of prosecution evidence and an inference that it did not support the prosecution case. (Vol 31) 1944 Cal 306 (307, 308) : 46 Cri L Jour 220 (DB).

[17] There is nothing in the Code which says that the prosecutor at a sessions trial can examine only such witnesses as have been examined before a committing Magistrate. (Vol 28) 1941 Mad 324 (321) : 42 Cri L Jour 404 \* (Vol 23) 1936 Lah 533 (537) : 37 Cri L Jour 742 : 17 Lah 176 (FB). (Overruling (Vol 21) 1934 Lah 667 : 15 Lah 331 : 36 Cri L Jour 169 (DB).) \* (Vol 21) 1934 Bom 487 (487) : 36 Cri L Jour 311 \* (Vol 22) 1935 Sind 31 (33) : 28 Sind L R 317 : 36 Cri L Jour 563.

[See (Vol 17) 1930 Sind 99 (103) : 24 Sind L R 96 : 31 Cri L Jour 117 (DB) \* (Vol 20) 1933 All 690 (694, 695) : 34 Cri L Jour 967 : 35 All 1040 (DB).]

[18] Prosecutor cannot, as of right, demand that any witness who was not examined by the committing Magistrate either under S. 208 or S. 219 should be called and examined, but the Court may call and examine such a witness if it considers it necessary in the interests of justice. (Vol 28) 1941 Mad 324 (321) : 42 Cri L Jour 404 \* (92) 14 All 212 (213, 214).

[See (Vol 32) 1945 Sind 1 (9) : 46 Cri L Jour 490 : I L R (1944) Kar 305 (DB).]

[19] Witnesses not examined in committing Magistrate's Court — Prosecution has to depend upon such witnesses, being willing to give evidence without being bound down to appear, or upon being able to persuade the Court under S. 540 to summon them. (Vol 23) 1936 Lah 533 (537) : 37 Cri L Jour 742 : 17 Lah 176 (FB).

[20] Where a material witness has not been examined in the committing Magistrate's Court, his evidence cannot be relied on in the Sessions Court. (Vol 25) 1938 Sind 97 (98, 99) : 39 Cri L Jour 618 : 32 Sind L R 709 (DB) \* (Vol 22) 1935 Sind 31 (33) : 28 Sind L R 317 : 36 Cri L Jour 563.

[21] Sessions Judge refusing to take evidence of persons called as witnesses, should leave upon record clear and distinct reasons for doing so. ('86) 1886 All W N 68 (68) (DB).

[22] Where a case is tried by jury, the witnesses cannot be examined in the absence of the jury and their evidence, if taken, cannot be acted upon. ('06) 3 Cri L Jour 42 (43) (DB) (Bom).

[23] Prosecution witness examined in committing Magistrate's Court not examined by prosecution in Sessions Court — Court cannot compel prosecution to examine him as Crown witness or to tender him for cross-examination — If Court thinks such witness to be material one, he should be examined as Court witness. (Vol 22) 1935 Sind 60 (62) : 36 Cri L Jour 869 : 29 Sind L R 422 (DB).

**6. Examination must be oral.** — [1] The examination must be oral as the demeanour of the witness may be important for the assessor or Judge in forming an opinion of his truth. ('86) 9 Mad 83 (81, 85) (DB).

**7. Cross-examination to follow examination-in-chief.** — [1] It is both irregular and inconvenient to allow all the witnesses to be examined one day and to reserve the cross-examination to a subsequent date. ('90) 2 Weir 381 (382) (DB).

[2] Court may grant postponement of cross-examination on reasonable grounds such as —

(a) Where counsel is unprepared. (Vol 4) 1911 Cal 834 (835) : 41 Cal 299 : 15 Cri L Jour 596 (DB).

[See also (Vol 7) 1920 Pat 351 (352) : 22 Cri L Jour 219 : 5 Pat L Jour 706 (DB).]

(b) Where accused was undefended the first day and put only a few questions and applied next day for cross-examination by his pleader explaining why he was not engaged before. (Vol 7) 1920 Pat 351 (352) : 22 Cri L Jour 219 : 5 Pat L Jour 706 (DB).

(c) Where the pleader, appointed to defend the accused, who had no instructions till then, requested the Court to postpone the cross-examination of the prosecution witnesses till next day after the examination-in-chief were over. (Vol 16) 1929 Cal 1 (5) : 30 Cri L Jour 494 (DB).

**8. Questions by Judge, jury or assessors.** — [1] Lawyer appointed by Crown to defend poor prisoner doing his work badly — Judge should cross-examine the witness. (Vol 25) 1938 Pat 153 (158) : 39 Cri L Jour 384.

**9. Duty of prosecution.** — [1] The legitimate object of the prosecution is to see that the prisoner is convicted. (Vol 17) 1930 Cal 131 (136) : 31 Cri L Jour 918 (DB).

[2] It is not the duty of the prosecution to obtain a conviction at any cost. (Vol 28) 1941 Rang 209 (212) : 43 Cri L Jour 157 : 1941 Rang L R 316 (DB) \* (Vol 24) 1937 Nag 274 (278) : 39 Cri L Jour 92 (DB) \* (Vol 19) 1932 Bom 279 (282) : 36 Bom 331 : 33 Cri L Jour 613 (DB) \* (Vol 3) 1916 Cal 523 (529) : 16 Cri L Jour 576 (DB) \* ('82) 8 Cal 121 (124) (DB).

[3] Prosecution should not obtain an unjustified conviction. (Vol 26) 1939 Rang 390 (391) : 41 Cri L Jour 153 : 1940 Rang L R 203 (DB) \* ('36) 14 Rang 45 (49) (DB) \* ('91) 16 All 81 (86) (FB).

[4] The duty of the Public Prosecutor is to conduct the case fairly and fearlessly and with a full sense of responsibility that attaches to his position. (Vol 29) 1912 Mad 227 (229) : 43 Cri L Jour 521 \* (Vol 23) 1936 P C 289 (300) : 37 Cri L Jour 963 (PC).

[5] Public Prosecutor should not act as the counsel for any particular person or party and should not aggravate the case against the prisoner or keep back a witness because his evidence may weaken the prosecution case. ('71) 8 Bom H C R Cr 126 (153) (FB).

[See (Vol 26) 1939 Rang 390 (392) : 41 Cri L Jour 153 : 1940 Rang L R 203 (DB).]

[6] Public Prosecutor should place before the Court all materials irrespective of the question as to whether they help the accused or so against him. (Vol 29) 1912 Lah 37 (39) : I L R (1913) Lah 77 : 43 Cri L Jour 370 (DB). (Statements before the police.) \* (Vol 16) 1929 Pat 275 (283) : 8 Pat 288 : 36 Cri L Jour 675 (DB). (Statements before Police.) \* ('07) 5 Cri L Jour 427 (429) : 34 Cal 698 (DB). (Material documents.) \* ('94) 21 Cal 642 (653) (DB). (Do.)

[7] The object of the Public Prosecutor should be to aid the Court in discovering the truth. (Vol 24) 1937 Nag 274 (278) : 39 Cri L Jour 92 (DB) \* ('71) 8 Bom H C R Cr 126 (153) (FB).

[8] There should be on the part of the Public Prosecutor no unseemly eagerness for, or grasping at, a conviction. ('71) 8 Bom H C R Cr 126 (153, 154) (FB) \* (Vol 4) 1917 Cal 123 (131) : 18 Cri L Jour 385 : 44 Cal 477 (FB). (Per Mookerjee J.) \* (Vol 11) 1921 Nag 213 (245) : 26 Cri L Jour 163.

[9] The prosecution should take great care not to leave anything ambiguous on the records and to explain clearly by evidence circumstances having material bearing on the case. ('29) 1929 Mad W N 395 (413) (DB) \* (Vol 15) 1928 All 25 (27) : 29 Cri L Jour 26 (DB).

[10] It is the duty of the Public Prosecutor to give opportunity to his witnesses to explain any discrepancies

*Examination of accused before Magistrate to be evidence.*

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.<sup>a</sup>

[1882 — S. 287 ; 1872 — S. 248 ; 1861 — S. 366.]

[a] See the Indian Evidence Act, 1872 (I [1] of 1872), S. 80.

*Evidence given at preliminary inquiry admissible.*

288. The evidence of a witness<sup>a</sup> [duly recorded in the presence of the accused under Chapter XVIII] may, in the discretion of

#### Section 286 — Note 9 (contd.)

or contradictions in their depositions. ('91) 16 All 207 (208, 209) (DB).

[See (Vol 25) 1938 Pat 579 (585) ; 40 Cri L Jour 147 (DB).]

[11] Public Prosecutor is not expected to call witnesses with reference to defence theories. ('04) 1 Cri L Jour 718 (726) (Kathiawar).

[12] It is not open to the Public Prosecutor to anticipate the defence and discredit it by calling in evidence even before such defence is set up. (Vol 14) 1927 Mad 533 (535) ; 28 Cri L Jour 285 (DB).

[13] It is no part of the prosecution's duty to suggest a motive for a crime nor is it the duty of the Court to determine why the crime was committed. (Vol 25) 1938 Rang 331 (332) ; 40 Cri L Jour 49 \* ('37) 1937 Mad W N 993 (994) (DB) \* (Vol 23) 1936 Rang 60 (62) ; 37 Cri L Jour 418 (DB).

10. Trial ought not to be stopped before the close of the prosecution. — [1] Once having commenced the case, the Sessions Judge should, except for some very pressing reason, proceed *de die in diem* till the trial is finished. ('05) 2 Cri L Jour 191 (192) ; 8 Oudh Cas 55 (DB) \* (Vol 14) 1927 All 721 (723) ; 50 All 365 ; 28 Cri L Jour 950.

[2] Trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish. ('12) 13 Cri L Jour 861 (862) ; 35 All 63 (DB) \* ('05) 2 Cri L Jour 191 (192) ; 8 Oudh Cas 55 (DB).

[3] No final opinion as to the reliability or otherwise of the evidence ought to be arrived at by the Judge or jury until the whole evidence is before them and has been considered. ('97) 20 Mad 445 (445, 446) (DB).

11. Treatment of witnesses. — [1] A Sessions Judge is not justified in stopping the cross-examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth. (1900) 1900 All W N 149 (149).

[2] No Judge should allow a threat to a witness unless he has shown that he is wilfully false or persistently refusing to give evidence on facts which must be within his knowledge. ('92) 14 All 242 (256) (SB).

#### Section 287 — Note 1

[1] It is obligatory on the prosecution to tender in evidence statement of accused made before committing Magistrate, whether such statement tells for or against he accused. ('94) 1894 Rat 710 (713) (DB) \* ('70) 13 W R Cr 63 (63) (DB).

[2] The statement tendered and read as evidence has the same effect as any other evidence adduced before the sessions Judge. (Vol 27) 1940 Pat 14 (15) ; 40 Cri L Jour 833 \* ('66) 5 Suth W R Cr 1 (1) \* ('92) 15 Mad 52 (553) (DB).

[3] Where accused has confessed his guilt in his statement before committing Magistrate he can be convicted on the basis of such confession. ('66) 6 Suth W R Cr 83 (DB) \* (Vol 8) 1921 Sind 129 (130) ; 16 Sind R 67 ; 25 Cri L Jour 574 (DB) \* ('69) 12 Suth W R 49 (49) (DB).

[4] Accused can be convicted on confession though he retracts confession before Sessions Judge. ('85) 1885 All W N 59 (59) (DB) \* (Vol 2) 1915 Bom 249 (250, 251) ; 40 Bom 220 ; 17 Cri L Jour 133 (DB) \* ('67) 8 Suth W R Cr 40 (40) (DB).

[5] Accused is entitled to rely on statement to prove points in his favour. ('93-1900) 1893-1900 How Bar Rul 207 (208).

[6] The section does not contemplate that the committing Magistrate should be called as a witness in the Sessions Court and examined with reference to the recorded statement. See ('01) 5 Cal W N xlvii (xlviii).

[7] Statement of accused should be read as part of the case for the prosecution before the accused enters upon his defence. ('87) 2 Weir 361 (361) \* ('67) 8 Suth W R Cr Cir No. 11, p. 6 (6).

[8] Where there are several accused in a case, and the statement made by one of them in the committing Magistrate's Court is read in the Sessions Court, the portions touching the other accused cannot be omitted. ('70) 5 Mad II G R App iv (iv).

[9] Accused making confession under improper inducement by police—Committing Magistrate admitting confession and examining accused with regard to it—*Held*, the confession was not duly recorded and could not be produced in the sessions. ('08) 8 Cri L Jour 62 (64) ; 4 Low Bar Rul 244.

[See also (Vol 2) 1915 Bom 249 (250) ; 17 Cri L Jour 133 ; 40 Bom 220 (DB).]

[10] An admission made by the accused before the committing Magistrate in answer to questions by the latter, when there is no evidence implicating the accused is not "duly recorded." (Vol 28) 1941 Mad 1 (5) ; 42 Cri L Jour 677.

[11] A written statement filed by the accused in answer to questions put to him by the committing Magistrate cannot be considered to be a document containing the examination of the accused "duly recorded." (Vol 28) 1941 Mad 296 (297) ; 42 Cri L Jour 402.

[12] Statement of the accused recorded by a Magistrate who held the preliminary enquiry is admissible although the case was actually committed to the sessions by some other Magistrate. ('08) 7 Cri L Jour 29 (30) ; 31 Mad 40 (DB).

[13] Where a Magistrate who succeeds to the jurisdiction of another Magistrate commits a case to the sessions under S. 350 on evidence recorded by his predecessor, the statement of the accused recorded by such predecessor is admissible. (Vol 13) 1926 Lah 271 (271) ; 7 Lah 70 ; 27 Cri L Jour 627 \* ('08) 7 Cri L Jour 29 (30) ; 31 Mad 40 (DB).

#### SECTION 288 — SYNOPSIS.

1. Scope, object and applicability.
2. "Duly recorded in the presence of the accused."
3. "Under Chapter XVIII."
4. "Discretion of the presiding Judge."
5. "If such witness is produced and examined."

the presiding Judge, if such witness is produced and examined, be treated as evidence in the case [for all purposes subject to the provisions of the Indian Evidence Act 1872.]

[1892 — S. 288; 1872 — S. 249.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), s. 75, for "duly taken in the presence of the accused before the committing Magistrate." [b] *Insert ed. 1932.*

## OBJECTS AND REASONS

"We think the amendments proposed in S. 288 effect a considerable improvement; but we would lay down that the evidence of a witness before the committing Magistrate can only be treated as evidence for all purposes 'subject to the provisions of the Indian Evidence Act.' We considered the suggestion that the

power conferred by this section should be exercisable by Appellate and Revisional Courts when the lower Court had refrained from exercising it, but on the whole, we were of opinion that no provision should be made in this respect."

— S. C. R. (18 [XVIII] of 1923)

### SECTION 238 — SYNOPSIS (*contd.*)

6. May be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act.

7. Corroboration of evidence admitted under this section.

8. Practice and procedure.

9. Approver's evidence.

1. Scope, object and applicability.—[1] But for this section evidence in the commitment proceedings would be admissible for the purpose of corroborating or contradicting the witness. (Vol 12) 1925 Lah 483 (185); 27 Cri L Jour 289 (DB) & (Vol 31) 1947 Pat 146 (118) (DB).

[2] This section gives a discretion in the Sessions Judge as substantive evidence even though it may not be admissible under S. 33, Evidence Act. ('87) 1887 Pun Re No. 51 Cr, p. 132 (135) (DB).

[3] The object of the section is to prevent the tampering of witnesses between the commitment and trial. ('93-1900) 1893-1900 Low Bur Rul 280 (280).

[4] All evidence given before the committing Magistrate does not become ipso facto evidence at the sessions unless the Judge admits them as such. (Vol 21) 1937 Sind 61 (65); 38 Cri L Jour 487; 30 Sind L R 238 (DB) & (Vol 33) 1946 Nag 321 (328); 1 I L R (1916) Nag 946; 47 Cri L Jour 918 (DB). (Evidence so committed can form the basis of the finding.)

[5] This section does not restrict the use of evidence which can be used at sessions trial for any purpose under the Evidence Act. (Vol 31) 1944 Lah 377 (380) (DB) & (Vol 31) 1914 Lah 206 (208); 45 Cri L Jour 660 (DB).

[6] Evidence of each individual should be separately admitted and no general order in respect of all or some of them should be passed. ('85) Weir 3rd Edn. 931 (936).

[7] The section applies only to prosecution witnesses. ('10) 11 Cri L Jour 538 (539) (DB) (C.D.).

[8] The section deals only with the admissibility of the evidence and not their value as evidence. (Vol 33) 1946 Lah 380 (385); 47 Cri L Jour 980 (DB) & (Vol 34) 1947 Pat 144 (145); 25 Pat 323 (325) (DB).

2. "Duly recorded in the presence of the accused." — [1] The existence of a record or memorandum of evidence is a condition precedent to the applicability of the section. ('87) 1887 Pun Re No. 51 Cr, p. 132 (134, 135).

[2] The evidence of prosecution witnesses recorded, without the accused being allowed to cross-examine them is not "duly recorded" and cannot be introduced into the record under this section. ('94) 21 Cal 642 (665) (DB) & (Vol 17) 1930 Sind 54 (55); 31 Cri L Jour 121 (DB).

[3] Accused declining to cross-examine prosecution

witnesses despite opportunity given — Absence of cross-examination does not affect admissibility of evidence of these witnesses. (Vol 17) 1930 Sind 54 (55); 31 Cri L Jour 121 (DB) & (Vol 13) 1926 Lah 590 (593, 594); 28 Cri L Jour 23 (DB) & (Vol 12) 1925 Oudh 726 (727); 26 Cri L Jour 1236.

[4] Evidence recorded in the absence of the accused cannot be admitted under this section. (106) 1 Cri L Jour 193 (500); 1904 Pun Re No. 3 Cr & (113) 11 Cri L Jour 211 (212); 35 All 260 (101) & (Vol 11) 1911 Oudh 388 (389); 16 Cri L Jour 132; 17 Oudh Cr 1965 & (96) 23 Cal 361 (365) (DB).

[5] Sessions trial — During cross-examination of prosecution witness, their depositions before the committing Magistrate tendered & contradicted them — No objection raised by Crown — Those depositions cannot be refused. ('86) 13 Cal 121 (123, 124) (DB).

3. "Under Chapter XVIII." — [1] The statement of a witness made otherwise than under Chapter XVIII, is not within the section. (112) 13 Cri L Jour 226 (229); 36 Mad 159 (DB) & ('04) 1 Cri L Jour 199 (500, 501); 1904 Pun Re No. 3 Cr & (Vol 9) 1922 Mad 303 (303); 23 Cri L Jour 262 (DB) & (Vol 19) 1932 Cal 683 (685); 33 Cri L Jour 770 (DB).

[2] Evidence recorded under S. 219, after commitment, would fall within the section. (Vol 13) 1926 Cal 235 (237); 53 Cal 181; 26 Cri L Jour 1577 (DB).

[3] Trial commenced with a view to try it himself — Subsequently committed to session — Evidence recorded by Magistrate can be deemed as recorded under Chapter XVIII. (Vol 27) 1910 Lah 389 (391); 1 I L R (1910) Lah 151; 12 Cri L Jour 29 (DB) & (Vol 13) 1926 Cal 235 (237); 53 Cal 181; 26 Cri L Jour 1577 (DB).

4. "Discretion of the presiding Judge." — [1] Discretion vested under this section should be very carefully and sparingly used. (Vol 32) 1915 Cal 467 (469, 470); 1 I L R (1914) 2 Cal 305 (DB) & (Vol 31) 1914 Cal 323 (324); 1 I L R (1913) 2 Cal 381; 46 Cri L Jour 199 (DB) & (Vol 24) 1937 Sind 61 (65); 38 Cri L Jour 487; 30 Sind L R 238 (DB).

[2] Discretion vested under this section is absolute. (Vol 29) 1912 Lah 215 (216); 1 I L R (1913) Lah 397; 43 Cri L Jour 828 (DB).

[3] Evidence admitted under this section should not be read out to the witnesses before they are cross-examined by the defence. (Vol 9) 1922 Lah 1 (12); 3 Lah 144; 23 Cri L Jour 513 (DB).

[4] Consent of the counsel or the expediting of the trial is not a proper ground for acting under this section. ('85) Weir 3rd Edn. 934 (936, 937).

[5] A Judge can act under this section only when he has reasons to think that the witness has stated the truth before the Magistrate but does not do so before him. (Vol 28) 1941 Mad 258 (259); 42 Cri L Jour 265; 1 I L R (1941) Mad 172 (DB) & (Vol 27) 1940 Mad 136

**section 288 — Note 4 (contd.)**

37) : 41 Cri L Jour 323 (DB) & (Vol 21) 1934 Sind 165) : 38 Cri L Jour 487 : 30 Sind L R 238 (DB) & (Vol 17) 1930 All 716 (747) : 32 Cri L Jour 152 (DB) (96) 9 C P L R Cr 21 (27) & (Vol 16) 1929 Lah 111 (2) : 29 Cri L Jour 1047 (DB) & (Vol 31) 1914 Cal 332 (24) : I L R (1913) 2 Cal 381 : 46 Cri L Jour 199 (DB). (Minor discrepancies does not warrant action under this section.)

[6] Contradicting witness alleging that his evidence before Magistrate was not voluntarily made but under duress—Judge should investigate it before deciding that the evidence given before him is false. (1900) 4 Cal W N 49 (55) (DB) & (1903) 7 Cal W N 315 (319, 350) (DB).

5. "If such witness is produced and examined." — [1] Examination of the witness in the sessions trial is condition precedent to the incorporation of his previous evidence under this section. (Vol 31) 1944 Lah 377 (380) (DB) & (Vol 7) 1920 Nag 176 (171) : 16 Nag L R 30 : 21 Cri L Jour 486 & (Vol 21) 1934 Lah 212 (214) : 35 Cri L Jour 349 (DB).

[2] Mere cross-examination of a witness or merely tendering a witness for cross-examination is not sufficient to satisfy the requirements of the section. (Vol 3) 1916 Mad 582 (583) : 16 Cri L Jour 615 (DB) & (Vol 17) 1930 Cal 706 (707) : 57 Cal 940 : 32 Cri L Jour 180 (DB).

[3] The mere examination of a witness as to the fact of his having made the previous deposition is not enough for allowing action under this section. (1855) Weir 3rd Edn. 934 (936).

6. May be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act. — [1] The previous deposition of a witness admitted under this section can be treated as substantive evidence in the case and not merely as evidence useful for the purpose of corroborating or contradicting a witness. (Vol 33) 1946 Lah 48 (49) : 47 Cri L Jour 232 & (Vol 31) 1944 Cal 323 (325) : I L R (1943) 2 Cal 381 : 46 Cri L Jour 199 (DB) & (Vol 29) 1942 Lah 215 (216) : I L R (1943) Lah 397 : 43 Cri L Jour 828 (DB) & (Vol 24) 1937 P C 119 (121) : 38 Cri L Jour 498 : 64 Ind App 148 : I L R (1937) Bom 711 (PC) & (Vol 27) 1940 Nag 340 (347) : I L R (1941) Nag 110 : 42 Cri L Jour 17 (DB) & (Vol 27) 1940 Pat 289 (293) : 19 Pat 369 : 41 Cri L Jour 910 (DB).

[2] The words "subject to the provisions of the Indian Evidence Act" do not mean that the previous statements of a witness admitted under this section can be treated as evidence only in those cases in which such a course is expressly provided for by the Evidence Act. (Vol 29) 1942 Lah 215 (216) : I L R (1943) Lah 397 : 43 Cri L Jour 828 (DB).

[3] The evidence admitted under this section is subject to the same rules as to admissibility and relevancy as any other evidence and irrelevant evidence cannot be admitted under this section merely because it is the deposition given before the committing Magistrate. (Vol 31) 1944 Sind 178 (182) : 46 Cri L Jour 348 : I L R (1944) Kar 75 (DB) & (Vol 12) 1925 Sind 289 (292) : 19 Sind L R 71 : 26 Cri L Jour 1063 (DB) & (Vol 12) 1925 Lah 452 (453) : 6 Lah 199 : 26 Cri L Jour 1245 (DB) & (Vol 12) 1925 Pat 51 (53) : 3 Pat 781 : 26 Cri L Jour 270 (DB) & (Vol 13) 1926 Pat 440 (442) : 27 Cri L Jour 594 (DB) & (Vol 13) 1926 Cal 105 (105, 106) : 26 Cri L Jour 1553 (DB) & (Vol 14) 1927 All 479 (480) : 49 All 251 : 27 Cri L Jour 1365 (DB) & (Vol 12) 1925 Bom 266 (267) : 26 Cri L Jour 705 : 50 Bom 215 (DB).

[4] There is no legal objection to a conviction being based merely on the prior deposition of a witness admit-

ted under this section. (Vol 27) 1940 Nag 330 (337) : I L R (1941) Nag 110 : 42 Cri L Jour 17 (DB) & (Vol 23) 1936 Lah 377 (378) : 37 Cri L Jour 547 : 17 Lah 419 (DB) & (Vol 22) 1935 All 691 (692) : 36 Cri L Jour 823 & (Vol 21) 1934 Oudh 222 (224) : 35 Cri L Jour 891 (DB).

[5] A Judge should have very substantial grounds for preferring the evidence before the committing Magistrate to that given before him. (Vol 29) 1942 Mad 700 (701) : 44 Cri L Jour 119 (DB) & (Vol 29) 1942 Sind 139 (140) : 41 Cri L Jour 73 : I L R (1942) Kar 299 (DB) & (Vol 27) 1940 Mad 136 (137) : 41 Cri L Jour 323 (DB) & (339) : 11 Pun L R 862 (864) (DB) & (Vol 23) 1936 Lah 357 (359) : 37 Cri L Jour 567 : 17 Lah 419 (DB) & (Vol 23) 1936 Pat 11 (14) : 37 Cri L Jour 235 (DB) & (Vol 13) 1926 Pat 119 (143) : 27 Cri L Jour 594 (DB) & (Vol 9) 1922 Bom 108 (109) : 46 Bom 97 : 22 Cri L Jour 636 (DB) & (Vol 21) 1934 Oudh 182 (183) : 35 Cri L Jour 797 & (1900) 4 Cal W N 49 (55) (DB).

[6] It is unsafe to use as corroboration of a retracted confession the retracted deposition of a witness admitted under this section. (1900) 27 Cal 295 (306, 307) (DB) & (192) 2 Weir 509 (509) (DB) & (189) 12 Mad 123 (124) (DB) & (1900) 13 C P L R Cr 107 (108, 110) & (Vol 4) 1917 Lah 331 (333) : 18 Cri L Jour 703 : 1917 Pun Re No. 37 Cr (DB).

[7] The whole of the prior statement of a witness and not merely portions of it should be treated as evidence in the case. (Vol 16) 1929 Nag 233 (235) : 30 Cri L Jour 333 (DB) & (Vol 12) 1925 Mad 879 (880) : 27 Cri L Jour 18 (DB).

7. Corroboration of evidence admitted under this section. — [1] Prior deposition made before Magistrate and admitted under this section can be corroborated by prior statements of the witness of the kind mentioned in S. 157, Evidence Act. (Vol 29) 1942 Sind 139 (140) : 44 Cri L Jour 73 : I L R (1942) Kar 299 (DB) & (Vol 11) 1924 Lah 609 (610) : 5 Lah 324 : 25 Cri L Jour 1201 (DB) & (Vol 10) 1923 Mad 20 (23) : 45 Mad 766 : 24 Cri L Jour 417 (DB) & (Vol 21) 1934 Cal 121 (125) : 60 Cal 1339 : 35 Cri L Jour 567 (DB).

[But see (10) 11 Cri L Jour 542 (542, 543) : 34 Bom 599 (DB).] (Only statements of witnesses made in trying Court can be corroborated in manner contemplated by S. 157, Evidence Act.)

[2] Statement of witness recorded under S. 161 and corroborating his deposition before the committing Magistrate cannot be treated as substantive evidence. (Vol 14) 1927 Mad 1112 (1112) : 28 Cri L Jour 279 (DB).

[3] Statement made to police cannot be used for corroborating the deposition. (Vol 12) 1925 Lah 399 (400) : 6 Lah 171 : 27 Cri L Jour 438 (DB).

[But see (Vol 11) 1924 Lah 609 (610) : 5 Lah 324 : 25 Cri L Jour 1201 (DB).]

[4] Statement before committing Magistrate transferred to sessions record — Judge being satisfied about its truth can act upon it and corroboration is not required. (Vol 33) 1916 Lah 380 (382, 383) : 47 Cri L Jour 980 (DB).

8. Practice and procedure. — [1] Before admitting evidence under this section, the Judge must inform the parties so that they can test it. (186) 1886 All W N 256 (256, 257) & (Vol 8) 1921 All 215 (216) : 27 Cri L Jour 813 (DB) & (Vol 16) 1929 Nag 233 (235) : 30 Cri L Jour 333 (DB).

[2] Depositions of witness before committing Magistrate and Sessions Judge inconsistent — Judge should afford an opportunity to the witness of explaining the inconsistency by drawing his attention to the previous statement. (Vol 32) 1945 Cal 159 (165) : 46 Cri L Jour 692 (DB) & (Vol 31) 1944 Cal 323 (324) : 46 Cri L

289. (1) When the examination of the witnesses for the prosecution and the examination of witnesses for defence (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

[1882 — S. 289; 1872 — S. 251; 1861 — S. 372.]

#### Section 288 — Note 3 (contd.)

Jour 199: 1 L R (1913) 2 Cal 381 (DB) & ('81) 1881 All W N 74 (74) & (Vol 16) 1929 Lah 111 (112): 20 Cri L Jour 1017 (DB) & ('85) 7 All 362 (863) & (Vol 9) 1922 Pat 40 (12): 23 Cri L Jour 218 (DB) & (Vol 17) 1930 Pat 338 (339, 344): 32 Cri L Jour 138 (DB) & ('04) 1 Cri L Jour 86 (88): 31 Cal 112 (FB) (Per Princep Offg. C. J.) & (Vol 2) 1915 Bom 237 (241): 16 Cri L Jour 751 (DB).

[See however (Vol 31) 1911 Sind 178 (182): 46 Cri L Jour 348: 1 L R (1941) Kar 75 (DB) & (Vol 29) 1912 Lah 215 (216): 43 Cri L Jour 828: 1 L R (1913) Lah 397 (DB).]

[3] Statement of witness for prosecution, who was given up by prosecution, transferred to Sessions record at request of defence — Witness is to be treated as defence or Court witness and not as prosecution witness. (Vol 31) 1944 Lah 206 (208, 209): 45 Cri L Jour 660 (DB).

[4] Witness resiling from statement made in committing Magistrate's Court — Notice to show cause cannot be issued when case is pending. (Vol 23) 1936 Sind 140 (141): 37 Cri L Jour 1045.

[5] Time for transfer of depositions—Court should not allow statements of approver to be read out to the witness before the defence has had an opportunity of cross-examining him. (Vol 9) 1922 Lah 1 (12): 3 Lah 144: 23 Cri L Jour 513 (DB).

9. Approver's evidence. — [1] Approver's deposition in committing Court is admissible under this section if considered true by trial Court — Retraction of confession and repudiation of that evidence by approver are not material. (Vol 33) 1916 Mad 271 (278): 1 L R (1946) Mad 389: 47 Cri L Jour 785 (DB) & (Vol 26) 1939 All 567 (572): 40 Cri L Jour 856: 1 L R (1939) All 736 & (Vol 17) 1930 Pat 545 (547, 548): 9 Pat 592: 32 Cri L Jour 66 (DB) & ('94) 1894 Pun Re No. 14 Cr. p. 42 (44) (DB) & (Vol 7) 1920 Mad 741 (742): 22 Cri L Jour 385 & ('99) 21 All 175 (176, 177) (DB) & ('03-04) 2 Low Bur Ind 214 (215).

[2] It is unsafe to base a conviction on the retracted statement of an approver in the absence of any corroboration. ('91) 1891 All W N 184 (185).

#### SECTION 289 — SYNOPSIS.

1. When the examination of witnesses for prosecution is concluded.

2. After the examination, if any, of the accused.
3. "The accused shall be asked whether he means to adduce evidence."
4. "The prosecutor may sum up his case"—Sub-section (2).
5. Where there is no evidence that the accused committed the offence.
6. Record a finding of not guilty.
7. "Direct the jury to return a verdict of not guilty."
8. "Shall call on the accused to enter on his defence"—Sub-section (4).
9. Procedure where the witnesses for the accused are absent.
10. Effect of non-compliance with the section.

1. When the examination of witnesses for prosecution is concluded. — [1] An accused person is entitled to know what the evidence against him is before he is called upon to enter on his defence. (Vol 10) 1923 All 322 (323): 15 All 323: 25 Cri L Jour 305.

[2] Prosecution witness examined after defence evidence recorded—Held, procedure was contrary to the provisions of the Code. (Vol 7) 1920 Bom 339 (341): 22 Cri L Jour 58 (DB). (Not justified.) & (Vol 15) 1923 Lah 953 (953): 29 Cri L Jour 844.

[3] The prosecutor cannot re-open his case and make additions to it except such voluntary additions as the accused may make himself. (Vol 10) 1923 All 322 (323): 45 All 323: 25 Cri L Jour 305 & ('71) 3 N W P H C R 271 (272). (Re-opening case allowed for contradicting new case set up by accused in defence.)

[4] Court recalling prosecution witness after accused has made his defence—Accused should be allowed to call further evidence to meet the evidence so taken. ('70) 13 Suth W R Cr 15 (15) (DB) & (Vol 12) 1925 Lah 531 (531): 26 Cri L Jour 1035.

[5] The Court should wait before proceeding under this section till all the evidence on the side of the prosecution is concluded. ('92) 14 All 212 (214).

[6] The Court cannot proceed under this section in the course of the prosecution evidence because it does not believe the evidence so far tendered. ('97) 20 Ma 415 (446) (DB) & ('98) 1 Oudh Cas 85 (87).

Section 289 (*contd.*)

2. After the examination, if any, of the accused. — [1] The words "if any" are not intended to relax the imperative provisions of S. 342 in sessions trials but covers only those cases where the accused has no circumstances to explain. ('09) 10 Cri L Jour 325 (339) (DB) (Cal) \* ('08-04) 2 Low Bur Rul 115 (116) (DB)\* (Vol 20) 1933 All 690 (695); 55 All 1040; 34 Cri L Jour 967 (DB).

[2] Before an accused person is called upon to enter on his defence, he should be examined regarding the evidence against him. ('66) 1866 Pun Re No. 57 Cr, p. 64 (65) (DB) \* (Vol 13) 1926 Oudh 57 (58); 26 Cri L Jour 1576. (By such examination the jury gets an opportunity of observing the demeanour of the accused.)

3. "The accused shall be asked whether he means to adduce evidence." — [1] The accused himself cannot waive the benefit of the provisions which requires the Court to ask him whether he intends to adduce evidence. ('68) 10 Suth W R Cr 7 (7) (DB).

[2] "Adduce evidence" does not mean the same thing as entering upon defence. The Court can require the accused to enter upon his defence only where Court considers that there is evidence that accused committed the offence. (Vol 7) 1920 Pat 471 (474, 478); 21 Cri L Jour 705; 5 Pat L Jour 430.

4. "The prosecutor may sum up his case" — Sub-section (2). — [1] A prosecutor may sum up, in a case where several accused are tried together, only if all the accused say they do not mean to adduce evidence. ('94) 18 Bom 364 (365).

5. Where there is no evidence that the accused committed the offence. — [1] The words "no evidence" in sub-section (2) does not mean that there is no satisfactory, trustworthy or conclusive evidence. ('88) 10 All 414 (416, 417) \* ('92) 16 Bom 414 (422) (DB) \* (Vol 12) 1925 Cal 1055 (1055); 26 Cri L Jour 1151 (DB) \* (Vol 16) 1929 Pat 121 (124); 30 Cri L Jour 519 \* ('94) Oudh Sel Cas No. 274, p. 607 (608).

[2] The evidence must be such that a jury might reasonably conclude the fact as established. (Vol 14) 1927 All 90 (91); 49 All 181; 27 Cri L Jour 1369. (Test is whether there is evidence which could go before a jury.) \* (Vol 2) 1915 Cal 773 (777); 16 Cri L Jour 561 (FB).

[3-4] Where the only evidence is the confession of a co-accused it is "no evidence" within the meaning of this section. ('71-74) 7 Mad H C R App xv (xv) \* ('09) 9 Cri L Jour 404 (405); 33 Mad 46 (DB) \* ('09) 10 Cri L Jour 68 (68) (DB) (Mad). (Evidence of witness of co-accused.)

[5] The evidence contemplated by sub-s. (2) includes both direct and circumstantial evidence. (Vol 24) 1937 Pat 263 (270); 15 Pat 817; 38 Cri L Jour 673 (DB). (The judgment uses the words "oral and circumstantial" but apparently what is meant is "direct and circumstantial.")

[6] Prosecution could not adduce evidence as witnesses failed to attend. It cannot be treated as a case of "No evidence." (Vol 13) 1926 Cal 584 (585); 27 Cri L Jour 125 (DB).

6. Record a finding of not guilty. — [1] Court considering that there is no evidence can record a finding of not guilty without taking opinions of assessors, but if there is some evidence Court cannot do so without their opinions. ('96) 9 C P L R Cr 24 (25) \* ('92) 16 Bom 414 (422) (DB) \* ('88) 10 All 414 (416, 417).

[2] Court cannot record a finding of not guilty where it considers the charge itself improper. ('90) 12 All 551 (552).

7. "Direct the jury to return a verdict of not guilty." — [1] The discretion conferred by this section must be exercised initially and where the Judge is

satisfied that there is no evidence to go to the jury, he must withdraw the case from them. (Vol 28) 1941 Bom 123 (124); 42 Cri L Jour 470; 1 L R (1941) Bom 515 (FB) \* (Vol 28) 1941 Bom 125 (128); 42 Cri L Jour 513 (FB) \* (Vol 28) 1941 Mad 763 (763, 764); 43 Cri L Jour 106 (DB) \* (Vol 16) 1929 Pat 121 (123); 30 Cri L Jour 519 \* (Vol 7) 1920 Cal 698 (699); 22 Cri L Jour 60 (DB).

[2] Direction by the Judge to return verdict of "not guilty" in the absence of evidence must be accepted by the jury as it is a question of law. (Vol 26) 1939 All 708 (708, 709); 1 L R (1939) All 871; 41 Cri L Jour 142 (DB).

[3] Likely prejudice to the case of co-accused cannot be a ground for not returning verdict of "Not guilty" if there is no evidence. (Vol 13) 1926 Cal 728 (729); 27 Cri L Jour 398.

[4] Where there is some evidence the Court cannot direct a verdict of not guilty because it believes it. (Vol 18) 1931 Pat 172 (175); 10 Pat 140; 32 Cri L Jour 975 (DB) \* (Vol 16) 1929 Pat 121 (123); 30 Cri L Jour 519 \* (Vol 11) 1924 Cal 809 (811); 25 Cri L Jour 1048 (DB) \* (Vol 12) 1925 Cal 1055 (1055, 1056); 26 Cri L Jour 1151 (DB).

[5] This provision is meant for remedying any suspicion of injustice under which the accused may labour in respect of what he considers to be a committal on insufficient evidence. (Vol 22) 1935 Nag 202 (204, 205); 36 Cri L Jour 1389; 31 Nag L R 360.

8. "Shall call on the accused to enter on his defence" — Sub-section (4). — [1] The calling upon an accused person to enter on his defence under this sub-section is not a mere formality but is an essential part of a criminal trial. ('96) 23 Cal 252 (253) (DB) \* ('92) 16 Bom 414 (423) (DB).

[2] Where several persons are tried together, all of them should be called upon to enter on their defence if even one of them offers to adduce evidence. ('94) 18 Bom 364 (365).

[3] Adverse inference cannot be drawn against the accused if he fails to adduce evidence even if he had agreed to adduce evidence when he was questioned. ('84) 10 Cal 140 (149, 150) (DB).

[4] The record should be complete noting any defence set up or, where the accused does not voluntarily make any statement or declines to answer, a note of the address to the Court under S. 290 recording the fact that he declined to make a statement or answer question. ('71) 15 Suth W R Cr 16 (17) (DB) \* ('86) 9 Mad 224 (244) (DB) \* ('85) Oudh Sel Cas No. 95, p. 106 (106) \* ('08-04) 2 Low Bur Rul 115 (116) (DB).

[5] Where the accused calls no witnesses, he or his pleader is to make his final address to the Court. (Vol 23) 1936 Mad 82 (88); 37 Cri L Jour 45 (DB) \* (Vol 14) 1927 Cal 250 (251); 28 Cri L Jour 297; 54 Cal 286 (DB).

9. Procedure where the witnesses for the accused are absent. — [1] Defence witnesses not in attendance because not summoned — After calling upon accused to enter upon his defence the trial should be adjourned and the witnesses summoned. ('69) 12 Suth W R Cr 22 (22) (DB) \* ('71) 6 Beng L R App 88 (88, 90) (DB) \* ('75) 23 Suth W R Cr 58 (59) (DB).

10. Effect of non-compliance with the section. — [1] Where criminal trials are substantially bad in themselves defect will not be cured by any consent or waiver on the part of the accused. ('76) 2 Cal 28 (30) (DB).

[2] It is irregular to record the prosecution evidence after the accused has entered on his defence. (Vol 18) 1928 Lah 953 (953); 29 Cri L Jour 844 \* ('92) 8 Cal 154 (156) (DB). (No prejudice to accused — Irregularity does not vitiate trial.) ('79) 4 Cal L Ben 338 (341) (DB).

293. The accused or his pleader may then open his case, stating the facts or law on which *Defence*. he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

[1882 — S. 290 ; 1872 — S. 251, para. 3 ; 1861 — S. 374.]

#### Section 289—Note 10 (*contd.*)

[3] Court recording finding of not guilty where there is enough evidence to go to jury—Court acts without jurisdiction and trial is illegal. ('94) Oudh Sel Cas No. 274, p 607 (809) \* ('88) 10 All 414 (417) \* ('89) 2 Weir 391 (391).

[See however (Vol 12) 1925 Cal 1055 (1056): 26 Cri L Jour 1151. (Only an irregularity not vitiating the trial in the absence of prejudice to accused.)]

[4] No evidence—Judge not directing jury to return verdict of "not guilty"—Jury returning verdict of "guilty"—Conviction is bad in law. ('67) 8 Suth W R Cr 87 (92) (DB) \* ('71) 15 Suth W R Cr 46 (47) (DB).

[5] Omission to call upon the accused to enter on his defence is failure of justice and conviction consequent thereon must be set aside. ('96) 23 Cal 252 (253) (DB) \* ('03-04) 2 Low Bur Rul 115 (117) (DB).

[See however (Vol 5) 1918 All 298 (299): 19 Cri L Jour 209 \* (Vol 23) 1936 Mad 82 (83): 37 Cri L Jour 45 (DB).]

[6] Where the accused is not asked if he means to adduce evidence, his conviction is liable to be set aside. ('68) 10 Suth W R Cr 7 (7) (DB).

#### SECTION 290 — SYNOPSIS.

1. Defence.
2. Accused's right to examine witnesses.
3. Accused's right to cross-examine witnesses.
4. Summing up after evidence—Right of.
5. Evidence in criminal cases.
6. Written statement.

1. Defence.—[1] Accused can set up any defence, technical or otherwise. (Vol 23) 1936 Nag 55 (58): 37 Cri L Jour 474 (DB) \* (Vol 1) 1914 Cal 456 (459): 41 Cal 350: 15 Cri L Jour 385 (DB).

[2] Accused is not barred from raising inconsistent defences. (Vol 23) 1936 Rang 1 (2): 37 Cri L Jour 293 \* (Vol 10) 1923 Cal 717 (718): 25 Cri L Jour 190 (DB) \* (Vol 5) 1918 All 189 (190): 40 All 284: 19 Cri L Jour 371 \* (Vol 6) 1919 Cal 439 (441): 20 Cri L Jour 661 (DB).

[See (Vol 7) 1920 Pat 843 (844): 5 Pat L Jour 64: 21 Cri L Jour 799 (DB).]

[But see ('10) 11 Cri L Jour 374 (376): 32 All 451 (DB).]

[3] Defence will become weaker by inconsistent pleas being raised. (Vol 10) 1923 Cal 717 (718): 25 Cri L Jour 190 (DB).

[4] Nature of defence should be ascertained from statements of accused and trend of cross-examination of prosecution witnesses. (Vol 17) 1930 Cal 442 (442, 443): 31 Cri L Jour 1203 (DB).

[5] Court must give effect to plea of private defence if it is made out on evidence, though it is not specifically raised by accused. (Vol 23) 1936 Rang 1 (2): 37 Cri L Jour 293 \* (Vol 14) 1927 Mad 97 (97): 27 Cri L Jour 1198 (DB) \* (Vol 2) 1915 Mad 532 (533): 15 Cri L Jour 710 \* (Vol 20) 1933 Oudh 63 (65): 34 Cri L Jour 373 \* (Vol 17) 1930 Cal 442 (443): 31 Cri L Jour 1203 (DB) \* (Vol 11) 1924 All 645 (651): 26 Cri L Jour 501.

[6] If accused makes out *prima facie* case in favour

of his plea, burden shifts to prosecution which has still to discharge its original and major onus that never shifts. (Vol 30) 1943 Lah 56 (58): 14 Cri L Jour 397 (DB).

[7] Accused is not bound to disclose nature of his defence in committing Magistrate's Court. (Vol 17) 1936 Cal 188 (189): 31 Cri L Jour 695 (DB).

[8] Accused is not bound to disclose his defence in Sessions Court till he is called on to enter upon his defence but if he means to bring charges against prosecution as part of his defence, he should disclose his intention during cross-examination of prosecution witnesses. (Vol 14) 1927 Sind 104 (107): 27 Sind L R 356: 28 Cri L Jour 66 (DB) \* (Vol 1) 1914 Cal 456 (466): 41 Cal 350: 15 Cri L Jour 385 (DB) \* (Vol 15) 1928 All 222 (225): 30 Cri L Jour 530 (DB).

[9] Accused can raise new defence at late stage of case, though in the case of a defence that could have been set up earlier, it will lose much of its force. (Vol 20) 1933 Pat 481 (483): 34 Cri L Jour 828.

[See also (Vol 23) 1936 Lah 233 (233): 37 Cri L Jour 751 (DB).]

#### 2. Accused's right to examine witnesses. —

[1] Judge is not bound to examine witness for accused when his pleader has refused to do so and accused has not raised objection. ('83) 1883 All W N 189 (190).

#### 3. Accused's right to cross-examine witnesses.

— [1] Accused can cross-examine witnesses of co-accused whose case is adverse to his own. (Vol 19) 1932 Lah 103 (110): 33 Cri L Jour 97 (DB) \* (Vol 27) 1940 Lah 210 (215): 41 Cri L Jour 639: (L R (1940) Lah 521 \* ('94) 21 Cal 401 (403) (DB).

[But see ('69) 12 Suth W R Cr 75 (76).]

[2] Witness examined by prosecution in committing Magistrate's Court given up by prosecution and accused thereafter calling him as his own witness—Accused cannot cross-examine him. ('98) 20 All 155 (157) (DB).

[But compare (Vol 10) 1923 Cal 717 (718): 25 Cri L Jour 190 (DB).]

4. Summing up after evidence — Right of. — [1] Where there are several accused in a case the counsel of each should be allowed to sum up separately. (Vol 19) 1932 Lah 103 (110): 33 Cri L Jour 97 (DB).

[2] Any arbitrary and undue curtailment by Court of parties' right of argument is to be deprecated. (Vol 24) 1937 Pat 263 (273): 38 Cri L Jour 673: 15 Pat 817 (DB).

5. Evidence in criminal cases. — [1] Burden of proving guilt of accused in all criminal cases is on prosecution. (Vol 33) 1946 All 191 (195): 47 Cri L Jour 611 (DB) \* (Vol 30) 1943 Lah 56 (58): 14 Cri L Jour 397 (DB) \* (Vol 20) 1933 Cal 600 (601, 604): 6: Cal 168: 35 Cri L Jour 156 (DB) \* (Vol 6) 1919 Ca 305 (308): 20 Cri L Jour 721 (DB) \* (Vol 27) 1940 Lah 54 (57): 41 Cri L Jour 447 (DB) \* (Vol 26) 193 Sind 209 (214): 41 Cri L Jour 28: (L R (1940) Ka 249 (DB) \* (Vol 17) 1930 Bom 179 (181): 31 Cri Jour 1096 (DB).

[2] Accused is not bound to produce evidence in his defence in first instance. (Vol 27) 1940 Mad 329 (33): 41 Cri L Jour 824 \* (Vol 19) 1932 Lah 243 (244): 33 Cri L Jour 411 (DB).

[3] Unless and until prosecution has established *prima facie* case against accused, no adverse inference



**291.** The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

[1882 — S. 291 ; 1872 — S. 363 ; 1861 — S. 375.]

**Section 290 — Note 5 (contd.)**

can be drawn against him from non-production of evidence by him. (Vol 29) 1942 All 47 (50) : ILR (1941) All 912 : 43 Cri L Jour 380 \* ('84) 10 Cal 140 (149) (DB) \* ('82) 8 Cal 121 (125) (DB).

[4] Accused cannot be convicted merely on ground of weakness or falsity of his defence. (Vol 10) 1923 Mad 365 (367) : 24 Cri L Jour 426 \* (Vol 27) 1940 Pat 365 (370) : 41 Cri L Jour 114 (DB) \* (Vol 27) 1940 Lah 54 (57) : 41 Cri L Jour 447 (DB) \* (Vol 24) 1937 Mad 968 (969) : 39 Cri L Jour 144 \* (Vol 23) 1936 Rang 90 (94) : 38 Cri L Jour 927 (DB) \* (Vol 9) 1922 All 24 (25) : 23 Cri L Jour 193 \* (Vol 8) 1921 Cal 531 (532) : 23 Cri L Jour 220 (DB) \* (Vol 12) 1925 Oudh 78 (88) : 27 Oudh Cas 188 : 26 Cri L Jour 225 (DB).

[5] Prosecution cannot seek to use admission in accused's statement to fill up gap in prosecution evidence. (Vol 12) 1925 Lah 85 (85) : 5 Lah 404 : 26 Cri L J 320 (DB) \* (Vol 24) 1937 Mad 209 (210) : 38 Cri L Jour 323 : ILR (1937) Mad 358 \* ('04) 27 Mad 238 (240).

[6] Conviction cannot be based merely on suspicion. (Vol 27) 1940 Pat 365 (371) : 41 Cri L Jour 114 (DB) \* ('39) 52 Mad L W 420 (428, 429) (DB) \* (Vol 17) 1930 Oudh 460 (463) : 32 Cri L Jour 94 (DB).

[7] Prosecution evidence not conclusive about guilt of accused and doubtful — Accused can have benefit of doubt and must be acquitted. (Vol 27) 1940 Pat 365 (371) : 41 Cri L Jour 114 (DB) \* ('36) 37 Cri L Jour 407 (407) (Lah) \* ('39) 52 Mad L W 420 (429) (DB).

[8] Prosecution established prima facie case against accused — Accused should explain incriminating circumstances appearing against him. (Vol 18) 1931 Pat 384 (386) : 10 Pat 590 : 33 Cri L Jour 111 (DB) \* (Vol 15) 1928 Pat 100 (101) : 6 Pat 627 : 29 Cri L Jour 239 (DB) \* (Vol 6) 1919 Oudh 160 (174) : 20 Cri L Jour 465 (DB) \* (Vol 1) 1914 Sind 111 (112) : 7 Sind L R 109 : 15 Cri L Jour 497 (DB) \* (Vol 12) 1925 Oudh 78 (88) : 27 Oudh Cas 188 : 26 Cri L Jour 225 (DB) \* (Vol 15) 1928 Cal 27 (39) : 29 Cri L Jour 49 (SB) \* (Vol 17) 1930 Lah 163 (166) : 31 Cri L Jour 131 \* (Vol 3) 1916 All 63 (64) : 17 Cri L Jour 23 \* (Vol 3) 1916 Cal 188 (199) : 16 Cri L Jour 497 : 42 Cal 957 (DB).

**6. Written statement.**—[1] There is no provision for filing written statement by accused in sessions trial. (Vol 18) 1932 Pat 566 (568) : 27 Cri L Jour 1041 (DB) \* (Vol 3) 1916 Cal 633 (641) : 16 Cri L Jour 724 (DB) \* (Vol 22) 1935 Cal 637 (688, 689) : 37 Cri L Jour 30 : 68 Cal 431 (DB).

[See however (Vol 20) 1933 All 690 (695) : 55 All 1040 : 34 Cri L Jour 967 (DB).]

**Section 291 — Note 1**

[1] Court should be careful to state specifically in record whether accused elected to call any witnesses in

his defence or refused to do so, and whether witnesses called by him were examined. ('95) 17 All 524 (526) (DB).

[2] If accused insists on examination of witness in attendance who had been discharged before, Court may allow him to be examined. (Vol 10) 1923 Oudh 142 (142) : 24 Cri L Jour 518.

[3] Accused cannot insist for grant of adjournment to examine witness not included in list delivered by him to committing Magistrate under S. 211. (Vol 20) 1933 Pat 559 (560) (DB) \* (Vol 12) 1925 Lah 537 (538) : 27 Cri L Jour 134 (DB) \* (Vol 33) 1946 P C 43 (44) : 47 Cri L Jour 356 (PC).

[4] Sessions Court can, in exercise of its discretion issue summons for attendance of witnesses not included in list. (Vol 22) 1935 Sind 216 (217) : 29 Sind L R 302 : 37 Cri L Jour 108 (DB) \* ('97) 19 All 502 (503, 504) (DB) \* (Vol 21) 1934 All 372 (373) : 35 Cri L Jour 591 \* (Vol 21) 1934 Lah 250 (251) : 35 Cri L Jour 1034 (DB).

[5] Ordinarily, application by accused for summons ought not to be refused if there is time to secure attendance of witnesses before conclusion of trial. (Vol 20) 1933 Pat 559 (560) (DB) \* (Vol 22) 1935 Sind 216 (217) : 37 Cri L Jour 108 : 29 Sind L R 302 (DB).

[See ('03) 7 Cal W N 188 (190) (DB) \* (Vol 17) 1930 Cal 362 (363) : 31 Cri L Jour 1077 (DB).]

[6] If any of the witnesses included in list fail to appear in Sessions Court, accused can have issue of process or adjournment of case to secure their attendance. (Vol 18) 1931 Cal 6 (7) : 58 Cal 412 : 32 Cri L Jour 316 (DB) \* ('82) 2 Weir 383 (383) (DB) \* (Vol 17) 1930 Cal 188 (189) : 31 Cri L Jour 695 (DB).

[7] Right of accused to secure attendance of witnesses applies to those included in list which committing Magistrate accepts in exercise of discretion under sub-s. (2) of S. 211. (Vol 17) 1930 Cal 188 (189) : 31 Cri L Jour 695 (DB).

[8] Accused saying that he does not wish to examine witness, but requesting for process at late stage of case — Court may decline to comply with his request. (Vol 12) 1925 Pat 381 (384) : 26 Cri L Jour 713 (DB).

[9] Court directing accused to make his application for summons early but latter delaying and applying for summons at last moment — His application may be rejected. (Vol 7) 1920 Cal 531 (531, 532) : 47 Cal 758 : 21 Cri L Jour 842 (DB).

[10] Accused is not bound to apply for summons before he is called on to enter upon his defence. ('82) 12 Suth W R Cr 22 (22) (DB).

[11] Committing Magistrate in exercise of his discretion under S. 216, refused to issue summons to witness — Accused applied to Sessions Court for same —



*Prosecutor's right of reply.* \***[292.** The prosecutor shall be entitled to reply —

- (a) if the accused or any of the accused adduces any oral evidence ; or
- (b) with the permission of the Court, on a point of law ; or
- (c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence :

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.]

[1882 — S. 292 ; 1872 — S. 252 ; 1861 — S. 376.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 79.

**293.** (1) Whenever the Court thinks that the jury or assessors should view the place in which *View by jury or* the offence charged is alleged to have been committed, or any other place in assessors. which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

[1882 — S. 293 ; 1872 — S. 253 ; 1861 — S. 348.]

**294.** If a juror or assessor is personally acquainted with any relevant fact, it is his *When juror or assessors* duty to inform the Judge that such is the case, whereupon he may be *may be examined.* sworn, examined, cross-examined and re-examined in the same manner as any other witness.

[1882 — S. 294 ; 1872 — S. 253.]

**Section 291 — Note 1 (contd.)**  
Sessions Court can issue such summons. ('86) 8 All 668 (871, 872) (DB).

[12] Sessions Court can under this section re-call prosecution witness for cross-examination by accused when accused had no opportunity of cross-examining him before. ('82) 2 Weir 363 (363) (DB).

#### Section 292 — Note 1

[1] Object of this section is to give each side opportunity to comment upon evidence let in by other and not to give additional advantage to prosecutor. ('84) 10 Cal 140 (142) (DB) \* (Vol 4) 1917 Cal 524 (524, 525) : 17 Cri L Jour 423 : 43 Cal 426 \* ('06) 4 Cri L Jour 1 (10, 11) : 80 Bom 421.

[2] In warrant cases, prosecutor and accused should be allowed to address arguments to Court after evidence is let in. (Vol 15) 1928 Bom 557 (559) : 58 Bom 119 : 30 Cri L Jour 185 (DB).

[3] One of several accused tried jointly calls witnesses at trial but other accused call no witnesses — Prosecutor has right of reply on whole case. ('94) 18 Bom 364 (365).

[4] If any of accused lets in oral evidence, prosecutor is entitled to reply against all accused and on whole

case and the reply need not be confined to the evidence let in by accused. ('94) 18 Bom 364 (365).

[5] Filing of document during cross-examination of prosecution witness will not give prosecutor right of reply. (Vol 18) 1931 Lah 534 (535) : 13 Lah 172 : 32 Cri L Jour 944 (DB).

[6] Reply wrongly allowed — Irregularity does not vitiate the proceedings — Re-trial is not necessary even from where the error arose. (Vol 18) 1931 Lah 584 (585) : 13 Lah 172 : 32 Cri L Jour 944 (DB).

#### Section 293 — Note 1

[1] Magistrate may hold local investigation to understand evidence laid before him and for no other purpose. ('10) 11 Cri L Jour 121 (125) : 37 Cal 340 (SB). (Per Stephen J. contra.)

[2] Sessions Judge directing assessors to make local inspection and also examine if they so desired — Held that the Judge acted irregularly in abdication his functions. (1866) 5 Suth W R Cr. 59 (60) (DB).

#### Section 294 — Note 1

[1] No man shall be convicted except on evidence which he has had opportunity of testing by cross-examination and of contradicting by rebutting evidence. ('10) 11 Cri L Jour 121 (126) : 37 Cal 340 (SB).

*Jury or assessors to attend at adjourned sitting.*  
the conclusion of the trial.

**295.** If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

[1882 — S. 295 ; 1872 — S. 260 ; 1861 — S. 378.]

**296.** The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

[1882 — S. 296.]

#### *F. — Conclusion of Trial in Cases tried by Jury.*

**297.** In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

[1882 — S. 297 ; 1872 — S. 255 ; 1861 — S. 379.]

#### **Section 294 — Note 1 (contd.)**

[2] Juror or assessor should form and give his opinion on evidence given at trial and not act upon his personal knowledge of any relevant facts not given in evidence. ('01) 24 Mad 523 (543) (SB) \* (Vol 26) 1939 Lah 475 (479) : 1 L R (1939) Lah 243 : 41 Cri L Jour 55 (DB). (Opinion expressed on personal knowledge should be ignored — It does not invalidate the trial.)

[3] Juror or assessor examined as witness — He is not disqualified from acting as juror or assessor in case after giving his evidence. ('70) 13 South W R Cr. 60 (61) (DB).

#### **Section 296 — Note 1**

[1] Jury cannot talk to persons connected with accused during progress of trial. (Vol 14) 1927 Cal 628 (629) : 55 Cal 279 : 28 Cri L Jour 783 (DB) \* (Vol 4) 1917 Cal 149 (151) : 44 Cal 723 : 18 Cri L Jour 311 (SD).

[2] One of jurors during trial expressed his opinion outside Court as to guilt of accused person and made intimation that he had formed opinion to that effect — *De novo* trial should be ordered after discharging that jury. (Vol 8) 1921 Cal 631 (631) : 22 Cri L Jour 510 (DB).

#### **SECTION 297 — SYNOPSIS.**

1. Object of charge to jury.
2. Judge, if should himself charge the jury.
3. Charge as to part only of case.
4. "When the case for the defence . . . . . are concluded."
5. Summing up of the evidence.
6. Summing up where there are several accused.
7. Direction to recommend for mercy.
8. "Laying down the law by which the jury are to be guided".
9. Effect of non-observance of this provision — Laying down the law.
10. Misdirection.
11. Non-direction.
12. Effect of misdirection.
13. Duty of appellate Court in reviewing a charge.
14. Effect of a juror not understanding the charge.

15. Effect of a bad charge.

16. When Judge can re-charge the jury.

**1. Object of charge to jury.** — [1] In a trial by jury the jurors are the sole judges of all questions of fact. (Vol 32) 1945 Lah 105 (110) : 17 Cri L Jour 4 : 1 L R (1945) Lah 290 (FB) \* (Vol 28) 1941 Bom 50 (53) : 1 L R (1941) Bom 27.

[2] The object of this section is to furnish guidance and help to the jury in order to enable them to arrive at a fair conclusion. (Vol 29) 1912 Nag 127 (130) : 1 L R (1912) Nag 749 : 44 Cri L Jour 18 (DB) \* (Vol 22) 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB) \* (Vol 15) 1928 Cal 269 (269, 270) (DB) \* (Vol 13) 1926 Cal 139 (141) : 53 Cal 372 : 27 Cri L Jour 266 (DB) \* (Vol 26) 1939 Cal 610 (611) : 40 Cri L Jour 880 (DB) (To come to reasonable and fair conclusion.) \* (Vol 21) 1937 Cal 321 (323) : 1 L R (1937) 2 Cal 345 : 39 Cri L Jour 371 (DB). (Do.) \* (Vol 19) 1932 Cal 395 (397) : 33 Cri L Jour 186 (DB). (Jury cannot sift and weigh evidence.) \* (Vol 13) 1926 Cal 235 (239) : 53 Cal 181 : 26 Cri L Jour 1577 (DB). (Do.) \* ('66) 5 South W R Cr 80 (87) (FB). (Jury perplexed by speeches of counsel.) \* (Vol 6) 1919 Cal 536 (538) : 19 Cri L Jour 830 (DB). (Do.)

[3] Every party to a trial by jury has a legal and constitutional right to have the case fairly submitted to that tribunal. ('09) 10 Cri L Jour 65 (67) (DB) (Bom.) \* (Vol 14) 1927 Cal 631 (632) : 28 Cri L Jour 742 (DB).

[4] It is incumbent upon the Judge to charge the jury before their verdict is taken. (Vol 23) 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB) \* (Vol 6) 1919 Cal 139 (412) : 20 Cri L Jour 661 (DB).

[See however ('97) 20 Mad 445 (446) (DB).]

[5] The duties of the Judge in charging the jury must be read together with numerous judicial decisions on the point. (Vol 14) 1927 Oudh 259 (259) : 2 Luck 597 : 28 Cri L Jour 633.

**2. Judge, if should himself charge the jury.** — [1] Judge not acquainted with the vernacular language of

**Section 297 — Note 2 (contd.)**

the jury—Delivering charge through another, held, not improper. (Vol 14) 1927 All 721 (723): 50 All 365 : 28 Cri L Jour 950 \* (Vol 15) 1928 Cal 401 (402) : 29 Cri L Jour 638 (DB).

**3. Charge as to part only of case.**—[1] The Judge should not ask for the verdict of the jury on one issue reserving his address on other questions of fact. (Vol 16) 1929 Cal 62 (63) : 30 Cri L Jour 434 (DB).

**4. "When the case for the defence . . . . . are concluded".**—[1] A charge before the defence case and prosecutor's reply are concluded, is premature. (Vol 1) 1914 Mad 319 (321) : 36 Mad 585 : 15 Cri L Jour 197 (DB) \* ('03) 7 Cal W N xxxi (xxxi) \* (Vol 11) 1924 Lah 17 (20) : 4 Lah 382 : 25 Cri L Jour 377.

[2] It is illegal to allow the jury to pronounce their verdict, before the accused is called upon to enter on his defence. ('96) 23 Cal 252 (253) (DB).

[3] The Judge is bound to allow the whole evidence to be placed before the jury. ('97) 20 Mad 445 (445, 446) (DB).

**5. Summing up of the evidence.**—[1] The Judge is bound to sum up the evidence whether or not the jury desires him to do so. (Vol 23) 1936 Bom 52 (53): 60 Bom 599 : 37 Cri L Jour 366 (FB).

[2] The summing up of the evidence is the presentation to the jury of a summary of the evidence as it appears on both sides of the case. (Vol 29) 1942 Nag 127 (130) : I L R (1942) Nag 749 : 44 Cri L Jour 18 (DB) \* (Vol 29) 1942 Oudh 221 (225) : 17 Luck 516 : 43 Cri L Jour 416 \* (Vol 13) 1926 All 752 (753) : 49 All 209 : 28 Cri L Jour 15 \* (Vol 4) 1917 Mad 335 (335, 336) : 17 Cri L Jour 19 (DB).

[3] The summing up should not be in the nature of a judgment and the Judge should not give his opinions as definite facts. (Vol 24) 1937 Nag 110 (112): 38 Cri L Jour 589 : I L R (1937) Nag 123 (DB).

[4] It is not necessary to read over to the jury all the evidence in extenso. (Vol 29) 1942 Nag 127 (132) : I L R (1942) Nag 749 : 44 Cri L Jour 18 (DB) \* (Vol 29) 1942 Oudh 221 (225) : 17 Luck 516 : 43 Cri L Jour 416 \* (Vol 23) 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB) \* (Vol 16) 1929 Cal 765 (766) : 57 Cal 248 : 31 Cri L Jour 857 (DB) \* (Vol 12) 1925 Nag 154 (154) : 27 Cri L Jour 217 \* (Vol 8) 1921 Cal 697 (698) : 22 Cri L Jour 606 (DB) (Not helpful to the Jury.) \* (Vol 22) 1935 Sind 145 (166) : 28 Sind L R 397 : 36 Cri L Jour 1161 (Do.).

[5] The Judge can ask the Jury whether it would help them for him to read his notes. (Vol 23) 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB).

[6] The Judge should group the depositions of the witnesses to direct the attention of the jury to the evidence regarding each particular fact sought to be proved. (Vol 17) 1930 Cal 481 (482) : 32 Cri L Jour 33 (DB).

[7] The Judge should sift, analyse and marshal the facts in order to enable the jury to weigh the evidence intelligently, to estimate the value of each part of it with the rest. (Vol 26) 1939 Cal 610 (611): 40 Cri L Jour 880 (DB) \* (Vol 25) 1938 Cal 51 (70) : 39 Cri L Jour 161 : I L R (1938) 1 Cal 290 (DB) \* (Vol 18) 1931 Cal 184 (188) : 53 Cal 1051 : 32 Cri L Jour 836 (FB).

[8] Where there are a large number of important points to be discussed, some of those points should be separated by some considerable time from the other items of the charge. (Vol 25) 1938 Mad 477 (478) : 39 Cri L Jour 323.

[9] The reading out of a written charge, does not violate any provision of this section. (Vol 29) 1942 Nag 126 (127) : I L R (1942) Nag 775 : 44 Cri L Jour 113 (DB).

[10] The charge should be characterised by clearness, coherence and sequence. (Vol 30) 1943 Cal 47 (49) : 44 Cri L Jour 307 (DB). (Coherence.) \* (Vol 7) 1920 Cal 406 (406) : 21 Cri L Jour 829 (DB). (Do.) \* (Vol 20) 1933 Pat 488 (491) : 34 Cri L Jour 892. (Do.) \* (Vol 21) 1934 Cal 77 (78) : 35 Cri L Jour 483 (DB). (Sequence.) \* ('31) 1931 Mad W N 129 (131). (Do.)

(11) Great care should be taken to place the evidence accurately and with precision. (Vol 30) 1943 Cal 527 (530) : 44 Cri L Jour 633 : I L R (1944) 1 Cal 113 (DB) \* (Vol 26) 1939 Cal 610 (611) : 40 Cri L Jour 880 (DB).

[12] The charge should not be colourless and should not fail to bring before the jury the main circumstances in the case. (Vol 24) 1937 Cal 463 (466): 38 Cri L Jour 931 (DB).

[13] Fanciful language and slang or colloquial phrases should be avoided in delivering the charge. (Vol 17) 1930 Cal 430 (432): 31 Cri L Jour 1115 (DB). (Fanciful Language) \* (Vol 5) 1918 Cal 88 (92) : 45 Cal 557 : 19 Cri L Jour 305 (DB). (Colloquial phrases.) \* (Vol 20) 1933 Pat 488 (492, 493) : 34 Cri L Jour 892 (Language tending to divert jury's attention from main issue).

[See (Vol 28) 1941 Cal 106 (108) : I L R (1940) 2 Cal 258: 42 Cri L Jour 385 (DB). (Case depending upon circumstantial evidence — Theoretical discourse on what is circumstantial evidence in unintelligible language is worthless).]

[14] The arrangement, structure and the manner of delivering the charge will make it of value or valueless to the Jury. (Vol 21) 1934 Cal 169 (172): 35 Cri L Jour 601 (SB).

[15] In absence of objection to summing up it should be assumed that the Judge directed the jury adequately and properly as to the weight of the evidence. (Vol 24) 1937 P C 24 (26) : 38 Cri L Jour 281 (P C).

[16] A charge should not be too summary or meagre. (Vol 17) 1930 All 28 (28): 52 All 207 : 30 Cri L Jour 1146 \* (Vol 16) 1929 Cal 170 (171): 30 Cri L Jour 912 (DB).

[17] A charge should sift and analyse the evidence. (Vol 17) 1930 Cal 136 (138) : 31 Cri L Jour 572 (DB).

[18] The charge should not be too elaborate. (Vol 29) 1942 Pat 481 (484) : 21 Pat 258 : 43 Cri L Jour 817 (DB) \* (Vol 28) 1941 Pat 362 (367) \* (Vol 24) 1937 Cal 309 (312): 38 Cri L Jour 1087 : I L R (1937) 2 Cal 308 (DB) \* (Vol 21) 1934 Cal 124 (127): 60 Cal 1839: 35 Cri L Jour 567 (DB) \* (Vol 8) 1916 Pat 236 (238): 1 Pat L Jour 317: 17 Cri L Jour 353 (DB) \* (Vol 18) 1931 Oudh 171 (172): 6 Luck 705 : 32 Cri L Jour 853 \* (Vol 16) 1929 Nag 295 (297): 31 Cri L Jour 557.

[19] It is sufficient if the main, salient and important points alone are placed before the jury. (Vol 29) 1942 Oudh 221 (225) : 17 Luck 516 : 43 Cri L Jour 416 \* (Vol 29) 1942 Pat 481 (484): 21 Pat 258: 43 Cri L Jour 817 (DB) \* (Vol 25) 1938 Cal 625 (627): 39 Cri L Jour 964 (DB) \* (Vol 23) 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB) \* (Vol 23) 1936 Nag 103 (105): 37 Cri L Jour 607: 31 Nag L R Sup 215 (DB) \* (Vol 17) 1930 Pat 513 (519) : 9 Pat 606 : 32 Cri L Jour 72 (DB) \* (Vol 1) 1914 P C 116 (123, 124): 41 Cal 1023 : 8 Low Bur Rul 16 : 15 Cri L Jour 809: 41 Ind App 149 (PC).

**ection 297—Note 5 (contd.)**

[20] The Judge need not criticise every phrase in the summing up. (Vol 25) 1938 Cal 658 (662): 19 Cri L Jour 101: 1 L R (1938) 1 Cal 636 (DB).

[21] To enable the jury to come to a correct decision essentials should be clearly brought out and not overwhelmed and obscured by too great a mass of detail. (Vol 30) 1943 Pat 163 (168): 21 Pat 865: 41 Cri L Jour 37 (DB) (Vol 27) 1940 Nag 221 (224): 41 Cri L Jour 34 (Vol 24) 1937 Pat 191 (193): 38 Cri L Jour 129 (DB).

[22] The summing up should be dispassionate and impartial. (Vol 28) 1911 Cal 406 (408): 42 Cri L Jour 81 (DB) (Vol 21) 1924 Cal 273 (275): 35 Cri L Jour 313 (DB).

[23] The summing up should not create prejudice against the accused. (Vol 26) 1939 Cal 497 (499): 40 Cri Jour 877 (DB) (Vol 24) 1937 Nag 110 (112): 38 Cri Jour 589: 1 L R (1937) Nag 123 (DB) (Vol 16) 1929 al 617 (621, 626): 30 Cri L Jour 993 (SB) (Vol 15) 1928 Pat 31 (33, 34): 7 Pat 50: 28 Cri L Jour 843 (DB) (Vol 13) 1926 All 429 (430): 27 Cri L Jour 785.

[24] The Judge should take up neither the role of the public Prosecutor nor that of the defence counsel. (Vol 4) 1927 Cal 266 (267): 38 Cri L Jour 767 (DB) (Vol 5) 1928 Cal 500 (502): 29 Cri L Jour 497 (DB).

[25] The Judge should refer to important pieces of evidence both for the prosecution and against it. (Vol 3) 1942 Bom 71 (77): 1 L R (1942) Bom 884: 43 Cri Jour 529 (FB) (Vol 24) 1937 Nag 110 (112, 113): 3 Cri L Jour 589: 1 L R (1937) Nag 123 (DB) (Vol 3) 1936 Bom 52 (53): 60 Bom 599: 37 Cri L Jour 366 (B) (Vol 11) 12 Cri L Jour 537 (539) (DB) (Oudh) (Vol 11) 12 Cri L Jour 140 (141) (DB) (Mad) (Vol 12) 1925 al 729 (734): 26 Cri L Jour 1009 (DB).

[26] The Judge should not put the case of the prosecution too strongly and fail to put the defence case as strongly as it ought to be. (Vol 28) 1941 Mad 339 (343): 31 Cri L Jour 414 (Vol 20) 1933 Cal 426 (428): 34 i L Jour 533 (SB).

[27] The following is the usual way of charging the jury:

(a) To ask them to presume innocence of the accused. (Vol 18) 1931 Cal 796 (798): 58 Cal 1095: 33 Cri L Jour 196 (S B).

(b) To trace history of the case as laid down by prosecution. (Vol 5) 2 Cri L Jour 311 (313) (DB) (Cal) (Vol 3) 1929 Pat 34 (35): 7 Pat 153: 30 Cri L Jour 273 (DB).

(c) To place before jury the prosecution evidence. (Vol 5) 1918 Cal 214 (315, 318): 19 Cri L Jour 81 (DB) (Vol 16) 1929 Cal 244 (246): 56 Cal 566: 30 Cri L Jour 1031 (DB).

(d) To draw jury's attention to weak points in the prosecution evidence. (Vol 24) 1937 Cal 266 (267): 38 i L Jour 767 (DB) (Vol 36) 1936 Oudh W N 187 (190) (29) 1929 Mad W N 946 (947, 952) (DB).

(e) To state the case for defence in sufficient details. 88) 1888 Rat 426 (427) (DB).

(f) To draw jury's attention to points in favour of defence though accused either failed to raise or stress them. (Vol 28) 1941 Mad 339 (345): 42 Cri L Jour 14 (Vol 28) 1941 Oudh 567 (569): 17 Luck 128: 42 i L Jour 728 (Vol 24) 1937 Cal 269 (272): 38 Cri Jour 1018 (DB) (Vol 2) 1915 Bom 249 (251, 252): Bom 220: 17 Cri L Jour 133 (DB) (Vol 2) 1915 al 773 (783): 16 Cri L Jour 561 (FB) (Vol 27) 1940 al 221 (224): 41 Cri L Jour 894. (Accused failing to use points in his favour.) (Vol 11) 1924 Cal 257 (262): 5 Cri L Jour 817 (FB). (Do.) (Vol 17) 1930 Cal 442

(442, 443): 41 Cri L Jour 1203 (DB). (Do.) (Vol 17) 1930 Sind 308 (309): 32 Cri L Jour 172 (DB). (Do.) (Vol 3) 1917 Mad 335 (335): 47 Cri L Jour 19 (DB). (Accused failing to stress points in his favour.)

[28] The Judge should state that the onus of proving guilt is on prosecution. (Vol 32) 1945 Pat 109 (113): 23 Pat 356: 46 Cri L Jour 517 (DB) (Vol 24) 1937 Cal 463 (465): 38 Cri L Jour 941 (DB).

[29] The Judge should not explain away the points favourable to accused. (Vol 13) 14 Cri L Jour 623 (623) (DB) (Mad).

[30] The Judge should not ridicule the defence. (Vol 12) 1925 Sind 116 (119): 25 Cri L Jour 761 (DB).

[31] The Judge should not introduce extraneous considerations in the charge. (Vol 26) 1939 Sind 209 (216): 41 Cri L Jour 28: 1 L R (1940) Kar 249 (DB).

[32] The Judge should point out what the discrepancies are. (Vol 23) 1936 Bom 52 (53): 60 Bom 599: 37 Cri L Jour 366 (FB) (Vol 14) 1927 Cal 200 (202): 28 Cri L Jour 201 (DB).

[33] The Judge should not ask jury to disbelieve a witness who has consistently deposed, merely because of a few minor discrepancies. (Vol 7) 1920 Pat 575 (575, 576): 22 Cri L Jour 1250.

[34] Hypothetical or speculative case for which there is no evidence should not be put before the jury. (Vol 23) 1936 Rang 421 (125): 37 Cri L Jour 1050: 14 Rang 716 (FB) (Vol 2) 1915 Cal 773 (779, 782): 16 Cri L Jour 561 (FB) (Vol 19) 1932 Bom 279 (285): 56 Bom 434: 33 Cri L Jour 613 (DB) (Vol 20) 1933 Pat 481 (484, 485): 34 Cri L Jour 828 (Vol 3) 1916 Low Bur 114 (122, 123): 17 Cri L Jour 49 (FB).

[35] The Judge should take care to caution the jury that they are the sole judges of all questions of fact. (Vol 32) 1945 Lah 105 (109): 1 L R (1945) Lah 290: 47 Cri L Jour 4 (FB) (Vol 30) 1943 Cal 625 (628): 1 L R (1943) 1 Cal 487: 45 Cri L Jour 155 (DB) (Vol 30) 1943 Cal 32 (34): 1 L R (1942) 2 Cal 136: 44 Cri L Jour 386 (DB) (Vol 27) 1940 Nag 221 (224): 41 Cri L Jour 894 (Vol 24) 1937 Nag 110 (112): 38 Cri L Jour 589: 1 L R (1937) Nag 123 (DB) (Vol 23) 1936 Oudh 164 (164): 37 Cri L Jour 182: 11 Luck 687 (Vol 21) 1934 All 1032 (1033): 36 Cri L Jour 322 (DB) (Vol 21) 1934 All 326 (328): 35 Cri L Jour 688 (DB) (Vol 22) 1935 Rang 214 (216): 13 Rang 141: 36 Cri L Jour 1232 (DB) (Vol 22) 1935 Pat 263 (265, 266): 14 Pat 225: 36 Cri L Jour 1026 (DB) (Vol 22) 1935 All 928 (929): 37 Cri L Jour 173.

[36] Telling jury at the end of the charge that though they do not believe defence it does not mean they must believe prosecution, is not misdirection. (Vol 25) 1938 Cal 658 (662): 40 Cri L Jour 101: 1 L R (1938) 1 Cal 636 (DB).

[37] The sufficiency of a charge to the jury must depend largely upon the special circumstances of each case. (Vol 10) 1923 Pat 238 (239): 24 Cri L Jour 495 (DB) (Vol 18) 1931 Oudh 171 (171, 172): 6 Luck 706: 32 Cri L Jour 858 (Vol 3) 27 Bom 644 (651) (DB) (Vol 5) 1918 Pat 201 (208): 19 Cri L Jour 886 (DB).

[38] The Judge must place before the jury the important facts of the case though the counsel have addressed long arguments to them. (Vol 15) 1928 Cal 269 (270) (DB) (Vol 3) 27 Bom 644 (651) (DB) (Vol 21) 1934 Nag 94 (95, 96): 30 Nag L R 262: 35 Cri L Jour 957 (Vol 14) 1927 Oudh 259 (260): 2 Luck 597: 28 Cri L Jour 683.

[39] The jury should learn from the Judge what are the important points to which their attention should be directed. (Vol 6) 1919 Cal 142 (144): 20 Cri L Jour 300 (FB).

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[40] An omission to refer to the case of the defence or the failure to deal with it in an adequate manner will vitiate the trial. (Vol 13) 1926 Mad 370 (370) : 27 Cri L Jour 176 (DB) \* (Vol 24) 1937 Cal 269 (272) : 38 Cri L Jour 1018 (DB) \* (Vol 23) 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB) \* (Vol 9) 1922 Cal 224 (126) : 23 Cri L Jour 567 (DB) \* (Vol 11) 1924 Mad 230 (230) : 25 Cri L Jour 269 (DB) \* (Vol 19) 1932 Oudh 23 (24, 25) : 7 Luck 290 : 33 Cri L Jour 167.

[41] No useful purpose would be served by formally charging the jury that the defence was a denial of the prosecution case. (Vol 19) 1932 Cal 536 (537) : 59 Cal 1123 : 33 Cri L Jour 694 (DB) \* (Vol 22) 1935 All 928 (929, 930) : 37 Cri L Jour 173.

[42] Evidence as to accused being identified in diffused light from electric torches—Judge while charging jury as to evidence of identification allowing jury to have experiment with such torches in absence of accused—*Held* that the procedure was gravely irregular. (Vol 21) 1934 Cal 744 (745) : 36 Cri L Jour 129 (DB).

6. Summing up where there are several accused.—[1] Where there are several accused, the Judge should deal with the evidence relating to each of the accused. (Vol 32) 1945 Pat 109 (116) : 23 Pat 656 : 46 Cri L Jour 513 (DB) \* (Vol 29) 1942 Pat 199 (200) : 21 Pat 130 : 43 Cri L Jour 230 (DB) \* (Vol 28) 1941 Mad 658 (659) : 42 Cri L Jour 631 \* (Vol 28) 1941 Mad 339 (341) : 42 Cri L Jour 414 \* (Vol 26) 1939 Sind 209 (214) : 41 Cri L Jour 28 : I L R (1940) Kar 249 (DB) \* (Vol 25) 1938 Cal 475 (476) : 39 Cri L Jour 751 (DB) \* (Vol 23) 1936 Cal 186 (187) : 37 Cri L Jour 673 (DB) \* (36) 1936 Oudh W N 201 (203).

[2] The Judge should not simply ask the jury to consider the case of each accused separately. (Vol 23) 1936 Cal 186 (187) : 37 Cri L Jour 673 (DB).

[3] The Judge should keep on repeating the same evidence in the case of each accused where the evidence is common to all. (Vol 29) 1942 Oudh 221 (224) : 17 Luck 516 : 43 Cri L Jour 416.

[4] To summarise evidence against each accused and ask jury at the end of each summary if the accused is falsely implicated, is wrong. (Vol 28) 1941 Cal 106 (109) : I L R (1940) 2 Cal 258 : 42 Cri L Jour 385 (DB).

[5] The discussion of the evidence of individual prosecution witnesses should precede that part of the charge in which the jury is asked to consider the case as against individual accused separately. (Vol 32) 1945 Pat 109 (115) : 23 Pat 656 : 46 Cri L Jour 513 (DB).

[6] The Judge in his charge to the jury should make reference to each accused separately. (Vol 23) 1936 Cal 186 (189) : 37 Cri L Jour 673 (DB).

[7] Jury trial — Misdirection—G, J and N charged with receiving stolen property—J and N in touch with actual thieves—G in touch with J only—G's case must be considered separately from that of J and N. (Vol 30) 1943 P C 211 (215) : 45 Cri L Jour 241 (PC).

[8] Charge under S. 401 of being members of gang—Evidence that big gang was committing acts of depredation all over India and that some of the accused were found associated together in crime characteristic of gang is sufficient to justify Judge, on very little proof of association, in leaving it to jury whether particular accused was member of gang. (Vol 25) 1938 Mad 858 (860) : 40 Cri L Jour 355.

7. Direction to recommend for mercy.—[1] The jury should not be directed by the Judge to recommend the accused to mercy. (70) 14 Suth W R Cr 46 (46) (DB).

[2] Where jury returned verdict of guilty and recommended accused to mercy, *held* that the recommendation did not imply that the jury did not believe the

accused to be guilty at all. (Vol 23) 1936 Pat 46 (48) : 37 Cri L Jour 320 (DB).

8. "Laying down the law by which the jury are to be guided."—[1] It is illegal to comment upon the evidence and ask the jury to consider whether the prisoner is guilty and then to explain the law and take their verdict as to what offence the prisoner is guilty of. (388) 2 Weir 493 (494) (DB).

[2] The discussion of legal matters should be introduced in the charge in appropriate places. (Vol 23) 1935 Cal 534 (536) : 62 Cal 911 : 36 Cri L Jour 1216 (DB).

*Elements of offence should be explained.*—[1] The Judge should draw the attention of the jury to the offence and explain clearly the various ingredients of that offence. (Vol 34) 1947 Cal 345 (346) : 47 Cr L J 951 (952) (DB) \* (Vol 30) 1943 Oudh 322 (325) : 41 Cr L J 604 \* (Vol 28) 1941 Oudh 567 (571) : 17 Luck 128 : 42 Cr L J 728 \* (Vol 34) 1947 Oudh 35 (38) : 47 Cr L Jour 725 \* (Vol 27) 1940 Loh 87 (88) : 41 Cri L Jour 482 \* (Vol 26) 1939 Bom 457 (459) : 41 Cri L Jour 176 : I L R (1939) Bom 648 (DB) \* (Vol 24) 1937 Cal 458 (459) : 38 Cri L Jour 966 (DB) \* (Vol 17) 1930 All 24 (25) : 31 Cri L Jour 33 (DB) \* (07) 5 Cri L Jour 78 (80) : 30 Mad 44.

[4] It should not be presumed that the jurors are aware of the necessary elements which constitute an offence or the legal distinction between one offence and another. (Vol 23) 1935 Oudh 175 (176) : 35 Cri L Jour 507.

[5] The Judge should charge the jury as to the necessity of strict proof of *mens rea* of fraudulent intention. (Vol 24) 1937 Pat 449 (444) : 38 Cri L Jour 919 : 16 Pat 413 (DB).

[6] If the evidence discloses that the accused comes under the exceptions to a particular offence or the general exceptions under Chap. IV of the Penal Code, the Judge should explain those exceptions also. (Vol 13) 1926 Cal 1107 (1108) : 27 Cri L Jour 1402 (DB).

[7] No particular exception pleaded for accused—Judge must point out to jury that evidence brings accused's case under particular exception. (Vol 31) 1944 Bom 274 (277, 287) : I L R (1945) Bom 52 : 46 Cri L Jour 277 (FB).

[8] Exceptions not applicable to case in Judge's opinion need not be pointed out to the jury. (Vol 31) 1944 Bom 274 (277, 287) : I L R (1945) Bom 52 : 46 Cri L Jour 277 (FB).

[9] Charge for murder—Deceased killed with knife—Proper direction to jury would be that accused was guilty under S. 302 and not S. 304, Part II, if case did not come under Ss. 302 and 304, Part I, Penal Code. (Vol 32) 1945 Cal 467 (470) : I L R (1944) 2 Cal 305 (DB).

[10] Accused identified as dacoit and found in possession of stolen property—Jury if not satisfied with evidence of identification but satisfied with identification of stolen property can be directed to convict accused under S. 412, Penal Code. (Vol 32) 1945 Cal 421 (423) : 47 Cri L Jour 193 (DB).

[11] Vandalism is one thing and dacoity and theft are quite different. Consequently, in a jury trial the failure of the Judge to point out the difference between vandalism and dacoity or theft to the jury when asking them to give their verdict on counts relating to dacoity and theft, amounts to misdirection. (Vol 28) 1941 Mad 339 (343) : 42 Cri L Jour 414.

[12] It is incumbent upon the Judge to explain what is culpable homicide under S. 299, Penal Code, and under what circumstances culpable homicide amounts to murder, and under what circumstances it does not, under S. 300, Penal Code. (Vol 26) 1939 Bom 457 (459) : 41 Cri L Jour 176 : I L R (1939) Bom 648 (DB).

[13] Section 366A, Penal Code—Where there is no exact evidence of age, the Judge should strongly

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emphasize this feature of the case and clearly direct the jury that if they are not completely satisfied that it has been established that the girl was under eighteen, they are bound to acquit upon that charge. (Vol 26) 1939 Pat 536 (339) : 41 Cri L Jour 1 : 18 Pat 693 (DB).

[14] Acts done in furtherance of common intention make all equally liable for the results of all the acts of others. (Vol 12) 1925 P C 1 (4) : 52 Cal 197 : 52 Ind App 40 : 26 Cri L Jour 431 (PC).

[15] Distinction between manslaughter and murder not considered—Conviction for murder not sustainable. (Vol 17) 1930 P C 201 (204) : 31 Cri L Jour 701 (PC) ✕ (29) 30 Cri L Jour 857 (857, 858) (DB) (Cal) ✕ (Vol 18) 1931 Cal 414 (416) : 53 Cal 8 : 32 Cri L Jour 892 (DB). (Section 395, Penal Code.) ✕ (Vol 20) 1933 Cal 294 (294, 295) : 34 Cri L Jour 524 (SB). (Section 396, Penal Code.)

*Reading of section by the Judge* — [16] It is not sufficient for the Judge to merely read the relevant section under which the accused stands charged though such reading is usually done. (Vol 28) 1941 Oudh 567 (571) : 17 Luck 128 : 42 Cri L Jour 728 ✕ (Vol 34) 1947 Oudh 35 (38) : 47 Cri L Jour 725 ✕ (Vol 26) 1939 Pat 536 (539) : 41 Cri L Jour 1 : 18 Pat 693 (DB) ✕ (Vol 24) 1937 Cal 266 (268) : 38 Cri L Jour 767 (DB) ✕ (33) 1933 Mad W N 320 (321) ✕ (Vol 31) 1944 Bom 274 (276) : I L R (1945) Bom 52 : 46 Cri L Jour 277 (FB). (Such reading, however, is not compulsory under the Code.)

[17] In charge to the jury the law should be sufficiently explained. (Vol 31) 1944 Bom 274 (276, 286) : I L R (1945) Bom 52 : 46 Cri L Jour 277 (FB) ✕ (37) 1937 Mad W N 737 (738) ✕ (Vol 9) 1922 Cal 124 (125) : 23 Cri L Jour 567 (DB) ✕ (Vol 13) 1926 Mad 1121 (1122) : 27 Cri L Jour 1191 (DB).

[18] Attention of the Jury should be drawn to the evidence in the case and the method of applying the law to the facts found on such evidence explained. (Vol 32) 1945 Cal 482 (483) (DB) ✕ (Vol 30) 1943 Cal 47 (48) : 44 Cri L Jour 307 (DB) ✕ (Vol 28) 1941 Pat 362 (367) ✕ (Vol 12) 1925 Pat 797 (805) : 4 Pat 626 : 27 Cri L Jour 49 (DB) ✕ (33) 1933 Mad W N 320 (321, 322).

[19] Law necessary to find whether the accused is guilty or not of the offence charged should be explained. (Vol 32) 1945 Pat 109 (115) : 23 Pat 656 : 46 Cri L Jour 513 (DB) ✕ (Vol 31) 1944 Bom 274 (276) : I L R (1945) Bom 52 : 46 Cri L Jour 277 (FB) ✕ (Vol 2) 1915 Cal 773 (777, 779) : 16 Cri L Jour 561 (FB) ✕ (Vol 21) 1934 Cal 142 (144) : 35 Cri L Jour 536 (DB) ✕ (Vol 5) 1918 Pat 201 (205) : 19 Cri L Jour 866 (DB).

[20] Digressions into questions of first principles or about the proposed amendments of the law should be avoided. (Vol 20) 1933 Cal 722 (723) : 34 Cri L Jour 1231 (DB). (First principles.) ✕ (Vol 1) 1914 Low Bur 34 (35) : 15 Cri L Jour 257. (Do.) ✕ (Vol 9) 1922 Cal 505 (506) : 24 Cri L Jour 76. (Amendments of law.)

[21] The explanation of the law should be in the shortest and simplest terms possible. (Vol 31) 1944 Bom 274 (276) : I L R (1945) Bom 52 : 46 Cri L Jour 277 (FB) ✕ (Vol 16) 1929 Cal 742 (746) : 57 Cal 740 : 31 Cri L Jour 673 (DB).

[22] A Judge can read to the jury cases from law reports. (Vol 14) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213 (FB) ✕ (Vol 17) 1930 Cal 434 (435) : 57 Cal 1161 : 32 Cri L Jour 111 (DB).

[23] A Judge may not refer to many cases, often conflicting, which would tend to confuse the jury. (Vol 80) 1943 Pat 163 (166) : 21 Pat 865 : 44 Cri L Jour 507 (DB) ✕ (Vol 29) 1942 Pat 444 (445) : 43 Cri L Jour 915 (DB) ✕ (Vol 24) 1947 Bom 38 (40) (SB).

[24] A Judge should not quote from headnotes but from the actual observations made in a judgment.

(Vol 28) 1941 Pat 362 (368). (Avoid citing authority not on question of law.)

[25] A Judge should not leave a copy of the Penal Code with the jury, so that they may find out under what section the offence against the accused falls. (Vol 13) 1926 Cal 895 (896, 897) : 27 Cri L Jour 926 (DB).

[26] A Judge may in his charge to the jury refer to works on medical jurisprudence cited by medical witnesses. (Vol 29) 1942 Cal 239 (240) : 43 Cri L Jour 565 (DB).

*Counsel addressing jury—Explanation of law still necessary*—[27] The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge. (Vol 29) 1942 Cal 379 (381) (DB) ✕ (Vol 26) 1939 Bom 457 (459) : 41 Cri L Jour 176 : I.L.R. (1939) Bom 648 (DB) ✕ (Vol 34) 1947 All 72 (73) ✕ (Vol 13) 1926 Nag 53 (54) : 26 Cri L Jour 1090.

[28] Jurors are apt to be suspicious of the law as propounded by the defence; they look to the Judge for an authoritative statement of it. (Vol 20) 1933 P C 218 (221) : 34 Cri L Jour 886 (P C).

[29] When the jurors state that they do not understand the law, it is the duty of the Judge to explain the same to them again. (Vol 11) 12 Cri L Jour 140 (141) (DB) (Mad) ✕ (Vol 13) 1926 Cal 895 (897) : 27 Cri L Jour 926 (DB) ✕ (Vol 10) 1923 Cal 647 (648) : 25 Cri L Jour 343 (DB).

[30] Charges under Ss. 147 and 353, Penal Code—Reference to Calcutta Police Act, held necessary though not invoked by accused. (Vol 12) 1925 Cal 494 (496) : 25 Cri L Jour 1386 (DB).

*Charge of major offence* : — [31] The Judge can direct that it is open to the jury to convict the accused of a minor offence though the charge is in respect of a major offence. (Vol 30) 1943 Oudh 322 (325) : 44 Cri L Jour 604 ✕ (Vol 27) 1940 Pat 417 (418) : 41 Cri L Jour 738 (DB) ✕ (Vol 13) 1926 Cal 1059 (1060) : 53 Cal 599 : 27 Cri L Jour 1314 (DB) ✕ (Vol 1) 1914 Mad 425 (428) : 13 Cri L Jour 739 : 37 Mad 236 (DB).

*Approver's evidence — Value of* : — [32] The Judge should direct the jury to consider whether a particular witness in the case is or is not an accomplice. He can direct that there is no prohibition under the law to convict an accused on the uncorroborated testimony of an accomplice, but that, considering the fact that it is tainted evidence and that the accomplice is giving evidence on a tender of pardon which is liable to be revoked, it should be received with caution and may be treated as unworthy of credit. (Vol 29) 1942 Oudh 221 (223) : 17 Luck 516 : 43 Cri L Jour 416 ✕ (Vol 14) 1927 Cal 460 (461) : 28 Cri L Jour 278 (DB) ✕ (Vol 12) 1925 Cal 666 (668) : 52 Cal 223 : 26 Cri L Jour 1155 (DB).

[33] The Judge can inform the jury that as a doctrine of expediency and prudence, it is always unsafe to convict an accused on the uncorroborated testimony of an approver alone. (Vol 32) 1945 Sind 132 (140) : I.L.R. (1944) Kar 456 (DB) ✕ (Vol 30) 1943 Bom 74 (75, 76) : 44 Cri L Jour 411 (DB) ✕ (Vol 30) 1943 Pat 163 (167) : 21 Pat 865 : 44 Cri L Jour 507 (DB) ✕ (Vol 29) 1942 Oudh 221 (223) : 17 Luck 516 : 43 Cri L Jour 416 ✕ (40) (1940) 2 Mad L Jour 468 (469) ✕ (Vol 24) 1937 Rang 209 (210) : 1937 Rang L R 110 : 38 Cri L Jour 785 (DB) ✕ (Vol 28) 1936 Nag 103 (107) : 31 Nag L B (Sup) 215 : 37 Cri L Jour 607 (DB) ✕ (36) 37 Cri L Jour 999 (1002) (FB) (Cal).

[34] Judge stating that if the jury believed a certain fact it would be ample corroboration of the approver's evidence—No misdirection. (Vol 29) 1942 Cal 239 (240) : 43 Cri L Jour 565 (DB).

[35] Accused charged with theft — Only evidence against accused being of a person receiving stolen pro-

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party — Judge while charging jury not pointing out unsafety of relying on such evidence, with sufficient force — This amounts to misdirection. (Vol 25) 1938 Mad 464 (464) : 39 Cri L Jour 580.

[36] An accused person should not be convicted solely upon the evidence of an approver. (Vol 23) 1936 All 337 (353, 354) : 37 Cri L Jour 794 : 53 All 695 (DB).

[37] Corroboration need not extend to every part of accomplice's statement. ('91) 1 Mad L Jour 397 (403, 404) (FB).

[38] There must be corroboration not only as to crime but as to the identity of each one of the accused and it must proceed from an unfainted source. ('11) 12 Cri L Jour 286 (289) : 38 Cal 559 (FB).

[39] The corroboration of the approver's evidence must be independent testimony which affects the accused by connecting him with the crime. (Vol 24) 1937 Sind 162 (167) : 38 Cri L Jour 808 : 31 Sind L R 82 (DB) & (Vol 21) 1934 Cal 7 (9) : 62 Cal 527 : 36 Cri L Jour 796 (DB).

[40] Judge assuming the statement of approver that he intentionally refrained from identifying accused, to be true and directing jury accordingly — This is misdirection. (Vol 24) 1937 Cal 269 (272) : 38 Cri L Jour 1018 (DB).

*Confession of prisoner.* — [41] The question as to the admissibility of a confession is one for the Judge. (Vol 30) 1943 Mad 527 (528) : 44 Cri L Jour 706 & (Vol 23) 1936 Cal 227 (229) : 37 Cri L Jour 676 : 62 Cal 1089 (DB) & (Vol 21) 1934 Cal 717 (718) : 36 Cri L Jour 135 (DB).

[42] A confession of an accused is legally sufficient to convict him, without any other corroborative evidence. (Vol 17) 1930 Cal 633 (635) : 57 Cal 498 (DB).

[43] The jury should be cautioned that confessions are not always true and that they must be checked in order to see if they carry conviction. (Vol 32) 1945 P C 181 (184) (P C).

[44] Retracted confession should not be acted upon without independent corroboration. (Vol 33) 1946 Cal 139 (140) (D B) & (Vol 17) 1930 Lah 257 (258) : 11 Lah 106 : 30 Cri L Jour 1046 (D B) & (Vol 16) 1929 Lah 597 (599) : 30 Cri L Jour 640 (DB) & (Vol 8) 1921 Pat 337 (338) : 22 Cri L Jour 200 (DB) & (Vol 16) 1929 Pat 212 (213) : 8 Pat 262 : 30 Cri L Jour 716 (D B) & (Vol 21) 1934 Cal 651 (653) : 36 Cri L Jour 70 (D B) & ('95) 18 All 78 (81) (DB).

[See however (Vol 31) 1944 Cal 249 (253) : 46 Cri L Jour 131 (D B) & (Vol 28) 1941 Bom 50 (53) : 1 L R (1941) Bom 27 & (Vol 16) 1929 Mad 837 (839) : 53 Mad 160 : 31 Cri L Jour 768 (D B) & (Vol 16) 1929 Oudh 381 (382) : 30 Cri L Jour 967 (D B) & (Vol 16) 1929 Sind 253 (254) : 31 Cri L Jour 753 (D B) & (Vol 8) 1921 Sind 129 (130) : 25 Cri L Jour 574 : 16 Sind L R 67 (DB).]

[45] It is for the jury to say whether all or any of the circumstances relied on as corroborating a confession were in fact established by independent evidence and further whether they sufficiently corroborated the confession. (Vol 32) 1945 Lah 105 (110) : 47 Cri L Jour 4 : 1 L R (1945) Lah 290 (FB).

[46] Confession — Mere fact that accused has given wrong description of way in which he killed deceased is no ground for acquitting him. (Vol 27) 1940 Mad 699 (700) : 41 Cri L Jour 909 (DB).

[47] Even after a confession is once admitted in evidence, the Judge can withdraw it from the jury where he finds on the subsequent evidence that it is inadmissible. (Vol 21) 1934 Cal 853 (857) : 62 Cal 312 : 36 Cri L Jour 485 (DB).

*Confession of co-accused.* — [48] A statement of an accused person which does not amount to a confession

cannot be considered at all as evidence against a co-accused. (Vol 12) 1925 Sind 116 (119) : 25 Cri L Jour 761 (D B) & (Vol 17) 1930 Cal 139 (141) : 57 Cal 801 : 31 Cri L Jour 610 (DB) & (Vol 15) 1928 Cal 416 (417) : 29 Cri L Jour 527 (D B).

[49] A confession of a co-accused may, under S. 30 of the Evidence Act, be considered against a co-accused. (Vol 29) 1942 Nag 127 (132) : 1 L R (1942) Nag 749 : 44 Cri L Jour 18 (DB).

[50] A confession of a co-accused without corroboration will be insufficient to sustain a conviction of the co-accused. (Vol 27) 1940 Nag 230 (233) : 41 Cri L Jour 553 (DB) & (Vol 28) 1941 Mad 238 (242) : 42 Cri L Jour 654 (D B) & (Vol 21) 1934 Pesh 11 (12) : 35 Cri L Jour 719 (DB) & (Vol 21) 1934 Cal 853 (858) : 36 Cri L Jour 485 : 62 Cal 312 (DB) & (Vol 16) 1929 Pat 275 (279) : 8 Pat 289 : 30 Cri L Jour 675 (DB).

[51] No conviction can be based on retracted confession of a co-accused without fullest corroboration. (Vol 33) 1946 Cal 139 (140) (DB) & (Vol 28) 1941 Bom 50 (53) : 1 L R (1941) Bom 27 & (Vol 21) 1934 Cal 853 (858) : 36 Cri L Jour 485 : 62 Cal 312 (DB).

[But see (Vol 28) 1941 Nag 145 (150) : 42 Cri L Jour 363 : 1 L R (1941) Nag 169.]

*Recent possession of stolen property — Presumption.* —

[52] Presumption of guilt from mere possession of stolen property may be made by the jury. (Vol 23) 1936 Cal 796 (800) : 37 Cri L Jour 701 : 62 Cal 956 (D B) & ('33) 1933 Mad W N 320 (321) & (Vol 12) 1925 Cal 666 (667, 668) : 52 Cal 223 : 23 Cri L Jour 1155 (DB).

[53] If the Jury think the explanation as to how the accused was in possession of stolen goods reasonably true, the accused is entitled to acquittal. (Vol 30) 1943 P C 211 (214, 215) : 45 Cri L Jour 241.

[54] Where the article found in possession of the accused is proved as being part of the property stolen at the time of dacoity the Judge can tell the jury that they may presume either that the accused was one of the dacoits or that he had dishonestly received or retained the article knowing or having reason to believe that the possession had been transferred by dacoity or that he had dishonestly received or retained it knowing or having reason to believe that it was stolen property. (Vol 32) 1945 Cal 421 (423) : 47 Cri L Jour 193 (DB).

[55] Case under Ss. 411 and 414, Penal Code — Presumption under S. 114, Evidence Act, not arising — Judge must tell jury that there is no evidence of guilty knowledge — Omission to so direct amounts to serious error vitiating trial. (Vol 24) 1937 Pat 191 (195) : 38 Cri L Jour 129 (D B).

[56] The jury should be told that the question whether the possession of the article was recent enough to attract the presumption of law under S. 114, Illustration (a) of the Evidence Act, is a matter to be decided by them from all the circumstances of the case. ('29) 30 Cri L Jour 542 (543) (DB) & ('32) 1932 Mad W N 802 (863).

*Circumstantial evidence:* —

[57] Where there is only circumstantial evidence against the accused, the Judge should direct the jury to find whether the circumstances have been proved and whether the circumstances are incompatible with the innocence of the accused. (Vol 34) 1947 Cal 345 (346) : 47 Cr L J 951 (952, 953) (DB). (Held, that there was misdirection.) & (Vol 29) 1942 Cal 524 (526) : 43 Cr L J 860 (DB) & (Vol 27) 1940 Mad 1 (3, 4) : 41 Cr L J 369 & (Vol 28) 1941 Cal 106 (108) : 1 L R (1940) 2 Cal 258 : 42 Cri L Jour 385 (DB) & (Vol 26) 1939 Sind 209 (215, 216) : 41 Cri L Jour 28 : 1 L R (1940) Kar 249 (DB) & (Vol 20) 1933 Pesh 94 (96) : 35 Cri L Jour 476 (DB).

[58] A theoretical discourse on what is circumstantial evidence couched in a language which would be unintelligible to the jury is quite worthless. (Vol 28) 1941



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Cal 106 (108) : I L R (1940) 2 Cal 258 : 42 Cri L Jour 385 (DB).

[59] It is the duty of the Judge to lay emphasis in his charge to the jury on the absence of motive which is a circumstance in favour of the accused. (Vol 27) 1940 Cal 561 (563) : 42 Cri L Jour 285 (DB).

[60] Accused alleged to have slept with wife at night—Wife found murdered in morning and husband missing—No evidence of husband having slept with wife at night—Direction by Judge to jury that if accused was present at village on the particular day it will follow that he slept with his wife that night is erroneous. (Vol 28) 1941 Cal 533 (534) : 42 Cri L Jour 871 (DB).

[61] In conspiracy cases, the inferences which are to be drawn by the jury and which the jury should be directed to consider with regard to their conspiracy verdict must be, even if they are more inferences, supported by solid evidence. (Vol 24) 1937 Cal 756 (757) : 39 Cri L Jour 182 : I L R (1937) 2 Cal 315 (DB).

*Non-examination of witnesses—Inference:*—[62] No adverse inference can be drawn against the accused from his non-examination of witnesses. (82) 8 Cal 121 (125) (DB) \* (84) 10 Cal 140 (149) (DB).

[63] The Judge should direct the jury to consider the question in the light of the circumstances and facts of each case. (Vol 25) 1938 Pat 579 (581) : 40 Cri L Jour 147.

[64] Where the prosecution had material witnesses who could have given relevant evidence and they had been deliberately kept back, the Judge should direct the jury to draw an adverse inference against the prosecution. (Vol 31) 1944 Cal 297 (299) : 46 Cri L Jour 427 (DB) \* (Vol 25) 1938 Cal 625 (626) : 39 Cri L Jour 964 (DB) \* (Vol 3) 1916 Mad 582 (583) : 16 Cri L Jour 615 (616) (DB) \* (Vol 20) 1933 Pat 481 (484) : 34 Cri L Jour 828 \* (Vol 16) 1929 Pat 651 (654) : 9 Pat 647 : 31 Cri L Jour 306 (DB) \* (Vol 14) 1927 Mad 475 (476, 477) : 28 Cri L Jour 307 (DB).

*Warning in cases of sexual offences:*—[65] The Judge should warn that in charges made by a woman in cases arising out of sexual matters, it is unsafe to rely solely upon the testimony of the woman and direct the jury as to whether there is any evidence corroborating the testimony of the woman. (Vol 29) 1942 Bom 121 (123) : 43 Cri L Jour 621 (FB) \* (Vol 28) 1941 Nag 324 (326) : 43 Cri L Jour 129 : I L R (1942) Nag 510 \* (Vol 27) 1940 Cal 461 (462) : I L R (1940) 2 Cal 180 (DB) \* (Vol 26) 1939 Pat 536 (538) : 41 Cri L Jour 1 : 18 Pat 698 (DB) \* (Vol 23) 1936 Cal 18 (19, 20) : 37 Cri L Jour 359 (DB). (Corroboration of woman's testimony.) \* (22) 23 Cri L Jour 475 (475) (Lab) \* (Vol 33) 1946 Pat 426 (427) (DB). (Failure to warn amounts to non-direction, vitiating trial.)

[66] The jury are entitled to convict the accused upon the uncorroborated testimony of the woman, if they are satisfied with the uncorroborated evidence. (Vol 27) 1940 Cal 461 (462) : I L R (1940) 2 Cal 180 (DB) \* (Vol 24) 1937 Cal 321 (322) : 39 Cri L Jour 371 : I L R (1937) 2 Cal 345 (DB).

[67] The failure to warn the jury of the danger of convicting the accused on the woman's evidence amounts to a non-direction which vitiates the trial. (Vol 26) 1939 Pat 536 (538) : 41 Cri L Jour 1 : 18 Pat 698 (DB) \* (Vol 23) 1936 Cal 18 (19) : 37 Cri L Jour 359 (DB).

[68] Where a part of the woman's evidence establishes the guilt of the accused, is corroborated, the failure to give warning cannot be said to have affected the verdict of the jury and is no ground to set aside

conviction. (Vol 25) 1938 Cal 658 (661) : I L R (1938) 1 Cal 626 : 40 Cri L Jour 101 (DB).

[69] Where a woman is alleged to be of a bad character, the Judge should point out to the jury that the alleged bad character is relevant only so far as it affects the credit of the woman or supports the defence suggestion that the case is not a true one. (Vol 24) 1937 Cal 368 (368) : 38 Cri L Jour 767 (DB).

[70] The rule that the Judge should warn the jury in cases involving sexual intercourse, that corroboration of the woman's story must be obtained does not apply where the only charge is of abduction. (Vol 29) 1942 Bom 71 (74) : I L R (1942) Bom 381 : 43 Cri L Jour 529 (DB).

[71] In case of sexual offences like abduction, Judge should tell jury that if girl was immoral it made her story of abduction less probable—Failure to do this amounts to misdirection. (Vol 26) 1939 Pat 536 (539) : 18 Pat 698 : 41 Cri L Jour 1 (DB).

[72] Trial for offence under S. 306, Penal Code—Judge telling jury that the fact of accused's previous intimacy with the girl was immaterial, amounts to misdirection. (Vol 20) 1933 Cal 718 (722) : 35 Cri L Jour 307 : 60 Cal 1457 (DB).

*Other cases of warning:*—[73] The Judge should warn the jury in following matters:

(a) Evidence of an expert should be approached with caution. (05) 2 Cri L Jour 311 (313) (DB) (Cal).

(b) Suggestions of pleaders are not evidence unless accepted by prosecution witnesses. (Vol 19) 1932 Cal 375 (377) : 33 Cri L Jour 725 (DB).

(c) Evidence of witnesses under S. 164 must be accepted with great caution. (08) 7 Cri L Jour 315 (316) (DB) (Cal).

(d) Jury subjected to proceedings under S. 110—Adverse inference against the accused should not be drawn. (Vol 26) 1939 Cal 497 (499) : 40 Cri L Jour 877 (DB).

(e) Statement of a witness before committing Magistrate, but denied before Sessions Judge should be accepted with great caution. (Vol 25) 1938 Cal 364 (365) : 39 Cri L Jour 625 (DB).

[74] Jury should be informed under what provision the first information report is substantive evidence and then they can attach to it such weight as is necessary. (Vol 29) 1942 Cal 74 (74, 75) : I L R (1942) 2 Cal 144 : 44 Cri L Jour 322 (DB).

9. Effect of non-observance of this provision—Laying down the law.—[1] Failure of the Judge to explain the law properly to the jury vitiates the trial and the defect is not curable under S. 537. (Vol 18) 1931 Mad 427 (428) : 54 Mad 588 : 32 Cri L Jour 1212 (DB) \* (Vol 11) 1924 Oudh 411 (412, 413) : 25 Cri L Jour 1129 \* (10) 11 Cri L Jour 340 (341, 342) : 5 Low Bur Rul 149 (DB) \* (Vol 22) 1935 Oudh 175 (176) : 35 Cri L Jour 607.

[2] Where the offence charged is a simple one and the jury have understood fully the constituent factors of the offence, an omission to explain the law may not justify a reversal of the verdict. (Vol 26) 1939 Bom 457 (459) : I L R (1939) Bom 648 : 41 Cri L Jour 176 (DB) \* (Vol 10) 1923 Mad 329 (330) (DB) \* (Vol 12) 1925 Oudh 69 (69) : 25 Cri L Jour 1032.

[3] Where an omission to explain the law occasions a failure of justice, the verdict will be set aside. (Vol 13) 1926 Mad 1121 (1122) : 27 Cri L Jour 1191 (DB) \* (Vol 12) 1925 Cal 1235 (1236) : 26 Cri L Jour 946 (DB).

[4] It is a question depending on the circumstances of each case whether the Judge has failed to lay down the law for the guidance of the jury. (Vol 23) 1936 Rang 421 (425) : 37 Cri L Jour 1050 (FB) \* (Vol 3) 1916 Low Bur 114 (116) : 17 Cri L Jour 49 : 8 Low Bur



Section 297—Note 9 (*contd.*)

Rul 306 (FB) (Vol 1) 1914 Low Bur 218 (218) : 8 Low Bur Rul 125 : 17 Cri L Jour 154 (DB).

1C. Misdirection. — [1] Misdirection includes not only an error in laying down the law by which the jury are to be guided, but also a defect in summing up the evidence. (10) 11 Cri L Jour 13 (13, 15) : 5 Sind L R 102 (DB) (30) 1930 Mad W N 249 (289) (DB).

[2] Those who allege misdirection must show that something wrong was said or something was said which would make wrong that which was left to be understood. (Vol 29) 1942 Nag 127 (131) : ILR (1912) Nag 740 : 44 Cri L Jour 18 (DB) (Vol 29) 1942 Oudh 221 (225) : 17 Luck 516 : 43 Cri L Jour 416 (Vol 29) 1942 Pat 481 (484) : 21 Pat 258 : 43 Cri L Jour 817 (DB) (Vol 2) 1916 Pat 236 (243) : 1 Pat L Jour 217 : 17 Cri L Jour 353 (DB) (Vol 2) 1915 Cal 773 (783) : 16 Cri L Jour 561 (FB).

[3] A charge to the jury must be read as a whole and if the case has been left to jury, there is no misdirection. (Vol 1) 1914 P C 116 (124) : 41 Cal 1023 : 3 Low Bur Rul 16 : 15 Cri L Jour 209 : 41 Ind App 149 : 1914 A C 844 (PC) (Vol 27) 1940 Nag 221 (224) : 41 Cri L Jour 594 (Vol 27) 1940 Oudh 337 (340) : 11 Cri L Jour 545 (Vol 26) 1930 Cal 682 (686) : I L R (1939) 1 Cal 187 : 41 Cri L Jour 59 (DB) (Vol 24) 1937 Pat 191 (193) : 38 Cri L Jour 129 (DB).

[4] Misdirection is not established by showing that the Judge might have laid much more stress than he has laid on the defects in the prosecution case. (Vol 13) 1926 Mad 370 (370) : 27 Cri L Jour 176 (DB).

[5] The following are instances of misdirection :

(a) Telling jury to find accused guilty if they are morally convinced. (Vol 13) 1926 All 752 (753) : 28 Cri L Jour 15 : 49 All 209.

(b) Misreading or misquoting the evidence. (Vol 17) 1930 All 28 (28) : 52 All 207 : 30 Cri L Jour 1146 (Vol 17) 1930 Cal 756 (756) : 32 Cri L Jour 233 (DB) (Vol 2) 1915 Mad 1036 (1038) : 16 Cri L Jour 717 (718) (DB) (Vol 10) 1923 Pat 158 (159) : 23 Cri L Jour 406 (DB).

(c) Saying anything wrong to the jury or incorrect representation of facts from evidence. (36) 1936 Oudh W N 187 (189) (Vol 14) 1927 Oudh 259 (259) : 2 Luck 597 : 28 Cri L Jour 683 (Vol 7) 1920 Cal 527 (528) : 21 Cri L Jour 670 (DB).

(d) Suggestion without foundation on record. (Vol 21) 1934 Cal 77 (80) : 35 Cri L Jour 483 (DB).

(e) Grave omissions and vague over-statements. (Vol 24) 1937 Pat 191 (195) : 38 Cri L Jour 129 (DB). (Minor omission of corroborative evidence are unimportant.)

(f) Asking jury to neglect any portion of evidence. (104) 6 Bom L R 31 (33) (DB).

(g) Telling jury that case thrown up because of contradictions would be end of Criminal law. (108) 12 Cal W N exl (exli) (P C).

(h) Suggesting that onus of proof of innocence lies on accused. (Vol 26) 1939 Sind 209 (212, 214) : 41 Cri L Jour 28 : I L R (1940) Kar 249 (DB) (Vol 24) 1937 Pat 191 (195) : 38 Cri L Jour 129 (DB) (Vol 29) 1936 P C 169 (170) : 37 Cri L Jour 628 : 1936 A C 388 : 105 L J P C 79 : 154 L T 620 (P C) (Vol 23) 1936 P C 289 (300) : 37 Cri L Jour 963 (P C) (Vol 23) 1936 Cal 73 (79, 80) : 37 Cri L Jour 994 : 63 Cal 929 (DB) (36) 37 Cri L Jour 976 (977) (DB) (Vol 3) 1916 Mad 582 (583) : 16 Cri L Jour 615 (DB) (106) 3 Cri L Jour 1 (3) : 3 Low Bur Rul 75 (F B) (Vol 12) 1925 Cal 666 (667) : 52 Cal 223 : 26 Cri L Jour 1155 (DB). (Onus shifts on accused.) (Vol 16) 1929 Cal 726 (728) : 31 Cri L Jour 909 : 57 Cal 649 (DB). (Do.)

(i) Telling jury that stronger evidence is required in capital cases. (Vol 9) 1922 Cal 342 (345) : 49 Cal 187 : 22 Cri L Jour 562 (DB).

(j) Saying that there was presumption of voluntary in favour of a witness. (Vol 19) 1932 Cal 474 (477, 478) : 59 Cal 1361 : 33 Cri L Jour 354 (DB) (Vol 13) 1926 Cal 796 (799) : 33 Cri L Jour 136 : 58 Cal 1095 (8 B).

(k) Submission of inadmissible evidence. (Vol 31) 1944 Bom 333 (343) (DB) (Vol 25) 1938 Cal 364 (365) : 33 Cri L Jour 625 (DB) (Vol 24) 1937 Cal 359 (311) : 1 L R (1937) 2 Cal 308 : 38 Cri L Jour 1667 (DB) (Vol 1) 1914 P C 155 (164) : 15 Cri L Jour 326 (P C) (Vol 13) 1926 Mad 370 (370) : 27 Cri L Jour 176 (DB) (Vol 5) 1918 Pat 201 (209) : 19 Cri L Jour 886 (DB).

(l) Failing to warn that jury should exclude inadmissible evidence except in the case. (29) 30 Cri L Jour 37 (58) (DB) (Cal) (Vol 13) 1926 Bom 238 (210, 241) : 17 Cri L Jour 481 (DB) (Vol 3) 1916 Mad 551 (552) : 16 Cri L Jour 294 : 39 Mad 449 (DB).

[See however (Vol 13) 1926 Cal 320 (322) : 27 Cri L Jour 263 (DB) (33) 27 Bom 626 (631, 633) (DB) (Vol 10) 1923 Pat 142 (142) : 23 Cri L Jour 141 (DB).

(m) Reference to prior conviction of accused contrary to provisions of S. 310. (Vol 7) 1920 Cal 698 (701) : 23 Cri L Jour 60 (DB).

(n) Improper rejection of evidence. (140) 1940 Mad W N 97 (100) (Vol 17) 1930 Cal 370 (375) : 58 Cal 96 : 32 Cri L Jour 10 (DB) (Vol 19) 1932 Cal 523 (523) : 33 Cri L Jour 604 (DB).

(o) Putting new explanation on behalf of prosecution. (32) 1932 Mad W N 862 (864).

(p) Saying that admissions by accused's pleader are binding on accused. (1906) 2 Bom L R 751 (752) (DB).

(q) Directing jury to accept statement in first information report in preference to evidence in Court. (10) 11 Cri L Jour 557 (557) (DB) (Cal).

(r) Telling jury that Judge's finding regarding voluntary nature of accused's confession is binding on them. (Vol 22) 1935 Cal 308 (309) : 36 Cri L Jour 921 (DB) (Vol 21) 1934 Cal 853 (855, 856) : 62 Cal 312 : 36 Cri L Jour 485 (DB).

(s) Telling jury not to believe dying declaration if they think some exculpatory statement in it to be untrue. (Vol 23) 1936 Cal 793 (795) : 38 Cri L Jour 243 : I L R (1937) 1 Cal 475 (DB).

(t) Charge of murder—Plea of accidental killing taken by accused—No plea of provocation so as to reduce offence to manslaughter taken—But question whether offence might only be manslaughter on ground of provocation or otherwise arising on evidence—Failure of Judge to put question as to provocation to jury amounts to grave defect in direction to jury. (Vol 33) 1946 P C 20 (23, 24) : 47 Cri L Jour 569 (P C).

(u) Where the Judge does not leave it to the jury to decide whether the evidence of the witness excluded the possibility of the case suggested by the accused and tells the jury that it does it amounts to misdirection. (Vol 32) 1945 Lah 105 (111) : 47 Cri L Jour 1 : I L R (1945) Lah 290 (F B).

(v) The omission to tell the jury in a trial under S. 412, Penal Code, that they had to be satisfied that the accused knew or had reason to believe that possession of the property had been transferred by means of dacoity, is material and is a serious misdirection in the charge. (Vol 32) 1945 Cal 482 (483) (DB).

(w) Several offences of making false entries in diaries charged separately—Judge directing jury that if any one item was established against accused, they could give a general verdict of guilty—Charge amounts to misdirection. (Vol 20) 1933 P C 124 (133) : 34 Cri L Jour 322 : 32 Sind L R 716 (P C).

(x) Directing jury to consider how far a statement in first information report is corroborated by the evidence in the case. (Vol 33) 1946 Cal 537 (539) : 47 Cri L Jour 737 (DB).

Section 297 — Note 10 (*contd.*)

(y) Directing jury in a murder trial, to consider non-examination of an eye-witness whose deposition in committal Court was not produced, as not giving rise to diverse inference against prosecution. (Vol 33) 1946 Bom 446 (450) : 47 Cri L Jour 962 (DB). (Charge initiated.)

(z) Accused charged in alternative for abduction and kidnapping — Statement of girl before investigating officer — Distinction between effect of statement in respect of two charges not brought out to jury by Court — Jury acquitting accused of abduction and finding guilty of kidnapping. (Vol 33) 1946 Cal 493 (494, 495) : 47 Cri L Jour 325.

[6] The test of misdirection is that jury should not be put on wrong track and made to arrive at a wrong conclusion. (Vol 15) 1928 Pat 120 (122) : 6 Pat 817 : 29 Cri L Jour 81 (DB).

[7] Defence of alibi raised in Sessions Court and not in committal Court — Comment of Judge in summing up on non-disclosure of alibi at earlier stage, held, not misdirection. (Vol 33) 1946 Mad 271 (278) : 1 L R (1946) Mad 389 : 47 Cri L Jour 785 (DB).

11. Non-direction. — [1] Non-direction is not necessarily misdirection in every case so as to vitiate the trial. (Vol 29) 1942 Nag 127 (131) : 1 L R (1942) Nag 749 : 44 Cri L Jour 18 (DB) \* (Vol 3) 1916 Pat 286 (243) : 17 Cri L Jour 353 : 1 Pat L Jour 317 (DB) \* (Vol 6) 1919 Cal 142 (144) : 20 Cri L Jour 300 (PB).

[2] Where the non-direction is with regard to a point of vital importance the trial will be held to be illegal. (Vol 26) 1939 Bom 457 (459) : 1 L R (1939) Bom 648 : 41 Cri L Jour 176 (DB). (Vital importance.) \* (Vol 24) 1937 Pat 440 (444) : 16 Pat 413 : 38 Cri L Jour 919 (DB). (Do.) \* (Vol 13) 1926 Cal 439 (441) : 26 Cri L Jour 567 (DB). (Do.) \* (Vol 28) 1941 Oudh 567 (569) : 17 Luck 128 : 42 Cri L Jour 728. (Favourable to accused.) \* (03) 27 Bom 626 (635) (DB). (Do.) \* (29) 1929 Mad W N 946 (950) (DB). (Do.) \* (Vol 29) 1942 Nag 127 (131) : 1 L R (1942) Nag 749 : 44 Cri L Jour 18 (DB). (Misleading jury.) \* (Vol 15) 1928 Pat 326 (334) : 29 Cri L Jour 325 (DB). (Do.)

[3] A failure to point out to jury matters in evidence to be considered by them is not misdirection. (Vol 9) 1922 Pat 321 (321) : 23 Cri L Jour 47 (DB).

[4] Mere omission to refer to some circumstance or suggestion is not misdirection. (Vol 29) 1942 Oudh 221 (225) : 17 Luck 516 : 43 Cri L Jour 416 \* (Vol 29) 1942 Pat 481 (484) : 21 Pat 258 : 43 Cri L Jour 817 (DB) \* (Vol 11) 1924 Cal 257 (301) : 25 Cri L Jour 817 (PB).

[5] The test of misdirection is whether an omission led to an erroneous verdict by the jury. (Vol 19) 1932 Oudh 23 (25) : 7 Luck 390 : 33 Cri L Jour 167.

[6] A grave omission to direct jury on vital point cannot be made good by accused's counsel referring to it. (Vol 16) 1929 Cal 617 (626) : 30 Cri L Jour 993 (SB).

[7] The following non-directions may amount to misdirection :

(a) Failure to explain law arising in the case. (Vol 28) 1941 Cal 315 (317) : 42 Cri L Jour 649 (DB) \* (Vol 27) 1940 Pat 417 (418) : 41 Cri L Jour 738 (DB) \* (Vol 27) 1940 Lah 87 (88) : 41 Cri L Jour 482 \* (Vol 28) 1941 Mad 839 (343) : 42 Cri L Jour 414 \* (Vol 26) 1939 Bom 457 (460) : 1 L R (1939) Bom 648 : 41 Cri L Jour 176 (DB) \* (Vol 24) 1937 Nag 110 (112) : 1 L R (1937) Nag 123 : 38 Cri L Jour 589 (DB) \* (Vol 18) 1931 Cal 184 (186, 187, 188) : 32 Cal 1051 : 32 Cri L Jour 836 (PB).

(b) Omission to direct jury to consider the case of each accused separately where there are many accused. (Vol 27) 1940 Pat 417 (419) : 41 Cri L Jour 738 (DB) \* (Vol 28) 1941 Mad 339 (342) : 42 Cri L Jour 414 \*

(Vol 26) 1939 Sind 209 (214) : 41 Cri L Jour 28 : 1 L R (1940) Kar 249 (DB) \* (Vol 20) 1933 Cal 718 (720) : 30 Cal 1457 : 35 Cri L Jour 307 (DB) \* (Vol 21) 1934 Nag 94 (95) : 35 Cri L Jour 957 : 30 Nag L R 262 \* (Vol 15) 1928 Pat 326 (333, 335) : 29 Cri L Jour 325 (DB) \* (Vol 20) 1933 All 128 (130) : 34 Cri L Jour 141 : 55 All 68 \* (Vol 29) 1942 Pat 199 (200) : 21 Pat 130 : 43 Cri L Jour 230 (DB). (Judge should divide evidence regarding each accused.) \* (Vol 28) 1941 Mad 658 (660) : 42 Cri L Jour 631 (DB). (Do.) \* (Vol 21) 1934 Cal 105 (109) : 35 Cri L Jour 554 : 61 Cal 6. (Do.)

(c) Omission to remind jury that statement of one accused is not evidence against another if the former is found not guilty by them. (Vol 23) 1936 Cal 73 (79) : 63 Cal 929 : 37 Cri L Jour 394 (DB).

(d) Failure to tell jury that the accused should be acquitted if there is reasonable doubt. ('36) 37 Cri L Jour 17 (18) (Lah) \* (Vol 34) 1917 Oudh 35 (38, 39) : 47 Cri L Jour 725 \* ('36) 1936 Oudh W N 201 (203) \* (Vol 20) 1933 P C 218 (221) : 34 Cri L Jour 886 : 1933 A C 699 (PC).

[See however (Vol 12) 1925 Nag 154 (155) : 27 Cri L Jour 217 \* (Vol 14) 1927 Nag 117 (119) : 28 Cri L Jour 177 \* (Vol 17) 1930 All 28 (29) : 52 All 207 : 30 Cri L Jour 1146.]

(e) Omission to tell that in case a plea of alibi is not established there is no presumption that accused is guilty. (Vol 8) 1921 Cal 252 (254) : 23 Cri L Jour 244.

(f) Failure to inform that no presumption of guilt arises merely because accused had absconded for some time. ('10) 11 Cri L Jour 557 (558) (DB) (Cal).

(g) Omission to direct that the jury should reject irrelevant evidence. (Vol 23) 1936 Cal 73 (79) : 37 Cri L Jour 394 : 63 Cal 929 (DB) \* (Vol 16) 1929 Cal 617 (625, 626) : 30 Cri L Jour 993 (SB).

(h) Omission to tell that jury should not be affected by result of prior proceedings. (Vol 7) 1920 Cal 617 (619) : 21 Cri L Jour 554 (DB).

(i) Omission to inform that the jury should not consider the conduct of one accused in judging the case of other. ('03) 27 Bom 626 (634) (DB).

(j) Omission to point out absence of material prosecution evidence. ('75) 23 Suth W R Cr 21 (21) (DB).

(k) Omission to point out discrepancies between evidence and first information report. (Vol 30) 1913 Cal 74 (75) : 44 Cri L Jour 322 : 1 L R (1942) 2 Cal 114 (DB) \* (Vol 13) 1926 All 429 (430, 431) : 27 Cri L Jour 785.

(l) Omission to point out discrepancies and contradictions in evidence. (Vol 23) 1941 Cal 106 (110) : 1 L R (1940) 2 Cal 258 : 42 Cri L Jour 385 (DB) \* (Vol 16) 1929 Cal 170 (171) : 30 Cri L Jour 912 (DB).

[See however (Vol 23) 1936 Nag 103 (105) : 31 Nag L R (Sup) 215 : 37 Cri L Jour 607 (DB).]

(m) Failure to inform that evidence of a hostile witness should be taken with caution. (Vol 30) 1913 Oudh 322 (325) : 44 Cri L Jour 604 \* (Vol 29) 1942 Cal 36 (37) : 43 Cri L Jour 277 (DB) \* (Vol 28) 1941 Nag 324 (326) : 43 Cri L Jour 129 : 1 L R (1942) Nag 510 \* (Vol 18) 1931 Cal 401 (407, 408) (PB).

[But see (Vol 19) 1932 Cal 523 (523) : 33 Cri L Jour 604 (DB).]

(n) Omission to tell that evidence of a witness deposing without oath should be relied upon with caution. (Vol 1) 1914 Cal 276 (279) : 41 Cal 406 : 14 Cri L Jour 485 (DB).

(o) Omission to tell that certain evidence is admissible only in corroboration. (Vol 29) 1942 Cal 524 (526) : 43 Cri L Jour 860 (DB) \* (Vol 23) 1936 Cal 186 (188) : 37 Cri L Jour 673 (DB).

(p) Omission to inform jury of the inordinate delay in preferring the complaint. (Vol 18) 1931 Cal 10 (11) : 32 Cri L Jour 186 (DB).

*Duty of Judge.* 298. (1) In such cases it is the duty of the Judge —

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

**Section 297 — Note 11 (contd.)**

(g) Failure to maintain that first information report could be used to contradict prosecution evidence. (Vol 31) 1944 Cal 339 (340, 346) : ILR (1944) 2 Cal 405 : 45 Cri L Jour 771 (DB). (Per *Das J.*)

(r) Failure to warn as to necessity for corroboration of opinion of police regarding bloodstains. (Vol 30) 1943 Pat 163 (167, 168) : 21 Pat 865 : 44 Cri L Jour 507 (DB).

(s) Failure to warn that confession while in police custody was not admissible in evidence. (Vol 29) 1942 Cal 524 (526) : 43 Cri L Jour 860 (DB).

(t) *A, B, C* beat *E* and turned away — *D* came and hit *E* with ramdao as a result of which he died — In the trial of all four under S. 304/34, Penal Code, the Judge failed to ask the jury to decide whether all the accused intended the assault by *D* or whether they intended merely beating—Charge held improper and conviction set aside. (Vol 33) 1946 Cal 286 (287) : 47 Cri L Jour 899 (DB).

12. Effect of misdirection. — [1] In appeals against the verdict of a jury it must be shown that there was misdirection or non-direction and it resulted in a miscarriage of justice. (Vol 31) 1944 Bom 338 (343) (DB)\* (Vol 30) 1943 P C 211 (215) : 45 Cri L Jour 241 (P C)\* (Vol 30) 1943 Pat 163 (166) : 21 Pat 865 : 44 Cri L Jour 507 (DB)\* (Vol 20) 1933 P C 218 (221) : 34 Cri L Jour 886 : 1933 A C 699 (P C)\* (Vol 26) 1939 Bom 457 (459) : I L R (1939) Bom 648 : 41 Cri L Jour 176 (DB). (Non-direction)\* (Vol 17) 1930 All 28 (28, 29) : 52 All 207 : 37 Cri L Jour 1146. (Do.)\* (Vol 13) 1926 All 429 (431) : 27 Cri L Jour 785\* (Vol 17) 1930 All 28 (29) : 52 All 207 : 30 Cri L Jour 1146\* (Vol 21) 1934 Cal 847 (849) : 62 Cal 337 : 36 Cri L Jour 358 (DB).

[2] If in spite of misdirection, conviction and verdict are justified by law, there is no failure of justice. (Vol 4) 1917 All 173 (175) : 18 Cri L Jour 491 : 39 All 348.

[3] Where the appellate Court finds that there is misdirection, it can under S. 423 either acquit the accused or reduce the sentence, or order a new trial with a fresh jury. (Vol 27) 1940 Lah 87 (90) : 41 Cri L Jour 482\* (Vol 26) 1939 Sind 209 (216, 217) : 41 Cri L Jour 28 : I L R (1940) Kar 249 (DB)\* (Vol 25) 1938 Cal 51 (59) : 39 Cri L Jour 161 : ILR (1938) 1 Cal 290 (DB)\* (Vol 33) 1946 Cal 493 (494, 495) : 47 Cri L Jour 325 (DB)\* (Vol 20) 1933 Bom 153 (155, 156) : 35 Cri L Jour 747 (DB)\* (Vol 12) 1925 Sind 116 (123, 126) : 25 Cri L Jour 761 (DB)\* (Vol 5) 1918 Low Bur Rul 104 (105, 107, 108) : 18 Cri L Jour 929 : 9 Low Bur Rul 60 (FB)\* (Vol 16) 1929 Cal 617 (622) : 30 Cri L Jour 993 (SB)\* (Vol 19) 1932 Oudh 23 (25) : 7 Luck 390 : 33 Cri L Jour 167 (DB)\* (Vol 13) 1926 Nag 53 (54, 55) : 26 Cri L Jour 1090.

[4] In trials by the High Court Sessions under

Letters Patent the verdict may be reviewed. (Vol 23) 1936 Bom 52 (53) : 60 Bom 599 : 37 Cri L Jour 366 (FB)\* ('90) 17 Cal 642 (668, 669) (FB).

[5] An appeal would not lie to the Privy Council merely on the ground of misdirection. (Vol 23) 1936 P C 160 (168) : 37 Cri L Jour 679 (P C)\* (Vol 23) 1936 P C 169 (170) : 37 Cri L Jour 628 (P C)\* ('93) 15 All 310 (315) : 20 Ind App 90 (P C)\* (Vol 1) 1914 P C 116 (126, 127) : 41 Cal 1023 : 41 Ind App 149 : 8 Low Bur Rul 16 : 15 Cri L Jour 309 (P C).

13. Duty of appellate Court in reviewing a charge. — [1] It is sufficient to see whether the tendency of a charge taken as a whole has given a correct or incorrect direction to the mind of the jury. (Vol 27) 1940 Oudh 337 (340) : 41 Cri L Jour 545\* (Vol 26) 1939 Cal 682 (686) : 41 Cri L Jour 59 : I L R (1939) 1 Cal 187 (DB)\* (Vol 8) 1921 Cal 73 (74) : 23 Cri L Jour 342 (DB)\* (Vol 1) 1914 Low Bur 65 (119) : 7 Low Bur Rul 143 : 15 Cri L Jour 80 (FB)\* (Vol 23) 1936 Bom 52 (54) : 37 Cri L Jour 366 : 60 Bom 599 (FB).

14. Effect of a juror not understanding the charge. — [1] Juror being unacquainted with the language of the charge, could not follow it — Held, the whole trial is vitiated. (Vol 20) 1933 P C 208 (209) : 60 Ind App 354 : 34 Cri L Jour 843 : 12 Pat 811 (P C).

15. Effect of a bad charge. — [1] Where a charge is inadequate and insufficient the whole trial will be bad. (Vol 13) 1926 Nag 53 (54) : 26 Cri L Jour 1090 \* (Vol 8) 1921 Cal 269 (270) : 23 Cri L Jour 41 (DB).

[2] It must be seen whether there was a failure of justice consequent on a bad charge. ('24) 25 Cri L Jour 294 (296) (FB) (Cal).

16. When Judge can re-charge the jury. — [1] Where the jury returns an unintelligible verdict, the Judge may again sum up the case to them and direct them to give a fresh verdict. (Vol 29) 1942 Pat 446 (448) : 21 Pat 138 : 43 Cri L Jour 205 (DB)\* (Vol 17) 1930 Cal 320 (320) : 57 Cal 61 : 31 Cri L Jour 761 (DB).

[2] The Judge cannot re-charge the jury and ask them to return a fresh verdict merely because he disagrees with their first verdict. (Vol 22) 1935 All 1020 (1022) : 36 Cri L Jour 1377.

**SECTION 298 — SYNOPSIS.**

1. Scope and object.
2. "Judge to decide all questions of law arising in the course of the trial."
3. Relevancy and admissibility to be decided by the Judge.
4. "Propriety of questions asked by or on behalf of the parties."
5. "To prevent the production of inadmissible evidence, whether it is or is not objected to by the parties."
6. Construction of documents—Clause (b).

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

*Illustrations.*

(a) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

[1882 — S. 298 : 1872 — S. 286.]

**Section 298 — SYNOPSIS (contd.)**

7. "To decide upon all matters . . . to enable evidence of particular matters to be given"—  
Clause (c).

8. When and how far a Judge may give his opinion on question of fact—Sub-section (2).

1. Scope and object. — [1] The Judge should decide whether there is any evidence while the jury should decide whether there is sufficient evidence. (Vol 28) 1941 Bom 128 (124) : 1 L R (1941) Bom 515 : 42 Cri L Jour 470 (FB).

[2] The Judge should evince an interest in the case even from its beginning. (Vol 17) 1930 All 534 (586) : 32 Cri L Jour 158.

2. "Judge to decide all questions of law arising in the course of the trial." — [1] The direction of the Judge on question of law is absolute and binding on the jury. ('78) 20 Suth W R Cr 41 (42) (D B) \* (Vol 16) 1929 Cal 57 (60) : 56 Cal 150 : 30 Cri L Jour 435 (DB).

[2] The following are questions of law and should be decided by the Judge:

(a) Whether right of private defence exists. (Vol 30) 1943 Pat 131 (133) : 44 Cri L Jour 356 : 21 Pat 854 (DB).

(b) Whether facts alleged constitute an offence as defined in the Penal Code. ('95) 19 Bom 735 (736) (DB). (Offence of rape.) \* ('79) 1879 Rat 140 (140) (DB). (Offence of defamation.)

(c) Whether a particular communication is a privileged one. ('68) 10 Suth W R Cr 14 (14) (DB).

(d) Whether any evidence had been given on which the jury could properly find the question for the party on whom onus of proof lies. (Vol 26) 1939 Mad 190 (192) : 40 Cri L Jour 437 \* (Vol 2) 1915 Cal 773 (777) : 16 Cri L Jour 561 (FB).

(e) Whether there is corroboration. (Vol 19) 1932 Cal 295 (296, 297) : 33 Cri L Jour 477 (DB).

(f) Whether a witness is capable of testifying as such. (Vol 1) 1914 Cal 276 (279) : 14 Cri L Jour 485 : 41 Cal 406 (DB) \* (Vol 10) 1923 Lah 332 (333) : 25 Cri L Jour 317. (Child.) \* ('12) 13 Cri L Jour 271 (271) (DB). (Mad). (Deaf and dumb person.) \* (Vol 5) 1918 Bom 212 (213) : 19 Cri L Jour 593 (DB). (Person unable to take oath.)

(g) Whether a charge under S. 498, Penal Code, is proper without a complaint under S. 199, Criminal P. C. (Vol 22) 1935 Pat 357 (357) : 36 Cri L Jour 856 : 14 Pat 717 (DB).

(h) Whether there is any evidence to go before the jury. (Vol 28) 1941 Bom 128 (124) : 1 L R (1941) Bom 515 : 42 Cri L Jour 470 (FB) \* (Vol 30) 1943 Pat 131 (133) : 21 Pat 854 : 44 Cri L Jour 356 (DB). (Ambiguous charge.)

(i) Whether prosecution witness is an accomplice is not a question for the Judge, but he should put all facts before jury. (Vol 14) 1927 Cal 460 (461) : 28 Cri

L Jour 278 (DB) \* (Vol 23) 1942 Oudh 221 (223) : 17 Luck 516 : 43 Cri L Jour 416.

[But see ('03) 26 Mad 1 (6, 7) (DB).]

3. Relevancy and admissibility to be decided by the Judge. — [1] The Judge should decide whether a certain piece of evidence is admissible or relevant. (Vol 30) 1943 Pat 163 (168) : 44 Cri L Jour 507 : 21 Pat 865 (DB) \* (Vol 25) 1938 Cal 460 (462) : 39 Cri L Jour 674 (DB) \* (Vol 22) 1935 Sind 115 (126) : 29 Sind L R 121 : 36 Cri L Jour 1310 (DB) \* (Vol 32) 1946 Cal 452 (456) : 48 Cri L Jour 46 (DB).

[2] In introducing evidence the Judge should be very careful to see that there is no miscarriage of justice. (Vol 13) 1926 Cal 147 (149) : 27 Cr L J 277 (DB).

[3] The Judge should, if the evidence is inadmissible, shut it out from the jury. (Vol 30) 1943 Pat 163 (166, 167) : 44 Cri L Jour 507 : 21 Pat 865 (DB) \* ('06) 4 Cri L Jour 332 (333) (DB) (Bom) \* (Vol 6) 1919 Lah 184 (186) : 20 Cri L Jour 305 (DB) \* (Vol 16) 1929 Cal 617 (620) : 30 Cri L Jour 993 (SB).

[4] The moment to decide the question of admissibility is when the evidence is sought to be admitted. (Vol 19) 1932 Sind 201 (205) : 26 Sind L R 302 : 34 Cri L Jour 147 (DB).

[5] The jury should be asked to retire from the Court when the question as to the admissibility of a particular piece of evidence is being discussed. (Vol 20) 1933 Cal 835 (837) : 34 Cri L Jour 1087 (SB).

[6] The Judge should decide that a confession is voluntary before admitting it and placing it before the Jury. (Vol 32) 1945 Bom 265 (267) : 46 Cri L Jour 714 (FB) \* (Vol 30) 1943 Mad 527 (528) : 44 Cri L Jour 766 \* (Vol 28) 1941 Pat 303 (305) : 42 Cri L Jour 343 : 20 Pat 547 (DB) \* ('36) 37 Cri L Jour 1084 (1085) : 63 Cal 833 (FB) \* (Vol 34) 1947 Cal 192 (194) : 47 Cri L Jour 814 (DB) \* ('07) 6 Cri L Jour 164 (174) : 32 Bom 111 (FB). (Facts preliminary to the admissibility of evidence are for Court.)

[7] The Judge should exclude a confession if he doubts its voluntary nature but is not concerned with its truth for admitting it. (Vol 12) 1925 Cal 587 (588) : 52 Cal 67 : 26 Cri L Jour 782.

[8] Once a confession is admitted by the Judge, the jury should see whether it is true and can be relied upon applying the test whether it was freely and voluntarily made. (Vol 32) 1945 Bom 265 (267) : 46 Cri L Jour 714 (FB) \* (Vol 28) 1941 Pat 303 (305) : 42 Cri L Jour 343 : 20 Pat 547 (DB) \* ('36) 37 Cri L Jour 1084 (1085) : 63 Cal 833 (FB).

[9] The Judge has to see if the confession is vitiated by any other circumstance mentioned in Ss. 24, 25, etc., of the Evidence Act. (Vol 4) 1917 Low Bur 93 (93) : 18 Cri L Jour 383 \* (Vol 8) 1921 Bom 70 (71) : 45 Bom 1086 : 22 Cri L Jour 318 (DB) \* (Vol 6) 1919 Cal 11 (13) : 20 Cri L Jour 883 (DB) \* (Vol 2) 1915 Bom 249 (252) : 40 Bom 220 : 17 Cri L Jour 133 (DB) \* (Vol 3) 1916 Cal 352 (352, 353) : 17 Cri L Jour 168 (DB).

**Section 298 — Note 3 (contd.)**

[10] The Judge should never leave it to the jury to decide about the admissibility of the confession. (Vol 20) 1933 Cal 187 (188) : 34 Cri L Jour 369 (DB) \* (Vol 5) 1918 Cal 88 (91) : 19 Cri L Jour 305 : 45 Cal 557 (DB) \* (Vol 1) 1914 Bom 305 (306) : 38 Bom 156 : 14 Cri L Jour 625 (DB).

[11] Where the Judge admits a first information report he should merely state that he admits the document in evidence and should lay it before the jury. (Vol 25) 1933 Cal 460 (462) : 39 Cri L Jour 674 (DB).

[12] Evidence should be taken in presence of jury so that they can gauge the value of the testimony of each witness by his general demeanour. (Vol 11) 1924 Lah 17 (19) : 4 Lah 382 : 25 Cri L Jour 377.

[13] Judge allowing alleged inadmissible evidence.—No objection taken either when it was given or when Judge summed up to jury.—There is no "decision" on a point of law within the meaning of Cl. 26 of Letters Patent. (Vol 22) 1935 Mad 486 (495) : 58 Mad 523 : 36 Cri L Jour 1398 (FB).

[14] Wrong admission of evidence — Course of trial not deflected — It is no ground for application under Cl. 39 of Letters Patent. (Vol 22) 1935 Rang 214 (218) : 13 Rang 141 : 36 Cri L Jour 1232 (DB).

4. "Propriety of questions asked by or on behalf of the parties." — [1] The Judge should control the examination-in-chief by the prosecution and allow only legal questions to be put in a legal way. (Vol 5) 1918 Pat 146 (152) : 19 Cri L Jour 789 (DB).

[2] In cross-examination the Judge should disallow any question which is improper or misleading. (Vol 20) 1933 Lah 667 (668) : 34 Cri L Jour 606 (DB).

5. "To prevent the production of inadmissible evidence whether it is or is not objected to by the parties." — [1] An erroneous omission on the part of the parties to object to the admissibility of a piece of evidence will not render it admissible if otherwise it is not. ('97) 19 All 76 (92) : 23 Ind App 106 : 7 Sar 73 (P C) \* (Vol 7) 1920 Bom 244 (245) : 44 Bom 192 (DB) \* ('03) 26 Mad 38 (40) (DB).

[2] The Judge may prevent the production of inadmissible evidence, whether it is or is not objected to by the parties. ('09) 10 Cri L Jour 65 (67) (DB) (Bom) \* (Vol 12) 1925 Cal 587 (588) : 52 Cal 67 : 26 Cri L Jour 782 \* (Vol 12) 1925 Cal 887 (888) : 28 Cri L Jour 606 (DB) \* (Vol 19) 1932 Sind 201 (204, 205) : 26 Sind L R 302 : 34 Cri L J 147 (DB) \* ('98) 25 Cal 736 (740) (DB).

[3] Accused stating certain evidence not admissible on particular ground — Judge should work into all circumstances to judge whether it is admissible or not. (Vol 12) 1925 Cal 587 (588) : 52 Cal 67 : 26 Cri L Jour 782 (DB).

[4] The Judge must distinctly tell the jury to guard themselves from being influenced by inadmissible evidence accidentally let in. ('68) 10 Suth W R Cr 17 (19) (DB).

[5] The minds of the jury are likely to be affected in a way by the admission of inadmissible evidence in spite of the admonition of the Judge. (Vol 10) 1923 Pat 142 (142) : 23 Cri L Jour 141 (DB) \* ('03) 27 Bom 626 (632, 633) (DB).

[6] Where admission of inadmissible evidence has been prejudicial to the accused, the trial will be vitiated. ('94) 21 Cal 955 (979) (DB) \* ('84) 10 Cal 775 (777) (DB).

**6. Construction of documents — Clause (b). —**

[1] The Judge should decide upon the meaning and construction of all the documents given in evidence. (Vol 20) 1933 P C 7 (10) : 34 Cri L Jour 550 (PC).

[2] The Judge will be acting wrongly if he leaves the legal construction of a letter or other document to the jury. (1865) 3 Suth W R Cr. 69 (69) (DB).

[3] Construction of any document is a question of law. ('04) 28 Bom 533 (545) : 1 Cri L Jour 390 (SB).

7. "To decide upon all matters . . . to enable evidence of particular matters to be given." — Clause (c). — [1] This clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible. (Vol 2) 1915 Cal 667 (674) : 18 Cri L Jour 65 : 42 Cal 856 (DB). (Question whether accused has forfeited a pardon granted under S. 239 is for the jury to decide.) \* ('08) 7 Cri L Jour 325 (327) : 31 Mad 127 (D B) \* ('71) 15 Suth W R Cr 11 (13, 14) (DB).

[2] It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say. (Vol 6) 1919 Cal 514 (517) : 10 Cal 895 : 20 Cri L Jour 324 (D B).

8. When and how far a Judge may give his opinion on question of fact—Sub-section (2). — [1] It is for the jury to accept or reject the view of the Judge on facts. (Vol 32) 1945 Lah 105 (109) : 1 L R (1945) Lah 290 : 47 Cri L Jour 4 (F B). (Per Division Bench in Order of Reference.) \* (Vol 27) 1940 Nag 231 (224) : 41 Cri L Jour 894 \* ('03) 5 Bom 1 L R 207 (209) (D B) \* (Vol 15) 1928 All 622 (623) : 50 All 540 : 29 Cri L Jour 342 (D B) \* (Vol 18) 1931 Cal 601 (603) : 33 Cri L Jour 11 (D B) \* (Vol 7) 1920 Pat 575 (575) : 22 Cri L Jour 1250.

[2] The Judge should tell the jury what view he has taken of the facts to enable them to consider the facts properly and arrive at their own decision on them. (Vol 25) 1938 Cal 658 (661) : 1 L R (1938) 1 Cal 636 : 40 Cri L Jour 101 (D B) \* ('87) 1928 Mad W N 559 (553) \* (Vol 23) 1936 Oudh 164 (164) : 37 Cri L Jour 182 : 11 Luck 687 \* (Vol 23) 1936 Mad 516 (519) : 37 Cri L Jour 909 : 59 Mad 904 (D B) \* (Vol 15) 1928 Cal 269 (270) (D B) \* (Vol 22) 1935 Rang 214 (216) : 13 Rang 141 : 36 Cri L Jour 1232 (D B).

[3] It is necessary that all help should be given to Jury. (Vol 13) 1926 Cal 235 (239) : 53 Cal 181 : 26 Cri L Jour 1577 (D B).

[4] A charge which succeeds in avoiding expression of opinion by Judge is the most colourless and unhelpful one. (Vol 27) 1940 Nag 221 (224) : 41 Cri L Jour 894 \* ('37) 1937 Mad W N 552 (553) \* (Vol 16) 1929 Cal 742 (746) : 31 Cri L Jour 673 : 57 Cal 740 (D B).

[5] If a Judge forms a definite and strong opinion that the evidence is not sufficient for a conviction, it is dangerous to leave the matter to the jury without a strong indication of such opinion. (Vol 18) 1931 Cal 752 (755) : 33 Cri L Jour 85 (D B).

[6] The Judge must warn the Jury that his opinion is not binding on them. (Vol 32) 1945 Lah 105 (109) : 1 L R (1945) Lah 290 : 47 Cri L Jour 4 (F B) \* (Vol 29) 1942 Pat 199 (200) : 21 Pat 130 : 43 Cri L Jour 230 (D B) \* (Vol 23) 1936 Mad 516 (519) : 37 Cri L Jour 909 : 59 Mad 904 (D B) \* (Vol 23) 1936 Oudh 164 (164) : 37 Cri L Jour 182 : 11 Luck 687 \* (Vol 20) 1933 Cal 190 (192) : 34 Cri L Jour 430 (D B) \* (Vol 1) 1914 Low Bur 34 (35) : 15 Cri L Jour 257 \* (Vol 16) 1929 Bom 296 (300) : 53 Bom 479 : 31 Cri L Jour 65 (D B) \* (Vol 18) 1931 Cal 752 (755) : 33 Cri L Jour 85 (D B) \* (Vol 20) 1933 Pat 96 (100) : 34 Cri L Jour 421 (D B) \* (Vol 21) 1934 Oudh 122 (123) : 35 Cri L Jour 502 \* (Vol 22) 1935 Rang 214 (216) : 13 Rang 141 : 36 Cri L Jour 1232 (D B) \* (Vol 21) 1934 Cal 77 (79) : 35 Cri L Jour 483 (D B). (Warning should be given when Judge has expressed his opinion to the jury.)

[See however (Vol 15) 1928 Oudh 326 (327, 328) : 29 Cri L Jour 721.]

[7] The Judge cannot pause always to assure the jury that the matters of fact are matters for them. (Vol 18) 1931 Cal 178 (182) : 32 Cri L Jour 190 (F B).

*Duty of jury.* 299. It is the duty of the jury —

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;
- (c) to decide all questions which according to law are to be deemed questions of fact;
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

*Illustrations.*

(a) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

[1882 — S. 299 ; 1872 — S. 257.]

**Section 298—Note 8 (contd.)**

[8] The Judge should present the case to the jury in a dispassionate and impartial manner. (Vol 8) 1921 Cal 252 (255) : 23 Cri L Jour 244 (F B).

[9] While summing up the Judge should avoid the following :—

(a) Summing up in too strong and unqualified terms or giving decided opinion. (Vol 14) 1927 Oudh 259 (259) : 2 Luck 597 : 28 Cri L Jour 683 & (Vol 18) 1931 Cal 11 (11, 13) : 32 Cri L Jour 418 (D B).

(b) Thrusting his opinion to the jury so as to dictate the verdict. (Vol 18) 1931 Cal 533 (536) : 32 Cri L Jour 1101 (S B) & (1910) 11 Cri L Jour 683 (684) (D B) (Mad).

(c) Dogmatic expression of opinion. (Vol 16) 1929 Cal 170 (171, 172) : 30 Cri L Jour 912 (D B) & (Vol 12) 1925 Sind 116 (123) : 25 Cri L Jour 761 (D B).

[See however (Vol 27) 1940 Nag 221 (224) : 41 Cri L Jour 894 & (Vol 18) 1931 Cal 178 (181) : 32 Cri L Jour 190 (F B).]

(d) Persuasion to accept his opinion. (Vol 9) 1922 Cal 107 (114) : 49 Cal 573 : 23 Cri L Jour 657 (D B) & (1890) 17 Cal 642 (F B).

(e) Creating a suggestion in the mind of the jury that they should follow his directions. (Vol 13) 1926 Cal 996 (997) : 27 Cri L Jour 1038 (D B).

(f) Creating an impression that his opinion is the only opinion that could be arrived at from the evidence. (1892) 14 All 25 (27).

[10] It is a misdirection if the Judge by his strong expression of opinion takes away the case from the jury. (Vol 24) 1937 Nag 110 (112) : 1 L R (1937) Nag 123 : 38 Cri L Jour 589 (D B) & (Vol 18) 1931 Oudh 171 (172) : 32 Cri L Jour 858 : 6 Luck 705 & (Vol 14) 1927 Cal 831 (832) : 28 Cri L Jour 742 (D B) & ('10) 11 Cri L Jour 334 (334) (D B) (Mad).

[11] It is not misdirection if on a whole review of the charge it appears that the case is left to the jury to decide. (Vol 27) 1940 Oudh 337 (340) : 41 Cri L Jour 545 & (Vol 11) 1924 Cal 257 (282) : 25 Cri L Jour 817 (F B) & (Vol 1) 1914 P C 116 (124) : 15 Cri L Jour 309 : 41 Cal 1023 : 8 Low Bur Rul 16 : 41 Ind App 149 (P C).

**Section 299—Note 1**

[1] The Judge should lay down the law and the jury should decide which view of facts is true as per direc-

tions of the Judge on questions of law. (Vol 30) 1943 Pat 131 (133) : 21 Pat 854 : 44 Cri L Jour 356 (DB) & (Vol 23) 1936 Rang 421 (422) : 37 Cri L Jour 1050 : 14 Rang 716 (FB).

[2] The Jury are not to decide questions of law. (Vol 11) 1924 Cal 701 (702, 703) : 51 Cal 160 : 25 Cri L Jour 1000 (DB) & (Vol 16) 1929 Cal 57 (60) : 56 Cal 150 : 30 Cri L Jour 435 (DB) & (Vol 20) 1933 Pat 273 (273) : 34 Cri L Jour 731 (DB).

[3] The Judge should direct the Jury on the following questions :

(a) Admissibility of evidence. (Vol 19) 1932 Bom 406 (409) : 56 Bom 304 : 33 Cri L Jour 666 & (Vol 20) 1933 Cal 187 (188) : 34 Cri L Jour 369 (DB).

(b) Capacity of witness to depose. (Vol 1) 1914 Cal 276 (279) : 41 Cal 406 : 14 Cri L Jour 485 (DB) & ('67) 8 Suth W R Cr 60 (60).

(c) Legal sufficiency of the evidence. ('76) 25 Suth W R Cr 36 (36) (DB).

(d) Whether a person was in police custody while making a confession. ('08) 7 Cri L Jour 325 (327) : 31 Mad 127 (DB).

(e) Whether a confession should or should not be used against a co-accused. ('78) 2 Bom 61 (64) (SB).

[4] The Judge should not allow the jury to resort to legal treatises during their consultation about the verdict. ('87) 14 Cal 164 (166) (DB) & (Vol 13) 1926 Cal 895 (897) : 27 Cri L Jour 926 (DB).

[5] The Judge should not cite cases or rulings to jury and ask them to differentiate or form an opinion on those authorities. ('05) 2 Cri L Jour 157 (158) (DB) (Cal) & ('12) 13 Cri L Jour 26 (27) (DB) (Cal).

[But see (Vol 14) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213 (FB). (It was held that the Judge may read out some passages from the judgments for the guidance of jury.)]

[6] The following are questions of fact which jury alone should decide :

(a) Weight to be attached to the evidence. (Vol 32) 1945 Lah 105 (110) : ILR (1945) Lah 290 : 47 Cri L Jour 4 (FB). (Per Division Bench in Order of Reference.) & (Vol 31) 1944 Cal 39 (40) : 45 Cri L Jour 468 (DB) & (Vol 28) 1941 Bom 123 (124) : ILR (1941) Bom 515 : 42 Cri L Jour 470 (FB) & (Vol 4) 1917 All 173 (175) : 18 Cri L Jour 491 : 39 All 348 & (Vol 18) 1931 Cal 401 (407) : 58 Cal 1404 : 32 Cri L Jour 768 (FB) &



**300.** In cases tried by jury, after the Judge has finished his charge, the jury may retire to *Retirement to consider.* consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to or hold any communication with, any member of such jury.

[1892 — S. 300; 1872 — S. 263; 1861 — S. 352.]

**Section 299—Note 1 (contd.)**

(Vol 19) 1932 Bom 406 (409) : 56 Bom 304 : 33 Cri L Jour 666 & (Vol 22) 1935 Pat 433 (434, 435) (DB) & (Vol 20) 1933 Pat 273 (273) : 34 Cri L Jour 781 (DB) & (Vol 12) 1925 Cal 587 (589) : 52 Cal 67 : 26 Cri L Jour 782 & ('96) 20 Bom 215 (221) (DB) & (Vol 29) 1942 Oudh 221 (223, 224) : 17 Luck 516 : 43 Cri L Jour 416. (Evidence of accomplice.) & ('78) 1 Mad 394 (395) (DB) (Do.) & (Vol 20) 1933 Cal 509 (511) : 34 Cri L Jour 841 (DB) (Do.) & (Vol 17) 1930 Pat 513 (515) : 9 Pat 606 : 32 Cri L Jour 72 (DB) (Do.)

(b) Whether fraud or negligence is established by the evidence. ('95) 19 Bom 749 (756) (DB).

(c) Whether a thing was done with a particular intention. ('98) 22 Bom 112 (132) & (Vol 5) 1918 Cal 140 (141) : 19 Cri L Jour 649 (DB) & (Vol 18) 1931 Cal 261 (262) : 32 Cri L Jour 187 (SB). (Knowledge.) & (Vol 12) 1925 Oudh 311 (313) : 28 Oudh Cas 69 : 26 Cri L Jour 310 (Do.) & ('95) 19 Bom 749 (756) (DB). (In forming opinion regarding intention or knowledge presumption about facts can be drawn by jury under S. 114, Evidence Act.) & ('78) 1 Mad 394 (395) (DB) (Do.)

(d) Whether the accused has sufficient understanding of judging nature and consequences of his conduct. ('69) 1869 Rat 27 (27) (DB).

(e) Whether provocation was so grave and sudden as to bring the case within exceptions recognised by law. ('96) 20 Bom 215 (225, 226) (DB) & ('85) 11 Cal 410 (412) (DB).

(f) Whether particular facts have been proved. (1900) 4 Cal W N 576 (581) (DB).

(g) In murder case inference of guilt to be drawn from circumstantial evidence against the accused. (Vol 24) 1937 Lah 127 (130) : 17 Lah 547 : 38 Cri L Jour 472 (DB) & ('11) 12 Cri L Jour 329 (333) (Low Bur). (Whether facts exclude possibility of deed being done by any other person.) & (Vol 4) 1917 Lah 8 (4, 8) : 18 Cri L Jour 482 : 1917 Pun Re No. 7 Cr. (Do.)

(h) Whether a certain witness was inimical towards accused. (Vol 32) 1945 Lah 105 (110) : ILR (1945) Lah 290 : 47 Cri L Jour 4 (FB).

(i) Whether accused committed offence under S. 307 or S. 325 or S. 323, Penal Code. ('37) 38 Cri L Jour 442 (443) (Nag).

(j) Whether the approver has forfeited his pardon. ('10) 11 Cri L Jour 254 (255) : 33 Mad 514 (DB) & (Vol 2) 1915 Cal 667 (674) : 16 Cri L Jour 65 : 42 Cal 856 (DB).

(k) Whether possession of property was recent enough to warrant conviction for substantive offence. ('03) 26 Mad 467 (468) (DB).

(l) Whether evidence of interested witnesses should be accepted. (Vol 38) 1946 P C 151 (155) : 73 Ind App 174 : 47 Cri L Jour 905 : 25 Pat 601 (PC).

[7] The meaning of terms of law and the legal effect of a document should be decided by the Judge. ('98) 22 Bom 112 (132). ("Disaffection" in S. 124A, Penal Code.) & ('92) 19 Cal 35 (45) (Do.) & (1865) 3 Suth W R Cr 69 (70) (DB). (Legal effect of a document.)

[8] A jury may find the accused guilty of a smaller offence than that with which he is charged. (Vol 33) 1946 Bom 38 (42) : 47 Cri L Jour 378 (FB) & ('10) 11 Cri L Jour 630 (630) : 13 Oudh Cas 295 & ('77) 3 Cal 189 (191) (DB).

[9] In murder trial, verdict of culpable homicide not amounting to murder cannot be properly come to—Judge

need not explain distinction between the two offences to jury. (Vol 33) 1936 Rang 421 (424, 425) : 37 Cri L Jour 1050 : 14 Rang 716 (FB) & (Vol 3) 1916 Low Bur 114 (116) : 17 Cr L J 49 : 8 Low Bur Rul 306 (FB).

**Section 300 — Note 1**

[1] Foreman of the jury indisposed—Jurors allowed to disperse — Returning after few hours, they considered and returned their verdict — Procedure was held to be illegal. (Vol 12) 1925 Pat 595 (596) : 26 Cri L Jour 861 (DB).

[2] Jury constituted of nine members — Five members came out of jury room — Remaining four coming after some time, foreman delivered the verdict — *Held*, verdict was vitiated. (Vol 17) 1930 Cal 446 (447) : 31 Cri L Jour 1090 (DB).

[3] The jury are entitled to consult a commentary on the law during their deliberation. ('95) 1895 Rat 736 (737) (DB) & ('87) 14 Cal 161 (166) (DB).

[4] A sworn statement of a juror that the verdict was arrived at by casting lots is not admissible in order to impeach it. ('13) 14 Cri L Jour 392 (395) : 10 Cal 693 (DB).

[5] Non-juror communicating with a juror—The verdict should be upset — Inquiry into the nature of communication is not necessary. (Vol 6) 1919 Cal 512 (513) : 46 Cal 207 : 19 Cri L Jour 737 (DB).

[6] The Sessions Judge should take precautions to see that no non-juror holds any communication with the jurors when they retire to consider their verdict. (Vol 6) 1919 Cal 512 (514) : 46 Cal 207 : 19 Cri L Jour 737 (DB) & (Vol 12) 1925 Pat 595 (596) : 26 Cri L Jour 861 (DB).

[7] Where a juror addressed to a police-officer a casual remark unconnected with the case and the police-officer made no reply, the provisions of the section were not infringed. (Vol 4) 1917 Cal 149 (151) : 18 Cri L Jour 311 : 44 Cal 723 (SB).

[8] Mere presence of a police-officer in the jury-room does not vitiate the verdict unless it is shown that he spoke to or held any communication with any of the jurors. (Vol 4) 1917 Cal 149 (151) : 18 Cri L Jour 311 : 44 Cal 723 (SB) (Posting police-officer in the jury-room or near about is undesirable.)

[9] Fresh directions to jury should be given in open Court and not in Chambers. (Vol 10) 1923 Cal 647 (648) : 25 Cri L Jour 343 (DB).

[10] In a sessions trial by the High Court, the clerk of the Crown can be sent to the jury-room to enquire if the jury require further assistance from the Judge. (Vol 4) 1917 Cal 149 (152) : 18 Cri L Jour 311 : 44 Cal 723 (SB).

[11] Case adjourned before Judge's charge to jury was finished — Juror seen conversing with non-juror — Fact not brought to Court's notice— Verdict of the jury was not interfered with in appeal. (Vol 6) 1919 Mad 222 (223) : 20 Cri L Jour 790.

[12] Jurors should not have communication with non-jurors upon the subject of a pending trial. (Vol 4) 1917 Cal 149 (151) : 18 Cri L Jour 311 : 44 Cal 723 (SB) & (Vol 14) 1927 Cal 628 (629) : 55 Cal 279 : 28 Cri L Jour 783 (DB) & (Vol 8) 1921 Cal 631 (631) : 22 Cri L Jour 510 (DB). (Juror expressing his opinion to non-juror that accused was guilty — Fresh trial, with fresh jury ordered.)

[13] Foreman discharged on ground of talking to Court Inspector—Judge selecting another person, emp-

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

[1882 -- S. 301; 1872 -- S. 262.]

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdicts although they are not unanimous.

[1882--S. 302; 1872--S. 263; 1861--S. 352.]

#### Section 300--Note 1 (contd.)

nelled him and proceeded with the trial -- Procedure, held not objectionable. (Vol 16) 1929 Cal 57 (48); 50 Cal 150; 30 Cri L Jour 435 (DB).

[14] Jury once discharged should not be called for the same case. (Vol 16) 1929 Cal 315 (315); 50 Cal 1032; 31 Cri L Jour 366 (DB).

#### SECTION 301 -- SYNOPSIS.

1. Delivery of verdict.
2. Verdict as to offence not specifically charged.
3. Special verdict.
4. Verdict arrived at by casting lots.

1. Delivery of verdict. -- [1] "Verdict" is the collective opinion of the jury as a body, arrived at after mutual consultation, and ascertained and announced by the foreman. (Vol 1) 1914 Mad 319 (321); 36 Mad 585; 15 Cri L Jour 197 (DB) & (Vol 12) 1925 Oudh 716 (716); 26 Cri L Jour 1346 & (1901) 21 Mad 523 (526) (SB).

[2] A recommendation made by the jurors in the verdict is not a part of the verdict. (Vol 21) 1934 Oudh 34 (35).

[3] Accused tried for various offences -- "Verdict" covers all the charges. (95) 22 Cal 377 (382) (DB).

[4] In case of disagreement, the Judge commits an irregularity in recording the individual opinions of the jurors. (Vol 1) 1914 Mad 319 (321); 15 Cri L Jour 197; 36 Mad 585 (DB) & (Vol 12) 1925 Oudh 716 (716); 26 Cri L Jour 1346.

[5] Where there are several accused persons in a case, the jury must return a verdict as against each. (12) 13 Cri L Jour 715 (715) (DB) (Cal).

[6] Accused tried on several charges--It is desirable to take the verdict on each charge separately. (Vol 26) 1939 Cal 321 (323); 40 Cri L Jour 649 (DB) & (Vol 11) 1924 Cal 47 (48); 50 Cal 658; 24 Cri L Jour 838 (DB).

[7] A verdict of "not guilty" covers every condition from mere hesitating doubt to conviction of innocence. (Vol 20) 1938 Cal 404 (405); 34 Cri L Jour 608 (DB).

[8] A verdict of "not guilty" should be regarded as fully establishing the innocence of the person to whom it relates. (Vol 25) 1938 Cal 51 (70); 39 Cri L Jour 161; 11 R (1938) 1 Cal 290 (DB).

[9] Mere repugnancy in a verdict is not sufficient to quash a conviction based on such verdict. (Vol 11) 1924 Cal 1031 (1032); 52 Cal 112; 26 Cri L Jour 11 (DB) & (Vol 1) 1914 Cal 456 (459); 41 Cal 350; 15 Cri L Jour 385 (DB).

[10] Verdict delivered--Foreman attempting to add something but Judge stopping.--Held, it was improper to stop jury at such stage. (1903) 30 Cal 485 (487, 488).

[11] There is no particular form for delivering verdict. (Vol 22) 1935 Cal 31 (31, 32); 36 Cri L Jour 480 (DB).

[12] The mere fact that the jury add to their verdict their finding on the facts does not vitiate the verdict. (Vol 22) 1935 Cal 31 (31, 32); 36 Cri L Jour 480 (DB).

[13] Where jury found that accused had caused death but that he was not responsible for his actions owing to influence of liquor: Held, this did not amount to verdict of guilty. (06) 10 Cal W N xxxvii (xxxviii) (PO).

[14] A verdict, such as 'guilty but not voluntarily', for a charge under S. 326, Penal Code, is one of 'not guilty.' (08) 7 Cri L Jour 362 (365) (FB) (Cal).

[15] The language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly. (Vol 19) 1933 P 11275 (218) (PO).

[16] A verdict of the jury after they have been discharged is not legal. (Vol 21) 1934 P 11227 (227) (PO).

#### 2. Verdict as to offence not specifically charged.

[1] The principle of Ss. 317 and 238, Cr. P. C., applies to the verdict of the jury also and they can return a verdict of guilty in respect of offence not charged but proved in the trial. (96) 20 Bom 215 (217, 218) (DB). (Charge of murder -- Verdict of culpable homicide not amounting to murder.) & (Vol 2) 1915 Low Bur 39 (45); 8 Low Bur 141 274; 16 Cri L Jour 676. (Charge of dacoity--Verdict of abetment of dacoity or robbery.) & (Vol 21) 1937 Pat 662 (664); 39 Cri L Jour 156. (Accused tried under S. 397 -- Jury returning verdict of not guilty -- Jury can find accused guilty under S. 323 or S. 325, even in absence of charge.) & (Vol 19) 1932 Cal 297 (298); 50 Cal 1040; 33 Cri L Jour 546 (DB). (Persons charged under Ss. 302 and 201, Penal Code -- Jury while acquitting them under S. 302 can find them guilty of minor charge under S. 201.)

[But see (Vol 2) 1915 Cal 292 (294); 41 Cal 662; 15 Cri L Jour 155. (Charge under S. 149, Penal Code, read with S. 325 -- Jury cannot return a verdict of guilty under latter section unless charged therefor.)

[2] Jury returning verdict of not guilty on charges framed but finding accused guilty of offence triable by assessors -- Conviction on such finding held valid in absence of miscarriage of justice. (Vol 15) 1928 Mad 275 (275); 29 Cri L Jour 351.

3. Special verdict. -- [1] A special verdict is one where the jury merely state certain facts as proved and leave it to the Judge to draw the legal inference from them. (95) 19 Bom 735 (736) (DB) & (96) 20 Bom 215 (217) (DB).

[2] A special verdict is a local verdict under the Code. (96) 20 Bom 215 (217) (DB) & (Vol 11) 1924 Cal 257 (281); 25 Cri L Jour 817 (FB).

[But see (12) 13 Cri L Jour 586 (587, 588) (DB) (Mad). (Proper under English Law.)

[3] A Judge is confined to the facts positively stated in the special verdict and cannot himself supply any defect in the statement. (91) 1894 Rat 710 (714).

[4] If the special verdict is ambiguous or incomplete the Judge can question the jury under S. 803 and have their verdict supplemented. (06) 3 Cri L Jour 1 (8); 3 Low Bur 75 (FB).

4. Verdict arrived at by casting lots. -- [1] The sworn statement of a juror is not admissible for the purpose of showing that a verdict was arrived at by casting lots though a verdict arrived at in that manner would not be legal. (13) 14 Cri L Jour 392 (395); 40 Cal 693 (DB).

#### Section 302--Note 1

[1] When the jury differ, the Judge should direct them under this section to re-consider their verdict. (82) 8 Cal 739 (754) (DB).

[2] The section does not apply to cases where the verdict has actually been delivered. (Vol 1) 1914 Low Bur 244 (245); 15 Cri L Jour 678; 7 Low Bur 140 (DB) & (84) 10 Cal 140 (144) (DB).



*Verdict to be given on each charge.  
Judge may question jury.*

*Questions and answers to be recorded.*

**303. (1)** Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

**(2)** Such questions and the answers to them shall be recorded.

[1932—S. 303 ; 1872—S. 263.]

#### Section 302 — Note 1 (contd.)

[2] When directing the jury to re-consider their verdict the Judge can give them fresh directions on matters of law. ('04) 1 Cri L Jour 265 (268) (DB) (Bom).

[4] If the jury are unanimous, their verdict must be received unless it is contrary to law. (Vol 15) 1928 Cal 228 (228) : 29 Cri L Jour 228 & ('06) 3 Cri L Jour 1 (3) : 3 Low Bur Rul 75 (FB).

[5] In case of ambiguous verdict, the Judge should question the jury under S. 303 and clear up the matter and not direct a reconsideration of the verdict. ('06) 3 Cri L Jour 1 (3, 4) : 3 Low Bur Rul 75 (FB).

[3] The Judge can direct the jury to reconsider the verdict if it is not in accordance with law or the jury have not understood the case. ('80) 5 Cal 871 (873, 874) (DB). (Verdict not in accordance with law.) & ('03) 30 Cal 485 (487, 488). (Jury have not understood the case.) & (Vol 17) 1930 Cal 320 (320) : 57 Cal 61 : 31 Cri L Jour 761 (DB.) (Do).

#### SECTION 303.—SYNOPSIS.

1. Verdict to be on all the charges.
2. Form of verdict.
3. "May ask them such questions as are necessary to ascertain what their verdict is."
4. Questions and answers to be recorded.
5. Re-consideration of the verdict.

1 Verdict to be on all the charges.—[1] Where there are several charges against an accused and evidence has been heard on all the charges, the jury should submit a verdict on all the charges. (Vol 26) 1939 Cal 321 (323) : 40 Cri L Jour 649 (DB) & (Vol 15) 1928 Mad 207 (208) : 28 Cri L Jour 1007 (DB) & (Vol 13) 1926 Nag 53 (54) : 26 Cri L Jour 1090.

[2] Verdict silent on one of the charges.—It does not operate as acquittal and retrial can be ordered on that charge. (Vol 11) 1924 Cal 809 (810, 811) : 25 Cri L Jour 1048 (DB).

[3] Separate and distinct charges against two accused tried jointly.—Single verdict of guilty by jury and conviction by Judge—Case remanded for re-trial in appeal. (Vol 34) 1947 Bom 146 (148) (SB).

2. Form of verdict. — [1] The jury may give their verdict in any form and if it is not exhaustive, Judge should put them questions to elicit complete findings. ('06) 3 Cri L Jour 1 (3) : 3 Low Bur Rul 75 (FB).

[2] Trial for offence under S. 408, Penal Code—Gross sum misappropriated during one year and composed of three items—Proper verdict to be given in respect of the offence under S. 408 and not in respect of each item. (Vol 17) 1930 Cal 717 (719) : 32 Cri L Jour 321 (DB).

3. "May ask them such questions as are necessary to ascertain what their verdict is." — [1] The Judge cannot make surmises or conjectures regarding the verdict of the jury. (Vol 23) 1936 Oudh 164 (165) : 37 Cri L Jour 182 : 11 Luck 687.

[2] Beyond putting questions, the Judge has no jurisdiction to discuss the facts of the case with the jury. (Vol 22) 1935 All 1020 (1022) : 36 Cri L Jour 1377.

[3] A Judge can ask questions under this section where the jury did not return verdict on all the heads of charges or where it is not clear. (Vol 11) 1924 Cal 47 (47) : 50 Cal 658 : 24 Cri L Jour 838 (DB). (Verdict not on all heads of charges.) & (Vol 22) 1935 All 1020

(1022) : 36 Cri L Jour 1377. (Verdict not clear.) & (Vol 18) 1931 Cal 636 (626) : 33 Cri L Jour 29 (DF) (Do.) & ('04) 1 Cri L Jour 331 (332) : 28 Bom 412 (DB) (Do.) & (Vol 18) 1931 Mad 775 (776) : 55 Mad 256 : 32 Cri L Jour 1276 (DB) (Do.)

[4] It is competent to the Judge to ask questions so as to elicit a complete finding where the verdict does not exhaust the facts in issue. ('70) 14 Suth W R Cr 59 (62) (DB).

[5] A Judge can ask such questions as are necessary to ascertain verdict in particular cases. (Vol 21) 1934 Cal 173 (174) : 61 Cal 256 : 35 Cri L Jour 496 (SB). (Offence under S. 304, Penal Code.) & ('96) 20 Bom 215 (217) (DB). (Verdict of guilty on charge of murder under grave and sudden provocation—Sufficiency of provocation can be ascertained by questions.) & ('08) 7 Cri L Jour 362 (365) (FB) (Cal) (Verdict of "guilty but not voluntarily" of an offence under S. 326, Penal Code — Jury can be asked to explain the verdict as voluntariness of act is the ingredient of the offence.) & (Vol 14) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213 (FB). (Verdict of not guilty of culpable homicide — Jury must be questioned as to whether a minor offence had been committed.) & (Vol 23) 1936 Oudh 164 (165) : 11 Luck 687 : 37 Cri L Jour 182 (Verdict of guilty of the offence of uttering forged notes—Jury should be asked whether knowledge of their forged nature was present.) & (Vol 23) 1936 Cal 675 (676) : 38 Cri L Jour 176 (DB). (Trial under S. 366, Penal Code—Jury should be questioned as to their conclusions about the age of the girl maltreated.)

[6] Where the verdict is clear, complete and unambiguous, the Judge is bound to accept the same. ('83) 9 Cal 53 (61) (DB) & ('07) 6 Cri L Jour 373 (373, 374) : 30 Mad 469 (DB).

[7] If the Judge disagrees with the verdict of the jury, he must make a reference to the High Court under S. 307. (Vol 22) 1935 All 1020 (1022) : 36 Cri L Jour 1377 & (Vol 1) 1914 Low Bur 244 (245) : 7 Low Bur Rul 140 : 15 Cri L Jour 678 (DB) & (Vol 21) 1934 Cal 173 (174) : 61 Cal 256 : 35 Cri L Jour 496 (SB) & (Vol 18) 1931 Mad 775 (776) : 55 Mad 256 : 32 Cri L Jour 1276 (DB).

[8] A Judge cannot ask the jury the reasons of their verdict. (Vol 22) 1935 All 1020 (1022) : 36 Cri L Jour 1377 & (Vol 34) 1947 All 99 (103) & (Vol 15) 1928 Cal 228 (228) : 29 Cri L Jour 228 (DB) & (Vol 17) 1930 Pat 208 (208) : 31 Cri L Jour 54 & (Vol 15) 1928 Pat 203 (205) : 7 Pat 55 : 29 Cri L Jour 466 (DB) & (Vol 18) 1931 Mad 775 (776) : 55 Mad 256 : 32 Cri L Jour 1276 (DB) & (Vol 18) 1931 Cal 636 (636) : 33 Cri L Jour 29 (DB) & (Vol 7) 1920 Mad 170 (170, 171) : 43 Mad 744 : 21 Cri L Jour 466 (DB) & (Vol 10) 1923 Pat 474 (474) : 26 Cri L Jour 856 (DB).

[9] Jury unable to give reasons for their verdict — *Heid*, it does not show that they had no reasons for it. (Vol 12) 1925 Cal 525 (529, 530) : 26 Cri L Jour 805 (DB).

4. Questions and answers to be recorded. — [1] A Judge who does not record the questions put to the jury and their answers thereto does not comply with this section. ('82) 8 Cal 739 (754) (DB). (Substance of the result of questioning is not sufficient.) & ('11) 12 Cri L Jour 140 (141) (DB) (Mad). (Do.) & (Vol 13) 1926 Nag 53 (54) : 26 Cri L Jour 1090. (Do.)

**304.** When by accident or mistake a wrong verdict is delivered, the jury may, by *Amending verdict*, immediately after it is recorded, amend the verdict, and it shall be ultimately amended.

[1882—S. 304.]

**305. (1)** When in a case tried before a High Court the jury are unanimous in their *Verdict in High Court* or when as many as six are of one opinion and the Judge agrees with *when to prevail*, the Judge shall give judgment in accordance with such opinion.

**(2)** When in any such case the jury are satisfied that they will not be unanimous, if they are of one opinion, the foreman shall so inform the Judge.

*Discharge of jury in other cases.* **(3)** If the Judge disagrees with the majority, he shall at once discharge the jury.

**(4)** If there are not so many as six who agree in opinion, the Judge shall, after the least such time as he thinks reasonable, discharge the jury.

[1882 — S. 305.]

#### Section 303 — Note 4 (*contd.*)

[2] The record of questions and answers should be immediately read over to the jury and this should always be done. (Vol 18) 1931 Cal 345 (348) : 58 Cal 1138 : 32 Cri L Jour 598 (DB).

[3] The omission to record the verdict of the jury in the terms prescribed by the Code is not such an irregularity as requires the trial to be quashed. ('71) 15 Suth W R Cr 11 (14) (DB).

**5. Re-consideration of the verdict** — [1] Where the jury have delivered a clear and legal verdict, the Judge cannot ask them to reconsider their verdict. (Vol 1) 1914 Low Bur 244 (245) : 7 Low Bur Rul 140 : 15 Cri L Jour 678 (DB) \* (Vol 1) 1914 Mad 319 (322) : 36 Mad 585 : 15 Cri L Jour 197 (DB) \* (Vol 18) 1931 Mad 775 (776, 777) : 55 Mad 256 : 32 Cri L Jour 1276 (DB) \* (Vol 22) 1935 All 1020 (1022) : 36 Cri L Jour 1877.

[2] A verdict which is not a legal one or is silent on a particular part of the case, can be sent back for reconsideration. (1864) 1 Suth W R Cr 50 (50, 51). (No legal verdict). \* (Vol 14) 1927 All 721 (723) : 50 All 365 : 28 Cri L Jour 950. (Silent on particular part of the case.)

[3] In case of inconsistent verdict, the Judge can make a further charge to the Jury. (Vol 29) 1942 Pat 446 (448) : 21 Pat 138 : 43 Cri L Jour 205 (DB) \* (Vol 20) 1933 Cal 640 (640, 641) : 60 Cal 729 : 34 Cri L Jour 1084 (DB).

[4] Murder trial — On failure by Jury to intimate under what part of S. 304, Penal Code, their verdict falls the Judge should send them back for reconsideration. (Vol 14) 1927 Rang 68 (70) : 4 Rang 488 : 28 Cri L Jour 213 (FB).

[5] Jury got confused — Remarks of Judge not understood — Direction to reconsider verdict, held, was proper. ('94) 2 Weir 514 (514).

#### Section 304 — Note 1

[1] Where the verdict is erroneous by reason of the jury having misunderstood the law, it can be corrected only under S. 307 by a reference to the High Court and not under this section. ('04) 1 Cri L Jour 331 (332) : 28 Bom 412 (DB) \* (Vol 18) 1931 Mad 775 (776) : 55 Mad 256 : 32 Cri L Jour 1276 (DB).

[2] The jury cannot review their former verdict or amend it unless by mistake or accident a wrong verdict had been delivered. ('98) 1898 Rat 982 (983) (DB) \* ('12) 13 Cri L Jour 285 (285) (DB) (Mad).

[See however (1864) 1 Suth W R Cr 50 (50, 51).]

[3] The Judge will not be acting wrongly in asking the jury to re-consider their verdict where it is absurd

or confused or not clear and definite. (Vol 29) 1942 Pat 446 (448) : 21 Pat 138 : 43 Cri L Jour 205 (Vol 17) 1930 Cal 320 (320) : 57 Cal 61 : 31 Cri 761 (DB) \* (Vol 21) 1934 Oudh 34 (35) \* (Vol 1 Cal 118 (118, 119) : 58 Cal 1335 : 33 Cri L Jour (DB).

[4] Judge presenting case to jury before defence — Jury returning verdict of guilty — On evidence being taken jury submitted a fresh verdict, second verdict was nullity, and judgment was without jurisdiction. (Vol 11) 1924 Lah 17 (24 Lah 382 : 25 Cri L Jour 377).

[5] Even after formal delivery of verdict, the Judge should allow jury to say, if they wish it, what they have in mind to complete the verdict. ('08) 30 Cal 485 (488) (DB).

[6] Wrong verdict can be amended before the jury have left the Court. ('12) 13 Cri L Jour 815 (817) : Pun Re No. 6 Cr (FB) \* (Vol 18) 1931 Cal 345 (349) : 58 Cal 1138 : 32 Cri L Jour 598 (DB).

[7] The Court will refuse to set aside the verdict when it is learnt some days after that the verdict was the unanimous verdict of the jury. ('12) 13 Cri L Jour 815 (821) : 1913 Pun Re No. 6 Cr (FB).

[8] Where there is some uncertainty in the mind of the jury, there could be no verdict formally returned until the last of the questions asked by the Judge had been answered. ('74) 21 Suth W R Cr 1 (2) (DB).

[9] An amendment of the charge under S. 227 may be made at any time till the final verdict of the jury is returned. ('84) 8 Bom 200 (211, 212) (SB).

#### Section 305 — Note 1

[1] Where the jury returns a unanimous verdict the Judge must pass judgment in accordance with it, whether or not he agrees with the opinion of the majority. (Vol 2) 1915 Low Bur 39 (41) : 8 Low Bur Rul 274 (Cri L Jour 676 (DB)).

[2] Judge when agrees with the majority verdict of the jury, must pass judgment accordingly. (Vol 2) 1 Cal 773 (784) : 16 Cri L Jour 561 (FB).

[See however (Vol 22) 1935 Sind 189 (189) : 36 L Jour 1359 (DB).]

[3] When the Judge disagrees with the opinion of the majority of the jury under sub-s. (3), it is competent to him to express his view as to the innocence or guilt of the accused. (Vol 22) 1935 Sind 189 (191) : 36 L Jour 1359 (DB).

[4] Verdict of 'not guilty' by jury — Judge accepts it "as it is purely on question of fact" — Judge cannot be said to have agreed with verdict. (Vol 34) 1947 Bom 42 (SB).

**306. (1)** When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

**(2)** If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, <sup>a</sup>[unless he proceeds in accordance with the provisions of section 562,] pass sentence on him according to law.

[1892 — S. 306 ; 1872 — S. 263 ; 1861 — S. 360.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 80.*

**307. (1)** If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which <sup>a</sup>[any accused person] has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case <sup>b</sup>[in respect of such accused person] to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, <sup>b</sup>[and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.]

#### SECTION 306 — SYNOPSIS.

1. Verdict to prevail where Judge does not disagree with it.
2. Judgment to be according to the verdict.
3. Sentence to be according to law.

1. Verdict to prevail where Judge does not disagree with it. — [1] The Judge must under this section and the next, make up his mind whether he agrees or disagrees with the verdict. (Vol 19) 1932 Lah 345 (348) : 13 Lah 573 : 33 Cri L Jour 220 (DB).

[2] The duty of deciding whether the verdict is to be accepted or not lies upon the Judge alone. (Vol 24) 1937 Cal 540 (541) : I L R (1937) 2 Cal 694 : 38 Cri L Jour 1075 (DB).

[3] In making a reference, the Judge must be of opinion that it is necessary in the ends of justice to submit the case to the High Court. (Vol 24) 1937 Cal 540 (541) : I L R (1937) 2 Cal 694 : 38 Cri L Jour 1075 (DB) \* (Vol 16) 1929 Cal 415 (416) : 56 Cal 473 : 30 Cri L Jour 1036 (DB) \* (Vol 16) 1929 Pat 313 (314) : 8 Pat 344 : 30 Cri L Jour 721 (DB).

[4] Where the Judge disagrees with the verdict, but does not think necessary to express it, he shall accept the verdict. (Vol 24) 1937 All 195 (196) : I L R (1937) All 419 : 38 Cri L Jour 465 (DB) \* (Vol 24) 1937 Cal 540 (542) : I L R (1937) 2 Cal 694 : 38 Cri L Jour 1075 (DB) \* (Vol 22) 1935 Bom 165 (166) : 37 Cri L Jour 26 (DB).

[5] Where the Sessions Judge does not think it necessary to express disagreement, he should not advertise the fact. (Vol 24) 1937 Cal 540 (542) : I L R (1937) 2 Cal 694 : 38 Cri L Jour 1075 (DB) \* (Vol 16) 1929 Cal 415 (415) : 56 Cal 473 : 30 Cri L Jour 1036 (DB). (See observations of Rankin C. J.).

[6] The Sessions Judge cannot record evidence in the absence of the jury and rely on it for determining whether or not he should disagree with the verdict. ('06) 3 Cri L Jour 42 (43) (DB) (Bom).

[7] Where the verdict entirely depends on oral evidence, weight should be attached to the verdict of the jury. (Vol 20) 1933 Pat 273 (273) : 34 Cri L Jour 731 (DB).

[8] Where the verdict is clearly against the trend of the charge, the Judge should state his reasons for accepting the verdict. ('37) 1937 Mad W N 737 (738).

2. Judgment to be according to the verdict. —

[1] Where the Sessions Judge has once accepted the verdict and postponed the case for passing sentence he cannot reconsider his order and refer the case to the High Court under S. 307. (1900) 4 Cal W N 683 (683) (DB).

[2] If the Judge disagrees with the verdict he must proceed under S. 307, and cannot treat the verdict as the opinion of the assessors and record a finding in opposition to that verdict where a charge triable with assessors is tried by jury. ('01) 25 Bom 680 (682) (FB) \* ('98) 25 Cal 555 (557) (DB).

3. Sentence to be according to law. — [1] Having accepted the verdict the Judge must pass sentence according to law as if he had agreed with the verdict even though he had personally doubted the propriety of the verdict. (Vol 26) 1939 Cal 610 (612) : 40 Cri L Jour 880 (DB) \* (Vol 16) 1929 Pat 313 (316) : 8 Pat 344 : 30 Cri L Jour 721 (DB).

[2] The sentence must be suitable to the offence of which the accused is found guilty though the Judge thinks a graver offence has been committed. ('17) 21 Cal W N cxxxix (cxxxix).

[3] Certain persons charged under Ss. 149 and 302, Penal Code — Impossible to say who struck the fatal blow — Absence of a case for capital sentence cannot be assumed. (Vol 16) 1929 All 160 (161) : 30 Cri L Jour 559 (DB).

#### SECTION 307 — SYNOPSIS.

1. Scope and object.
2. Who can refer.
3. "Disagrees with the verdict."
4. "Is clearly of opinion that it is necessary for the ends of justice."
5. "Submit the case."
6. "In respect of such accused person."
7. Grounds of opinion to be recorded.
8. Reference against verdict of acquittal.
9. Bail pending reference to High Court.
10. Powers of the High Court under this section.
11. "After giving due weight to the opinions of the Sessions Judge and the jury."
12. Power of High Court to order re-trial or order additional evidence to be taken.
13. Verdict of jury in cases not triable by jury — Applicability of this section.
14. Acquit or convict of any offence, etc.
15. Notice of reference.
16. Difference between Judges hearing reference — Procedure.
17. Appeal.

1. Scope and object. — [1] In making a reference to the High Court under this section the Judge must clearly feel that it is necessary for the ends of justice,

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which [such accused] has been tried, but may either remand [such accused] to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict [such accused] of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

[1882 — S. 307; 1872 — S. 263, paras. 5, 6.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1928 (18 [XVIII] of 1928), S. 81 "the accused". [b] *Inserted, ibid.*

Section 307 — Note 1 (*contd.*)

(Vol 27) 1940 Nag 17 (26) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB) & (Vol 24) 1937 Cal 540 (541) : 38 Cri L Jour 1075 : I L R (1937) 2 Cal 694 (DB) & ('04) 1 Cri L Jour 743 (744) (DB) & (Vol 16) 1929 All 338 (333) : 30 Cri L Jour 1078 (DB) & (Vol 20) 1933 Cal 472 (474) : 34 Cri L Jour 965 (DB).

[2] Where a reference is made under this section the same is not rendered incompetent by the Judge's misdirection to jury. ('43) ILR (1943) 1 Cal 417 (421) (DB).

[3] The Judge must first make up his mind whether he agrees or disagrees and in the latter case, he must form an opinion whether in the interest of justice it is necessary to submit the case to the High Court. (Vol 19) 1932 Lah 345 (348) : 13 Lah 573 : 33 Cri L Jour 220 (DB).

[4] The reference is no longer a matter of discretion, but is one of obligation once the Judge disagrees and has formed an opinion that reference is necessary. (Vol 30) 1943 Bom 74 (76) : 44 Cri L Jour 411 (DB) & (Vol 27) 1940 Nag 17 (26) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB) & (Vol 18) 1931 Cal 15 (17) : 57 Cal 1183 : 32 Cri L Jour 452 (DB) & (Vol 16) 1929 Cal 415 (416) : 56 Cal 473 : 30 Cri L Jour 1036 (DB).

[5] The object of the section is to safeguard against possible miscarriage of justice. ('87) 9 All 420 (425) (DB) & (Vol 18) 1931 Cal 15 (17) : 57 Cal 1183 : 32 Cri L Jour 452 (DB) & (Vol 21) 1934 Cal 847 (849) : 62 Cal 337 : 36 Cri L Jour 358 (DB).

[6] Judge either not disagreeing or definitely of opinion that reference is not necessary — He cannot submit the case to High Court. (Vol 15) 1928 Pat 120 (123, 124) : 6 Pat 817 : 29 Cri L Jour 81 (DB) & (Vol 13) 1926 Cal 728 (729) : 27 Cri L Jour 398 (DB) & (Vol 2) 1915 Cal 292 (294) : 41 Cal 662 : 15 Cri L Jour 155 (DB).

[7] Where a reference is made when the Judge was neither bound nor entitled, the High Court will not act on it or interfere with the verdict. (Vol 10) 1923 Cal 453 (455) : 50 Cal 41 : 24 Cri L Jour 763 (DB).

[8] Where no reference is made by the Sessions Judge under this section, the High Court cannot interfere with the verdict of the jury. (Vol 15) 1928 Pat 120 (123, 124) : 6 Pat 817 : 29 Cri L Jour 81 (DB) & (Vol 13) 1926 Cal 728 (729, 730) : 27 Cri L Jour 398 (DB) & ('09) 9 Cri L Jour 93 (93, 94) (DB) (Mad) & ('91) 14 Mad 36 (37) (DB).

[9] Even in the absence of reference, the High Court can interfere on appeal or in revision with an erroneous verdict of the jury due to misdirection by the Judge or mis understanding of the law. (Vol 24) 1937 Pat 440 (448) : 38 Cri L Jour 919 : 16 Pat 413 (DB).

[10] The High Court cannot direct the Judge to make a reference. (Vol 24) 1937 Cal 540 (541) : 38 Cri L Jour 1075 : I L R (1937) 2 Cal 694 (DB) & (Vol 24) 1937 Pat 440 (443) : 38 Cri L Jour 919 : 16 Pat 413 (DB) & (Vol 15) 1928 Cal 444 (445, 446) : 29 Cri L Jour 819 (DB).

[But see (Vol 12) 1925 Cal 795 (796) : 26 Cri L Jour 1066 (DB).]

[11] Verdict clear and unambiguous — Judge disagree can only act under this but shall not re-charge jury to return a fresh verdict. (Vol 22) 1935 All 1 (1022) : 36 Cri L Jour 1377.

[12] Jury returning an unreasonable verdict can re-charged and asked to return proper verdict by Judge who need not make reference to the High Court. (Vol 29) 1942 Pat 446 (448) : 21 Pat 138 : 43 Cri L Jour 205 (DB).

[13] There can be no reference under this section when the charge is not supported by any evidence. (Vol 32) 1945 Oudh 48 (50, 51) : 47 Cri L Jour 66 (DB) & (Vol 28) 1941 Mad 763 (763) : 43 Cri L Jour 205 (DB).

2. Who can refer. — [1] A reference under this section made by a Judge who held the trial, but who, at the time of the reference, had ceased to be a Judge, is not invalid. ('05) 2 Cri L Jour 386 (387) (DB) (Cal).

[2] A Judge of the Court of Judicial Commissioner Sind holding a Sessions trial by jury has no power to make a reference under this section. (Vol 26) 1939 Sind 218 : 41 Cri L Jour 28 : I L R (1940) Kar 249 (DB) & (Vol 15) 1928 Sind 149 (152, 157, 161) : 22 Sind 349 : 29 Cri L Jour 945 (F B).

[But see (Vol 8) 1921 Sind 145 (146) : 26 Cri L Jour 609 : 16 Sind L R 143 (DB).]

3. "Disagrees with the verdict." — [1] The necessity of submitting the case to the High Court depends upon the gravity of the offence, and its prevalence and other considerations of a similar nature, not merely because of disagreement. (Vol 20) 1933 Cal 404 (405) : 34 Cri L Jour 608 (DB).

[See however (Vol 24) 1937 Pat 440 (443) : 38 Cri L Jour 919 : 16 Pat 413 (DB). (There is no disagreement unless a reference is necessitated.) & (Vol 19) 1931 Pat 246 (247) : 11 Pat 669 : 33 Cri L Jour 877 (DB). (Vol 16) 1929 Cal 415 (416) : 56 Cal 473 : 30 Cri L Jour 1036 (DB). (Do.) & (Vol 12) 1925 Cal 795 (795) : 26 Cri L Jour 1006 (DB). (Do.)]

[2] The section requires that the Judge must not only disagree, but must think it necessary to express disagreement. (Vol 24) 1937 Cal 540 (541, 542) : 38 Cri L Jour 1075 : I L R (1937) 2 Cal 694 (DB).

[3] In a case where the Judge is not satisfied with a verdict but refrains from expressing disagreement as he thinks that the High Court will not interfere he does not act irregularly. (Vol 24) 1937 Cal 540 (541, 542) : 38 Cri L Jour 1075 : I L R (1937) 2 Cal 694 (DB).

[4] Sections 298 and 299 show that the Judge is entitled to disagree only when he considers that a reasonable jury would have reached the conclusion in question. (Vol 27) 1940 Nag 17 (25) : 41 Cri L Jour 218 : ILR (1940) Nag 394 (FB). (Per Niyogi and Bose, JJ., Order of Reference).

[5] The disagreement contemplated by the section is with the verdict and not merely with the grounds on which the verdict was given. (Vol 20) 1934 Cal 404 (404) : 34 Cri L Jour 608 (DB).

Section 307—Note 3 (*contd.*)

[6] Jury returning verdict of guilty—Judge distinctly of opinion that benefit of doubt should be given to accused — There is sufficient disagreement to make a reference. (Vol 24) 1937 All 195 (196) : 38 Cri L Jour 465 : I L R (1937) All 419 (D B).

[7] Judge directing that if verdict of guilty on major offence such a verdict may be given in respect of minor offence — Verdict of not guilty returned — Judge of opinion that accused guilty of minor offence — There is disagreement to make a reference. (Vol 16) 1929 Nag 114 (115) : 30 Cri L Jour 793 \* (Vol 10) 1923 Cal 103 (110) : 24 Cri Jour 674 (DB) \* ('08) 8 Cri L Jour 143 (144) (D B) (Bom).

[8] Charge under S. 326, I. P. C. read with S. 149— Verdict of not guilty in respect of rioting — Judge accepting the verdict cannot be said to have disagreed with the verdict in respect of S. 326. (Vol 2) 1915 Cal 292 (294) : 41 Cal 682 : 15 Cri L Jour 155 (D B).

[9] Judge having once accepted the verdict cannot change his mind at the time of passing sentence and disagree. (1900) 4 Cal W N 683 (683) (D B).

4. "Is clearly of opinion that it is necessary for the ends of justice." — [1] The Judge's power to refer is not limited to cases where the verdict is perverse or manifestly wrong but extends to cases where ends of justice require it. (Vol 19) 1932 Lah 345 (348) : 13 Lah 573 : 33 Cri L Jour 220 (D B) \* (Vol 19) 1932 Pat 246 (247) : 11 Pat 669 : 33 Cri L Jour 877 (D B) \* (Vol 24) 1937 Pat 440 (442) : 38 Cri L Jour 919 : 16 Pat 413 (D B) \* (Vol 6) 1919 Cal 536 (536) : 19 Cri L Jour 830 (D B) \* (Vol 13) 1926 Cal 1107 (1109) : 27 Cri L Jour 1402 (D B) \* (Vol 24) 1937 Nag 50 (52) : 38 Cri L Jour 330 : I L R (1937) Nag 277 (D B).

[But see (Vol 15) 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cri L Jour 317 (F B) \* (Vol 27) 1940 Nag 17 (26) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (F B) \* (Vol 1) 1914 Cal 65 (69) : 14 Cri L Jour 660 (664) : 41 Cal 621 (D B) \* (Vol 23) 1936 Cal 451 (451) : 38 Cri L Jour 174 (DB).]

[2] The Judge should always make a reference where the verdict is perverse or unreasonable or not supported by evidence. (Vol 30) 1943 Bom 74 (76) : 44 Cri L Jour 411 (D B) \* (Vol 13) 1926 Mad 370 (370) : 27 Cri L Jour 176 (D B) \* (Vol 18) 1931 Cal 15 (17) : 57 Cal 1183 : 32 Cri L Jour 452 (D B) \* (Vol 17) 1930 Pat 174 (175) : 30 Cri L Jour 1114 \* (Vol 18) 1931 Mad 775 (776) : 55 Mad 256 : 32 Cri L Jour 1276 (D B).

[3] No reference should be made if the verdict is warranted by the evidence or is reasonable. ('08) 7 Cal W N 135 (140) (D B). (Verdict warranted by evidence.) \* ('96) 20 Bom 215 (218) (D B). (Verdict reasonable.)

[4] The trial Judge should appreciate the evidence and form his own opinion whether it is necessary for the ends of justice to make a reference. (Vol 21) 1934 Cal 347 (349) : 62 Cal 337 : 36 Cri L Jour 353 (D B).

[5] Same persons sitting as jurors and assessors—Reasons given by them as assessors should not be used to call the verdict given by them as jurors perverse. ('29) 1929 Mad W N 281 (281) (F B).

[6] Judge and jury differing on the offence of which the accused was guilty—Punishment in both cases the same—Held, reference was not necessary. (Vol 27) 1940 Nag 17 (25) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (F B) \* (Vol 24) 1937 Bom 60 (61) : 38 Cri L Jour 327 (D B).

5. "Submit the case." — [1] A submission must be of the whole case against the particular accused and not merely of those charges on which the Judge disagrees. (Vol 31) 1944 Cal 306 (307) : 46 Cri L Jour 220 (D B) \* (Vol 20) 1933 Cal 665 (666, 667) : 34 Cri L Jour 918 (S B) \* (Vol 15) 1928 Pat 596 (596) : 30 Cri L Jour 390 (D B) \* (Vol 17) 1930 All 489 (489) : 52

All 881 : 32 Cri L Jour 81 (D B) \* (Vol 19) 1932 Pat 156 (157) : 11 Pat 395 : 33 Cri L Jour 505 (D B).

[2] The Judge should not divide the verdict of the jury, accept a part and make a submission with reference to the other part. (Vol 10) 1923 Cal 453 (456) : 50 Cal 41 : 24 Cri L Jour 763 (D B) \* (Vol 22) 1935 Pat 357 (357) : 33 Cri L Jour 856 : 14 Pat 717 (D B) \* (Vol 34) 1947 All 99 (100) (D B).

6. "In respect of such accused person." — [1] Several accused — Judge disagreeing with the verdict in respect of all except one — The whole case need not be referred—Accused in respect of whom he agrees can be convicted or acquitted as the case may be. (Vol 31) 1944 Cal 306 (307) : 46 Cri L Jour 220 (D B) \* (Vol 25) 1936 Mad 686 (686, 687) : 39 Cri L Jour 864 (D B) \* (Vol 2) 1915 Cal 731 (731, 732) : 16 Cri L Jour 321 : 42 Cal 789 (D B).

7. Grounds of opinion to be recorded. — [1] If the Judge does not record his opinion, it is not possible for the High Court to pass orders on the reference. (Vol 8) 1921 Cal 252 (253) : 23 Cri L Jour 244 \* ('04) 1 Cri L Jour 743 (744) (D B) (Bom).

[2] The letter of reference should state the case, the verdict and concisely the ground upon which the Judge differs from the jury and considers it necessary to submit the case. (Vol 18) 1931 Cal 15 (16, 17) : 57 Cal 1183 : 32 Cri L Jour 452 (D B) \* ('05) 9 Cal W N lxvi (lxvi) (D B) \* (Vol 16) 1929 Pat 16 (16, 18) : 30 Cri L Jour 210 (D B) \* ('08) 7 Cri L Jour 192 (193) (D B) (Bom).

[3] The letter of reference should be complete and the High Court should not be required to refer to the order sheet in order to gather the particulars. (Vol 8) 1921 Cal 252 (253) : 23 Cri L Jour 244 (D B).

[4] The referring order should be in the nature of a judgment. (Vol 15) 1928 All 622 (623, 624) : 50 All 540 : 29 Cri L Jour 342 (D B).

[5] Merely repeating remarks made in the charge to the jury and adding vaguely that for these reasons the reference is made are not sufficient. ('04) 1 Cri L Jour 586 (586) (D B) (Bom).

[6] The Judge should state exactly what material portion of the evidence he believes to be true and his reasons for arriving at his conclusions. ('08) 7 Cri L Jour 192 (193) (D B) (Bom) \* ('03) 7 Cal W N 345 (347) (D B) \* (Vol 9) 1922 Pat 348 (350) : 23 Cri L Jour 421 (D B) \* (Vol 16) 1929 Pat 16 (17) : 30 Cri L Jour 210 (D B).

[7] The High Court should not be asked to consider the case on matters not placed before the jury. ('99) 27 Cal 295 (304) (D B).

[8] Where a reference shows that the Judge's opinion is that the verdict is perverse, but this is not clearly stated, it will be presumed that reference has been made on that ground. (Vol 16) 1929 Oudh 280 (281) : 30 Cri L Jour 570 (D B) \* (Vol 15) 1928 Mad 1186 (1190) : 51 Mad 956 : 30 Cri L Jour 317 (F B).

[9] The Judge should not make unsupported reflections on the conduct of the juror. (Vol 11) 1924 Cal 323 (326) : 51 Cal 418 : 25 Cri L Jour 776 (D B) \* (Vol 11) 1924 Cal 321 (322) : 51 Cal 347 : 25 Cri L Jour 758 (D B).

8. Reference against verdict of acquittal. — [1] Where the Judge disagrees with a verdict of acquittal he should in his letter of reference state the offence which he considers to have been committed by the accused. (Vol 20) 1933 Cal 404 (406) : 34 Cri L Jour 603 (D B). (Omission to state offence does not entail rejection of reference.) \* ('78) 9 Cal 623 (624, 625) (D B) \* (Vol 8) 1921 Cal 252 (253) : 23 Cri L Jour 244 (D B).

[2] Where the verdict of the jury is one of acquittal there is a much greater onus on the Judge to satisfy the High Court as to the necessity of interference than in

Section 307—Note 8<sup>1/2</sup> (contd.)

cases of a verdict of guilty. (Vol 23) 1936 Cal 407 (408); 37 Cri L Jour 1142 (D B).

[3] Unless the verdict of acquittal is manifestly wrong or perverse or unreasonable the Judge is not entitled to submit the case to the High Court. (37) 38 Cri L Jour 758 (758) (D B) (Cal).

[4] A submission on a pure question of fact is not permissible where the verdict is one of acquittal. (Vol 23) 1936 Cal 407 (408); 37 Cri L Jour 1149 (D B).

9. Bail pending reference to High Court. — [1] Pending reference on a verdict of guilty the accused should not be let out on bail. (Vol 22) 1935 Cal 407 (412); 62 Cal 900; 36 Cri L Jour 944 (S B). (Charge of murder.)

[See however (Vol 28) 1941 Mad 763 (764); 43 Cri L Jour 106 (D B).]

10. Powers of the High Court under this section. — [1] The words "subject thereto" do not restrict the power of the High Court to go into the questions of law alone but clothes the High Court with all the powers as regards procedure. (Vol 27) 1940 Nag 17 (28); 41 Cri L Jour 289; I L R (1940) Nag 394 (F B) & (Vol 27) 1940 Pat 513 (514); 41 Cri L Jour 457 (DB) & (Vol 25) 1938 All 227 (229); 39 Cri L Jour 559; I L R (1938) All 483 (DB) & (Vol 9) 1922 Bom 868 (369); 25 Cri L Jour 315; 47 Bom 31 (DB) & (Vol 15) 1928 All 207 (210); 50 All 625; 29 Cri L Jour 853 (FB) & (Vol 20) 1933 Cal 47 (48); 60 Cal 427; 34 Cri L Jour 164 (DB).

[2] The following are the views on the question as to the extent of the High Court's power of interference on matters of fact:

(a) Verdict of the jury should not be touched except under strong circumstances. (37) 9 All 420 (425) (D B) & (Vol 23) 1936 Cal 451 (451); 38 Cri L Jour 174 (DB) & (Vol 20) 1933 Cal 665 (668); 34 Cri L Jour 918 (SB) & (Vol 15) 1928 Pat 120 (124); 6 Pat 817; 29 Cri L Jour 81 (DB).

(b) Two views possible on evidence — Jury taking one view — High Court should not interfere though it takes a contrary view. (Vol 33) 1946 Bom 24 (25); 47 Cri L Jour 494 (DB) & (44) 25 Pat L Tim 141 (143, 144) (DB) & (Vol 11) 1924 Cal 317 (320); 24 Cri L Jour 897 (DB) & (Vol 11) 1924 All 411 (411); 46 All 265; 25 Cri L Jour 981 (DB) & (32) 33 Cri L Jour 745 (745) (DB) & (Vol 11) 1924 Cal 449 (451); 51 Cal 271; 25 Cri L Jour 773 (DB) & (Vol 16) 1929 Pat 313 (314); 8 Pat 344; 30 Cri L Jour 721 (DB) & (Vol 34) 1947 All 99 (103) (DB).

(c) The High Court cannot interfere unless the verdict is perverse or manifestly wrong or unreasonable or contrary to evidence or not supported by any evidence. (Vol 33) 1946 Bom 24 (25); 47 Cri L Jour 494 (DB) & (Vol 27) 1940 Mad 509 (509); 41 Cri L Jour 581 (DB). (Perverse verdict.) & (Vol 15) 1928 Mad 1186 (1190); 51 Mad 956; 30 Cri L Jour 317 (FB). (Do.) & (Vol 16) 1929 Nag 36 (37); 29 Cri L Jour 963. (Do.) & (Vol 11) 1924 All 411 (412); 46 All 265; 25 Cri L Jour 981 (DB). (Do.) & (Vol 20) 1933 Oudh 181 (181, 182); 8 Luck 439; 34 Cri L Jour 795 (DB). (Do.) & (Vol 19) 1932 Cal 656 (658); 33 Cri L Jour 593 (FB). (Do.) & (Vol 32) 1945 Bom 277 (280); 46 Cri L Jour 635 (FB). (Verdict manifestly wrong.) & (Vol 25) 1938 Cal 295 (296); 39 Cri L Jour 479 (DB). (Do.) & (Vol 16) 1929 Pat 313 (314); 8 Pat 344; 30 Cri L Jour 721 (DB). (Do.) & (Vol 18) 1931 Cal 15 (17); 57 Cal 1183; 32 Cri L Jour 452 (D B). (Unreasonable verdict.) & (29) 1929 Mad W N 281 (282) (FB). (Do.) & (Vol 16) 1929 Cal 737 (738); 31 Cri L Jour 698 (DB). (Verdict contrary to evidence.) & (Vol 13) 1926 Pat 535 (536); 5 Pat 578; 27 Cri L Jour 1808 (DB). (Verdict not supported

by evidence.) & (Vol 34) 1947 All 99 (103) (DB). (Verdict not perverse.)

(d) The verdict loses its sanctity if the Judge disagrees with it and the High Court can interfere. (Vol 27) 1940 Nag 17 (28); 41 Cri L Jour 289; I L R (1940) Nag 394 (FB). (The whole case is opened up on reference.) & (Vol 9) 1922 Bom 368 (369); 47 Bom 31; 25 Cri L Jour 315 (DB). (Do.) & (Vol 20) 1933 Cal 47 (48); 60 Cal 427; 34 Cri L Jour 164 (DB). (Do.) & (Vol 19) 1932 Pat 246 (247); 11 Pat 669; 33 Cri L Jour 877 & (Vol 19) 1932 Mad 21 (21, 22); 33 Cri L Jour 215 & (Vol 15) 1928 Pat 596 (597); 30 Cri L Jour 390 (DB). (Function of Judge and jury is cast upon the High Court.) & (37) 66 Cal L Jour 500 (510) (DB). (High Court can come to any conclusion.) & (39) 22 Mad 15 (18). (Do.) & (Vol 21) 1934 Pat 533 (535); 36 Cri L Jour 262 (DB). (Do.) & (Vol 1) 1914 Low Bur 197 (198); 15 Cri L Jour 513 (DB). (Do.) & (Vol 32) 1945 Lah 105 (108); I L R (1945) Lah 290; 47 Cri L Jour 4 (FB). (An interference even if verdict is not perverse or unreasonable.) & (Vol 32) 1945 Oudh 48 (52); 47 Cri L Jour 66 (DB). (Do.) & (Vol 25) 1938 All 227 (229); I L R (1938) All 483; 39 Cri L Jour 559 (DB). (Do.) & (Vol 19) 1932 Cal 658 (659); 33 Cri L Jour 476 (SB). (Do.)

[3] This section speaks of the opinion of the jury and not of the verdict. (36) 3 Cri L Jour 371 (373, 374); 29 Mad 91 (SB) & (Vol 11) 1924 Mad 232 (233); 25 Cri L Jour 145 (DB).

[4] Where the decision is correct or cannot be said to be wrong, there is no room for any interference. (Vol 3) 1916 Mad 783 (784); 16 Cri L Jour 440 (SB) & (Vol 14) 1927 Cal 820 (821); 28 Cri L Jour 874 (DB) & (Vol 17) 1930 Oudh 334 (334); 31 Cri L Jour 719; 5 Luck 720 (DB) & (31) 32 Cri L Jour 1028 (1029) (DB) (All) & (Vol 21) 1934 Pat 533 (536); 36 Cri L Jour 262 (DB) & (29) 30 Cri L Jour 820 (824) (SB) (Cal) & (Vol 22) 1935 Pat 433 (434, 435) (DB).

[5] Where the decision is perverse or unreasonable or against the evidence or is not supported by evidence, the High Court will interfere. (Vol 32) 1945 Oudh 48 (52); 47 Cri L Jour 66 (D B) & (Vol 25) 1938 All 227 (229); 39 Cri L Jour 559; I L R (1938) All 483 (D B) & (Vol 24) 1937 Nag 33 (35); 38 Cri L Jour 355 (DB) & (Vol 16) 1929 All 338 (339); 30 Cri L Jour 1078 (DB) & (36) 20 Bom 215 (224, 227) (DB) & (Vol 15) 1928 Cal 233 (233) (DB). (Verdict against the evidence.) & (Vol 21) 1934 Cal 432 (433); 35 Cri L Jour 1311 (DB) & (Vol 20) 1933 Pat 273 (273); 34 Cri L Jour 731 (DB) & (Vol 20) 1933 Pat 481 (484); 34 Cri L Jour 828 & (Vol 8) 1921 Sind 145 (149); 26 Cri L Jour 609; 16 Sind L R 143 (DB) & (Vol 21) 1934 Oudh 399 (400); 35 Cri L Jour 1130 (DB) & (Vol 22) 1935 All 970 (970, 973, 974); 37 Cri L Jour 125 (DB).

[6] The High Court can consider whether the making of the confession was caused by any such threat, inducement or promise as is contemplated by S. 24 of the Evidence Act in appeal or reference. (Vol 30) 1943 Cal 625 (626); I L R (1943) 1 Cal 487; 45 Cri L Jour 155 (DB).

[7] The powers of the High Court under this section are controlled by S. 537 and where there is no failure of justice, the High Court cannot interfere. (Vol 9) 1922 Bom 368 (369, 370); 47 Bom 31; 25 Cri L Jour 315 (DB).

[8] Paramount consideration in High Court must be whether ends of justice require that verdict of jury should be set aside. (Vol 38) 1946 P C 151 (154); 47 Cri L Jour 905; 25 Pat 601 (P C).

11. "After giving due weight to the opinions of the Sessions Judge and the jury". — [1] The following are the views in respect of the weight to be



Section 307—Note 11 (*contd.*)

attached to the opinion of the Judge and jury respectively in case of difference :

(a) Opinion of jury must stand unless it is clearly wrong. (Vol 11) 1924 Cal 701 (703) : 51 Cal 160 : 25 Cri L Jour 1000 (DB).

(b) More weight ought to be attached to the opinion of the Judge. (Vol 15) 1923 Cal 732 (733) : 55 Cal 879 : 29 Cri L Jour 823 (DB).

(c) One is not entitled to more weight than the other. (Vol 11) 1924 Oudh 314 (314) : 27 Oudh Cas 29 : 25 Cri L Jour 785 (DB) \* (13) 14 Cri L Jour 556 (558) (Cal).

(d) Relative weight to be attached depends upon the fact of each case. (Vol 11) 1924 Cal 321 (322) : 51 Cal 347 : 25 Cri L Jour 758 (DB).

[2] The Judge has no power to ask the jury under S. 303, the reasons for their verdict, and the opinion of the jury does not include the reasons, but only the verdict. ('06) 3 Cri L Jour 371 (375) : 29 Mad 91 (DB) \* (Vol 15) 1928 Pat 203 (205) : 7 Pat 55 : 29 Cri L Jour 466 (DB) \* ('91) 15 Bom 452 (457) (SB) \* (Vol 11) 1924 Mad 232 (233) : 25 Cri L Jour 145 (DB) \* (Vol 1) 1914 Cal 394 (395) : 15 Cri L Jour 31 (DB).

[See however (Vol 27) 1940 Nag 17 (36) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB). (Per Bose J.) \* (Vol 7) 1920 Mad 170 (171) : 43 Mad 744 : 21 Cri L Jour 466 (DB). (Per Sadasiva Aiyar J.) \* (Vol 7) 1920 Pat 674 (676) : 21 Cri L Jour 278 (DB) \* ('09) 10 Cri L Jour 32 (35) : 36 Cal 629 (DB) \* (Vol 9) 1922 Pat 348 (351) : 23 Cri L Jour 421 (DB). (Per Jwala Prasad, J.) \* ('33) 34 Cri L Jour 411 (412) (Nag).]

[3] The word "opinions" is wider than "verdict" and includes the opinion of the majority. (Vol 27) 1940 Nag 17 (36) : 41 Cri L Jour 289 : ILR (1940) Nag 394 (FB). (Per Bose J.)

[4] The opinion of the Sessions Judge means the opinion expressed in the reference or at the hearing. (Vol 11) 1924 Mad 232 (233) : 25 Cri L Jour 145 (DB).

[5] The opinion of the Sessions Judge does not include his speculations as to what external considerations might have affected the verdict of the jury. (Vol 11) 1924 Cal 321 (322) : 51 Cal 347 : 25 Cri L Jour 758 (DB).

[6] The weight to be given to the opinion of the jury must depend on the nature of the charge to the jury. (Vol 32) 1945 Pat 109 (113) : 23 Pat 656 : 46 Cri L Jour 513 (DB).

12. Power of High Court to order re-trial or order additional evidence to be taken. — [1] The High Court can, in a reference under this section, order a re-trial. (Vol 22) 1935 Cal 184 (189) : 62 Cal 572 : 36 Cri L Jour 308 (FB) \* (Vol 27) 1940 Nag 17 (29) : 41 Cri L Jour 289 : I L R (1940) Nag 394 (FB) \* (Vol 24) 1937 Bom 60 (62) : 38 Cri L Jour 327 (DB).

[2] The High Court may call for additional evidence under S. 428 of the Code. (Vol 16) 1929 Cal 244 (246) : 56 Cal 566 : 30 Cri L Jour 1031 (DB).

[3] The jurisdiction exercised under this section is neither original criminal jurisdiction nor that of a Court of appeal. ('02) 29 Cal 236 (297, 303) (FB). (Not original jurisdiction.) \* (Vol 15) 1928 All 207 (210) : 50 All 625 : 29 Cri L Jour 353 (FB). (Not appellate jurisdiction.)

13. Verdict of jury in cases not triable by jury — Applicability of this section. — [1] Case triable by assessors tried by jury—Judge differing with them can refer under this section. (Vol 22) 1935 Pat 433 (435) : 36 Cri L Jour 1502 (DB).

[2] Where a charge triable with the aid of the jury as assessors is tried by the jury and a verdict is given, the procedure, though irregular, is legal and a reference

is competent under this section. ('99) 23 Bom 696 (697) \* ('98) 25 Cal 555 (557) (DB).

[3] In a case some charges are triable by jury and others with jury as assessors — Reference made to the High Court in respect of former — *Held*, whole case should not be submitted but Judge should pass judgment in respect of other charges. (Vol 27) 1940 All 260 (261) : 41 Cri L Jour 676 : I L R (1940) All 365 (DB). \* (Vol 25) 1938 Mad 686 (686) : 39 Cri L Jour 864 (DB) \* (Vol 19) 1932 Bom 61 (62, 63) : 33 Cri L Jour 172 (DB) \* (Vol 19) 1932 Mad 512 (512) : 55 Mad 715 : 33 Cri L Jour 533 (DB) \* (Vol 21) 1934 Pat 421 (425) : 36 Cri L Jour 469 (DB)

[See however (Vol 24) 1937 Pat 662 (665) : 39 Cri L Jour 156 (DB).]

[4] The High Court can on the reference set aside the sentence passed by the Judge with regard to the offence triable with the aid of assessors. (Vol 9) 1922 Bom 234 (237) : 24 Cri L Jour 923 (DB).

[See however (Vol 25) 1938 Mad 686 (686) : 39 Cri L Jour 864.]

## 14. Acquit or convict of any offence, etc. —

[1] The High Court can, on hearing a reference under this section, convict the accused of an offence different from the one he was charged with within the limits of Ss. 237 and 238. (Vol 1) 1914 Mad 425 (423) : 37 Mad 236 : 13 Cri L Jour 739 (DB) \* (Vol 11) 1921 Bom 450 (451) : 26 Cri L Jour 211 (DB) \* ('95) 22 Cal 1006 (1009, 1010) (DB) \* (Vol 2) 1915 Bom 297 (298) : 16 Cri L Jour 305 (DB). (Case under S. 302 — High Court can convict accused under S. 304A, Penal Code.)

[2] The High Court can acquit the accused if it so thinks fit on facts notwithstanding that the jury have found the prisoner guilty. (Vol 13) 1926 Cal 1034 (1037) : 27 Cri L Jour 1341 (DB) \* ('87) 14 Cal 42 (46) (FB).

[3] The High Court can convict the accused notwithstanding that the jury have found the prisoner not guilty. (Vol 22) 1935 All 970 (970) : 37 Cri L Jour 135 (DB) \* (Vol 11) 1924 Cal 718 (721) : 51 Cal 469 : 26 Cri L Jour 24 (DB) \* (Vol 8) 1921 Sind 145 (147) : 16 Sind L R 143 : 26 Cri L Jour 609 (DB).

[4] Two accused charged under S. 120B, Penal Code — Charge not showing complicity of any other person in conspiracy — One of the accused convicted of conspiracy and the case of the other accused referred under S. 307 — Latter acquitted on reference — Conviction against the other accused cannot remain and must be set aside. (Vol 14) 1927 Cal 949 (950) : 28 Cri L Jour 449 (DB).

15. Notice of reference. — [1] Though section is silent as to notice of reference to accused it is fair that such notice should be given. ('73) 19 Suth W R Cr 38 (39) (DB) \* ('73) 20 Suth W R Cr 33 (33) (DB).

16. Difference between Judges hearing reference — Procedure. — [1] Difference between two Judges hearing reference — Matter must be referred to third Judge. ('94) 15 Bom 452 (474, 475) (SB) \* ('05) 2 Cal L Jour 77n (77n) (DB) \* (Vol 3) 1916 Mad 783 (785) : 16 Cri L Jour 440 (SB).

17. Appeal. — [1] Inasmuch as no judgment of acquittal or of conviction is to be recorded where a reference is made under this section, there can be no appeal as from a Sessions Judge to the High Court. (Vol 16) 1929 Mad 135 (137) : 30 Cri L Jour 843 (DB).

[2] Where no reference is made the judgment that must follow the verdict will be appealable under S. 417. ('78) 2 Bom 526n (526n) (DB).

[3] A judgment passed by the High Court on a reference under this section is itself not open to appeal to the High Court. ('94) 1894 Rat 691 (691) (DB).

*G. — Retrial of Accused after Discharge of Jury.*

308. Whenever the jury is discharged, the accused shall be detained in custody or on bail *Retrial of accused after discharge of jury.* (as the case may be), and shall be tried by another jury unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

[1882 — S. 308.]

*H. — Conclusion of Trial in Cases tried with Assessors.*

309. (1) When, in a case tried with the aid of assessors, the case for the defence and the *Delivery of opinion of assessors.* prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally <sup>a</sup>[on all the charges on which the accused has been tried], and shall record such opinion, <sup>a</sup>[and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded].

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to *Judgment.* the opinions of the assessors.

(3) If the accused is convicted, the Judge shall, <sup>a</sup>[unless he proceeds in accordance with the provisions of section 562], pass sentence on him according to law.

[1882 — S. 309 ; 1872 — Ss. 255, 261, 262 ; 1861 — S. 324.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 82.

**Section 308 — Note 1**

[1] Resummoning a jury who have been released from their oath as jury and discharged is improper. (Vol 14) 1927 Cal 199 (200) : 28 Cri L Jour 141 (DB).

[2] In an order under this section that the accused should not be re-tried, the Judge cannot pass remarks implying the guilt of the accused. (Vol 16) 1929 Sind 145 (146) : 23 Sind L R 397 : 30 Cri L Jour 877 (DB).

[3] The Judge can record his opinion that the accused is innocent where he is not to be re-tried. (Vol 22) 1935 Sind 189 (191) : 36 Cri L Jour 1359 (DB).

[4] Where the Judge is of opinion that the accused should not be re-tried, he should make an entry as provided by this section and an order of acquittal is not technically correct. (Vol 33) 1946 Bom 33 (42):47 Cri L Jour 378 (FB).

[5] Where the accused was tried three times but the Judge could not agree with the verdict of the jury in any trial, he should make an entry under this section that the accused should not be re-tried. (Vol 31) 1944 Sind 65 (67, 68) : ILR (1944) Kar 239 : 45 Cri L Jour 505 (DB).

**SECTION 309—SYNOPSIS.**

1. Summing up of evidence by Judge to assessors.
2. Delivery of opinions of assessors.
3. Retirement of assessors to consider their opinions.
4. Each assessor to be asked his opinion.
5. Assessors' opinions to be stated orally.
6. Opinion to be given on all the charges.
7. Conviction for offence different from that on which opinions of assessors were taken.
8. Recording of opinions.
9. Questioning assessors.
10. Reasons for opinions, if may be asked.
11. "The Judge shall then give judgment."
12. Judge not bound to conform to the opinions of the assessors.
13. Opinions of assessors recorded by one Judge—Judgment delivered by his successor—Legality.
14. Sentence.

1. Summing up of evidence by Judge to assessors.—[1] This section confers a discretion on the Court to sum up the evidence for the prosecution and

the defence. ('12) 13 Cri L Jour 497 (497) : 40 Cal 163 (D B).

[2] The provisions of summing up evidence to assessors should be resorted to in long and intricate cases. ('83) 9 Cal 875 (876) (D B) & ('01) 24 Mad 523 (537) (S B).

[3] The Judge should not obtrude on the assessors his own opinion on the value of the evidence. ('83) 9 Cal 875 (876) (D B).

[4] The Judge in summing up the evidence should explain to the jurors acting as assessors the double capacity in which they are acting. ('02) 2 Wair 334 (334).

[5] If the Judge is incapable of recording the heads of summing up to the assessors, he should ask some Court Officer or some independent person to do so but not the pleader for prosecution. ('83) 9 Cal 875 (876, 877) (D B).

2. Delivery of opinions of assessors.—[1] The Judge is bound to take the opinions of the assessors before convicting or acquitting the accused. (Vol 25) 1936 Cal 551 (552) : 39 Cri L Jour 835 (D B) & ('05) 2 Cri L Jour 609 (610) (DB) (Bom). (Even where the accused admits his guilt.)

[2] The Judge is bound to record the opinions of the assessors under this section though he considers the evidence for the prosecution to be unreliable. ('88) 10 All 414 (416, 417) & ('83) 9 Cal 875 (877) (D B) & ('92) 16 Bom 414 (422) (D B) & ('95) 9 C P L R Cr 24 (25).

[3] The omission to ask for and record opinions of assessors is not a mere irregularity curable under S. 537. ('88) 10 All 414 (417, 418) & ('12) 13 Cri L Jour 497 (497):40 Cal 163 (DB)&('05) 2 Cri L Jour 609 (610)(DB). [But see ('75) 1 All 610 (611).]

[4] Prosecution withdrawn under S. 494—Accused is entitled to be acquitted — Opinions of assessors need not be recorded before acquittal. ('86) 1886 Rat 307 (307) (D B).

[5] Failure of assessors to give their opinions in open Court amounts to substantial and grave injustice. (Vol 30) 1943 P C 4 (7) : 44 Cri L Jour 1 (P C).

3. Retirement of assessors to consider their opinions. — [1] The Judge may allow the assessors to consult each other before giving their opinions. ('87) 1887 Pun Re No. 41 Cr 95 (97) (D B) & (Vol 2) 1915 Mad 1036 (1037) : 16 Cri L Jour 717 (D B).



Section 309—Note 3 (*contd.*)

[2] The Judge is entitled to have before him the independent and individual opinion of each of the assessors. (Vol 2) 1915 Mad 1036 (1037) : 16 Cri L Jour 717 (D B) \* ('01) 24 Mad 523 (537) (S B).

4. Each assessor to be asked his opinion.—[1] Each assessor acts and expresses his opinion individually. ('01) 24 Mad 523 (536, 537) (S B).

[2] The Judge should ask each assessor individually his opinion and record it separately. ('92) 14 All 502 (506) (D B) \* ('01) 24 Mad 523 (537) (S B) \* ('88) 9 Cal 875 (877) (D B).

[3] Where the opinions of some of the assessors are not asked for and recorded, the trial is vitiated by an illegality. ('03) 26 Mad 598 (599) (D B).

[4] All assessors found to be of same opinion on being asked separately — Recording such opinion in a joint statement is held to be an irregularity curable under S. 537. ('87) 1887 Pun Re No. 41 Cr p. 95 (97, 98) (D B) \* ('92) 14 All 502 (506) (D B).

5. Assessors' opinions to be stated orally.—[1] This section does not contemplate written opinions by assessors. ('12) 13 Cri L Jour 433 (433, 434) : 39 Cal 119 (D B).

[2] The giving of opinions in writing is an irregularity which does not vitiate proceedings unless failure of justice is caused. (Vol 12) 1925 P C 130 (131) : 6 Lah 226 : 52 Ind App 191 : 26 Cri L Jour 1059 (P O).

6. Opinion to be given on all the charges.—[1] A distinct opinion on each charge on which the accused has been tried must be taken and recorded. (Vol 15) 1928 Nag 257 (261) : 29 Cri L Jour 561 \* (Vol 22) 1935 Sind 23 (23, 24) : 28 Sind L R 295 : 36 Cri L Jour 504 (D B).

[2] A failure to comply with the section in this respect renders the trial illegal. (Vol 21) 1934 Oudh 354 (358) : 35 Cri L Jour 1066 : 10 Luck 119 (D B).

7. Conviction for offence different from that on which opinions of assessors were taken.—[1] If a case falls within the purview of S. 237 or S. 238, the accused can be convicted of an offence different from that on which the opinions of the assessors were taken. (Vol 12) 1925 P C 130 (131) : 6 Lah 226 : 26 Cri L Jour 1059 : 52 Ind App 191 (P O). (Opinion taken on a charge under S. 302—Accused convicted under S. 201, Penal Code; (Vol 11) 1924 Bom 246 (247) impliedly overruled.) \* (Vol 15) 1928 Bom 130 (133, 134) : 52 Bom 385 : 29 Cri L Jour 403 (D B) \* (Vol 16) 1929 Sind 147 (148) : 30 Cri L Jour 875 (D B). (Opinion taken on a charge under S. 395—Accused convicted under S. 403, Penal Code.)

[2] Opinions of assessors taken on a charge—Accused to be convicted on different charge — *Held*, Judge should elicit opinions of assessors on such a charge — Failure to do so is an irregularity and cannot vitiate the trial. (Vol 32) 1945 All 87 (90) : 46 Cri L Jour 495.

8. Recording of opinions. — [1] The opinions of assessors should be recorded correctly and fully. ('91) 1891 All W N 145 (146) (D B). (Correctly.) \* (1900) 2 Bom L R 323 (324). (Fully.)

[2] The opinions should be recorded in the very words used by each assessor immediately after he delivers his opinion. (Vol 8) 1921 Pat 109 (115) : 6 Pat L Jour 147 : 22 Cri L Jour 417 (D B).

[3] The failure to record the opinions of the assessors vitiates the proceedings and the conviction must be set aside. (Vol 21) 1934 Pat 561 (564) : 13 Pat 729 : 36 Cri L Jour 17 (D B).

9. Questioning assessors. — [1] The Judge can clear up the obscurity in the opinions of assessors by questioning them. ('12) 13 Cri L Jour 497 (497) : 40 Cal 163 (D B).

[2] In deciding a mixed question of fact and law, the Judge should ask the assessors specific questions on the facts on which the law will turn. (Vol 5) 1918 Pat 308 (310, 311) : 3 Pat L Jour 653 : 19 Cri L Jour 933 (D B).

[3] Before asking questions the Judge should allow the assessors to give their opinions in their own way. (Vol 1) 1914 Cal 456 (459) : 41 Cal 350 : 15 Cri L Jour 385 (D B) \* ('12) 13 Cri L Jour 457 (497) : 40 Cal 163 (D B).

[4] The Judge should ask the opinion of assessors first as to what happened and then on matters such as intention or knowledge. (Vol 16) 1929 Lah 37 (37) : 30 Cri L Jour 378.

## 10. Reasons for opinions, if may be asked. —

[1] The Judge ought not to ask the assessors to give reasons for their opinions beyond what is necessary to decide whether they have understood the case. ('31) 1931 Mad W N 1139 (1140).

[See however (1900) 2 Bom L R 322 (323) (D B) \* (1865) 3 Suth W R Cr 6 (6) (D B) \* ('79) 4 Cal L Rep 405 (410) (D B) \* ('05) 1905 Pun Re No. 48 Cr p. 117 (117) : 3 Cri L Jour 132 \* ('93-1900) 1893-1900 Low Bur Rul 126 (127).]

[2] The Judge should not cross-examine the assessors and must allow them to give their independent opinions on the case. ('12) 13 Cri L Jour 497 (497) : 40 Cal 163 (D B).

## 11. "The Judge shall then give judgment." —

[1] The section requires that on taking the opinions of the assessors, the Judge should proceed to deliver his judgment. (Vol 25) 1938 Cal 551 (552) : 39 Cri L Jour 835 (D B).

[2] The Judge has no power, after the opinions of the assessors have been recorded, to cancel the trial and hold a fresh trial. (Vol 2) 1915 Bom 149 (150) : 16 Cri L Jour 824 (D B).

[3] The Judge cannot after recording the opinions take fresh evidence and decide on such evidence. ('93) 15 All 136 (136) (D B) \* ('34) 35 Cri L Jour 1002 (1005) (D B) (Lah).

[4] After recording the opinions the Judge must not make a local inspection and decide on such inspection. (Vol 5) 1918 Low Bur 22 (23) : 9 Low Bur Rul 88 : 19 Cri L Jour 54 (D B).

[5] The Judge is not entitled to refer in his judgment to the opinion of the committing Magistrate. (Vol 25) 1938 Cal 551 (552) : 39 Cri L Jour 835 (D B).

[6] The Judge should not merely state that he agrees with the opinions of the assessors but should state the reasons for the decision. ('75) 22 Cal 805 (810) (D B).

12. Judge not bound to conform to the opinions of the assessors.—[1] Though assessors' opinions are entitled to consideration, they lack legal training which will enable them to distinguish suspicion from proof. (Vol 25) 1938 Nag 52 (53) : 39 Cri L Jour 105 (D B).

[2] The Judge can and should take into consideration the opinions of assessors. (Vol 25) 1938 Nag 52 (53) : 39 Cri L Jour 105 (D B).

[3] The Judge should discuss the opinions of assessors in his judgment. (Vol 23) 1936 Cal 527 (528) : 38 Cri L Jour 212 : 1 L R (1937) 1 Cal 306 (D B) \* (Vol 20) 1933 Lah 910 (911) : 35 Cri L Jour 163 (D B) \* ('93-1900) 1893-1900 Low Bur Rul 126 (127).

[4] The Judge cannot refer in his judgment to the opinion of an assessor based on the latter's personal knowledge. (Vol 26) 1939 Lah 475 (478, 479) : 41 Cri L Jour 55 : 1 L R (1939) Lah 243 (D B).

[5] In a case of identification of ornaments of small value, the opinions of assessors are of considerable importance. (Vol 12) 1925 Oudh 452 (452) : 26 Cri L Jour 1291.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

(2) If, during the continuance of any sessions, it appears that the number of persons so *Supplementary summons.* summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

[1882 — S. 315.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 84, for "in each presidency-town". [b] *Substituted, ibid.*, for "at least twenty-seven of these who are liable to serve on special juries, and fifty-four of those who are liable to serve on common juries".

**316.** Whenever a High Court has given notice of its intention to hold sittings at any place *Summoning jurors outside the place of sitting of High Courts.* outside the <sup>a</sup>[town which is the usual place of sitting of such High Court] for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

[1882 — S. 316.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 85, for "presidency-towns".

**317.** (1) In addition to the persons so summoned as jurors, the said Court of Session shall, *Military jurors.* if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army <sup>a</sup>[or Air Force] resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent <sup>b</sup>[official] duty, or for any other special <sup>b</sup>[official] reason.

[1882 — S. 317.]

[a] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I. [b] *Substituted, ibid.*, for "military".

*Failure of jurors to attend.*

**318.** Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid:

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

[1882 — S. 318.]

*K.—List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.*

*Liability to serve as jurors or assessors.*

**319.** All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside, or, if the <sup>a</sup>[Provincial Government] on

**Section 315 — Note 1 (contd.)**

[2] Summons served by affixing duplicate copy to the dwelling house of a juror — Juror living away had no knowledge — *Held*, he was not liable to fine for non-attendance. ('02) 6 Cal W N 337 (388) (DB).

[3] Additional persons can be summoned during the course of the High Court Sessions when the number summoned is insufficient. (Vol 26) 1939 Sind 209 (219): 41 Cri L Jour 28 : 1 L R (1940) Kar 249 (DB).

[4] Sub-section (3) does not apply to the choosing of a jury in a particular case where a deficiency of one or more members has appeared within the meaning of Ss. 276 and 279 (2) and the trial has already begun.

(Vol 26) 1939 Sind 209 (219, 220) : 41 Cri L Jour 28 : 1 L R (1940) Kar 249 (DB).

**Section 319 — Note 1**

[1] It is undesirable that a gentleman of high position should be summoned to serve as an assessor without his consent. ('97) 1897 All W N 167 (167).

[2] A juror or assessor, who is absent for a long time from his ordinary place of residence, will be regarded as non-resident in that place and will be exempt from liability to serve as a juror or assessor under this section. (Vol 18) 1931 Pat 160 (160) : 32 Cri L Jour 740.

[3] Holding sessions outside the area fixed where no assessors are available will not be permitted. ('86) 1886 Rat 304 (304).

consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

[1882—S. 319; 1872—S. 404; 1861—S. 333.]

[a] *Substituted* by A. O. for "Local Government."

*Exemptions.*

**320.** The following persons are exempt from liability to serve as jurors or assessors, namely:—

- (a) officers in civil employ superior in rank to a District Magistrate;
- <sup>a</sup>[(aa) members of any Legislature in British India;]
- (b) salaried Judges;
- (c) Commissioners and Collectors of Revenue or Customs;
- (d) police-officers and persons engaged in the Preventive Service in the Customs Department;
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;
- (f) persons actually officiating as priests or ministers of their respective religions;
- (g) persons in Her Majesty's Army <sup>b</sup>[, Navy], <sup>c</sup>[or Air Force], except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors;
- (h) surgeons and others who openly and constantly practise the medical profession;
- (i) legal practitioners (as defined by the Legal Practitioners' Act, 1879), in actual practice;
- (j) persons employed in the Post-Office and Telegraph Departments;
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641;<sup>d</sup>
- (l) other persons exempted by the <sup>e</sup>[Provincial Government] from liability to serve as jurors or assessors.

[1882—S. 320; 1872—S. 406; 1861—S. 335.]

[a] *Substituted* by A. O. for original cl. (aa) which had been *inserted* by the Legislative Members Exemption Act, 1925 (23 [XXIII] of 1925), S. 2.

[b] *Inserted* by the Amending Act, 1934 (35 [XXXV] of 1934), S. 2 and Sch.

[c] *Inserted* by the Repealing and Amending Act, 1927 (10 [X] of 1927), S. 2 and Sch. I.

[d] *See now* the Code of Civil Procedure, 1908 (Act 5 [V] of 1908), Ss. 132 and 133.

[e] *Substituted* by A. O. for "Local Government."

#### OBJECTS AND REASONS.

"Clause 320. —The definition of "Judge" given by the Indian Penal Code is too wide, as it would include Honorary Magistrates and other persons not intended to be exempted from serving on juries. We have therefore limited the exemption to salaried Judges, whose

public duties occupy their whole time. We have also made express provision for the exemption of legal practitioners in actual practice. They are exempted in England, and Local Governments have already exempted them in many parts of India. We think the exemption should be universal."—S. C. R., 1898.

**321.** (1) The Sessions Judge, and the Collector of the district or such other officer as the *List of jurors* <sup>a</sup>[Provincial Government] appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (b) to (h), both inclusive.

(2) The list shall contain the name, place of abode and quality or business of every such person; and, if the person is an European or an American, the list shall mention the race to which he belongs.

[1882—S. 321; 1872—S. 400; 1861—S. 329.]

[a] *Substituted* by A. O. for "Local Government."

**322.** Copies of such list shall be stuck up in the office of the Collector or other officer as *Publication* aforesaid, and in the court-houses of the District Magistrate and of the District Court, and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

[1882—S. 322; 1872—S. 401; 1861—S. 330.]

#### Section 321 — Note 1

[1] It is undesirable that a gentleman of a high posi-

tion, such as a hereditary Raja should be placed on the list of jurors or assessors. ('97) 1897 All W N 167 (167).

**323.** To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the sessions court-house, and at a time to be mentioned in the notice.

[1882—S. 323; 1872—S. 401 para 2; 1861—S. 330.]

**324.** (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror, or as an assessor, or who may establish his right to any exemption from service given by section 320 and insert the name of any person omitted from the list whom they deem qualified for such service.

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

(6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

[1882—Ss. 324, 325; 1872—Ss. 402, 403; 1861—Ss. 331, 332.]

**325.** In the case of any district for which the [Provincial Government] has declared that the trial of certain offences shall, if the Judge so direct, be by special jury the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors: Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of liability to serve as an ordinary juror in cases not tried by special jury.

[1882—S. 325A.]

[a] Substituted by A. O. for "Local Government."

**326.** (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial [and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.]

#### Section 324 — Note 1

[1] The list of jurors or assessors can be revised only once a year. ('86) 1886 Rat 304 (304) (DB).

#### SECTION 326 — SYNOPSIS.

1. Scope and object.

2. Letter to be sent only by the Sessions Judge.

3. Assessor not summoned if can be chosen by the Sessions Judge to make up deficiency.

4. Names of persons to be drawn by lot.

1. Scope and object.—[1] All jurors or assessors should be summoned for the first day on which a criminal session commences, whatever may be the number of trials posted for that session. (Vol 18) 1931 Pat 152 (153, 154): 10 Pat 107; 32 Cri L Jour 797 (DB).

(Judge should at least summon double the number of jurors or assessors for a particular trial.) \* (Vol 20) 1933 All 941 (944, 945): 56 All 210: 35 Cri L Jour 668 (DB) \* (Vol 3) 1916 All 54 (55, 56): 17 Cri L Jour 17.

[2] Object of summoning a number of persons is to avoid interested persons becoming jurors and also to allow for the chance of any of them claiming exception on the ground of ill-health. (Vol 3) 1916 All 54 (55, 56): 17 Cri L Jour 17 \* (Vol 18) 1931 Pat 152 (153): 10 Pat 107: 32 Cri L Jour 797 (DB). (Exemption on ground of ill-health.)

[3] The section is not mandatory. (Vol 25) 1938 Pat 60 (62): 39 Cri L Jour 302 (DB) \* (Vol 20) 1933 All 941 (944): 56 All 210: 35 Cri L Jour 668 (DB).

[4] The Judge should summon a sufficient number of

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

<sup>a</sup>[(3) Where the accused requires and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained:]

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320.

(4) Where, under the proviso to sub-section (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316.]

[1882 — S. 326; 1872 — S. 407; 1861 — S. 336.]

[a] *Inserted by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 19.*

**327.** The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before another set of jurors or assessors. the Court renders the attendance of one set of jurors or assessors for a whole session oppressive or whenever for other reasons such direction is found to be necessary.

[1882 — S. 327; 1872 — S. 410; 1861 — S. 338.]

**328.** Every summons to a juror or assessor shall be in writing, and shall require his *Form and contents* attendance as a juror or assessor, as the case may be, at a time and place of summons. to be therein specified.

[1882 — S. 328; 1872 — S. 409, Para. 1; 1861 — S. 337.]

**329.** When any person summoned to serve as a juror or assessor is in the service of the *When Crown or Railway servant may be excused.* [Crown] or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

[1882 — S. 329; 1872 — S. 411; 1861 — S. 339.]

[a] *Substituted by A. O. for "Government."*

*Court may excuse attendance of juror or assessor.* **330.** (1) The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session.

#### Section 326—Note 1 (contd.)

persons to enable him to choose the requisite number of jurors or assessors from among them as provided by law. (Vol 18) 1931 Pat 152 (154): 10 Pat 107: 32 Cri L Jour 797 (DB).

[5] Murder trial — Fourteen persons summoned to act as jurors—Nine appeared and were chosen by lot — *Held*, the trial was not bad. (Vol 17) 1930 Cal 212 (218, 214, 215, 216): 57 Cal 1228: 31 Cri L Jour 536 (FB). (Overruling ('30) 31 Cri L Jour 426 (DB) (Cal).):

[6] Eighteen jurors summoned—Eleven appeared and jury of seven empanelled—*Held*, failure to effect service on some jurors did not vitiate trial. (Vol 33) 1946 Cal 36 (38): 1 L R (1944) 2 Cal 287 (DB).

2. Letter to be sent only by the Sessions Judge. — [1] The power of sending a precept could be exercised by an Assistant Sessions Judge. (Vol 28) 1941 Pat 362 (364).

3. Assessor not summoned if can be chosen by the Sessions Judge to make up deficiency.—[1] The Sessions Judge cannot select any one to act as an assessor who has not been summoned under this section. ('94) 1894 All W N 207 (207) (DB) & ('10) 11 Cri L Jour 724 (725): 13 Oudh Cas 337.

[See however (Vol 25) 1938 Pat 352 (357): 39 Cri L Jour 725 (DB). (Summons served on the date of trial on a person whose name was on the list and who was present

in Court.) & (Vol 25) 1938 Pat 60 (62): 39 Cri L Jour 302 (DB). (Do.)]

4. Names of persons to be drawn by lot.—[1] Accused can claim to be tried with jurors or assessors chosen with all safeguards to secure perfect impartiality. ('03) 7 Cal W N 188 (192) (DB) & (Vol 14) 1927 Cal 593 (595): 28 Cri L Jour 615: 54 Cal 1026 (DB).

[2] Impartial trial should be secured by making impossible an intentional selection of jurors or assessors in a particular case. (Vol 15) 1928 Cal 83 (85): 55 Cal 371: 29 Cri L Jour 437 (FB) & (Vol 20) 1933 All 941 (944): 56 All 210: 35 Cri L Jour 668 (DB) & (Vol 17) 1930 Cal 212 (215): 57 Cal 1228: 31 Cri L Jour 536 (FB). (Conscious choice either by Judge, District Magistrate or any other should be avoided.) & ('94) 1894 All W N 207 (207). (Do.)

#### Section 327 — Note 1

[1] Set of jurors summoned for the whole Session — He or the officer holding the Court of Sessions can summon another set for a particular trial where it is convenient or practicable. (Vol 28) 1941 Pat 362 (364).

[2] An Assistant Sessions Judge can exercise the powers under this section but where he does not, the trial cannot be challenged as illegal on that account. (Vol 28) 1941 Pat 362 (364). (Trial with the same jury who were summoned before adjournment at the adjourned date.)

*Court may relieve special jurors from liability to serve again as jurors for twelve months.*

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

[1882 — S. 320 ; 1872 — S. 412 ; 1861 — S. 340.]

*List of jurors and assessors attending.*

331. (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.  
(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

[1882 — S. 331 ; 1872 — S. 413 ; 1861 — S. 341.]

332. (1) Any person summoned to attend as a juror or as an assessor who without lawful excuse fails to attend as required by summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

[1882 — S. 332 ; 1872 — S. 414 ; 1861 — S. 354.]

#### *L. — Special Provisions for High Courts.*

333. At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

[1882 — S. 333.]

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

[1882—S. 334.]

335. (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the <sup>a</sup>[Provincial Government], may direct.

#### Section 332 — Note 1

[1] A person cannot be fined under this section for non-attendance as an assessor in obedience to a summons served in district of which he has ceased to be a resident and of which he had no notice. (Vol 18) 1931 Pat 160 (160) : 32 Cri L Jour 740.

[2] The order of a Sessions Judge fining an assessor is not open to appeal. ('67) 8 Suth W R Cr 83 (83) (DB).

#### Section 333 — Note 1

[1] Entering a *nolle prosequi* is one of the rights and privileges, which an Advocate General has by virtue of his appointment. (Vol 19) 1932 Cal 699 (703) : 60 Cal 233 : 34 Cri L Jour 433 (SB).

[2] A *nolle prosequi* is entered where it is clear that an indictment is not sustainable against the defendant, or questions of difficulty arise as to the jurisdiction of the Court. (Vol 18) 1931 Cal 607 (612) : 59 Cal 275 : 33 Cri L Jour 3 (DB) & ('04) 8 Cal W N xlviii (xlviii). (Difficulty regarding jurisdiction of the Court.)

[3] Trial before a Judge and jury — Judge retiring was succeeded by another Judge—Objection raised that the succeeding Judge and jury had no jurisdiction — The Advocate-General was allowed to enter a *nolle prosequi*. ('98) 2 Cal W N 481 (481, 482, 483).

[4] Jury giving verdict before hearing case for defence — Advocate-General entered *nolle prosequi* and the accused was discharged. ('03) 7 Cal W N xxxi (xxxii).

[5] An order of discharge under this section is no bar to fresh proceedings being taken before a competent Magistrate upon complaint, or upon a police-report, or under S. 190 (1) (c). ('12) 13 Cri L Jour 488 (488) : 40 Cal 71 (DB).

[6] A and B indicated before the Court B being an absconder — A discharged under this section on *nolle prosequi* being entered against him—When B was apprehended, held that same proceedings in which *nolle prosequi* was entered could not be continued both against A and B. (Vol 12) 1925 Cal 902 (903) : 52 Cal 590 : 26 Cri L Jour 1397.

(2) But it may, from time to time b[\* \* \* \* \*] with the consent of the c[Provincial Government], hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the d[Official Notice of sittings. Gazetted] of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

[1882—S. 335.]

[a] *Substituted* by A. O. for "Governor-General in Council in the case of the High Court at Fort-William, or the Local Government in the case of the High Courts." [b] The words "in the case of the High Court at Fort-William with the consent of the Governor-General in Council and in all other cases." were *repealed* by A. O. [c] *Substituted* by A. O. for "Local Government." [d] *Substituted* by A. O. for "local official Gazette."

**336.** [Place of trial of European British subjects.] *Repealed by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923, S. 20.*

[1882—S. 336.]

## CHAPTER XXIV.

### GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

**337.** <sup>a</sup>[(1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof :

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record :

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.]

#### SECTION 337 — SYNOPSIS.

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|---|---|
| <ol style="list-style-type: none"> <li>1. Scope and object.</li> <li>2. Who can tender a pardon.</li> <li>3. Power of Provincial Government to tender conditional pardon.</li> <li>4. Offences in respect of which pardon may be tendered.</li> <li>5. Effect of tendering pardon in other cases.</li> <li>6. Stage at which pardon can be tendered.</li> <li>7. "Supposed to have been directly or indirectly concerned in, or privy to, the offence."</li> <li>8. Condition of pardon.</li> <li>9. Procedure in tendering pardon.</li> <li>10. Recording reasons for tendering pardon.</li> <li>11. Accepting pardon.</li> <li>12. Disclosure, whether should be recorded at the time of the tender of pardon.</li> </ol> | <ol style="list-style-type: none"> <li>13. Effect of pardon.</li> <li>14. Examination of approver as witness — Sub-section (2).</li> <li>15. Evidence of an accomplice—Credibility of.</li> <li>16. Commitment of accused.</li> <li>17. Detention of approver in custody — Sub-section (3).               <ol style="list-style-type: none"> <li>1. Scope and object. — [1] Object of tendering conditional pardon to accomplice in crime is to secure evidence of such person and to encourage him to give fullest details in respect of the matter. ('89) 11 All 79 (90).<br/>[See (Vol 31) 1944 Nag 105 (109) : 1 L R (1944) Nag 274 : 45 Cri L Jour 673 (FB). (Per Bose J. in Order of reference.) * (Vol 9) 1922 Bom 177 (177) : 46 Bom 120: 22 Cri L Jour 620 (DB).]</li> <li>[2] In exercise of power to tender pardon Magistrate should exercise sound judicial discretion. See ('72-92)</li> </ol> </li> </ol> |
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(2) Every person accepting a tender under this section shall be examined as a witness in<sup>3</sup> [the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.]

<sup>4</sup>[(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.]

(3) Such person,<sup>4</sup> [unless he is already on bail], shall be detained in custody until the termination of the trial<sup>4</sup> [\* \* \* \* \*]

[\* \* \* \* \*]

[1882 — S. 337 ; 1872 — S. 347 ; 1861 — S. 209.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 86, for the original sub-s. (1). [b] Substituted, *ibid.*, for "the Case." [c] Inserted, *ibid.* [d] Substituted, *ibid.*, for "if not on bail." [e] The words "by the Court of Session or High Court, as the case may be" were repealed, *ibid.* [f] Sub-s. (4) was repealed, *ibid.*

### Objects and Reasons.

*Amendments made in 1923.*— "After considerable discussion of the provisions of Section 337 and examination of the large body of opinions on this Clause, we have unanimously come to the following decisions :—

- (a) Instead of including all offences punishable with imprisonment for a term which may extend to seven years, we have made the limit ten years and have added as special cases, Sections 211, 216A, 369, 401, 435 and 477A of the Indian Penal Code.
- (b) The Magistrates who should be allowed to tender a pardon should, in our opinion, be Magistrates of the First Class who are inquiring into the offence and any District Magistrate, Presidency Magistrate, Sub-Divisional Magistrate, or with the sanction of the District Magistrate, a Magistrate of the First Class, having jurisdiction in

any place where the offence might be inquired into or tried.

- (c) The power to tender a pardon should be exercisable during an investigation as well as after a magisterial inquiry has begun.
- (d) We have deleted the words 'other than a Presidency Magistrate.' We see no reason why Presidency Magistrates should not record their reasons for tendering a pardon.
- (e) We do not agree with the Committee of 1916 that it should not be necessary to produce as a witness in the Sessions Court an accused person who has accepted a pardon.
- (f) We think all cases in which there is an approver should be committed for trial, and we have deleted the provision which enabled cases to be transferred to Section 30-Magistrates'.—S. C. R. [XVIII of 1923].

### Provincial Amendment.

#### PUNJAB.

In the cases governed by the (Punjab) Frontier Crimes Regulation, 1901 (3 [III] of 1901), section 337, Criminal P. C. shall, for the purposes of that Regulation, be construed as if,

- (a) the words in sub-section (1) "triable exclusively by the High Court . . . . . sections 216A, 369, 401, 435 and 477A," and
- (b) the whole of sub-section (2A) were omitted.

— (Punjab) Frontier Crimes Regulation, 1901, section 7.

#### Section 337—Note 1 (*contd.*)

1872-1892 Low Bur Rul 246 (248, 250) ✕ ('03) 1903 Pun Re No. 4 Cr. p. 11 (14) (DB) ✕ ('66) 5 Suth W R Cr 80 (85) : Beng L R Sup Vol 459 (FB).]

[8] Magistrate tendering pardon to person who was principal offender to obtain evidence against other accused — Magistrate held had wrongly exercised discretion given by this section. (Vol 8) 1921 Pat 499 (501).

[4] Provisions of this section do not imply that only method of obtaining evidence of accused person against his co-accused is by tendering pardon to such person with all conditions and safeguards mentioned in section. (Vol 24) 1937 Nag 17 (21) : 38 Cri L Jour 237 & 251 : I L R (1937) Nag 315 (FB). (Provision is enabling and not obligatory.)

[5] It is right of Crown at any stage to enter *nolle prosequi* and thereafter call accused person as witness for Crown. (Vol 16) 1929 Cal 319 (320, 321) : 56 Cal 1023 : 31 Cri L Jour 815 (DB) ✕ (Vol 10) 1923 All 91 (107) : 45 All 226 : 25 Cri L Jour 497 (DB) ✕ (1900) 25 Bom 422 (428, 429) (DB) ✕ (Vol 22) 1935 Bom 186 (188) : 59 Bom 355 : 36 Cri L Jour 937 (DB).

[But see (Vol 22) 1935 Cal 473 (474) : 36 Cri L Jour 1248 (DB).]

[6] Police omitting to charge person against whom

there is evidence because they require him as witness — Such course is competent but deprecable. (Vol 24) 1937 Nag 17 (20, 21) : 38 Cri L Jour 237 & 251 : I L R (1937) Nag 315 (FB) ✕ (Vol 22) 1935 Bom 186 (188) : 59 Bom 355 : 36 Cri L Jour 937 (DB).

[7] Magistrate should exercise special powers in strict accordance with provisions of section. ('72-92) 1872-1892 Low Bur Rul 246 (248, 250) ✕ ('08) 8 Cri L Jour 445 (450) (DB) (All).

[8] If manner in which tender of pardon is made follows in substance method prescribed in this section, the section must be held to apply and minor and immaterial irregularities or variations cannot be taken to affect operation of section. (Vol 25) 1938 P C 266 (269) : I L R (1938) Lah 628 : 65 Ind App 388 : 32 Sind L R 937 : 40 Cri L Jour 360 (PC).

2. Who can tender a pardon. — [1] District Magistrate can tender pardon at any stage of investigation, inquiry or trial even though he himself may not be holding such inquiry or trial. See ('12) 13 Cri L Jour 33 (34) : 5 Sind L R 174 (DB).

[2] Words "District Magistrate" in this section will include Additional District Magistrate on whom all powers of District Magistrate have been conferred under S. 10 (2). (Vol 25) 1938 Lah 796 (798) : I L R (1938) Lah 38 : 40 Cri L Jour 543 (DB). (Pardon tendered by



Section 337 — Note 2 (*contd.*)

such Additional District Magistrate without sanction of District Magistrate is not invalid—Dissenting from (Vol 23) 1936 Lah 353 : 16 Lah 594 : 37 Cri L Jour 515 (DB.)

[3] Absence of written sanction of District Magistrate is irregularity not sufficient under S. 529 to vitiate proceedings obtained in good faith. ('08) 8 Cri L Jour 445 (450, 451) (DB) (All).

[4] Pardon under this section is tendered as a judicial act. (Vol 25) 1938 P C 266 (270) : I L R (1938) Lah 628 : 65 Ind App 388 : 32 Sind L R 937 : 40 Cr L Jour 360 (P C).

[5] Magistrate empowered to exercise tender of pardon cannot delegate it to police-officer or to subordinate Magistrate. ('72-92) 1872-92 Low Bur Rul 246 (248, 250) \* ('66) 6 Suth W R Cri L 5 (5).

[6] Magistrate having no jurisdiction tenders pardon—Pardon is illegal and defect cannot be cured under S. 529—Accused person can be tried and convicted along with other accused. ('98) 20 All 40 (41, 42) (D B).

[7] Person to whom illegal pardon is tendered cannot be examined as witness and if he has been examined, his evidence is inadmissible. ('72-92) 1872-92 Low Bur Rul 246 (248, 250).

[8] Special Magistrate appointed under S. 24 of Bengal Suppression of Terrorist Outrages Act (12 [XII] of 1932) can tender pardon under this section. (Vol 28) 1936 Cal 356 (361, 363, 364) : 37 Cri L Jour 758 : ILR (1937) 1 Cal 711 (F B). (Per Full Bench—But the Special Magistrate must try the accused himself instead of committing him to the session—Mukerji J., *contra.*)

3. Power of Provincial Government to tender conditional pardon. — [1] Conditional pardon can be tendered only by Magistrate and Courts specified in Ss. 337 and 338. ('06) 4 Cri L Jour 145 (148) : 33 Cal 1353 (D B) \* ('06) 4 Cri L Jour 44 (45) (D B) (Cal). (Evidence of accused taken under conditional pardon so offered is wholly inadmissible.)

[2] Fact that Magistrate in tendering pardon did so after consulting Provincial Government and with its authority, cannot affect position of accused or approver. (Vol 25) 1938 P C 266 (269) : I L R (1938) Lah 628 : 65 Ind App 388 : 32 Sind L R 937 : 40 Cri L Jour 360 (P C). (Overruling (Vol 33) 1936 Lah 353 : 16 Lah 594 : 37 Cri L Jour 515) (D B).

4. Offences in respect of which pardon may be tendered. — [1] Jurisdiction to tender pardon to accomplice is strictly limited to such offences as are specifically mentioned in section. (Vol 25) 1938 P C 266 (268) : I L R (1938) Lah 628 : 65 Ind App 388 : 32 Sind L R 937 : 40 Cri L Jour 360 (P C) \* (Vol 23) 1936 Cal 356 (366) : 37 Cri L Jour 758 : I L R (1937) 1 Cal 711 (F B).

[2] Jurisdiction is determined with reference to offence in respect of which investigation is being made or inquiry or trial is held, and is not affected by subsequent alteration of charge or offence or by ultimate result of investigation, inquiry or trial. (Vol 26) 1939 All 567 (571, 572) : I L R (1939) All 736 : 40 Cri L Jour 856 \* ('21) 22 Cri L Jour 676 (677) (Lah) \* (Vol 12) 1925 Sind 105 (108) : 19 Sind L R 183 : 25 Cri L Jour 1057 (D B) \* (Vol 20) 1933 Pesh 3 (4) : 34 Cri L Jour 212.

[3] Jurisdiction is not affected by fact that there are also other offences alleged or charged against accused. (Vol 2) 1915 Lah 16 (21) : 1915 Pun Re No. 17 Cr : 16 Cri L Jour 354 (D B) \* (Vol 2) 1915 Sind 43 (45) : 9 Sind L R 43 : 16 Cri L Jour 632 (D B).

[4] For validity of pardon, there should be investigation or inquiry in progress relating to offence referred to in section. (Vol 12) 1925 Nag 337 (338) : 26 Cri L Jour 1115.

[5] Words "triable exclusively by the High Court or a Court of Session" mean "shown in the second schedule as so triable." ('97) 1897 Pun Re No. 3 Cr, p. 4 (6) (DB).

5. Effect of tendering pardon in other cases. — [1] Pardon granted in respect of offence not specified in section—Person to whom pardon is granted cannot be examined on oath and his evidence is inadmissible. ('80) 2 All 260 (262) (D B).

[See however (Vol 13) 1926 All 590 (591) : 27 Cri L Jour 1103.]

[2] Person to whom pardon is granted cannot be prosecuted for giving false evidence. ('86) 10 Bom 190 (192) (D B) \* ('93-1900) 1893-1900 Low Bur Rul 51 (51).

6. Stage at which pardon can be tendered. — [1] Pardon may be granted even at the stage of investigation by police. (Vol 24) 1937 Nag 17 (20) : 38 Cri L Jour 237 & 251 : I L R (1937) Nag 315 (F B).

[2] Magistrate can tender pardon until he commits accused under sub-s. (2A) or discharges him. (Vol 19) 1932 Sind 40 (41) : 33 Cri L Jour 906 (D B) \* ('21) 22 Cri L Jour 255 (256) (Lah).

[3] Mere fact that case is adjourned on application under S. 526 does not deprive Magistrate of his power of tendering pardon. (Vol 14) 1927 All 90 (90) : 49 All 181 : 27 Cri L Jour 1369.

7. "Supposed to have been directly or indirectly concerned in, or privy to, the offence." — [1] Expression "any person supposed to have been directly or indirectly concerned in, or privy to, the offence" is wide one and is not confined to person who has been charged with offence or who has been sent up by police for trial as accused person. ('12) 13 Cri L Jour 33 (34) : 5 Sind L R-174 (D B) \* (Vol 10) 1923 Nag 248 (249) : 24 Cri L Jour 566 (D B).

[2] Person concerned in offence need not exactly know what crime is being committed in all its details. (Vol 7) 1920 Cal 980 (983) : 21 Cri L Jour 802 \* (1913) 9 Cr App Rep 232.

[3] There should be intention of assisting in commission of crime. (Vol 7) 1920 Cal 980 (983) : 21 Cri L Jour 802.

[See (Vol 33) 1946 Cal 156 (158) : I L R (1944) 2 Cal 312 (DB).]

[4] Magistrate should be satisfied that person himself took part in crime to the extent he admits and that he can give true account as to what occurred. (Vol 10) 1923 Nag 248 (250, 251) : 24 Cri L Jour 566 (DB).

[See (Vol 20) 1933 Rang 199 (200) : 34 Cri L Jour 1255 (DB) \* (Vol 11) 1924 Oudh 138 (138) : 24 Cri L Jour 799 \* ('09) 10 Cri L Jour 530 (532) (DB) (Bom).]

[5] This section does not contemplate tender of pardon to "spy". (Vol 15) 1928 Lah 193 (194, 195) : 9 Lah 550 : 29 Cri L Jour 577 \* ('95) 19 Bom 363 (370) (DB) \* ('10) 11 Cri L Jour 560 (564) : 38 Cal 96 (DB) \* ('12) 13 Cri L Jour 609 (663) (SB) (Cal) \* (Vol 15) 1928 Lah 647 (649) : 29 Cri L Jour 740.

[6] Word "supposed" does not exclude person who confesses guilt and pleads guilty to charge and is yet unconvicted but person already convicted of offence. ('85) 7 All 160 (163) (DB) \* ('95) 1895 Rat 750 (752) (DB).

8. Condition of pardon. — [1] Law requires not cramped and constrained statement by approver, but thorough and complete disclosure of all facts within his knowledge bearing upon offence or offences as to which he gives evidence. ('89) 11 All 79 (87) \* (Vol 13) 1926 Pat 279 (281, 286) : 5 Pat 171 : 27 Cri L Jour 957.

[2] It is illegal to tender pardon on condition that prisoner should profess to have been present at murder and to have personal knowledge of circumstances under which offence took place as alleged by prosecution. ('92) 1892 Rat 612 (613, 614) (DB).

Section 337—Note 8 (*contd.*)

[3] Accused warned that he would be liable to prosecution if he resiled from his previous confession.—Pardon held not conditional. (Vol 33) 1946 Mad 271 (279) : I L R (1946) Mad 389 : 47 Cri L Jour 785 (DB).

9. Procedure in tendering pardon.—[1] Person to whom pardon is to be tendered in hospital—District Magistrate need not tender it personally but may make order in writing tendering pardon. (Vol 31) 1944 Sind 184 (186) : I L R (1944) Kar 97 : 46 Cr L J 218 (DB).

10. Recording reasons for tendering pardon.—[1] Circumstances preceding grant of pardon appear on record and are sufficient grounds for Magistrate's action.—Magistrate need not formally set them out in writing. ('09) 10 Cri L Jour 32 (34) : 36 Cal 629 (DB)\* ('07) 5 Cri L Jour 142 (144) (DB) (Cal).

[2] Magistrate states in his order that to connect accused with offence of murder, it is essential to make approver in case.—There is sufficient compliance with provisions of sub-s. (1A) of this section. (Vol 25) 1938 Lah 796 (798) : I L R (1939) Lah 38 : 40 Cr L J 543 (DB).

[3] Recording of reasons is matter relating to procedure and not condition precedent to tender of pardon. ('12) 13 Cri L Jour 588 (590) (DB) (All).

[4] Omission to record reasons amounts to irregularity. (Vol 25) 1938 P C 266 (269) : I L R (1938) Lah 628 : 65 Ind App 388 : 32 Sind L R 937 : 40 Cri L Jour 360 (PC).

[5] Omission to record reasons will not vitiate trial, unless it is shown that it has occasioned failure of justice. (Vol 16) 1929 All 321 (322) : 30 Cri L Jour 1157 (DB)\* ('08) 8 Cri L Jour 445 (450, 451) (DB) (All) \* (Vol 11) 1924 Lah 90 (90) : 25 Cri L Jour 174.

11. Accepting pardon.—[1] Person expresses complete ignorance and states that he is indifferent as to whether pardon is granted or not.—He cannot be said to accept tender of pardon. (Vol 11) 1924 All 564 (564) : 26 Cri L Jour 336.

[2] Acceptance of pardon can be gathered from circumstances. (Vol 31) 1944 Sind 184 (186) : I L R (1944) Kar 97 : 46 Cri L Jour 218 (DB)\* (Vol 25) 1938 Lah 796 (798, 799) : I L R (1939) Lah 38 : 40 Cri L Jour 543 (DB).

12. Disclosure, whether should be recorded at the time of the tender of pardon.—[1] Section does not contemplate recording of statement by proposed approver before pardon is granted to him. (Vol 31) 1944 Sind 184 (185) : I L R (1944) Kar 97 : 46 Cri L Jour 218 (DB). (But statement may be recorded under S. 164 for purpose of tender of pardon.) \* (Vol 27) 1940 Nag 218 (219) : 41 Cri L Jour 433 (DB).

[2] After pardon has been granted, approver can be examined on oath under S. 164 before preliminary inquiry in committing Magistrate's Court. (Vol 31) 1944 Nag 105 (119) : I L R (1944) Nag 274 : 45 Cri L Jour 673 (FB). (13 C P L R 7, impliedly overruled.) \* (Vol 20) 1933 Lah 868 (869) : 35 Cri L Jour 111 \* (Vol 25) 1938 Lah 796 (799) : I L R (1939) Lah 38 : 40 Cri L Jour 543 (DB).

[But see (Vol 12) 1925 Rang 286 (286) : 3 Rang 224 : 26 Cri L Jour 1896 \* (Vol 9) 1922 Bom 138 (141) : 46 Bom 61 : 22 Cri L Jour 728 (DB).]

13. Effect of pardon.—[1] Pardon tendered and accepted under this section.—Prosecution need not be withdrawn. (Vol 23) 1936 Lah 353 (354) : 16 Lah 594 : 37 Cri L Jour 515 (DB).

[2] Pardon tendered under this section refers to offence in respect of which it is tendered and extends to all such offences in connection with same matter as approver has necessarily to disclose in making full and true disclosure of all circumstances relating to such offence. (Vol 8) 1921 All 234 (234) : 22 Cri L Jour 699.

[See however (Vol 11) 1924 All 220 (222) : 46 All

236 : 25 Cri L Jour 956 (FB) \* ('37) 38 Cri L Jour 84 (86) (DB) (Lah).]

[3] Magistrate cannot withdraw pardon. (Vol 31) 1944 Sind 184 (185, 186) : I L R (1944) Kar 97 : 46 Cri L Jour 218 (DB).

14. Examination of approver as witness—Sub-section (2).—[1] Approver resiled from his former position and broke condition of his pardon.—He must be examined in Sessions Court. (Vol 18) 1931 Lah 102 (102) : 32 Cri L Jour 1126 (DB) \* (Vol 17) 1930 Lah 95 (96) : 11 Lah 230 : 31 Cri L Jour 111 (DB)\* (Vol 27) 1940 Sind 114 (116, 117) : 41 Cri L Jour 747 (DB).

[But see (Vol 21) 1934 Cal 636 (638, 639) : 61 Cal 399 : 35 Cri L Jour 1479 (DB).]

15. Evidence of an accomplice—Credibility of.—[1] See Evidence Act, Ss. 113 and 114.

[2] Presumption that accomplice is unworthy of credit, unless corroborated in material particulars is a rule of practice of universal application. (Vol 32) 1945 Sind 132 (140) : 47 Cri L Jour 159 : I L R (1944) Kar 456 (DB)\* (Vol 30) 1943 Mad 278 (279) : 44 Cri L Jour 482 \* (Vol 30) 1943 Pat 146 (149) : 22 Pat 27 : 44 Cri L Jour 494 (DB) \* (Vol 26) 1939 All 567 (571) : 40 Cri L Jour 856 : I L R (1939) All 736 \* (Vol 25) 1938 Rang 177 (178) : 39 Cri L Jour 581 : 1938 Rang L R 190 (FB) \* (Vol 24) 1937 Cal 433 (444) : 38 Cri L Jour 852 (SB)\* (Vol 23) 1936 P C 242 (246) : 37 Cri L Jour 914 (PC)\* ('36) 37 Cri L Jour 999 (1002) (FB) (Cal).

[3] Utmost caution is necessary in considering weight to be attached to evidence of accomplice. (Vol 16) 1929 P C 15 (18) (PC).

[4] Judge must warn jury of danger of convicting accused person on strength of accomplice's evidence. ('36) 37 Cri L Jour 999 (1002, 1003) (FB) (Cal)\* (1925) 133 L T 736 (738)\* ('12) 13 Cri L Jour 305 (314) : 35 Mad 247 (DB) \* (Vol 15) 1928 Oudh 207 (208) : 29 Cri L Jour 311 \* (Vol 15) 1928 Pat 630 (631) : 3 Pat 235 : 30 Cri L Jour 137 (DB).

[5] Accomplice need not be corroborated regarding every portion of his statement and in all its details. (Vol 28) 1941 Oudh 130 (138) : 42 Cri L Jour 165 (DB)\* (Vol 26) 1939 All 567 (571) : 40 Cri L Jour 856 : I L R (1939) All 736 \* ('13) 41 Cri L Jour 225 (229) (DB) (Bom)\* (Vol 12) 1925 Cal 872 (874) : 52 Cal 595 : 26 Cri L Jour 1037 \* ('12) 13 Cri L Jour 305 (315) : 35 Mad 247 (DB)\* ('92-96) 1 Upp Bur Rul 148 (152).

[6] In determining weight to be attached to evidence of accomplice and amount of corroboration required in each particular case, Court must consider all surrounding circumstances including character and antecedents of accomplice, extent of his complicity in crime and circumstances under which his evidence is tendered. (Vol 30) 1943 Lah 5 (6) : 44 Cri L Jour 62 \* (Vol 20) 1933 Pat 96 (99) : 34 Cri L Jour 421 (DB)\* ('87) 9 All 528 (554) (SB) \* (Vol 20) 1933 Bom 24 (25) : 34 Cri L Jour 136 (DB)\* (Vol 16) 1929 Bom 296 (302) : 53 Bom 479 : 31 Cri L Jour 65 (DB)\* ('79) 4 Cal 433 (490, 496) (FB)\* (Vol 20) 1933 Cal 148 (149) : 34 Cri L Jour 675 (DB)\* (Vol 20) 1933 Lah 871 (875) : 35 Cri L Jour 137 \* ('12) 13 Cri L Jour 305 (314, 315) : 35 Mad 247 (DB)\* ('13) 14 Cri L Jour 207 (207) (DB) (Mad)\* (Vol 16) 1929 Nag 215 (217) : 30 Cri L Jour 311 \* (Vol 17) 1930 Nag 97 (104) : 31 Cri L Jour 153 (DB)\* (Vol 19) 1932 Oudh 11 (15, 16) : 33 Cri L Jour 287 (DB)\* (Vol 15) 1928 Pat 630 (631) : 8 Pat 235 : 30 Cri L Jour 137 (DB) \* ('97-1901) 1 Upp Bur Rul 173 (174) \* (Vol 18) 1931 Rang 235 (242) : 9 Rang 404 : 33 Cri L Jour 205 (SB)\* (Vol 1) 1914 Sind 117 (118) : 8 Sind L R 203 : 16 Cri L Jour 233 (DB)\* (Vol 12) 1925 Sind 295 (295) : 19 Sind L R 111 : 26 Cri L Jour 1028 (DB).

[7] While dealing with evidence of corroboration Court must deal with it as whole. (Vol 30) 1943 Pat 146 (151) : 22 Pat 27 : 44 Cri L Jour 494 (DB).

Section 337—Note 15 (*contd.*)

[8] Evidence in corroboration should be satisfactory and reliable and should be derived from independent and unimpeachable sources or circumstances. (Vol 23) 1936 Lah 400 (401) : 17 Lah 518 : 37 Cri L Jour 597 (DB) \* (04) 1 Cri L Jour 568 (371) (DB) (Bom) \* (10) 11 Cri L Jour 554 (555) : 13 Oudh Cas 243 (DB) \* (11) 13 Cri L Jour 424 (425, 426) : 1 Upp Bur Rul 3rd Qr 96 \* (79) 4 Cal 483 (490, 494) (FB) \* (Vol 12) 1925 Oudh 295 (298) : 25 Cri L Jour 391 (DB) \* (Vol 19) 1932 Sind 100 (103) : 33 Cri L Jour 324 (DB) \* (Vol 13) 1926 Cal 374 (376) : 26 Cri L Jour 1146 (DB) \* (Vol 18) 1931 Pat 105 (119) : 32 Cri L Jour 383 (DB) \* (Vol 8) 1921 Pat 406 (407) (DB) \* (Vol 21) 1934 Lah 23 (24) : 35 Cri L Jour 352 (DB).

[9] Evidence in corroboration must not merely consist of statements or evidence of other accomplices. (Vol 31) 1944 Lah 472 (473) : I L R (1944) Lah 463 : 46 Cri L Jour 152 (DB) \* (Vol 30) 1943 Pat 146 (150) : 22 Pat 27 : 44 Cri L Jour 494 (DB) \* (Vol 24) 1937 Cal 433 (445) : 38 Cri L Jour 852 (SB) \* (Vol 23) 1936 P C 242 (246) : 37 Cri L Jour 914 (PC).

[But see (Vol 22) 1935 Rang 491 (494) : 37 Cri L Jour 280.]

[10] Evidence in corroboration must not merely consist of statements or confessions of co-accused. (Vol 31) 1944 Lah 472 (473) : I L R (1944) Lah 463 : 46 Cri L Jour 152 (DB) \* (Vol 20) 1933 All 31 (36) : 55 All 91 : 34 Cri L Jour 489 (DB) \* (13) 14 Cri L Jour 112 (113) (All) \* (Vol 19) 1932 Lah 298 (300) : 33 Cri L Jour 251 \* (02) 25 Mad 143 (148) (DB) \* (Vol 12) 1925 Nag 78 (80) : 25 Cri L Jour 1067 (DB) \* (Vol 11) 1924 Oudh 369 (371) : 25 Cri L Jour 1207 (DB) \* (Vol 20) 1933 Oudh 355 (360) : 9 Luck 22 : 35 Cri L Jour 273 (DB) \* (Vol 1) 1914 Bom 305 (311) : 14 Cri L Jour 625 : 38 Bom 156 (DB).

[See however (07) 5 Cri L Jour 360 (375) : 29 All 434 (DB).]

[But see (Vol 24) 1937 Rang 116 (116) : 38 Cri L Jour 705.]

[11] Under circumstances of particular case, evidence of one accomplice can be used to corroborate that of another. (Vol 31) 1944 Mad 503 (503) : 46 Cri L Jour 377 \* (Vol 10) 1923 Lah 666 (667) : 25 Cri L Jour 520 \* (Vol 20) 1933 Rang 57 (58) : 11 Rang 4 : 34 Cri L Jour 286 (DB) \* (97-01) 1 Upp Bur Rul 173 (174) \* (Vol 22) 1935 Cal 513 (517) : 62 Cal 238 : 36 Cri L Jour 1115 (SB) \* (Vol 25) 1938 Rang 177 (179) : 39 Cri L Jour 581 : 1938 Rang L R 190 (FB). (Overruling dicta to the contrary in (Vol 18) 1931 Rang 235 : 9 Rang 404 : 33 Cri L Jour 205 (SB) and (Vol 24) 1937 Rang 209 : 38 Cri L Jour 785 (DB).)

[12] It is not enough if corroborative evidence is of vague or general nature and relates merely to circumstances of occurrence or to details of crime: *See* (Vol 14) 1927 Lah 581 (590) : 28 Cri L Jour 625 (SB) \* (Vol 4) 1917 Lah 317 (319) : 18 Cri L Jour 696 (DB).

[13] Corroborative evidence should refer and relate distinctly to complicity of accused in crime and also to identity of each of the accused. (Vol 32) 1945 Sind 132 (140) : ILR (1944) Kar 456 : 47 Cri L Jour 159 (DB) \* (Vol 24) 1937 Cal 433 (437, 445) : 38 Cri L Jour 852 (SB) \* (Vol 23) 1936 P C 242 (246) : 37 Cri L Jour 914 (PC).

[14] Corroboration may be provided by circumstantial evidence. (Vol 33) 1946 Cal 156 (158) : ILR (1944) 2 Cal 312 : 47 Cri L Jour 695 (DB) \* (Vol 32) 1945 Sind 132 (140) : I L R (1944) Kar 456 : 47 Cri L Jour 159 (DB) \* (Vol 30) 1943 Lah 5 (7) : 44 Cri L Jour 62 \* (Vol 22) 1935 All 132 (133, 134) : 36 Cri L Jour 617 \* (Vol 20) 1933 Lah 294 (296) : 35 Cri L Jour 641 \* (Vol 9) 1922 Nag 172 (173) : 23 Cri L Jour 391 \* (Vol 16) 1929 Oudh 321 (326) : 30 Cri L Jour 922 \* (Vol 17) 1930 Oudh 455 (459) : 32 Cri L Jour 162 (DB) \* (Vol

20) 1933 Bom 482 (483) : 58 Bom 40 : 35 Cri L Jour 317 (DB).

[15] Circumstantial evidence should lead to inference of guilt and be inconsistent with theory about innocence of accused. (Vol 30) 1943 Lah 5 (S) : 44 Cri L Jour 62 \* (Vol 19) 1932 Oudh 251 (253) : 32 Cri L Jour 1184 : 6 Luck 658.

*See the following cases illustrating the proposition :* (Vol 18) 1931 Cal 697 (702) : 33 Cri L Jour 19 (SB) \* (Vol 19) 1932 Lah 621 (622, 623) : 33 Cri L Jour 916 : 14 Lah 411 (DB) \* (Vol 18) 1931 Mad 689 (691, 694, 696) : 54 Mad 931 : 33 Cri L Jour 51 (DB) \* (Vol 17) 1930 Oudh 353 (356) : 31 Cri L Jour 1210 (DB).

[16] Irregularities in matters of procedure in recording statements of approver cannot take away value of his evidence when it is found that it is supported by other reliable evidence. (Vol 24) 1937 Cal 99 (120) : 38 Cri L Jour 818 (SB).

[17] Verification proceedings are not illegal and may afford some test of truth of approver's statement. (Vol 28) 1941 Oudh 130 (144) : 42 Cri L Jour 165 (DB).

16. Commitment of accused. — [1] Under sub-s. (2 A) Magistrate cannot try case himself even if he is otherwise competent to do so. (43) 44 Cri L Jour 279 (279) (Oudh) \* (Vol 19) 1932 All 581 (582) : 33 Cri L Jour 802 \* (Vol 22) 1935 Bom 70 (71) : 36 Cri L Jour 499 (DB). (In sub-s. (2 A) "accused" does not include approver.) \* (Vol 16) 1929 Oudh 190 (192) : 4 Luck 679 : 30 Cri L Jour 567 (DB) \* (Vol 12) 1925 Rang 207 (207) : 26 Cri L Jour 829 \* (Vol 12) 1925 Nag 119 (119) : 25 Cri L Jour 1341. (Sub-section (2 A) governs S. 30, Cri. P. C.) \* (Vol 20) 1933 Pesh 3 (4) : 34 Cri L Jour 212 \* (Vol 12) 1925 Lah 378 (378) : 26 Cr L J 549.

[2] Under sub-s. (2 A) case cannot be tried by another Magistrate though he may be vested with power under S. 30 to try it. (Vol 25) 1938 P C 266 (270) : I L R (1938) Lah 628 : 65 Ind App 388 : 32 Sind L R 937 : 40 Cri L Jour 360 (PC).

[See however (Vol 31) 1944 Mad 503 (503) : 46 Cri L Jour 377 \* (Vol 23) 1936 Cal 356 (361, 362) : 37 Cri L Jour 758 : ILR (1937) 1 Cal 711 (FB). (Per Full Bench — Mukerji J., *contra.*) \* (Vol 22) 1935 Cal 281 (282) : 36 Cri L Jour 884 (DB).]

[3] Right to trial by Sessions Court or High Court conferred by sub-s. (2 A) is not dependent upon nature of evidence given by person who has accepted pardon. (Vol 29) 1942 Sind 100 (101) : I L R (1942) Kar 69 : 43 Cri L Jour 707 (DB).

[4] Sub-section does not authorise joint commitment of approver along with other accused. (43) 44 Cri L Jour 279 (279) (Oudh).

17. Detention of approver in custody — Sub-section (3). — [1] If person to whom pardon is tendered is not already on bail, he has to be detained in judicial custody until termination of trial and cannot be released on bail under provisions of Ss. 497 and 498. (1900) 13 C P L R Cr 7 (8) \* (Vol 19) 1932 Sind 40 (41) : 33 Cri L Jour 906 (DB) \* (Vol 14) 1927 Sind 173 (173, 174) : 28 Cri L Jour 439 (DB).

[2] Custody contemplated is judicial custody and not custody of police. (Vol 30) 1943 All 93 (95) : I L R (1943) All 289 : 44 Cri L Jour 327. (Detention in police custody is illegal.) \* (Vol 19) 1932 Sind 40 (42) : 33 Cri L Jour 906 (DB) \* (Vol 18) 1931 Lah 476 (478, 479) : 12 Lah 635 : 32 Cri L Jour 913 (DB) \* (Vol 18) 1931 Lah 480 (480) : 33 Cri L Jour 162 (DB).

[3] Approver should be detained in judicial custody until proceedings are terminated by magisterial order of discharge or until after termination of sessions trial. (12) 13 Cri L Jour 842 (843, 844) : 37 Bom 146 (DB).

[4] Detention of approver can only be ordered till termination of trial. (Vol 22) 1935 Cal 545 (545, 546) : 62 Cal 430 : 36 Cri L Jour 1303 (DB).

**338.** At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

[1882 — S. 338; 1872 — S. 348; 1861 — S. 219.]

**339.** (1) Where a pardon has been tendered under section 337 or section 338, and <sup>a</sup>[the Public Prosecutor certifies that in his opinion] any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made <sup>b</sup>[such person may be] tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter :

<sup>a</sup>[Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.]

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him <sup>c</sup>[at such trial].

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

[1882 — S. 339; 1872 — S. 349; 1861 — S. 211.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 87.

[b] Substituted, *ibid.*, for "he may be". [c] Substituted, *ibid.*, for "when the pardon has been forfeited under this section."

#### Objects and Reasons.

*Amendments of 1923.*— We accept Clause 86 [of the Bill] so far as it goes except that we would substitute a certificate by the Public Prosecutor for an allegation by the prosecution as the basis of the prosecution of a person who has accepted a tender of pardon. We consider, however, that it is desirable to lay down some procedure with regard to the plea contemplated by the proviso to sub-section (1). The Bill contains no indication as to when this plea is to be raised and what is to be the effect of it, and difficulties of procedure may obviously arise with reference to Sections 255, 271 (2)

and 272. We, therefore, propose a new Section to be added after Section 339, which lays down that when a person to whom a pardon is tendered is being tried under that Section, he shall, at the commencement of the proceedings, be asked whether he raises the plea that he has complied with the conditions on which the pardon was granted, and, if he does so plead, the Court shall record a finding on the point and, if it finds that the conditions have been complied with, shall acquit the accused. This provision we have inserted as a new Clause 86-A in the Bill." [See now S. 339A].—S. C. R. [XVIII of 1923.]

#### Section 338 — Note 1

[1] The Sessions Judge should not exercise power to tender pardon after taking evidence for the prosecution and the defence and the opinion of the assessors. ('84) 1884 All W N 147 (148) (DB).

[2] Where the tender of pardon made by the Magistrate is found to be invalid, the Sessions Judge may make a valid tender of pardon under this section. ('82) 1882 All W N 241 (241).

[3] An Assistant Sessions Judge when presiding over a Court of Session has power under this section to tender pardon. (Vol 32) 1945 Cal 42 (44) : I L R (1944) 1 Cal 280 : 46 Cri L Jour 557 (DB).

#### SECTION 339 — SYNOPSIS.

1. The certificate of the Public Prosecutor.
2. "Any person who has accepted such tender."
3. Non-compliance with the conditions.
4. "Wilfully concealing anything essential."
5. Effect of pardon.
6. Procedure at the trial—Joint trial.
7. Use of statements made by the approver—Sub-section (2).
8. Prosecution for perjury — Sanction of the High Court.

1. The certificate of the Public Prosecutor. —
- [1] The certificate of the Public Prosecutor is the sole

basis for the prosecution of the approver for the original offence. (Vol 12) 1925 Bom 135 (136, 137) : 26 Cri L Jour 469 (DB) \* (Vol 12) 1925 Lah 15 (15) : 5 Lah 379 : 26 Cri L Jour 237 (DB) \* ('26) 27 Cri L Jour 940 (941) (DB) (Lah).

[2] The Sessions Judge has no power to order the prosecution of the approver *suo motu*. (Vol 12) 1925 Bom 135 (136, 137) : 26 Cri L Jour 469 (DB).

[3] Absence of public prosecutor's certificate is not fatal to the commitment of an approver as such certificate can be filed before the trial commences in the Sessions Court. (Vol 22) 1935 Oudh 116 (116, 117) : 10 Luck 537 : 36 Cri L Jour 377 (DB) \* (Vol 12) 1925 Rang 219 (220, 221) : 3 Rang 55 : 27 Cri L Jour 254 (DB).

[4] A certificate cannot be said to be defective if it does not mention particulars of forfeiture of pardon. (Vol 23) 1936 Lah 409 (411) : 37 Cri L Jour 732 (DB).

[5] The public prosecutor who conducted the case in which pardon was granted need not hold that position on the date of granting that certificate. (Vol 23) 1936 Lah 409 (410) : 37 Cri L Jour 732 (DB).

[6] Assistant Public Prosecutor conducted the case — Certificate for prosecution of approver was granted by Public Prosecutor — Held the certificate was not without jurisdiction. (Vol 27) 1940 Sind 114 (116) : 42 Cri L Jour 747 (DB).

section 339 — Note 1 (*contd.*)

[7] Public prosecutor's agreeing with the Magistrate not alone sufficient for prosecution of approver for original offence — His certificate is necessary. (Vol 34) 147 All 71 (72) : 48 Cri L Jour 199 (DB).

2. "Any person who has accepted such tender." — [1] It should first be proved that the approver accepted the conditions of the pardon. ('69) 12 Suth R Cr 80 (81) ✕ (Vol 11) 1924 All 564 (564) : 26 Cri Jour 336.

[2] It should be proved that the approver accepted the tender of pardon on a full understanding of conditions. ('93-1900) 1893-1900 Low Bur Rul 7 (8).

[3] An approver resiling from acceptance of pardon and wanting to be tried for clearing his character may be tried jointly with the other accused. (Vol 11) 1924 ad 391 (391, 392) : 25 Cri L Jour 210 (DB).

3. Non-compliance with the conditions. — [1] Before trying the approver for the original offence the court should consider whether the approver has failed to comply with the conditions of pardon. ('01) 25 Bom 5 (879, 680) (DB) ✕ (Vol 9) 1922 Sind 31 (32) : 16 Ind L R 131 : 23 Cri L Jour 611 ✕ (Vol 6) 1919 Lah 9 (450) : 1918 Pun Re No. 24 Cr : 19 Cri L Jour 926 (Vol 4) 1917 All 316 (317) : 39 All 305 : 18 Cri L Jour 444.

[2] The prosecution must establish that the approver has failed to comply with the conditions of the pardon. (Vol 27) 1940 Nag 77 (77) : 40 Cri L Jour 956 : I L R 940 Nag 668 (I.B) ✕ (Vol 22) 1935 Lah 799 (800) : Cri L Jour 79 ✕ ('80) 1930 Mad W N 773 (775) (DB). (By wilfully giving false evidence.) ✕ ('13) 14 Cri Jour 401 (403) : 7 Low Bur Rul 1. (Do.) ✕ (Vol 2) 15 Cal 397 (398) : 42 Cal 756 : 16 Cri L Jour 120 (DB). (Do.) ✕ ('26) 27 Cri L Jour 77 (78) (DB) (Lah). (Do.)

[3] The following do not show that the condition of pardon has not been complied with :

(a) Acquittal of the accused tried. ('95) 1895 Pun Re No. 15 Cr. p. 47 (49) (DB).

(b) The Sessions Judge or Magistrate opines that the approver is not telling the truth. ('70) 14 Suth W R Cr (10) (DB).

(c) Improbability of the facts deposed to. ('01) 3 Bom R 489 (502, 503) (DB).

(d) Discrepancies were found from approver's cross-examination. ('02) 1902 Pun Re No. 34 Cr. p. 88 (93) ('26) 27 Cri L Jour 768 (768) (DB) (Oudh).

[See however ('26) 27 Cri L Jour 77 (78, 79) (Lah). Wilful introduction of discrepancies.]

(e) Inconsistencies in approver's evidence on material points. ('80) 12 Cal L Rep 226 (229) (DB) ✕ (Vol 22) 1935 Lah 799 (800) : 37 Cri L Jour 79.

[4] Absolutely inconsistent statement with one made the time of tender of pardon is enough to institute proceedings—Actual examination of both before Magistrate and Sessions Court not necessary. (Vol 15) 1928 ad 320 (323) : 9 Lah 608 : 29 Cri L Jour 413 (DB). [But see (Vol 27) 1940 Sind 114 (116) : 41 Cri L Jour 747 (DB).]

[5] Approver's evidence in Sessions trial not in compliance with conditions of pardon — His evidence before committing Magistrate was in accordance with those conditions—*Held*, this does not save the approver from his liability to prosecution under this section. (Vol 2) 15 Nag 92 (93, 94) : 11 Nag L R 59 : 16 Cri L Jour 7 ✕ ('10) 11 Cri L Jour 254 (254, 255) : 33 Mad 514 (B).

[6] Approver's evidence in Sessions trial was in compliance with conditions of pardon—His giving false evidence before the committing Magistrate is not non-compliance with the conditions of pardon. (Vol 27) 140 Sind 114 (117) : 41 Cri L Jour 747 (DB).

4. "Wilfully concealing anything essential." — [1] The prosecution has to establish that certain essential facts within the knowledge of the approver had wilfully been concealed by him. ('03) 3 Bom L R 489 (502) (DB).

2. Mere absconding does not amount to wilful concealment by approver. (Vol 3) 1916 Low Bur 111 (112) : 8 Low Bur Rul 337 : 17 Cri L Jour 391.

3. The approver is not bound to make any disclosure relative to any offence, which was not being inquired into at the time. (Vol 6) 1919 Lah 449 (150) : 1918 Pun Re No. 24 Cr : 19 Cri L Jour 926.

5. Effect of pardon. — 1. Pardon granted to a person on condition that he would make complete disclosure of circumstances known to him — *Held*, complete faith should be kept with him. ('02) 1902 Pun Re No. 34 Cr. p. 88 (93) ✕ ('30) 1930 Mad W N 773 (775) (DB).

2. Pardon granted—Person discloses his complicity in other offences — Institution of proceedings for these offences, held, improper. (Vol 13) 1926 Pat 279 (281, 286) : 5 Pat 171 : 27 Cri L Jour 957 (DB).

6. Procedure at the trial—Joint trial. — [1] The approver should not be tried jointly with the other accused. ('37) 1937 Mad W N 879 (880) ✕ (Vol 13) 1931 Oudh 113 (114, 115) : 32 Cri L Jour 91 : 6 Luck 386 (D B) ✕ (Vol 23) 1935 Oudh 226 (228) : 35 Cri L Jour 889.

[2] The Crown may re-arrest the approver after his release and proceed against him for the offence in respect of which he was granted a conditional pardon if so advised. ('06) 4 Cri L Jour 346 (354) : 30 Bom 611 (D B) ✕ ('10) 11 Cri L Jour 702 (703, 704) : 37 Cal 845 (D B) ✕ (Vol 9) 1922 Sind 31 (32) : 16 Sind L R 131 : 23 Cri L Jour 611 ✕ ('99) 23 Bom 493 (494) (D B) ✕ ('09) 10 Cri L Jour 418 (419) : 5 Nag L R 134.

[3] Person accepting conditional pardon subsequently proceeded against—He can plead that the pardon was not forfeited—The issue is to be decided in trial. (Vol 2) 1915 Cal 397 (398) : 42 Cal 756 : 16 Cri L Jour 120 (D B).

[4] Prosecution of person forfeiting pardon under specific charge cannot be directed by Sessions Judge—He can only invite District Magistrate's attention—Plea of pardon can be raised before Sessions Judge—(Vol 2) 1915 All 245 (246, 247) : 37 All 331 : 16 Cri L Jour 483 (D B).

[See However (Vol 7) 1920 Lah 376 (376) : 1 Lah 218 : 21 Cri L J 518.]

[5] Statements made before the Magistrate to be admissible should have been made after the offer and acceptance of pardon by the approver. (Vol 30) 1943 Sind 166 (169, 170) : I L R (1943) Kar 285 : 45 Cri L Jour 118 (DB) ✕ (Vol 27) 1940 Nag 218 (221) : 41 Cri L Jour 433 : I L R (1941) Nag 372 (D B).

7. Use of statements made by the approver—Sub-section (2)—[1] The admissibility of a statement by approver is not affected by S. 24 of the Evidence Act. ('82) 8 Cal 560 (568) (D B) ✕ ('08) 8 Cri L Jour 445 (451) (D B) (All) ✕ (Vol 2) 1915 Nag 92 (95) : 16 Cri L Jour 417 : 11 Nag L R 59 ✕ (Vol 7) 1920 Bom 270 (279, 280) : 22 Cri L Jour 68 (F B) ✕ (Vol 20) 1933 Lah 910 (913) : 35 Cri L Jour 168 (D B).

[2] Section 399 (2) operates as an exception to S. 24 of the Evidence Act in respect of statements which have been induced by a promise of pardon. (Vol 15) 1928 Lah 320 (323) : 29 Cri L Jour 413 : 9 Lah 608 (D B) ✕ (Vol 23) 1936 Lah 409 (415) : 37 Cri L Jour 732 (D B).

[3] Before a statement of the approver is used in the trial against him it should be properly proved and he should be asked if he desires to offer any explanations thereon. (Vol 12) 1925 Nag 172 (173) : 25 Cri L Jour 1355 (D B).

*Procedure in trial of person under section 339.*

339A. (1. The Court trying under section 339 a person who has accepted a tender of pardon shall—

(a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, sub-section (1), and

(b) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case find whether or not the accused has complied with the con.

#### Section 339 — Note 7 (contd.)

[4] Sub-section (2) applies to statements made by the approver before the inquiry in the committing Magistrate's Court. (Vol 31) 1944 Nag 105 (120) : I L R (1944) Nag 274 : 45 Cri L Jour 673 (F B). (13 C P L B 7 impliedly overruled.) \* (Vol 27) 1940 Nag 218 (221) : I L R (1941) Nag 372 : 41 Cri L Jour 433 (D B) \* (Vol 12) 1925 Nag 172 (173) : 25 Cri L Jour 1355 (D B) \* (Vol 15) 1928 Lah 320 (322) : 9 Lah 608 : 29 Cri L Jour 413 (D B).

[But see (Vol 9) 1922 Bom 138 (141) : 46 Bom 61 : 22 Cri L Jour 728 (D B).]

[6] Examination of approver as a witness before any statements made by him are used in evidence against him is not necessary. ('06) 3 Cri L Jour 55 (67, 68, 69) : 1905 Pun Re No. 41 Cr (F B) \* ('08) 7 Cri L Jour 245 (249) : 1907-09 Upp Bur Rul Cr P C 7.

[But see ('09) 8 Cri L Jour 153 (153) : 31 Mad 272 (D B).]

[7] Statements, if retracted, should be corroborated by extrinsic evidence before convicting the approver thereon. (Vol 30) 1943 Sind 166 (170) : I L R (1943) Kar 285 : 45 Cri L Jour 118 (D B) \* (Vol 21) 1934 Pesh 46 (46, 47) : 35 Cri L Jour 1242 (D B) \* (Vol 2) 1915 Lah 307 (307, 308) : 16 Cri L Jour 815 (D B) \* (Vol 17) 1930 Nag 259 (260) : 31 Cri L Jour 661 (D B).

[But see (Vol 25) 1938 Lah 135 (135) : 39 Cri L Jour 335 (D B).]

[8] The statement can be used against the approver in an inquiry into the offence of perjury against him. ('12) 13 Cri L Jour 33 (35) : 5 Sind L R 174 (D B).

[9] Statement made by approver can be used in a civil suit for damages brought against him by the complainant. ('09) 4 Ind Cas 523 (526) (Cal).

8. Prosecution for perjury—Sanction of the High Court. — [1] If sanction of High Court for prosecuting for perjury is not obtained before the institution of the proceedings, the defect affects the jurisdiction of the Court and cannot be cured under S. 537. ('84) 1884 Pun Re No. 42 Cr, p. 92 (96) (D B) \* ('04) 1 Cri L Jour 1021 (1021, 1022) : 2 Low Bur Rul 302 (D B) \* (1900) 27 Cal 137 (139) (D B) \* ('86) 10 Bom 190 (193) (D B).

[2] The application for sanction to prosecute the approver should be made on behalf of the Crown by a regular application to the High Court and a letter of reference by the Sessions Judge is not sufficient. ('08) 9 Cri L Jour 283 (284) : 32 Mad 47 (D B) \* ('93) 1893 All W N 13 (13, 14) \* ('97) 24 Cal 492 (493) (D B) \* ('04) 1 Cri L Jour 793 (793) : 1904 Pun Re No. 10 Cr \* ('12) 13 Cri L Jour 451 (451) (Lah) \* (Vol 16) 1929 Oudh 527 (527) : 5 Luck 452 : 31 Cri L Jour 204.

[3] The High Court is not bound to accord sanction in every case that is brought to its notice under sub-s. (3) of this section but has a discretion in the matter. (Vol 24) 1937 Lah 551 (551) : 39 Cri L Jour 1079. (Discretion must be used with extreme caution.)

\* (Vol 21) 1934 All 43 (45) : 56 All 288 : 35 Cri L Jour 441.

[4] The mere fact that the approver makes two inconsistent statements cannot be a justification for directing his prosecution. (Vol 24) 1937 Lah 551 (552) : 38 Cri L Jour 1079 \* (Vol 21) 1934 All 43 (45) : 56 All 288 : 35 Cri L Jour 444 \* ('14) 15 Cri L Jour 76 (77) (D B) (All) \* (Vol 12) 1925 Rang 286 (286) : 3 Rang 224 : 26 Cri L Jour 1396.

[But see (Vol 20) 1933 Lah 868 (869) : 35 Cri L Jour 111.]

[5] The High Court should decide whether the previous statement or confession was true and voluntary. (Vol 24) 1937 Lah 551 (552) : 38 Cri L Jour 1079 \* (Vol 21) 1934 All 43 (45) : 56 All 288 : 35 Cri L Jour 444.

[6] High Court opining previous statement of approver, and not the latter, to be true — Sanction to prosecute is expedient. (Vol 21) 1934 All 43 (45) : 56 All 288 : 35 Cri L Jour 444 \* (Vol 11) 1924 Lah 90 (91) : 25 Cri L Jour 174.

[7] Latter statement of approver found true — Previous statement inferred to be obtained by threat — Sanction to prosecute is undesirable. (Vol 24) 1937 Lah 551 (552) : 38 Cri L Jour 1079 \* (Vol 21) 1934 All 43 (45) : 56 All 288 : 35 Cri L Jour 444 \* (Vol 19) 1932 Lah 307 (308) : 33 Cri L Jour 485.

[8] Where the approver is induced to make certain statements in connexion with a capital charge, the High Court can allow him every possible *locus poenitentiae* in respect of such a statement. ('14) 15 Cri L Jour 76 (77) (D B) (All) \* (Vol 11) 1924 Lah 90 (91) : 25 Cri L Jour 174.

[9] Where the approver is proceeded against for the original offence itself his prosecution for perjury is improper. (Vol 19) 1932 Lah 307 (308) : 33 Cri L Jour 485.

[See however (Vol 14) 1927 Nag 189 (191) : 23 Nag L R 35 : 28 Cri L Jour 645. (Conviction or even if convicted proper sentence unlikely—High Court can sanction.)]

[10] Prosecution for perjury can be instituted only under Ss. 195 and 476, though sanction of the High Court is obtained. (Vol 14) 1927 Nag 189 (192) : 23 Nag L R 35 : 28 Cri L Jour 645.

[11] Approver's examination in the case is not necessary for granting sanction to prosecute under sub-s. (3). ('13) 14 Cri L Jour 64 (64) (Lah) \* ('05) 3 Cri L Jour 55 (58) : 1905 Pun Re No. 41 Cr (F B).

#### Section 339A — Note 1

[1] The procedure laid down under this section should be strictly followed. (Vol 16) 1929 Oudh 256 (256) : 30 Cri L Jour 559 (D B) \* (Vol 12) 1925 Lah 15 (15, 16) : 5 Lah 379 : 26 Cri L Jour 237 (D B).

[2] The Court should tell the accused that he is entitled to plead compliance with the conditions of the pardon. (Vol 27) 1940 Nag 77 (77) : 40 Cri L Jour 956 :

tions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.]

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 88.

#### Objects and Reasons.

(See under section 330.)

*Right of person against whom proceedings are instituted to be defended and his competency to a witness.*

<sup>3</sup>[340. (1) Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

(2) Any person against whom proceedings are instituted in any such Court under section 107, under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under section 532, may offer himself as a witness in such proceedings.]

[1882—S. 340 ; 1872—S. 186 ; 1861—S. 432.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 89.

#### Provincial Amendment

JN:JAB

For the purpose of trials under the Punjab Public Safety Ordinance, 1946 (No. XIV of 1946) a new Sub-section (3) was added ; see—Section 34 (3) of that Ordinance. [19-11-1946.]

Section 339A — Note 1 (*contd.*)

L R (1940) Nag 668 (D B) ✕ (Vol 12) 1925 Lah 155, 16) : 5 Lah 379 : 26 Cri L Jour 237 (D B) ✕ (Vol 1) 1929 Oudh 256 (256) : 30 Cri L Jour 559 (D B).

[3] A Magistrate giving finding on the plea of compliance with the conditions of pardon raised by accused before him does not absolve the Sessions Judge from trying him if he pleads such compliance. (Vol 16) 1929 Oudh 256 (256) : 30 Cri L Jour 559 (D B) ✕ (Vol 3) 16 Mad 290 (290) : 16 Cri L Jour 234 (D B) ✕ (Vol 1915 Cal 667 (673) : 16 Cri L Jour 65 : 42 Cal 6 (D B).

[4] Magistrate recording plea of compliance with conditions of pardon, but question discussed after considering whether accused was guilty — *Held* there was irregularity vitiating trial. (Vol 20) 1933 Lah 910 (1) : 35 Cri L Jour 168 (DB).

[5] The Crown should prove that the pardon has been forfeited by the approver. (Vol 27) 1940 Nag 77 (7) : 40 Cri L Jour 956 : I L R (1940) Nag 668 (DB) ✕ (Vol 22) 1935 Lah 799 (800) : 37 Cri L Jour 79.

[6] In a case triable by the jury, the question whether the accused has complied with the conditions of the pardon should be left to the jury. ('10) 11 Cri L Jour 254 (255) : 33 Mad 514 (DB).

[7] In a case triable with the aid of assessors, the Court should, after recording the plea, call upon the assessors to deliver their opinions on that plea and then record its own finding. (Vol 27) 1940 Nag 77 (77) : 40 Cri L Jour 956 : I L R (1940) Nag 668 (DB).

[8] Section 339A does not apply to case of approver who has stated that his statement as approver was completely false. (Vol 26) 1939 Lah 66 (67) : 40 Cri L Jour 614 : I L R (1939) Lah 216 (DB).

[9] Failure to conform to the provisions of the section vitiates the trial. (Vol 27) 1940 Nag 77 (77, 78) : 40 Cri L Jour 956 : I L R (1940) Nag 668 (DB) ✕ (Vol 16) 1929 Oudh 256 (256) : 30 Cri L Jour 559 (DB) (Vol 12) 1925 Lah 15 (16) : 5 Lah 379 : 26 Cri L Jour 237 (DB).

[See however (Vol 26) 1939 Lah 66 (67) : 40 Cri L Jour 614 : I L R (1939) Lah 216 (DB).]

#### SECTION 340 — SYNOPSIS.

1. Scope.

2. "Proceedings . . . under this Code."

2a. "Criminal Court."

3. Appellate and revisional Courts.

4. "May of right be defended."

5. Right of accused while in custody.

6. Choice of pleader.

6a. Appointment of defence counsel by the Crown.

7. Arguments.

8. Citing accused's counsel as witness.

9. Court and pleader.

10. "Pleader."

11. Muktears and other persons.

12. Sub-section (2).

1. Scope. — [1] Complainants have the legal right to be represented by counsel, though where the Crown also prosecutes the officer acting on its behalf will lead. ('70) 5 Beng L R App 70 (71) (DB) ✕ ('70) 1870 Pun Re No. 30 Cr, p. 47 (47) (DE) ✕ (Vol 12) 1925 All 301 (302) : 26 Cri L Jour 734.

[But see ('86) 1886 Pun Re No. 29 Cr, p. 70 (72) (DB) ✕ ('71) 8 Bom H C R A C 202 (204) (DB).]

[2] The Crown is entitled as of right to be heard by counsel or pleader in support of each prosecution whether in an original or appellate Court. ('71) 8 Bom H C R 204n.

2. "Proceedings . . . under this Code." —

[1] Proceedings under Chapter X are criminal proceedings. (Vol 3) 1916 Mad 970 (970) : 16 Cri L Jour 349 : 39 Mad 537 (DB).

[2] Access to the accused by his legal advisers should be allowed irrespective of whether a charge-sheet has been sent up or not. (Vol 13) 1926 Bom 551 (554) : 50 Bom 741 : 27 Cri L Jour 1169 (DB) ✕ (Vol 19) 1932 Lah 13 (14) : 12 Lah 211 : 32 Cri L Jour 1022 ✕ (Vol 18) 1931 Lah 99 (100) : 12 Lah 435 : 33 Cri L Jour 180 ✕ (Vol 17) 1930 Lah 945 (946) : 12 Lah 16 : 32 Cri L Jour 339.

[3] A person with regard to whom a preliminary enquiry under S. 202 is being held is not entitled by any rule of law to intervene. ('13) 14 Cri L Jour 57 (58) : 40 Cal 444 (DB) ✕ ('20) 25 Cal W N xii (xii) (DB) ✕ (Vol 13) 1926 Sind 188 (189) : 20 Sind L R 43 : 27 Cri L Jour 494 (DB) ✕ ('08) 8 Cri L Jour 20 (23) : 4 Nag L R 81 ✕ ('11) 12 Cri L Jour 207 (208) (DB) (Cal). (The accused can watch the proceedings by engaging a counsel.)

[4] The pleader's assistance is secured as a matter of practice as *amicus curiae* even when parties have no right to be heard either in person or by pleader. ('11) 12 Cri L Jour 231 (232) (All).

2a. "Criminal Court." — [1] A Police Patel acting under S. 14 of the Bombay Village Police Act of 1867 is a "Criminal Court" within the meaning of this sec-



## Section 340 — Note 2a (continued)

tion. (Vol 29) 1942 Bom 205 (205) : 15 Cri L Jour 786 (DB).

3. Appellate and revisional Courts.—[1] The section has been held to be applicable to an appellate Court. (70) 1870 Pun Re No 31 Cr, p. 49 (DB) & (05) 9 Cal W N colxxxv (colxxxv) (DB).

[2] The right of persons to appear personally or by pleader before Courts exercising powers of revision is expressly excluded by S. 440. (11) 12 Cri L Jour 231 (232) (All) & (76) 1 Bom 64 (65) (DB).

4. "May of right be defended."—[1] The accused is entitled to be represented by a pleader. (1900) 27 Cal 656 (658) (DB) & (Vol 12) 1925 All 285 (285) : 47 All 147 : 26 Cri L Jour 575.

[2] Accused denied right to be represented by pleader—A re-trial would be ordered. (77) 1877 Pun Re No. 9 Cr, p. 23 (23) (DB).

[3] Notice of the date fixed for hearing should be given to the accused. (03) 25 All 375 (377).

[4] The accused should be allowed to secure proper legal advice and assistance before he is called upon to cross-examine the prosecution witnesses. (Vol 3) 1916 Mad 933 (934) : 16 Cri L Jour 786 & (Vol 3) 1916 Mad 142 (143) : 16 Cri L Jour 334.

[5] Accused should not be asked immediately after the framing of the charge to cross-examine the prosecution witnesses. (Vol 3) 1916 Mad 933 (934) : 16 Cri L Jour 786 & (11) 12 Cri L Jour 548 (549) (Mad).

[6] The accused should be given an opportunity of engaging a pleader by adjourning the case for a reasonable period. (Vol 12) 1925 All 285 (285) : 47 All 147 : 26 Cri L Jour 575 & (Vol 3) 1916 Lah 445 (445) : 17 Cri L Jour 278.

[7] The services of a counsel are necessary even when witnesses are examined-in-chief, not only to check leading questions but to prevent irrelevant evidence being recorded. (Vol 12) 1925 Mad 1153 (1154) : 27 Cri L Jour 33.

[8] Trial held at a place where accused cannot put up proper defence being unable to be represented by pleader—Held, Magistrate exercises jurisdiction with material irregularity. (Vol 5) 1918 Pat 197 (199) : 19 Cri L Jour 249 : 3 Pat L Jour 147 (DB).

[9] Court held on Sunday—Accused deprived of rights under this section—Held, conviction should be set aside. (Vol 2) 1915 Bom 254 (255) : 16 Cri L Jour 752 (DB) & (Vol 17) 1930 Nag 255 (257) : 31 Cri L Jour 705.

[See also (Vol 12) 1925 Pat 772 (782) : 4 Pat 646 : 26 Cri L Jour 1441 (DB).]

[10] Accused deprived of services of senior counsel—Accused not prejudiced—Conviction allowed to stand. (98) 1898 Pun Re No. 14 Cr, p. 32 (33) (DB).

[11] An appellant is entitled to be heard through his pleader. (08) 9 Cri L Jour 189 (190) (DB) (Cal).

[12] Accused's counsel applying for being heard—Judge deciding appeal without hearing counsel, on a day when it was physically impossible for counsel to attend—Held, Judge contravened provisions of the Code. (70) 1870 Pun Re No. 31 Cr, p. 48 (49) (DB).

[13] Persons not defended—Magistrate or Judge should test accuracy of statement of witnesses by questioning them. (84) 7 All 160 (162) (DB).

[14] Ignorant person accused of technical offence—Judge should help him in putting up obvious defensive pleas. (Vol 17) 1930 Rang 349 (350) : 32 Cri L Jour 206.

[15] Defence lawyer engaged at Crown's expense incompetent—Judge should cross-examine witness if necessary in the interest of justice. (Vol 29) 1942 Pat 90 (93) : 43 Cri L Jour 36 (DB) & (Vol 25) 1938 Pat 133 (158) : 39 Cri L Jour 384 (DB).

5. Right of accused while in custody.—[1] This section implies that the accused shall have a reasonable opportunity if in custody, of getting into communication with his pleader and preparing for his defence. (Vol 13) 1926 Bom 551 (552) : 50 Bom 741 : 27 Cri L Jour 1169 (DB) & (Vol 22) 1935 Lah 230 (244) : 35 Cri L Jour 1180 (DB).

[2] Accused on remand has a right to have access to his legal adviser subject to restrictions necessary to prevent interference with the course of investigation. (Vol 17) 1930 Lah 945 (947) : 12 Lah 16 : 32 Cri L Jour 339 & (Vol 19) 1932 Lah 13 (14) : 12 Lah 211 : 32 Cri L Jour 1022.

[3] The High Court can interfere under S. 561A if the accused is prevented from having access to his legal advisers, while on remand. (Vol 13) 1926 Bom 551 (553) : 50 Bom 741 : 27 Cri L Jour 1169 (DB).

[4] Accused arrested, placed in custody and called upon to conduct their case—No legal assistance allowed to be secured—Held, procedure was irregular. (Vol 7) 1920 All 268 (269) : 42 All 646 : 22 Cri L Jour 228.

[5] Reasonable facilities should be given to the under-trial officer to consult his legal advisers and conduct his defence. (Vol 6) 1919 Cal 156 (156) : 20 Cri L Jour 230 (D B) & (Vol 19) 1932 Cal 285 (286) : 33 Cal 1132 : 33 Cri L Jour 15.

[6] The High Court should satisfy itself that the accused, a police officer, is not hampered in his defence though it is beyond its jurisdiction to interfere with the discipline of the police force or the exercise of lawful powers by the superior officers. (Vol 6) 1919 Cal 383 (385) : 20 Cri L Jour 675 (D B).

[7] Police should not overhear the conversation between the under-trial prisoner and his lawyer. (71) 8 Bom H C R Cr 126 (157) (F B) & (Vol 17) 1930 Lah 945 (947) : 12 Lah 16 : 32 Cri L Jour 339 & (Vol 22) 1935 Cal 101 (102) : 62 Cal 334 : 26 Cri L Jour 615.

6. Choice of pleader.—[1] Prisoners should have the fullest opportunity to execute vakalatnamas to whomsoever they please. (1863) 1 Bom H C R Cr 16 (16) (S B) & (1862) 1 Mad H C R 4 (4) (D B).

[2] Pleader engaged by accused did not know how to behave—Magistrate cannot ask accused to engage another counsel. (96) 1896 Rat 861 (863) (D B).

[3] No Court has any authority to force upon an accused person the services of a counsel if he is unwilling to accept them. (37) 39 Pun L R 311 (312) & (Vol 16) 1929 Lah 705 (706) : 11 Lah 220 : 31 Cri L Jour 977 (D B) & (37) 39 Pun L R 311 (312) (D B).

[4] The Magistrate is not justified in refusing the pleader an interview with the accused or a seat in Court. (99) 1 Bom L R 856 (856) (D B) & (93) 21 Cal 642 (661, 662) (D B).

[5] Dispute between counsel assigned for defence and another who is asked to associate with him—Judge interfering decides that the former should conduct defence—Held, Judge did not act contrary to S. 340. (Vol 16) 1929 Cal 1 (5, 6) : 30 Cri L Jour 494 (D B).

6a. Appointment of defence counsel by the Crown.—[1] The selection of lawyers to defend prisoners should be made from among young men of marked ability. (Vol 29) 1942 Pat 90 (93) : 43 Cri L Jour 36 (D B) & (Vol 25) 1938 Pat 153 (158) : 39 Cri L Jour 384 (D B).

[2] In a Sessions trial for rape, the Judge should appoint a member of the Bar as *amicus curiae*. (Vol 29) 1942 Mad 285 (287) : 43 Cri L Jour 576.

7. Arguments.—[1] A Court is bound to hear arguments offered at any criminal trial or proceedings. (Vol 12) 1925 All 282 (283) : 26 Cri L Jour 810 & (Vol 12) 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cri L Jour 1380 & (04) 1 Cri L Jour 760 (761) (Bom).



Section 340—Note 7 (*contd.*)

[But see (Vol 31) 1944 Oudh 296 (296) : 20 Luck 11.]

[2] Refusal to hear arguments is not a mere irregularity but an illegality. (Vol 15) 1928 Mad 1234 (1235) : 29 Cri L Jour 1082.

[4] A Magistrate may cut short an argument which has proceeded for an inordinate length of time. ('08) 7 Cri L Jour 146 (153) : 35 Cal 243 (D B).

[5] Court witness examined after arguments and closure of case—Magistrate not requested to hear further arguments—Held, no objection could be raised in revision. (Vol 11) 1924 Cal 980 (980) : 25 Cr L J 1167.

[6] A counsel should generally be heard by an oral address and not by a written speech. (Vol 8) 1921 Cal 426 (428) (D B) & (Vol 15) 1928 Bom 557 (558) : 53 Bom 119 : 30 Cri L Jour 185 (D B).

[7] The Court should take notes of the arguments when they are being submitted. (Vol 8) 1921 Cal 426 (428) (D B).

[8] Filing memorandum of arguments taken behind the back of one of the parties, is improper. (Vol 15) 1928 Mad 1130 (1131) : 29 Cri L Jour 929 & (Vol 15) 1928 Bom 557 (559) : 53 Bom 119 : 30 Cri L Jour 185 (D B) & (Vol 13) 1926 Sind 194 (198) : 21 Sind L R 293 : 27 Cri L Jour 711.

[9] Where notes of arguments are submitted to the Court the counsel should show it to the pleader of opposite party for his remarks. (Vol 8) 1921 Cal 426 (428) (D B).

[10] Where a counsel on behalf of his client is entitled to be last heard in the matter, he cannot be deprived of the right. (Vol 15) 1928 Bom 557 (559) : 53 Bom 119 : 30 Cri L Jour 185 (D B). (Violation of right is irregularity curable by S. 537.) & ('06) 11 Cal W N xliii (xliii) (D B).

[11] Writing of judgment during the arguments is irregular, but curable under S. 537. ('93) 21 Cal 121 (123, 129) (S B).

8. Citing accused's counsel as witness. — [1] Prosecution requiring defence counsel as witness—Sufficient notice should be given to the accused to engage competent counsel. (Vol 12) 1925 Mad 1153 (1154) : 27 Cri L Jour 33.

[2] Accused's counsel cited as witness—Rule as to exclusion of witnesses from Court does not apply. (Vol 8) 1921 Mad 424 (424) : 44 Mad 916 : 28 Cri L Jour 588 (D B).

[3] It is desirable that counsel do not appear in cases where it is probable that their evidence would be material. (Vol 3) 1916 Mad 5 (7) & (Vol 12) 1925 Sind 99 (100) : 18 Sind L R 30 : 25 Cri L Jour 571 (DB) & (Vol 14) 1927 Pat 61 (79) : 5 Pat 777 (D B).

[4] No self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution. (Vol 12) 1925 Mad 1153 (1155) : 27 Cri L Jour 33 & (Vol 1) 1914 Cal 396 (427 to 429) : 40 Cal 898 (S B). (Objections are not against his giving evidence but to his conducting the case.)

9. Court and pleader.—[1] A Magistrate should not conduct himself unpleasantly towards persons brought before him for trial or their legal advisers. ('71) 8 Bom H C R Cr 126 (157, 158) (F B).

[2] It is improper for the Court or for persons in charge of the prosecution to intimidate either the accused or the pleaders appearing for them. ('01) 3 Bom L R 562 (563) (DB) & (Vol 6) 1919 Pat 515 (517) : 20 Cri L Jour 566. (As the position of the accused is always of grave anxiety.)

[3] Court cannot refuse to allow the pleader to cross examine witnesses or permit him to do so only on condition of his apologizing for his previous contumacious behaviour. ('96) 1896 Rat 861 (863) (DB).

[4] It is improper to suspend a pleader before the close of a case. ('84) 10 Cal 256 (260, 264) (DB).

[5] Courts cannot fetter the discretion of advocates by insisting that their case should be put to this witness or that. (Vol 6) 1919 Pat 515 (516) : 20 Cri L Jour 566.

[6] The Court should leave witnesses to the pleaders to be dealt with. (Vol 11) 1924 Oudh 371 (372) : 27 Oudh Cas 246 : 25 Cri L Jour 1226.

[7] A pleader cannot be charged with misconduct if he writes out petitions without asking the client and asks or advises him to present the same. ('13) 14 Cri L Jour 438 (439) (Oudh).

[8] Pleader's admission is binding on the party. (Vol 15) 1928 Bom 241 (242, 243) : 52 Bom 686 : 29 Cri L Jour 990 (DB).

[9] Admission from defence counsel should not be taken in a capital case—Every fact should be strictly proved on record. (Vol 7) 1920 All 99 (101) : 21 Cri L Jour 777 (DB).

[10] The counsel should endeavour by their conduct to prevent any unpleasantness, and to avoid provoking the Court to offer discourtesy. Some latitude should be allowed to a member of the bar, insisting on the conduct of his case upon his question being taken down or his objections being noted, where the Court thinks the question inadmissible or the objections untenable. (Vol 4) 1917 Pat 437 (438) : 18 Cri L Jour 670 (DB).

[11] There ought to be a spirit of give and take between the Bench and the Bar in matters of taking down questions or objections of pleader. ('04) 1 Cri L Jour 612 (613) (Bom).

[12] The same counsel should not appear for two accused having conflicting defences. ('90) 1890 Pun Re No. 13 Cr, p. 25 (25) (DB).

[13] A pleader who is himself interested in a case ought not to appear for the accused. (Vol 20) 1933 Rang 34 (34) : 34 Cri L Jour 466 (DB).

[14] An advocate should protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence of which he is charged. (Vol 11) 1924 Cal 257 (268, 269) : 25 Cri L Jour 817 (FB).

10. "Pleader."—[1] Advocates on the appellate side do not come within the definition of pleader quoad the High Court Sessions. (Vol 21) 1934 Bom 70 (71) : 58 Bom 456 (FB).

[2] The question whether a vakil can act for a party in a criminal appeal from the original side of the High Court or whether the appearance can be only by an attorney depends upon the rules of that Court. (Vol 15) 1928 Cal 675 (678) : 55 Cal 858 : 29 Cr L J 1022 (DB).

[3] A Munsif's Court pleader comes within the category of "authorised pleader." ('79) 2 Weir 402 (402).

[4] The discretion to allow a pleader who is authorised to practise in certain other districts should be exercised judicially and sparingly. (Vol 5) 1918 Upp Bur 56 (56) : 2 Upp Bur Rul 121 : 18 Cri L Jour 345. (The interests of the accused must be considered in doing so.)

[5] A Magistrate has no power to forbid a duly qualified pleader to appear. ('69) 1869 Rat 25 (25) (DB).

[6] A memorandum of appearance is sufficient where an authorised pleader appears for defence. (Vol 13) 1926 Pat 296 (298) : 27 Cri L Jour 666 (DB) & (Vol 11) 1924 Mad 192 (192) : 25 Cri L Jour 73.

[7] Even a memorandum of appearance is unnecessary when the party is present. ('09) 9 Cri L Jour 305 (306) (Mad).

[8] The High Court alone can forbid legal practitioners from practising pending renewal of their certificates. (Vol 13) 1931 Mad 688 (688) : 54 Mad 574.

11. Muktears and other persons.—[1] An estate manager may be a pleader provided he has the permis-

341. If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

[1882—S. 341; 1872—S. 186 Para 3.]

Section 340 — Note 11 (*contd*)  
sion of the Court to plead. (Vol 13) 1926 Bom 218 (222); 50 Bom 250; 27 Cri L Jour 440 (DB).

[2] A Prosecuting Inspector may, with the Court's permission, defend an accused person. (Vol 17) 1930 Nag 150 (151); 26 Nag L R 172; 31 Cri L Jour 419.

[3] Third class advocates in Burma required permission to plead and act in a Sessions Court. ('72-92) 1872-1892 Low Bur Rul 260.

[4] The practice of permitting private vakils to defend parties is not illegal. ('74) 7 Mad H C R App xxxvii (xxxvii).

[5] A general order prohibiting a person from appearing in any case in any Court or Courts is illegal. (Vol 10) 1923 Mad 183 (184) & ('02) 12 Mad L Jour 354 (354) (SB) & ('11) 12 Cri L Jour 111 (112); 38 Cal 488 (DB).

[6] A person aggrieved by the refusal of a Magistrate to allow him to appear in a particular case may move the High Court in revision. (Vol 10) 1923 Mad 183 (184) (DB).

[See however (Vol 10) 1923 Mad 484 (485). (Case concluded — No purpose in proceeding with revision — Objection may be taken in appeal.)]

12. Sub-section (2). — [1] Class of persons referred to in the sub-section are accused persons in respect of whom the ordinary bar against putting on oath an accused person has been removed by the Legislature. (Vol 12) 1925 Cal 822 (828); 52 Cal 721; 26 Cri L Jour 1194 (FB).

[See however (Vol 14) 1927 Cal 509 (511); 54 Cal 532; 28 Cri L Jour 407 (DB). (Persons referred to are not accused persons.)]

[2] The omission of the word "accused" in sub-s. (9) of S. 488 indicates that such persons should no longer be looked upon as accused persons. (Vol 12) 1925 Cal 339 (339); 25 Cri L Jour 1091 (DB).

#### SECTION 341 — SYNOPSIS.

1. Scope.
2. Duties and powers of Court other than the High Court.
3. Proceedings shall be forwarded to the High Court.
- 3a. Non-compliance with the section—Effect.
4. "High Court shall pass thereon such order as it thinks fit."
5. Criminal responsibility of deaf mutes.

1. Scope. — [1] The provisions of this section apply to persons who are unable to understand the proceedings from deafness or dumbness or ignorance of the language of the country or other similar cause. (Vol 30) 1943 Sind 237 (241); I L R (1943) Kar 326; 45 Cri L Jour 138 (DB) & ('80) 5 Bom 262 (263).

[2] Where the inability to understand the proceedings is due to unsoundness of mind the procedure to be followed is that provided for in Chap. XXXIV. ('80) 5 Bom 262 (263).

[3] Accused of poor wits and incapable of understanding anything — High Court directed inquiry to be held if he was lunatic at the time of trial or at the time of committing act—If so found he should be tried under S. 341 and the case reported to the High Court. (12) 13 Cri L Jour 24 (24) (Mad).

[4] The fact that the accused is deaf and dumb does not *per se* justify a reference under S. 341; he must also be unable to understand the proceedings. (Vol 30) 1943 Sind 237 (240); I L R (1943) Kar 326; 45 Cri L Jour 138 (DB) & ('37) 1937 Mad W N 1121 (1121) & (Vol 14) 1927 Lah 799 (799); 28 Cri L Jour 656 & (Vol 16) 1929 Lah 840 (840); 10 Lah 566; 29 Cri L Jour 1104 & ('01) 3 Bom L R 371 (371) (DB) & ('26) 27 Cri L Jour 1097 (1097, 1098) (All) & ('04) 1 All L Jour 273n (273n).

[5] Accused slightly deaf — He should be spoken to from close quarters and efforts taken to make him understand the proceedings—High Court should not be asked to pass orders dispensing with taking their efforts on the ground that it is troublesome. (Vol 34) 1947 Mad 129 (129).

2. Duties and powers of Court other than the High Court. — [1] A Magistrate should not proceed to pass sentence on the accused, but having convicted him should stay proceedings and report the matter to the High Court for orders. (Vol 30) 1943 Sind 237 (241); I L R (1943) Kar 326; 45 Cri L Jour 138 (DB) & ('89) 1889 Pun Re No. 37 Cr. p. 139 (140) (DB) & ('11) 12 Cri L Jour 386 (387); 1 Upp Bur Rul 57.

[2] A Magistrate is not empowered to pass an order under S. 562 of the Code. ('12) 13 Cri L Jour 248 (248) (DB) (Mad).

[3] The Magistrate should attempt to get into communication with the accused with the assistance of his relatives. (Vol 30) 1943 Sind 237 (240); I L R (1943) Kar 326; 45 Cri L Jour 138 (DB) & ('06) 4 Cri L Jour 444 (445) (DB) (Bom) & ('11) 12 Cri L Jour 386 (387); 1 Upp Bur Rul 57.

[4] Where there was failure to communicate with accused and the High Court was not able to say that the accused were not prejudiced, the conviction was set aside. (Vol 30) 1943 Sind 237 (240); I L R (1943) Kar 326; 45 Cri L Jour 138 (DB) & ('70) 6 Mad H C R App vii (vii).

[5] No communication with accused — No failure of justice resulted — High Court may decline to interfere with conviction. ('70) 2 Weir 402 (403).

[6] Summary procedure is not suitable to the case of accused who cannot be made to understand the proceedings. ('06) 4 Cri L Jour 444 (445) (Bom).

3. Proceedings shall be forwarded to the High Court. — [1] There should be a conviction or committal before a reference is made to the High Court. ('97) 1897 Rat 879 (879) (DB) & (1900) 27 Cal 368 (370) (DB).

[2] If a reference is made before a conviction or committal, the record will be returned to the trying Magistrate to be reported by him only if he convicts or commits the accused. ('81) 1881 All W N 15 (15).

[3] Finding must be given by the Magistrate as to the capability of accused understanding the nature of the case and the purport of evidence. ('97) 1897 Rat 879 (879) (DB).

[4] Report of the Magistrate should give reasons for accused's not understanding the proceedings as also the means used by Court to make the accused understand the proceedings. ('96) 9 C P L R Cr 38 (39).

[5] Two accused on trial jointly — One unable to understand proceedings — Cases of both should not be

**342.** (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.<sup>3</sup>

[1882 — S. 342 : 1872 — Ss. 193, 250, 342, 343, 345 ; 1881 — Ss. 202, 204, 373.]

[a] But see the Prevention of Corruption Act, 1947 (2 [II] of 1947), S. 7.

[11-8-1947.]

#### Section 341 — Note 3 (contd.)

referred to High Court — High Court has no powers to pass orders in case of accused who understood the proceedings. (Vol 25) 1938 Bom 352 (353) : 39 Cri L Jour 866 (DB).

3a. Non-compliance with the section—Effect. —[1] Accused unable to understand proceedings committed to Session — Session Judge tried and acquitted the accused—*Held*, Judge was wrong in not submitting the case to High Court and trying the accused but trial not completely void under S. 530. ('37) 1937 Mad W N 1121 (1121) (DB).

4. "High Court shall pass thereon such order as it thinks fit." — [1] Under this section High Court can pass any order as required by circumstances. ('35) 1935 Mad W N 1287 (1288) (DB).

[2] Accused unable to understand proceedings—High Court can under special circumstances treat these proceedings as sufficient trial and pass sentence on facts established. (Vol 30) 1943 Sind 237 (241) : I L R (1943) Kar 326 : 45 Cri L Jour 138 (DB) \* (Vol 28) 1941 Mad 225 (226) : 42 Cri L Jour 315 (DB) \* (1900) 27 Cal 368 (369) : ('11) 12 Cri L Jour 386 (388) : 1 Upp Bur Rul 57.

[3] High Court can order confinement of accused in safe custody under orders of Provincial Government. (Vol 30) 1943 Sind 237 (241) : I L R (1943) Kar 326 : 45 Cri L Jour 138 (DB) \* ('11) 12 Cri L Jour 613 (614) : 1911 Pun Re No. 13 Cr (DB) \* ('81) 5 Bom 262 (263) (DB).

[4] In case of minor offences, the accused may be discharged. (Vol 25) 1938 Bom 352 (353) : 39 Cri L Jour 866 (DB) \* (Vol 7) 1920 Lah 333 (334) : 1 Lah 260 : 21 Cri L Jour 621 (DB).

[5] The High Court may cause notice of the reference to be served on the accused. ('74) 22 Suth W R Cr 35 (36).

[6] Person unable to understand proceedings — Case committed to Sessions—Proceedings submitted to High Court — High Court can determine whether sessions trial should take place. (1900) 27 Cal 368 (369, 370) (DB).

#### 5. Criminal responsibility of deaf mutes. —

[1] A deaf mute having sufficient intelligence to understand the character of the criminal act, is liable to be punished. (Vol 4) 1917 Bom 288 (288) : 18 Cri L Jour 143 (143) : 40 Bom 598 (DB).

[2] Accused charged with murder — He was unable to understand proceedings and was of unsound mind — He was not punished as an ordinary offender but kept in detention. ('11) 12 Cri L Jour 386 (388) : 1 Upp Bur Rul 57 \* ('81) 1881 All W N 54 (54) \* (1900) 27 Cal 368 (370).

[3] Accused infirm—High Court unable to determine

whether he knew the nature of the act or he had dishonest intentions—Accused acquitted. ('02) 4 Bom L R 296 (296).

[4] Accused offering no explanation due to his infirmity as to the possession of stolen property — High Court refused to presume against the accused. (Vol 2) 1915 Mad 50 (50) : 15 Cri L Jour 573 (579) (DB).

[5] Before convicting a deaf and dumb person and submitting his case to High Court Magistrate should record a finding that such person understood the nature of his act. (Vol 17) 1930 Lah 64 (64) : 30 Cri L Jour 948.

#### SECTION 342 — SYNOPSIS.

##### 1. Scope.

2. Applicability to summons cases and summary trials.

3. Applicability to trials before Presidency Magistrates.

4. Applicability to proceeding under Chapter VIII.

5. Applicability to proceeding under section 363 of the Calcutta Municipal Act.

6. Applicability to proceeding under section 488.

7. When questions should be put.

8. Examination after framing charge.

9. "Evidence," meaning of.

10. Examination must be by the Court itself and not by others.

11. De novo trial—Examination by successor.

12. Nature of examination contemplated by the section.

13. "Question him generally on the case."

14. "Without previously warning the accused."

15. Examination of pleader of accused.

16. Written statement of accused, if sufficient.

17. Examination by committing Magistrate.

18. Examination of accused in sessions trials.

19. Refusal to answer—sub-section (2).

20. Answers given to be taken into consideration.

21. Irrelevant answers.

22. Answers making defamatory statements.

23. Answers amounting to contempt of Court.

24. Answers by one accused, if can be considered against co-accused.

25. Several accused — Each to be examined separately.

26. Accused's defence in general.

27. Court, if can ask accused to give thumb-impressions.

SECTION 342 — SYNOPSIS (*contd.*)

28. "No oath shall be administered to the accused" sub-section (4).

29. Examination of accused in a cross-case as a witness.

30. Applicability to proceedings under section 14, Legal Practitioners Act.

31. Applicability to proceedings under S. 145.

32. Destruction of record—Proof of examination.

33. Non-compliance with the section—Effect of.

1. Scope. — [1] Except under the circumstances and restrictions set forth in the section, an accused person is incapable of being examined by the Court. ('97) 19 All 200 (201).

[2] The section is based on the principle that no one should be condemned unheard. (Vol 23) 1936 Oudh 16 (18) : 36 Cri L Jour 1303 : 11 Luck 461 \* ('09) 9 Cri L Jour 36 (58) : 4 Nag L R 163 \* (Vol 16) 1929 Sind 5 (5, 6) : 23 Sind L R 1 : 29 Cri L Jour 932 (D B) \* (Vol 20) 1933 Sind 49 (52) : 34 Cri L Jour 591 (DB).

[3] The section contemplates that the accused should be heard, not merely on what is *prima facie* proved against him, but on every circumstance appearing in evidence against him. (Vol 27) 1940 Cal 378 (380) : 41 Cri L Jour 753 (D B) \* ('09) 9 Cri L Jour 56 (58) : 4 Nag L R 163.

[4] The intention of the provision is for the furtherance of justice and to enable the Court to decide the question of the guilt of the accused. (Vol 21) 1934 All 693 (694) : 35 Cri L Jour 879 \* ('04) 1 Cri L Jour 854 (858) : 17 C P L R Cr 113 \* (Vol 12) 1925 Cal 361 (365) : 52 Cal 522 : 26 Cri L Jour 631 (DB).

[5] The first part of sub-s. (1) gives a discretion to the Court. (Vol 27) 1940 Nag 283 (283) : 41 Cri L Jour 585 \* (Vol 23) 1936 Pesh 211 (212) : 38 Cri L Jour 399 (D B) \* (Vol 22) 1935 Cal 605 (605) : 36 Cri L Jour 1340 : 62 Cal 475 (D B) \* (Vol 7) 1920 Pat 471 (477) : 5 Pat L Jour 430 : 21 Cri L Jour 705 (D B) \* (Vol 12) 1925 Pat 723 (725) : 26 Cri L Jour 927 \* (Vol 8) 1921 Sind 131 (131, 132) : 16 Sind L R 201 : 25 Cri L Jour 191 (DB).

[See (Vol 11) 1924 Bom 334 (335) : 25 Cri L Jour 1127.]

[6] The second part of sub-s. (1) is mandatory. ('37) 1937 Mad W N 574 (575) \* (Vol 24) 1937 Pesh 20 (20) : 38 Cri L Jour 887 \* (Vol 23) 1936 Pesh 211 (212) : 38 Cri L Jour 399 (D B) \* (Vol 22) 1935 Cal 605 (605) : 36 Cri L Jour 1340 : 62 Cal 475 (D B) \* (Vol 12) 1925 Cal 361 (363) : 52 Cal 522 : 26 Cri L Jour 631 (D B) \* (Vol 13) 1926 Lah 551 (552) : 7 Lah 564 : 27 Cri L Jour 1007 \* (Vol 18) 1931 Lah 153 (154) : 32 Cri L Jour 708 \* (Vol 21) 1934 Pat 330 (334) : 35 Cri L Jour 1322 (DB) \* (Vol 14) 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364 (DB) \* (Vol 14) 1927 Sind 175 (176) : 21 Sind L R 331 : 28 Cri L Jour 417 \* (Vol 21) 1934 All 735 (738) : 36 Cri L Jour 33.

[7] The accused must be examined whether he offers to produce defence or not. (Vol 24) 1937 Oudh 130 (131) : 37 Cri L Jour 408 : 12 Luck 24.

[8] Court is not bound to give the accused an opportunity of explaining the circumstances appearing against him in the evidence of witnesses examined on behalf of a co-accused though the Court may give him such an opportunity. (Vol 23) 1936 Bom 154 (160) : 37 Cri L Jour 688 : 60 Bom 148 (D B).

[9] The section does not apply to statements offered by the accused. (Vol 23) 1936 Bom 154 (160) : 37 Cri L Jour 688 : 60 Bom 148 (D B) \* ('84) 1884 All W N 84 (84).

[10] The section is not exhaustive and does not limit the generality of S. 21, Evidence Act, as to the

relevancy of admissions (Vol 23) 1936 Rang 350 (351) : 37 Cri L Jour 920 \* ('10) 11 Cri L Jour 453 (470) : 37 Cal 467 (DB).

[11] The section does not apply to confessions under S. 164 (Vol 34) 1947 Lah 92 (95).

2. Applicability to summons cases and summary trials. — [1] The section applies equally to summons-cases as well as to warrant cases (Vol 27) 1940 Bom 314 (315) : 42 Cri L Jour 71 (D B) \* ('58) 39 Cri L Jour 841 (842) (Oudh) \* (Vol 13) 1926 All 358 (358) : 27 Cri L Jour 405 \* (Vol 13) 1926 Lah 667 (667) : 27 Cri L Jour 1000 \* (Vol 13) 1926 Nag 300 (300) : 22 Nag L R 65 : 27 Cri L Jour 632 \* (Vol 22) 1935 All 217 (218) : 36 Cri L Jour 1290 : 57 All 666 (D B) \* (Vol 18) 1931 Bom 195 (197) : 32 Cri L Jour 719 (F B) \* (Vol 10) 1923 Cal 164 (164) : 49 Cal 1075 : 24 Cri L Jour 3 (D B) \* (Vol 14) 1927 Cal 250 (253) : 54 Cal 286 : 28 Cri L Jour 297 (D B) \* (Vol 18) 1931 Lah 153 (154) : 32 Cri L Jour 708 \* (Vol 8) 1921 Pat 11 (12) : 6 Pat L Jour 174 : 22 Cri L Jour 427 (D B) \* (Vol 13) 1926 Sind 1 (3) : 20 Sind L R 34 : 26 Cri L Jour 1554 (F B) \* (Vol 13) 1926 Sind 281 (282) : 19 Sind L R 121 : 27 Cri L Jour 1290 (D B) \* (Vol 7) 1920 Pat 471 (477) : 21 Cri L Jour 705 : 5 Pat L Jour 430 (D B).

[But see (Vol 11) 1924 Mad 15 (17) : 46 Mad 758 : 24 Cri L Jour 833 (F B). (The section does not apply to summons-cases) \* (Vol 18) 1931 Rang 244 (246) : 9 Rang 506 : 32 Cri L Jour 1190 (F B) \* (Vol 14) 1927 Lah 268 (269) : 28 Cri L Jour 480 \* (Vol 14) 1927 Lah 435 (435) : 28 Cri L Jour 478.]

3. Applicability to trials before Presidency Magistrates. — [1] Presidency Magistrates are not relieved from the obligation of questioning the accused generally under the section. (Vol 8) 1921 Bom 374 (375, 376) : 45 Bom 672 : 22 Cri L Jour 17 (DB).

4. Applicability to proceeding under Chapter VIII. — [1] The section has no application to a person proceeded against under Chapter VIII of the Code (security proceedings). (Vol 11) 1924 Cal 392 (393) : 50 Cal 985 : 25 Cri L Jour 1085 (DB) \* (Vol 20) 1933 Sind 49 (53) : 34 Cri L Jour 591 (DB).

5. Applicability to proceeding under section 363 of the Calcutta Municipal Act. — [1] The section has no application to a person proceeded against under S. 363 of the Calcutta Municipal Act (Vol 14) 1927 Cal 509 (510, 511) : 54 Cal 532 : 28 Cri L Jour 407 (DB).

6. Applicability to proceeding under section 488.

— [1] The section does not apply to proceedings under S. 488. (Vol 15) 1928 Bom 347 (348) : 52 Bom 768 : 29 Cri L Jour 1051 (DB) \* (Vol 16) 1929 Lah 32 (33, 34) : 10 Lah 406 : 29 Cri L Jour 1002 (DB) \* (Vol 19) 1932 Cal 488 (489) : 33 Cri L Jour 640. (*Quare*).

[See (Vol 12) 1925 Cal 339 (339) : 25 Cri L Jour 1091 (DB).]

[See also ('93) 16 Mad 234 (234).]

[But see (Vol 13) 1926 Lah 667 (668) : 27 Cri L Jour 1000. (Section was held applicable to summons-case and therefore applicable to proceedings under S. 488 — Whether person proceeded against was "accused" was not adverted to.)]

7. When questions should be put. — [1] The examination of the accused generally on the case must be after the close of the prosecution case and before the accused is called on for his defence. (Vol 29) 1942 Pat 77 (78) : 43 Cri L Jour 48 \* (Vol 27) 1940 Pat 295 (297) : 41 Cri L Jour 267 (DB) \* (Vol 25) 1938 Lah 543 (544, 545) : 39 Cri L Jour 781 : 1 L R (1938) Lah 603 \* (Vol 24) 1937 Pesh 20 (20) : 38 Cri L Jour 387 \* (Vol 23) 1936 Pesh 211 (212) : 38 Cri L Jour 399 (DB) \* (Vol 14) 1927 All 475 (476) : 49 All 551 : 28 Cri L Jour 399 \* (Vol 15) 1928 All 222 (227) : 30 Cri L Jour 530 (DB) \* (Vol 11) 1924 Bom 334 (335) : 25 Cri L Jour 1127 (DB) \* (Vol 16) 1929 Bom 447 (448) : 31 Cri L Jour

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402 (DB) \* (30) 31 Cri L Jour 613 (614) (Cal) \* (Vol 12) 1925 Cal 361 (363, 365, 369) : 52 Cal 522 : 26 Cri L Jour 631 (DB) \* (Vol 13) 1931 Lah 153 (154) : 32 Cri L Jour 708 \* (Vol 18) 1931 Mad 241 (241, 242) : 32 Cri L Jour 757 \* (Vol 11) 1924 Nag 301 (304, 305) : 25 Cri L Jour 417 \* (Vol 21) 1934 Oudh 457 (458) : 35 Cri L Jour 1417 : 10 Luck 235 (DB) \* (Vol 12) 1925 Rang 101 (101) : 26 Cri L Jour 321 \* (Vol 14) 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1304 (DB) \* (Vol 14) 1927 Sind 175 (175, 176) : 21 Sind L R 341 : 28 Cri L Jour 417 \* (Vol 19) 1932 Sind 165 (166) : 34 Cri L Jour 161 (DB).

[2] The examination under the first part of the section does not dispense with the examination under the second part of the section. (Vol 8) 1921 Pat 374 (375) : 22 Cri L Jour 439 (DB).

3. Examination of the accused before all the prosecution witnesses have been examined, cross-examined, and re-examined, cannot possibly fulfil the conditions of the section. (Vol 12) 1925 Bom 170 (172) : 50 Bom 42 : 26 Cri L Jour 690 (DB) \* (Vol 13) 1926 Lah 551 (552) : 7 Lah 564 : 27 Cri L Jour 1007 \* (Vol 12) 1925 Cal 574 (575) : 24 Cri L Jour 943 (DB).

[See (Vol 13) 1926 Sind 1 (2) : 20 Sind L R 34 : 26 Cri L Jour 1554 (FB).]

[See also (Vol 28) 1941 Lah 322 (323) : 43 Cr L J 165.]

[4] Examination of accused before close of prosecution evidence is contrary to the law and unfair to the accused. (14) 15 Cri L Jour 436 (438) (Oudh).

[5] The word "examination" includes cross-examination and re-examination and "examined" means completely examined. (Vol 12) 1925 Nag 44 (47) : 20 Nag L R 174 : 26 Cri L Jour 971 (FB) \* (Vol 12) 1925 Nag 147 : 25 Cri L Jour 1152. (Overruled by implication.) \* (Vol 9) 1922 Pat 158 (160) : 6 Pat L Jour 644 : 22 Cri L Jour 697 (DB) \* (Vol 14) 1927 Sind 175 (175, 176) : 21 Sind L R 331 : 28 Cri L Jour 417 \* (Vol 19) 1932 Sind 165 (166) : 34 Cri L Jour 161 (DB) \* (Vol 10) 1923 Cal 727 (732) : 50 Cal 939 : 25 Cri L Jour 27 (DB).

[6] It is not necessary that the accused, who has been examined once before charge is framed, should be examined a second time, when the prosecution witnesses are re-called under S. 256 and cross-examined a second time. (38) 40 Pun L R 902 (903) \* (Vol 25) 1938 Lah 543 (544, 545) : 39 Cri L Jour 781 : I L R (1938) Lah 603 \* (Vol 10) 1923 Mad 609 (609, 610, 611) : 46 Mad 449 : 24 Cri L Jour 547 (FB). (Overruling (Vol 9) 1922 Mad 512 : 45 Mad 820 : 24 Cri L Jour 124.) \* (Vol 12) 1925 Oudh 422 (422, 423) : 28 Oudh Cas 130 : 26 Cri L Jour 1301. (Vol 10) 1923 Mad 609 : 46 Mad 449 : 24 Cri L Jour 547 (FB), Followed.) \* (Vol 19) 1932 Oudh 113 (113) : 33 Cri L Jour 811. (Relying on (Vol 12) 1925 Oudh 422 : 28 Oudh Cas 130 : 26 Cri L Jour 1301.) \* (Vol 23) 1936 All 319 (320) : 37 Cri L Jour 710 \* (Vol 12) 1925 Rang 258 (259, 260, 261) : 3 Rang 139 : 26 Cri L Jour 1386.

[But see (Vol 12) 1925 Rang 363 (364) : 27 Cri L Jour 336 \* (Vol 16) 1929 Rang 331 (332, 333) : 7 Rang 470 : 30 Cri L Jour 1164 \* (Vol 11) 1924 Pat 791 (792) : 25 Cri L Jour 711 \* (Vol 12) 1925 Nag 44 (46, 47) : 20 Nag L R 174 : 26 Cri L Jour 971 (FB) \* (Vol 23) 1936 Pesh 211 (212) : 38 Cri L Jour 399 (DB) \* (Vol 13) 1926 Lah 51 (51, 52) : 26 Cri L Jour 1370.]

[7] Case submitted to another Magistrate under S. 349 at end of trial on the discovery that accused being a previous convict was liable to more severe sentence than the trying Magistrate could award—Magistrate to whom case is submitted taking fresh evidence—He is bound to examine the accused afresh. (Vol 33) 1946 Pat 128 (129) : 47 Cri L Jour 440.

8 It is no compliance with the section if the examination takes place at later stage. (Vol 27) 1940 Pat 295 (298) : 41 Cri L Jour 267 (DB) \* (Vol 12) 1925 Cal 450 (480) : 51 Cal 933 : 26 Cri L Jour 261 (DB).

[But see (Vol 28) 1941 Oudh 510 (512) : 42 Cri L Jour 746. (Magistrate examining accused after prosecution case was closed and one defence witness heard—Procedure is not in violation of S. 342 unless accused is prejudiced thereby—Even if it be irregularity it is curable under S. 327.)

[9] No fresh examination of the accused is necessary where :

a. A prosecution witness is re-called under S. 257 (after the accused has entered on his defence) and cross-examined. (Vol 17) 1930 Cal 219 (219, 220) : 56 Cal 1157 : 31 Cri L Jour 406 (DB) \* (Vol 20) 1933 Cal 594 (596) : 35 Cri L Jour 226 (DB).

b. Additional evidence is taken or ordered to be taken by the appellate Court under S. 428. (Vol 28) 1941 Nag 66 (69) : I L R (1942) Nag 34 : 41 Cri L Jour 356 \* (Vol 15) 1928 Bom 200 (200) : 52 Bom 699 : 29 Cri L Jour 972 (DB) \* (Vol 12) 1925 Pat 414 (417, 420) : 4 Pat 488 : 26 Cri L Jour 811 (DB).

c. Witnesses are re-called under S. 231 on an altered charge after the accused has been called on for his defence. (Vol 9) 1922 Pat 393 (394) : 1 Pat 54 : 23 Cri L Jour 146 (DB).

[10] It may be desirable that the accused should be examined again. (Vol 23) 1936 Pat 438 (439) : 37 Cri L Jour 906. (When appellate Court orders additional evidence to be taken it will be quite proper to direct a further examination of the accused at the same time.) \* (Vol 20) 1933 Sind 49 (52) : 34 Cri L Jour 591 (DB). (Per *Ferrers J C.*)

[See also (Vol 24) 1937 Nag 285 (287) : 38 Cri L Jour 1058 : I L R (1937) Nag 541. (Where a prosecution witness is re-called and re-examined under S. 540, accused should be re-examined, but when a fresh witness is called by the Court, re-examination is not necessary.)

[11] Accused disclosing defence only in examination—Prosecution can be allowed to rebut defence. (Vol 31) 1944 Pat 378 (381) : 23 Pat 457 : 46 Cri L Jour 438 (DB).

8. Examination after framing charge. — [1] Provided the accused is examined after the prosecution evidence is completely closed, it makes no difference whether the examination takes place before or after the charge is framed. (Vol 27) 1940 Nag 233 (283) : 41 Cri L Jour 585 \* (Vol 17) 1930 Bom 241 (242) : 31 Cri L Jour 743 (DB). (Observation of Patkar, J., in (Vol 16) 1929 Bom 447 : 31 Cri L Jour 402 (DB) to the contrary dissented from.)

[See also (Vol 28) 1941 Lah 322 (323) : 43 Cri L Jour 165.]

[2] Where witnesses are examined after charge the accused must be questioned after the close of such examination. (42) 43 Cri L Jour 452 (453) (Mad). ((Vol 10) 1923 Mad 609 : 46 Mad 449 : 24 Cri L Jour 547 (FB), Followed.) \* (Vol 21) 1934 Pesh 75 (75) : 35 Cri L Jour 1361 \* (35) 36 Cri L Jour 407 (407) (Lah) \* (Vol 13) 1926 Lah 551 (552) : 27 Cri L Jour 1007 : 7 Lah 564.

9. "Evidence," meaning of. — [1] The word "evidence" in the section means evidence already given at the inquiry or trial at the time of the examination. (92) 14 All 242 (253) (S B).

10. Examination must be by the Court itself and not by others.—[1] The Court alone is authorised to examine the accused person and the counsel for the complainant or the prosecution should not be allowed to take part in the examination. (Vol 25) 1938 Nag 283 (285) : 40 Cri L Jour 197 : I L R (1939) Nag 686 \* (Vol 17)

**Section 342.—Note 10 (contd.)**

1930 Lah 166 (167) : 31 Cri L Jour 560\* ('87) 10 Mad 121 (123) (S B).

[2] It is improper for a Magistrate to base his examination on detailed instructions given by the counsel for the prosecution. (Vol 20) 1933 Nag 269 (269) : 34 Cri L Jour 1172\* (Vol 21) 1934 Nag 218 (214, 215) : 35 Cri L Jour 1457 : 31 Nag L R 49.

11. *De novo* trial.—Examination by successor.—[1] Magistrate trying case transferred.—Successor should examine accused once again. (Vol 14) 1927 Lah 720 (720) : 29 Cri L Jour 125.

[2] Failure to examine accused, where no new matter has been introduced in the *de novo* trial, does not vitiate the proceedings. (Vol 22) 1935 Mad 22 (22) : 58 Mad 427 : 36 Cri L Jour 307.

12. Nature of examination contemplated by the section.—[1] Accused can be questioned only "for the purpose of enabling him to explain any circumstances appearing in the evidence against him." (Vol 31) 1944 Lah 25 (27) : I L R (1943) Lah 477 : 45 Cri L Jour 364 (F B) \* (Vol 30) 1943 Mad 408 (409) : 44 Cri L Jour 541\* ('03) 7 Cal W N 345 (351) (D B) \* ('78) 1 Cal L Rep 436 (436, 437) (D B) \* ('87) 10 Mad 121 (123) (S B).

[2] The object of section is to enable the Judge to ascertain from the accused such explanation as he may desire to give, regarding any statements made by the prosecution witnesses or to elicit from the accused how he proposes to meet such evidence as, in the opinion of the Court, implicates him. (Vol 32) 1945 All 81 (85, 86) : 46 Cri L Jour 750 : I L R (1945) All 558\* (Vol 29) 1942 Sind 102 (103) : I L R (1942) Kar 112 : 43 Cri L Jour 799\* (Vol 28) 1941 Mad 296 (296) : 42 Cri L Jour 402 \* (Vol 27) 1940 Cal 250 (251) : 41 Cri L Jour 563 (D B).

[See also (Vol 32) 1945 All 87 (89) : I L R (1945) All 432 : 46 Cri L Jour 495.]

[3] The section has no application where no evidence at all has been recorded on behalf of the prosecution. ('91) 13 All 345 (347, 348) \* ('01) 5 Cal W N 864 (865, 866) \* (Vol 12) 1925 Lah 432 (433) : 6 Lah 183 : 26 Cri L Jour 1238 (D B) \* (Vol 21) 1934 Lah 96 (96) : 15 Lah 60 : 35 Cri L Jour 1394 \* ('10) 11 Cri L Jour 193 (193) (D B) (Mad).

[See also (Vol 8) 1921 All 282 (283, 284) : 22 Cri L Jour 146.]

[4] No evidence implicating accused given.—The section does not apply. (Vol 31) 1944 Pat 345 (346) : 23 Pat 1 : 46 Cri L Jour 86 (D B) \* (Vol 30) 1943 Mad 408 (409) : 44 Cri L Jour 541\* (Vol 10) 1923 Lah 225 (226) : 4 Lah 55 : 24 Cri L Jour 693\* (Vol 28) 1941 Mad 1 (5) : 42 Cri L Jour 677 \* (Vol 16) 1929 Nag 350 (352) : 31 Cri L Jour 15.

[5] Accused cannot be examined for the purpose of getting from him the names of his witnesses, the nature of his evidence and the particulars of his defence. ('92) 14 All 242 (254, 255) \* (Vol 12) 1925 Nag 403 (404, 405) : 22 Nag L R 1 : 27 Cri L Jour 66.

[6] The examination contemplated is not a cross-examination or an examination of inquisitorial nature. (Vol 29) 1942 Sind 102 (103) : I L R (1942) Kar 112 : 43 Cri L Jour 799 \* (Vol 27) 1940 Cal 250 (251) : 41 Cri L Jour 563 (D B) \* (Vol 27) 1940 Mad 372 (375) : I L R (1940) Mad 514 : 41 Cri L Jour 858 (D B) \* (Vol 1) 1914 Oudh 32 (37) : 15 Cri L Jour 474 (D B) \* (Vol 20) 1933 All 690 (695) : 34 Cri L Jour 967 : 55 All 1040 (D B) \* ('04) 6 Bom L R 94 (98) (D B) \* (Vol 12) 1925 Cal 361 (369) : 52 Cal 522 : 26 Cri L Jour 631 (D B) \* (Vol 17) 1930 Lah 166 (167) : 31 Cri L Jour 560 \* (Vol 12) 1925 Nag 403 (404) : 22 Nag L R 1 : 27 Cri L Jour 666\* (Vol 14) 1929 Lah 382 (384) : 10 Lah 223 : 9 Cri L Jour 769 \* ('04) 1 Cri L Jour 699 (700) : 7

Oudh Cas 191 (D B) \* (Vol 5) 1918 Upp Bur 84 (89) : 2 Upp Bur Rul 3 : 18 Cri L Jour 774 \* (Vol 17) 1930 Rang 351 (353) : 8 Rang 372 : 32 Cri L Jour 23 (D B) \* (Vol 17) 1930 Sind 225 (229, 235) : 31 Cri L Jour 1026 (D B) \* (Vol 22) 1935 All 717 (719) : 36 Cri L Jour 773 (D B).

[7] The purpose of examination is not to entrap the accused to extract from him damaging admissions, upon which to build up the case. ('84) 1884 All W N 106 (107) \* ('66) 3 Bom H C R Cr 51 (53) (D B) \* ('63) 1 Mad H C R 199 (200) (D B) \* ('12) 13 Cr L Jour 283 (284) (D B) (Cal) \* ('13) 14 Cri L Jour 129 (130) (D B) (Cal) \* ('87) 10 Mad 295 (315) (S B) \* ('82) 5 C P L R Cr 11 (11, 12) \* ('09) 9 Cri L Jour 56 (57) : 4 Nag L R 163\* ('93-1900) 1893-1900 Low Bur Rul 549 (352) \* (Vol 4) 1917 Low Bur 187 (139) : 17 Cri L Jour 316.

[8] Examination cannot be made to supply a gap in the case for prosecution. (Vol 28) 1941 Mad 1 (4) : 42 Cr L Jour 677\* (Vol 27) 1940 Cal 250 (251) : 41 Cri L Jour 563 (D B) \* (Vol 24) 1937 Mad 209 (210) : 38 Cri L Jour 328 : I L R (1937) Mad 358\* (Vol 22) 1935 Rang 509 (510) : 37 Cri L Jour 323 (S B) \* (Vol 12) 1925 Nag 403 (404) : 22 Nag L R 1 : 27 Cri L Jour 66 \* (1901) 28 Cal 689 (693) (D B) \* (Vol 17) 1930 Pat 498 (499) : 9 Pat 504 : 32 Cri L Jour 898 (D B) \* (Vol 10) 1923 Lah 225 (226) : 4 Lah 55 : 24 Cri L Jour 693\* (1908) 8 Cri L Jour 62 (63) : 4 Low Bur Rul 244 (D B) \* (Vol 17) 1930 Sind 225 (235) : 31 Cri L Jour 1026 (D B) \* (Vol 7) 1920 All 274 (275) : 42 All 522 : 22 Cri L Jour 84.

[9] The Magistrate or Judge cannot ask the accused about his previous convictions. (Vol 31) 1944 Lah 25 (27, 28) : I L R (1943) Lah 477 : 45 Cri L Jour 364 (F B) \* ('01) 28 Cal 689 (693) (D B) \* ('04) 1 Cri L Jour 227 (243) : 28 Bom 129 (S B) \* ('05) 2 Cri L Jour 227 (227) (Upp Bur).

[10] By putting questions to the accused the Court ascertains what explanation or defence he wishes to put forward. ('04) 1 Cri L Jour 854 (858) : 17 C P L R 113\* (Vol 5) 1918 Nag 143 (145) : 20 Cri L Jour 12 (D B).

**13. "Question him generally on the case."—**

[1] The word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case but means that the questions should relate to the whole case and should not be limited to particular parts of it. (Vol 32) 1945 All 87 (89) : I L R (1945) All 432 : 46 Cri L Jour 495 \* (Vol 32) 1945 All 81 (85) : 46 Cri L Jour 750 : I L R (1945) All 558 \* (Vol 29) 1942 Sind 102 (103) : I L R (1942) Kar 112 : 43 Cri L Jour 799\* (Vol 29) 1942 Sind 33 (37) : I L R (1941) Kar 532 : 43 Cri L Jour 458 (D B) \* (Vol 28) 1941 Oudh 517 (520) : 42 Cri L Jour 758 (DB) \* (Vol 20) 1933 P C 124 (130) : 34 Cri L Jour 322 (PC) \* (Vol 33) 1946 Bom 465 (466) : 47 Cri L Jour 884 (SB) \* (Vol 27) 1940 Cal 378 (380) : 41 Cri L Jour 783 (D B) \* (Vol 24) 1937 Rang 83 (86) : 38 Cri L Jour 524 : 14 Rang 666 (F B) \* (Vol 33) 1946 Mad 179 (180) (D B) \* (Vol 31) 1944 Mad 42 (43) : 45 Cri L Jour 282 : I L R (1944) Mad 304 (D B) \* (Vol 25) 1938 Nag 283 (285) : 40 Cri L Jour 197 : I L R (1939) Nag 686.

[See however (Vol 27) 1940 Mad 372 (375) : I L R (1940) Mad 514 : 41 Cri L Jour 858 (D B).] (Where the accused has shown by his replies that he has understood all the points against him and has attempted to explain them, the failure of the Judge to put to him all the items of evidence leading to the inference of his guilt is not material.)

[2] A long composite question should not be asked, but separate questions on the various points should be put and the explanation of the accused asked. (Vol 14) 1927 Lah 650 (650, 651) : 28 Cri L Jour 787.

[3] The habit of summarising the whole evidence and asking the accused what he has to say with regard



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so it is to be deprecated. (Vol 33) 1946 Mad 179 (130) : I L R (1946) Mad 659 (D B).

14. "Without previously warning the accused." [1] The section does not require, as in the case of statements taken under S. 164, that the accused shall be warned of the consequences of the statements he makes. (Vol 32) 1945 Lah 91 (96) (D B).

[2] It is extremely desirable that the Magistrate should follow the practice in England and warn the accused that they are not obliged to answer unless they desire to do so. (Vol 13) 1926 Mad 570 (572, 573) : 27 Cri L Jour 311 (D B).

15. Examination of pleader of accused. — [1] Different views are held as to whether Court can examine the pleader of the accused where personal attendance of accused has been dispensed with under S. 205 :

[a] The examination must be of the accused in person. (Vol 21) 1934 All 693 (694) : 35 Cri L Jour 879 \* (Vol 32) 1945 Cal 482 (482, 483) (D B) \* (Vol 13) 1926 Cal 430 (431) : 26 Cri L Jour 1032 (D B) \* (Vol 8) 1921 Mad 679 (680) : 23 Cri L Jour 697.

[b] The Magistrate is not bound to examine the accused personally. (Vol 13) 1926 Bom 218 (220) : 27 Cri L Jour 440 : 50 Bom 250 (D B) \* (Vol 21) 1934 Bom 212 (212) : 35 Cri L Jour 1035 (D B) \* (Vol 14) 1927 Rang 73 (73) : 4 Rang 506 : 28 Cri L Jour 226 \* (13) 14 Cri L Jour 272 (272) : 6 Sind L R 206 (D B) .

16. Written statement of accused, if sufficient. [1] The accused is not entitled, as of right, to put in a written statement in lieu of answers. (Vol 16) 1929 Bom 296 (300) : 53 Bom 479 : 31 Cri L Jour 65 (D B) \* (Vol 4) 1917 Cal 687 (692) : 17 Cri L Jour 9 (D B) \* (Vol 3) 1916 Cal 633 (641) : 16 Cri L Jour 724 (D B) \* (Vol 34) 1947 Pat 107 (109) : 47 Cr L J 780 (D B).

[2] The section contemplates an oral examination. (Vol 18) 1931 Mad 241 (242) : 32 Cri L Jour 757.

[3] The written statement of defence cannot be allowed to take the place of the examination, which the section imperatively orders the Court to make. (Vol 29) 1942 Sind 102 (103) : I L R (1942) Kar 112 : 43 Cri L Jour 799 \* (Vol 28) 1941 Mad 296 (297) : 42 Cri L Jour 402 \* (Vol 23) 1936 Nag 147 (148) \* (Vol 20) 1933 All 690 (695) : 34 Cri L Jour 967 : 55 All 1040 (D B) \* (Vol 12) 1925 Pat 378 (380, 381) : 4 Pat 231 : 26 Cri L Jour 932 (D B) \* (Vol 21) 1934 Nag 213 (214, 215) : 35 Cri L Jour 1457 : 31 Nag L R 49 \* (Vol 3) 1916 Cal 188 (214) : 42 Cal 957 : 16 Cri L Jour 497 \* (Vol 7) 1920 Pat 471 (479) : 5 Pat L Jour 430 : 21 Cri L Jour 705 (D B) \* (21) 22 Cri L Jour 276 (279) (Lah) \* (Vol 8) 1921 Mad 679 (680) : 23 Cri L Jour 697.

[See however (Vol 24) 1937 Nag 67 (68) : I L R (1937) Nag 228 : 38 Cri L Jour 354. (Accused declining to make statement but preferring to file written statement controverting all points in prosecution evidence—There is no violation of the section.)]

[But see (Vol 31) 1944 Pat 67 (72) : 22 Pat 681 : 45 Cri L Jour 624 (D B). (Filing of a written statement of defence dispenses with the necessity to examine the accused orally.) \* (Vol 12) 1925 Pat 414 (417) : 4 Pat 488 : 26 Cri L Jour 811 (D B).]

[4] The practice of taking written statements is pernicious and entirely irresponsible. (Vol 23) 1936 Oudh 405 (407) : 37 Cri L Jour 955 : 12 Luck 261 (DB). (Pernicious.) \* (Vol 3) 1916 Cal 633 (641) : 16 Cri L Jour 724 (D B). (Do.) \* (Vol 4) 1917 Cal 687 (692) : 17 Cri L Jour 9 (D B). (Irresponsible).

[5] A written statement drafted by the accused's legal adviser can never have the same value as answers coming directly from the accused's mouth. (Vol 23) 1936 Oudh 405 (407) : 37 Cri L Jour 955 : 12 Luck 261 (D B) \* (Vol 23) 1936 Pat 626 (627) : 38 Cri L Jour 2 \*

(Vol 3) 1916 Cal 633 (641) : 16 Cri L Jour 724 (D B).

[6] In answer to the questions accused said that he would file a written statement—Held that Magistrate is not thereby relieved of his duty to put questions under this section. (Vol 34) 1947 Pat 235 (314) : 25 Pat 612 (627) (DB).

17. Examination by committing Magistrate. —

[1] A committing Magistrate is bound, before commitment, to examine the accused. (Vol 25) 1941 Mad 1 (4) : 42 Cri L Jour 677 \* (1940) 23 Mad 636 (637) (D B).

But see (Vol 22) 1935 Cal 805 (806) : 62 Cal 475 : 36 Cri L Jour 1340 \* (Vol 8) 1921 Sind 131 (122) : 16 Sind L R 291 : 26 Cri L Jour 131 (D B) \* (Vol 4) 1917 Sind 24 (24) : 11 Sind L R 52 : 13 Cri L Jour 915 (D B).]

18. Examination of accused in sessions trials. —

[1] Even where the accused has been examined generally by the committing Magistrate, the Sessions Judge is bound to examine the accused in the trial. (Vol 7) 1920 Pat 471 (477, 478) : 5 Pat L Jour 430 : 21 Cri L Jour 705 (D B) \* (Vol 13) 1926 Oudh 57 (58) : 26 Cri L Jour 1576 \* (1904) 2 Low Bur Rul 115 (116, 117) (D B) \* (Vol 14) 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364 (D B) \* (107) 6 Cri L Jour 74 (75) (DB) (Bom). (It has, however, been observed that the proposition was open to serious doubt).

[But see (109) 10 Cri L Jour 325 (339) (D B) (Cal).]

19. Refusal to answer— Sub-section (2). — [1] Accused is entitled to refuse to answer questions put to him. (Vol 18) 1931 Lah 178 (181, 182) : 32 Cri L Jour 684 (D B).

[2] Accused refusing to answer — Court is not bound to go on questioning him. (Vol 31) 1944 Nag 192 (195) : I L R (1944) Nag 589 : 46 Cri L Jour 80 (D B) \* (Vol 31) 1944 Pat 67 (72) : 22 Pat 681 : 45 Cri L Jour 624 (D B) \* (Vol 24) 1937 Nag 67 (67, 68) : 38 Cri L Jour 354 : I L R (1937) Nag 228 \* (Vol 12) 1925 Pat 378 (381) : 4 Pat 231 : 26 Cri L Jour 932 (D B).

[3] Court should not hold inquisitorial proceedings against accused who refuses to answer. (Vol 17) 1930 Cal 209 (212) : 57 Cal 1074 : 31 Cri L Jour 903 (D B).

[4] Accused declining to answer — Fact should be noted on record. (71) 15 Suth W R Cr 16 (17) (D B).

[5] The fact that the accused declines to make a statement will not necessarily indicate that he would not like to answer specific questions. (Vol 17) 1930 Cal 209 (212) : 57 Cal 1074 : 31 Cri L Jour 903 (D B).

[6] If the accused refuses to give an explanation, his refusal should be made abundantly apparent on the face of the record, in order that the inference against him thereon, authorised by the section may be well founded. (Vol 34) 1947 Pat 107 (110) : 47 Cr L J 780.

20. Answers given to be taken into consideration. — [1] Where facts are put forward on behalf of the prosecution, which, unless explained, justify an inference of guilt being drawn against the accused, it is both lawful and proper for the Court to consider the explanation of those facts, which the accused puts forward in his defence. (Vol 3) 1916 All 63 (64) : 17 Cri L Jour 23 \* (Vol 7) 1920 All 72 (73, 74) : 21 Cri L Jour 410.

[See (Vol 30) 1943 Mad 408 (409) : 44 Cri L Jour 541 \* (Vol 5) 1918 Cal 314 (315) : 19 Cri L Jour 81 (DB).]

[2] Court cannot discard the explanation of the accused unless it finds itself unable to believe it on the evidence. (Vol 34) 1947 Cal 162 (167) : 47 Cr L J 662 (DB).

[3] In cases of circumstantial evidence, the Court should always take the explanation of the accused into consideration. (Vol 13) 1926 Bom 71 (73) : 49 Bom 878 : 27 Cri L Jour 114 (DB).

[4] The burden of proving an exception under the Penal Code is on the accused. (Vol 31) 1944 Lah 97 (101) : 45 Cri L Jour 634 (DB) \* (37) 1937 Mad W N 557 (561) (FB) \* (Vol 14) 1927 Cal 324 (326) : 28 Cri L Jour 334 (DB) \* (Vol 16) 1929 Cal 346 (348) : 56 Cal

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1013 : 31 Cri L Jour 369\* (Vol 12) 1925 Lah 399 (400) : 6 Lah 171 : 27 Cri L Jour 438\* (33) 34 Cri L Jour 404 (406) (Nag) \* (Vol 15) 1928 Nag 58 (62) : 28 Cri L Jour 996 \* (Vol 20) 1933 Rang 142 (143) : 34 Cri L Jour 783 (DB) \* (Vol 16) 1929 Sind 90 (92) : 23 Sind L R 216 : 30 Cri L Jour 548 (DB).

[5] The circumstances, with accused's statement, may be sufficient to establish the exception under Penal Code, in his favour. (Vol 14) 1927 All 119 (119) : 27 Cri L Jour 1995 (DB).

[6] The proof of a case against the accused must depend, not on the absence of an explanation on his part, but upon the positive affirmative evidence of his guilt given by the prosecution. (Vol 11) 1924 Cal 257 (283) : 25 Cri L Jour 817 (FB).

[7] Where the prosecution evidence *prima facie* establishes the guilt of the accused or involves him in considerable suspicion, his absence of explanation may give rise to an inference against him. (Vol 5) 1918 Mad 111 (115) : 19 Cri L Jour 189 (DB) \* (Vol 6) 1919 Oudh 160 (174) : 20 Cri L Jour 465 (DB) \* (Vol 1) 1914 Sind 111 (112) : 7 Sind L R 109 : 15 Cri L Jour 497 (DB).

[See (Vol 11) 1924 Cal 257 (283) : 25 Cri L Jour 817 (FB).]

[8] Prosecution evidence entirely untrustworthy—It is not open to the Court to rely upon the admissions of the accused to base a conviction. (Vol 29) 1942 Oudh 321 (322) : 17 Luck 646 : 43 Cri L Jour 657\* (37) 1937 Mad W N 569 (570).

[See also (Vol 30) 1943 Mad 408 (409) : 44 Cr L J 541.]

[But see (Vol 32) 1945 Sind 42 (46) : I L R (1944) Kar 444 : 46 Cri L Jour 614 (DB) \* (Vol 31) 1944 Sind 137 (140, 141) : I L R (1944) Kar 114 : 46 Cri L Jour 19 (DB).]

[9] The answers given cannot be allowed to fill up a gap in the prosecution evidence. (Vol 29) 1942 Oudh 321 (322) : 17 Luck 646 : 43 Cri L Jour 657 \* (Vol 24) 1937 Mad 209 (210) : 38 Cri L Jour 823 : I L R (1937) Mad 358 \* (Vol 23) 1936 Lah 28 (29) : 37 Cri L Jour 428\* (Vol 15) 1928 Oudh 373 (373) : 29 Cri L Jour 763\* (Vol 16) 1929 Sind 255 (256) : 24 Sind L R 10 : 30 Cri L Jour 1135 (DB) \* (Vol 8) 1916 Mad 851 (853) : 39 Mad 449 : 16 Cri L Jour 294 (DB).

[10] Where in a prosecution for defamation no evidence was let in to prove publication, it was held that the admission of publication, made by the accused in his statement, was not sufficient to fill up the gap in the prosecution evidence. (Vol 25) 1938 Mad 904 (905) : 40 Cri L Jour 69 \* (Vol 10) 1923 Lah 225 (226) : 4 Lah 55 : 24 Cri L Jour 698 \* ('11) 12 Cri L Jour 585 (587) : 36 Mad 457 (SB).

[But see (Vol 22) 1935 Rang 509 (510, 511) : 37 Cri L Jour 828.]

[11] Prosecution for murder — Prosecution evidence not sufficient to connect accused with murder — Gap cannot be filled up by admission by accused. (Vol 28) 1941 Mad 1 (4) : 42 Cri L Jour 677.

[12] Court cannot supplement the prosecution evidence by selecting only the passages which might corroborate the prosecution evidence, rejecting passages exonerating the accused; the entire statement should be considered. (Vol 24) 1937 Lah 243 (245) : 38 Cri L Jour 843 (DB) \* (Vol 16) 1929 All 1 (5) : 51 All 313 : 30 Cri L Jour 101 (DB) \* ('94) 21 Cal 955 (976) (DB) \* ('12) 13 Cri L Jour 195 (196) : 39 Cal 855 (DB) \* ('11) 12 Cri L Jour 142 (142) (DB) (Mad).

[See also (Vol 31) 1944 Lah 97 (104, 105) : 45 Cri L Jour 634 (DB) \* (Vol 18) 1931 All 1 (2) : 32 Cri L Jour 362 : 52 All 1011 (FB).]

[13] Statement of accused can be used for or against him. (Vol 27) 1940 Cal 250 (251) : 41 Cri L Jour 563 (DB) \* (Vol 8) 1921 Pat 122 (122) : 6 Pat L Jour 241 : 22 Cri L Jour 433 (DB).

[See (Vol 10) 1923 All 90 (91) : 45 All 166 : 24 Cri L Jour 6 (DB).]

[14] Statement of accused can be used for or against him in a subsequent trial for a different offence. (Vol 29) 1942 Cal 277 (279) : 43 Cri L Jour 693 (DB) \* (Vol 8) 1921 Pat 122 (122) : 6 Pat L Jour 241 : 22 Cri L Jour 433 (DB).

[15] Statement cannot be used against any person other than the one who made it. (Vol 27) 1940 Cal 250 (251) : 41 Cri L Jour 563 (DB).

[21] Irrelevant answers. — [1] The Judge can refuse to record irrelevant answers and may even prevent the making of such answers. (Vol 20) 1933 All 690 (695) : 55 All 1040 : 34 Cri L Jour 967 (DB).

[22] Answers making defamatory statements. — [1] Defamatory statement, made in answer to questions put by Court, will not render the accused liable to punishment. (Vol 14) 1927 All 707 (708) : 50 All 169 : 29 Cri L Jour 262\* ('12) 13 Cri L Jour 275 (278, 282) : 36 Mad 216 (FB).

[But see (Vol 13) 1926 Bom 141 (143) : 50 Bom 162 : 27 Cri L Jour 423 (FB).]

[23] Answers amounting to contempt of Court. — [1] A statement which amounts to contempt of Court, will render the accused liable to punishment. (Vol 9) 1922 Bom 261 (264) : 46 Bom 973 : 23 Cri L Jour 325 (DB).

[24] Answers by one accused, if can be considered against co-accused. — [1] A confession made by one accused in the course of his statement cannot be taken into consideration against his co-accused under S. 30 of the Evidence Act. (Vol 10) 1923 All 322 (323) : 25 Cri L Jour 305 : 45 All 323\* (Vol 18) 1931 Mad 820 (821) : 32 Cri L Jour 1099 : 54 Mad 788 (DB) \* (Vol 16) 1929 Mad 285 (285) : 30 Cri L Jour 932\* (Vol 27) 1940 Cal 250 (251) : 41 Cri L Jour 563 (DB) \* (Vol 27) 1940 Nag 287 (290, 291) : 41 Cri L Jour 886 (DB).

[But see (Vol 18) 1931 Nag 169 (170) : 32 Cri L Jour 1222 : 27 Nag L R 163. (Disapproved in (Vol 27) 1940 Nag 287 : 41 Cri L Jour 886 (DB).) \* (Vol 1) 1914 Mad 45 (46) : 15 Cri L Jour 13 : 38 Mad 302\* (Vol 17) 1930 Bom 354 (355, 356) : 54 Bom 531 : 31 Cri L Jour 1137 (DB) \* (Vol 23) 1936 Lah 337 (338) : 37 Cri L Jour 508 : 16 Lah 651 (DB).]

[25] Several accused — Each to be examined separately. — [1] Several accused in a case — Joint statement of all the accused in a single paragraph is not authorised by the section. (Vol 24) 1937 Sind 304 (304) : 39 Cri L Jour 59 : 32 Sind L R 30 (DB) \* (Vol 18) 1931 Bom 132 (135) : 55 Bom 356 : 32 Cri L Jour 572 (DB) \* (Vol 1) 1914 Lah 42 (43, 44) : 1913 Pun Re No. 20 Cr : 15 Cri L Jour 11 \* ('28) 29 Cri L Jour 469 (469) (Lah).

[But see (Vol 12) 1925 Nag 403 (403, 404) : 22 Nag L R 1 : 27 Cri L Jour 66. (Co-accused not debarred from giving concerted statement.)]

[2] Where, after taking an explanation from one of the accused as regards the nature of his defence, the Judge subsequently took another statement from a co-accused, it was held that he was entitled to do so. (Vol 15) 1928 Cal 675 (677) : 55 Cal 888 : 29 Cri L Jour 1022 (DB).

[3] Where there are several accused, the case of each of them should be individually considered and each of them should be questioned with reference to the particular position brought out by the evidence against him. (Vol 25) 1938 Nag 283 (285) : 40 Cri L Jour 197 : ILR (1938) Nag 686.

[26] Accused's defence in general. — [1] The nature of the defence should be ascertained, not only from the statement of accused but from the trend of the cross-examination of the prosecution witnesses, and from the arguments of the accused's pleader at the close of



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the trial. (Vol 17) 1930 Cal 442 (442, 443): 31 Cri L Jour 1203 (DB).

2. Accused is entitled to put forward any defence open to him, technical or otherwise, and to have the Court's judgment on it. (Vol 1) 1914 Cal 453 (459): 41 Cal 350: 15 Cri L Jour 385 (DB).

3. There is nothing in law to prevent the accused from setting up alternative and inconsistent defences. (Vol 5) 1918 All 189 (190): 40 All 284: 19 Cri L Jour 371\*(Vol 10) 1923 Cal 717 (718): 25 Cri L Jour 130 (DB) \*(Vol 6) 1919 Cal 489 (441): 20 Cri L Jour 631 (DB)\* (Vol 14) 1927 Lah 710 (712): 29 Cri L Jour 117 (DB)\* (Vol 7) 1920 Pat 343 (343, 344): 21 Cri L Jour 799: 5 Pat L Jour 64 (DB)\* (Vol 15) 1928 Rang 167 (167): 30 Cri L Jour 239.

4. It is open to accused to plead the right of private defence, either specially, or in the alternative. (Vol 7) 1920 Pat 343 (343, 344): 21 Cri L Jour 799: 5 Pat L Jour 64 (DB).

5. It is not the affair of the defence to explain or to supply gaps in the prosecution evidence. (Vol 1) 1914 Cal 456 (466): 41 Cal 350: 15 Cri L Jour 385 (DB).

6. Court cannot call upon the accused to frame a theory, particularly in a case of difficulty in which the theory of the prosecution is itself not clear. (Vol 5) 1918 All 160 (166): 19 Cri L Jour 935 (DB)\* ('30) 1930 Mad W N 1211 (1215) (DB).

7. Where a *prima facie* case is made out by the prosecution, it is the duty of the defence to rebut the presumption arising therefrom, by some tangible evidence. (Vol 15) 1928 Cal 27 (39): 29 Cri L Jour 49 (SB). (Per *Suhrawardy J.*) \*(Vol 1) 1914 Sind 111 (112): 7 Sind L R 109: 15 Cri L Jour 497 (DB)\* (Vol 20) 1933 Cal 599 (600): 34 Cri L Jour 1015 (DB)\* (Vol 15) 1928 Pat 100 (101): 6 Pat 627: 29 Cri L Jour 239 (DB)\* (Vol 18) 1931 Pat 384 (386): 10 Pat 590: 33 Cri L Jour 111 (DB)\* (Vol 14) 1927 Sind 85 (87): 27 Cri L Jour 1265 (DB).

8. A plea of guilty is an extreme instance of admission upon which a decision may be based. ('06) 4 Cri L Jour 471 (475): 3 Low Bur Rul 208 (FB).

[See also (Vol 21) 1934 Cal 221 (229, 230): 35 Cri L Jour 334 (SB).]

27. Court, if can ask accused to give thumb impressions.—[1] Court can direct accused to give his thumb impression in Court. (Vol 15) 1928 Pat 103 (104): 6 Pat 623: 28 Cri L Jour 1028 \*(Vol 15) 1928 Pat 129 (131, 132): 6 Pat 305: 28 Cri L Jour 850 (DB)\* (Vol 11) 1924 Rang 115 (116, 117): 1 Rang 759: 26 Cri L Jour 108 (FB).

[See also (Vol 13) 1926 Cal 531 (533): 27 Cri L Jour 409 (DB)\* (Vol 10) 1923 Mad 178 (179): 23 Cri L Jour 694: 46 Mad 715 (DB).]

[But see (Vol 9) 1922 Pat 73 (74, 75): 1 Pat 242: 23 Cri L Jour 638 (DB).]

[2] Where the accused refused to give his handwriting in a forgery case against him, it was held that an adverse inference can be drawn against him by reason of such refusal. (Vol 19) 1932 Bom 406 (409): 56 Bom 304: 33 Cri L Jour 666.

28. "No oath shall be administered to the accused"—Sub-section (4). — [1] Under the Indian law, a person cannot be administered an oath in any case in which he is an accused person. (Vol 18) 1931 Cal 341 (342): 58 Cal 1214: 32 Cri L Jour 667 (DB)\* (Vol 6) 1919 Upp Bur 31 (32): 3 Upp Bur Rul 115: 20 Cri L Jour 341\*(11) 12 Cri L Jour 577 (578) (Low Bur)\* (Vol 18) 1931 Lah 476 (478): 12 Lah 635: 32 Cri L Jour 913 (DB)\*('06) 3 Cri L Jour 225 (226): 28 All 331\*(Vol 6) 1919 Cal 1021 (1022): 45 Cal 720: 19 Cri L Jour 663 (DB)\* (Vol 16) 1929 Pat 145 (148): 30 Cri L Jour 646 (FB)\*('02) 26 Mad 116 (118)\*('10) 11

Cri L Jour 537 (537): 33 All 163 (DB)\*('96) 19 Mad 209 (210) (DB)\* (Vol 13) 1926 Bom 144 (146): 50 Bom 56: 27 Cri L Jour 433.

[But see (Vol 13) 1926 Bom 151 (152): 50 Bom 111: 27 Cri L Jour 466. (Statement of accused on oath at Coroner's inquest is admissible at his trial.) \*(66) 6 Sudh W R Cr 91 (91). (Persons jointly tried—No community of interest—Any person jointly indicted is a competent witness against others.)]

[2] As an exception to the above rule, see the Prevention of Corruption Act, 1947, S. 7 which mainly provides that any person charged with an offence punishable under S. 161 or S. 165, Penal Code or under S. 5 (2), Prevention of Corruption Act, 1947, shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial.

3. "Accused" must be an accused in the inquiry or trial in which he is presented as a witness. (Vol 25) 1938 Bom 481 (482, 483): 40 Cri L Jour 118: I L R (1939) Bom 42 (DB)\* (Vol 6) 1919 Cal 1021 (1022): 45 Cal 720: 19 Cri L Jour 663 (DB)\* (Vol 12) 1925 Oudh 227 (227): 25 Cri L Jour 1194 \*(Vol 12) 1925 Rang 122 (125): 3 Rang 11: 26 Cri L Jour 492\*(01) 28 Cal 709 (714) (DB)\*('98) 21 All 107 (109) \*(Vol 22) 1935 Bom 186 (188): 59 Bom 355: 36 Cri L Jour 937 (DB)\* (Vol 27) 1940 Nag 410 (413): 41 Cri L Jour 697 \*(Vol 24) 1937 Nag 17 (22, 23): 38 Cri L Jour 237 and 251: I L R (1937) Nag 315 (FB). (The word 'inquiry' in the section does not include an investigation.)

4. The section does not contemplate an accused over whom the Court is exercising jurisdiction in another inquiry or trial. (Vol 25) 1938 Bom 481 (482): 40 Cri L Jour 118: I L R (1939) Bom 42 (DB)\* (Vol 24) 1937 Nag 17 (22): 38 Cri L Jour 237 and 251: I L R (1937) Nag 315 (FB)\* (Vol 15) 1928 Cal 557 (559): 56 Cal 400: 30 Cri L Jour 818 (DB)\* (Vol 18) 1931 Cal 341 (342): 58 Cal 1214: 32 Cri L Jour 667 (DB)\* (Vol 28) 1941 All 337 (337, 338): 42 Cri L Jour 883: I L R (1941) All 635. (Section 539A applies to accused person—Accused filing false affidavit that Magistrate's statement about his previous conviction was wrong—Conviction of accused under Ss. 199 and 193, Penal Code, is justified.) \*(Vol 15) 1928 All 182 (184): 29 Cri L Jour 336\*(Vol 9) 1922 Lah 113 (113): 3 Lah 46: 23 Cri L Jour 399\*(Vol 12) 1925 Lah 312 (313, 314): 6 Lah 34: 27 Cri L Jour 98 \*(09) 10 Cri L Jour 509 (512, 513): 12 Oudh Cas 308 (DB)\*('08) 8 Cri L Jour 378 (379): 1 Sind L R 124.

[But see ('96) 19 Mad 209 (210) (DB). (Affidavit in revision is not admissible.)]

5. The word "accused" cannot include any person who, at the time he is administered an oath, is not on his trial in any proceeding. (Vol 34) 1947 Pat 284 (289): 25 Pat 539 (546) (DB). (Person examined as witness for prosecution in a case against other persons, and subsequently arraigned as an accused—Definite order should be made to expunge his evidence from record, and evidence should not be used against him.) \*(Vol 7) 1920 Nag 255 (256): 16 Nag L R 9: 21 Cri L Jour 769\*(04) 1 Cri L Jour 1066 (1067, 1068): 1904 Pun Re No. 21 Cr. (Where accused is pardoned under S. 337.)\*(Vol 2) 1915 Sind 43 (45): 9 Sind L R 43: 16 Cri L Jour 632 (DB). (Do.)\* (Vol 5) 1918 All 111 (113): 19 Cri L Jour 401: 40 All 416. (Where accused is discharged.) \*(Vol 4) 1917 Cal 261 (262): 17 Cri L Jour 428 (DB). (Do.)\*('09) 9 Cri L Jour 370 (372, 374): 4 Low Bur Rul 362 (DB). (Do.)

6. Several persons arrested—Police discharging one of them—Discharged person made witness in trial against others—Held that he was a competent witness, even though his discharge by the police was illegal. ('92) 16 Bom 661 (663, 668) (DB).

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[7] Several accused charge-sheeted — Subsequently one of them placed on a separate charge-sheet and tried separately:—*Held* that he was a competent witness against the others. (Vol 25) 1938 Bom 481 (483) : 40 Cri L Jour 118 : I.L.R. (1959) Bom 42 (DB).

[8] Where the police refrain from prosecuting a person against whom there is adequate evidence to justify his production for inquiry and trial before a Magistrate, he can be a competent witness even though he was not pardoned under S. 337. (Vol 24) 1937 Nag 17 (23) : 38 Cri L Jour 237 and 251 : I.L.R. (1937) Nag 315 (FB).

[9] A and B charged with theft—Process issued only against A. B is a competent witness in the trial against A. (82) 10 Cal L Rep 553 (554) (DB) \* (Vol 10) 1923 Lah 666 (667) : 25 Cri L Jour 520.

[10] An accused who has not been legally granted a pardon does not cease to be an accused person. (06) 4 Cri L Jour 282 (283) : 1906 Pun Re No. 9 Cr (DB) \* (02) 1902 Pun Re No. 12 Cr, p. 33 (36) (DB) \* (79) 2 All 260 (262) (DB) \* (77) 1 Bom 610 (618) (DB) \* (Vol 7) 1920 Lah 215 (216) : 1 Lah 102 : 21 Cri L Jour 599. (Mere promise of immunity to accomplice does not amount to discharge.) \* (06) 4 Cri L Jour 44 (45, 46) (DB).

[11] Pardon granted by Government to accused after commencement of trial — Accused's evidence is not admissible against his co-accused. (06) 4 Cri L Jour 282 (283) : 1906 Pun Re No. 9 Cr (DB) \* (02) 1902 Pun Re No. 12 Cr, p. 33 (36) (DB) \* (79) 2 All 260 (262) (DB).

[See also (Vol 23) 1936 Lah 358 (356) : 37 Cri L Jour 515 : 16 Lah 594 (DB).]

[12] Where an accused is convicted he ceases to be an accused person. (01) 3 Bom L R 437 (438) (DB). (Per Candy J. Fulton J., *Contra.*; One of several co-accused convicted on his plea of guilty—He becomes a competent witness against others.) \* (Vol 18) 1931 Cal 341 (343, 344) : 58 Cal 1214 : 32 Cri L Jour 667 (DB) \* (1900) 10 Mad L Jour 147 (158, 159, 160) (FB). (Where accused pleads guilty, his incompetency of being a witness is removed, though he is convicted on such plea some time later.)

[13] Prosecution withdrawn against one of several accused under S. 494—He is a competent witness, to whom an oath can be administered, in further proceedings against others. (10) 11 Cri L Jour 21 (21, 22) (All) \* (1900) 25 Bom 422 (424, 428) (SB) \* (Vol 3) 1916 Bom 229 (231, 234, 235) : 17 Cri L Jour 256 (DB) \* (Vol 16) 1929 Cal 319 (320, 321) : 56 Cal 1023 : 31 Cri L Jour 315 (DB) \* (Vol 20) 1933 Cal 148 (149) : 34 Cri L Jour 675 (DB) \* (Vol 11) 1924 Lah 235 (235) : 24 Cri L Jour 696 \* (Vol 13) 1926 Nag 426 (427, 428) : 27 Cri L Jour 307.

[But see (Vol 22) 1935 Cal 473 (475) : 36 Cri L Jour 1248 (DB).]

[14] A criminal appeal is a continuation of the criminal case and the appellant cannot be administered an oath. (89) 12 Mad 451 (453) (DB) \* (Vol 13) 1926 Lah 309 (309) : 7 Lah 148 : 27 Cri L Jour 463.

[15] Where a Magistrate examines persons, against whom a complaint is laid, before issue of process, the procedure is irregular and illegal. (06) 4 Cri L Jour 165 (166, 167) (DB).

[16] Section 10, Bombay Gambling Act, 1887, empowers the Magistrate to examine as witnesses, any of the persons arrested and brought before him in accordance with S. 6 (b) thereof. (Vol 1) 1914 Sind 45 (46, 47) : 8 Sind L R 309 : 16 Sind L R 447 (DB).

[But see (Vol 2) 1915 Bom 123 (123, 124) : 17 Cri L Jour 2 (DB).]

29. Examination of accused in cross-case as a witness.—[1] Where there is a case and a counter or

cross case, both pending, it was held that the examination of the accused in the one case, as witness in the other constituted a grave irregularity. (86) 14 Cal 358 (359, 360) (DB). (Accused not prejudiced by the course adopted—Trial not vitiated.) \* (80) 6 Cal 96 (97, 98, 101) (DB).

[But see (04) 1 Cri L Jour 199 (202, 203, 204) (DB) (Cal) \* (Vol 15) 1928 Cal 557 (559) : 56 Cal 400 : 30 Cri L Jour 518 (DB).]

30. Applicability to proceedings under S. 14, Legal Practitioners Act.—[1] A pleader, against whom proceedings are taken under S. 14, Legal Practitioners Act, is an accused person and he cannot be solemnly affirmed. (83) 6 Mad 252 (253) (DB).

[But see (Vol 9) 1922 Cal 515 (529, 535) : 49 Cal 732 : 24 Cri L Jour 33 (SB).]

31. Applicability to proceedings under Section 145.—[1] Parties litigating under S. 145 can be examined as witnesses in the case. (Vol 12) 1925 Oudh 286 (286) : 26 Cri L Jour 70.

32. Destruction of record — Proof of examination.—[1] Where the records have been destroyed and in his explanation the Magistrate states that the accused was examined, his statement must be accepted. (Vol 16) 1929 Cal 406 (406) : 56 Cal 1067 : 30 Cri L Jour 526.

33. Non-compliance with the section — Effect of.—[1] Different views are held as to the effect of non-compliance with the provisions of the section :

(a) Non-compliance with the provisions of the section vitiates the trial. (Vol 25) 1938 Lah 543 (543) : 39 Cri L Jour 781 : I L R (1938) Lah 603 \* (Vol 23) 1936 Oudh 16 (17, 18) : 36 Cri L Jour 1303 : 11 Luck 461. (Prejudice may be presumed.) \* (Vol 20) 1933 Cal 347 (348) : 24 Cri L Jour 549. (No examination made after close of prosecution evidence.) \* (Vol 10) 1923 Mad 609 (610) : 46 Mad 449 : 24 Cri L Jour 547 (FB). (Do.) \* (Vol 33) 1946 Pat 128 (129) : 47 Cri L Jour 440 \* (Vol 13) 1926 Bom 57 (58) : 50 Bom 34 : 27 Cri L Jour 165 (DB). (Consent of accused does not affect.) \* (Vol 11) 1924 Cal 975 (976) : 51 Cal 924 : 26 Cri L Jour 15 (DB) \* (Vol 21) 1934 Lah 96 (96) : 15 Lah 60 : 35 Cri L Jour 1394 \* (Vol 21) 1934 Nag 213 (215) : 31 Nag L R 49 : 35 Cri L Jour 1457. (Magistrate not examining accused when written statement filed.) \* (Vol 10) 1923 Rang 132 (133) : 4 Upp Bur Rul 127 : 25 Cri L Jour 319. (Particulars of offence not explained.) \* (Vol 14) 1927 Rang 19 (19) : 4 Rang 361 : 27 Cri L Jour 1364 (DB). (Retrial ordered even though accused had been acquitted.) \* (Vol 13) 1926 Sind 1 (3) : 20 Sind L R 34 : 26 Cri L Jour 1554 (FB) \* (Vol 12) 1925 Nag 44 (47) : 20 Nag L R 174 : 26 Cri L Jour 971 (FB). (Examination after prosecution witnesses were examined and before their cross-examination.) \* (Vol 21) 1934 Oudh 457 (458, 459) : 35 Cri L Jour 1417 : 10 Luck 235 (DB). (Do.) \* (Vol 9) 1922 Pat 158 (159, 160) : 22 Cri L Jour 697 : 6 Pat L Jour 644 (DB). (Do.) \* (Vol 29) 1942 Sind 33 (37) : I L R (1941) Kar 532 : 43 Cri L Jour 458 (DB). (Asking general questions.) \* (Vol 18) 1931 Bom 132 (135) : 55 Bom 356 : 32 Cri L Jour 572 (DB). (Taking joint statement from several accused.) \* (41) 43 Cri L Jour 452 (453) (Mad.) (Examination of prosecution witness after charge—Omission to examine accused thereafter.)

[See also (Vol 31) 1944 Nag 192 (195) : I L R (1944) Nag 589 : 46 Cri L Jour 80 (DB).]

(b) Non-compliance with the section does not vitiate the trial unless the accused has been prejudiced by the procedure adopted. (Vol 27) 1940 Bom 314 (314) : 42 Cri L Jour 71 (DB). (When statement of accused is not taken at all, *prima facie* he is prejudiced.) \* (Vol 24) 1937 Oudh 130 (131) : 37 Cri L Jour 408 : 12 Luck 24. (Failure to examine raises presumption of prejudice but

**343.** Except as provided in sections 337 and 338, no influence, by means of any promise or

*No influences to be used* threat or otherwise, shall be used to an accused person to induce him to  
*induce disclosures.* disclose or withhold any matter within his knowledge.

[1882 — S. 343; 1872 — S. 344; 1861 — S. 203.]

Section 342 — Note 33 (*contd.*)

It can be rebutted.) \* (Vol 22) 1935 All 217 (219); 36 Cri L Jour 1290:57 All 666(DB). (Summary trial—Mere fact that statement of accused has not been recorded is not fatal.) \* (Vol 9) 1922 Pat 388 (389); 1 Pat 31; 23 Cri L Jour 703 (DB). (Accused not examined but filing written statement — High Court refusing to interfere as accused were not prejudiced.) \* (Vol 12) 1925 Pat 414 (417, 418, 419); 4 Pat 438; 26 Cri L Jour 811 (DB) \* (Vol 19) 1932 Rang 190 (191, 192); 10 Rang 511; 34 Cri L Jour 121 (FB); \* (Vol 29) 1942 Oudh 342 (343); 13 Cri L Jour 568. (Failure to re-examine accused after cross-examination of prosecution witnesses after charge — No prejudice caused — Conviction not illegal.) \* (Vol 23) 1936 Pesh 211 (213); 38 Cri L Jour 399 (DB). (Failure to examine after the second cross-examination will not vitiate trial unless prejudice is caused.) \* (Vol 11) 1924 Lah 84 (88, 89); 4 Lah 61; 25 Cri L Jour 801. (Fresh examination of accused after examination of prosecution witnesses recalled by accused is not necessary.) \* (Vol 14) 1927 Cal 330 (331); 28 Cri L Jour 347 (DB). (Examination after defence was over — Obiter.) \* (Vol 33) 1946 Bom 465 (466); 47 Cri L Jour 884 (SB). (Omission to ask questions on specific points.) \* (Vol 32) 1945 All 81 (86); 1 I L R (1945) All 558:46 Cri L Jour 750. (Failure to question specifically.) \* (Vol 29) 1942 Sind 102 (103); 1 I L R (1942) Kar 112; 43 Cri L Jour 799. (Accused convicted under S. 420 on ground of misrepresentations relating to liabilities of accused — No question regarding misrepresentations — Omission amounts to miscarriage of justice.) \* (Vol 27) 1940 Mad 372 (374); 1 I L R (1940) Mad 514 (DB) \* (Vol 24) 1937 Rang 83 (86, 87); 38 Cri L Jour 524; 14 Rang 666 (FB). (See observations of Roberts, C. J.) \* (Vol 25) 1938 Nag 283 (285); 40 Cri L Jour 197; 1 I L R (1939) Nag 686 \* (Vol 29) 1942 Sind 122 (126); 1 I L R (1942) Kar 252; 44 Cri L Jour 367 (DB). (Three accused — Written statement filed by one dittoed by others — Statement withdrawn and replaced by another which merely omitted objectionable matter — Second statement signed by one accused only — Omission to examine again held not prejudicial accused.)

[See (Vol 27) 1940 Pat 295 (298); 41 Cri L Jour 267 (DB). (Accused examined after close of arguments—Such procedure even if amounts to irregularity is such that it seriously prejudices the accused and the trial is vitiated — Obiter.) \* (Vol 22) 1935 Cal 605 (606); 36 Cri L Jour 1340; 62 Cal 475 (DB). (Sessions trial — Omission to examine the accused in the committing Magistrate's Court does not vitiate trial.)]

(c) Non-compliance does not vitiate trial unless the accused or the Crown are prejudiced by the procedure. (Vol 34) 1947 Pat 305 (314); 25 Pat 612 (DB).

[2] Where non-compliance with section is held to vitiate trial whether by reason of prejudice to the accused, or independently of any prejudice, ordinarily, the proper course is to order a re-trial from the stage at which the provisions of the section were not complied with. (Vol 27) 1940 Bom 314 (315); 42 Cri L Jour 71 (DB) \* (Vol 25) 1938 Nag 283 (285); 40 Cri L Jour 197; 1 I L R (1939) Nag 686 \* (Vol 24) 1937 Sind 221 (224); 38 Cri L Jour 995; 31 Sind L R 470 (DB). (Failure of Magistrate to ask explanation from accused on a vital point necessitates a retrial — Question of illegality or irregularity of such non-compliance was not adverted to.) \* (Vol 20) 1933 Lah 1002 (1003); 35 Cri L Jour 104 \* (Vol 17) 1930 Lah 153 (153); 31 Cri L Jour 727 \* (Vol 15) 1928 Nag 162 (164); 29 Cri L Jour

475 \* (Vol 11) 1924 Pat 376 (376); 24 Cri L Jour 475 \* (Vol 13) 1926 Pat 29 (29); 26 Cri L Jour 1289.

[See (Vol 29) 1942 Sind 102 (103); 1 I L R (1942) Kar 112; 43 Cri L Jour 799. (Charge under S. 420, Penal Code—Misrepresentations and manner of cheating not set out with precision in charge — Retrial held should start from before framing of charge) \* (Vol 29) 1942 Sind 33 (37); 1 I L R (1941) Kar 532; 43 Cri L Jour 455 (DB). (Retrial of entire case ordered so as to enable prosecution to place its case in proper and legal manner.)]

[3] The Court remanding the case should remand the whole case to be tried on merits, as if it were before the Court for the first time. (Vol 12) 1925 Cal 172 (172); 26 Cri L Jour 313 (DB).

[4] Case a petty one — *De novo* trial is not justified — Accused should be acquitted. (27) 1937 Mad W N 574 (575) \* (Vol 23) 1936 Oudh 16 (18); 36 Cri L Jour 1303; 11 Luck 461 \* (Vol 21) 1934 Lah 415 (415, 416); 35 Cri L Jour 1447 \* (Vol 20) 1933 Nag 192 (193); 34 Cri L Jour 340 \* (Vol 9) 1922 Pat 212 (213) \* (Vol 21) 1934 Lah 648 (648); 36 Cri L Jour 468 (DB). (Offence merely technical.)

[5] Answers given to questions in the nature of cross-examination should not be taken into account. (Vol 10) 1923 Lah 225 (226); 4 Lah 55; 24 Cri L Jour 693 \* (08) 8 Cri L Jour 62 (64); 4 Low Bur Rul 244. (Questions about confession — Answers to such questions are inadmissible.) \* (09) 10 Cri L Jour 325 (339, 340) (DB) (Cal) \* (Vol 3) 1916 Mad 407 (408); 39 Mad 770; 16 Cri L Jour 623 (DB).

[6] Further evidence taken after examination of accused — Accused not examined again — Further evidence taken should be rejected. (Vol 14) 1927 Lah 916 (916); 29 Cri L Jour 11.

[7] Circumstances appearing in prosecution evidence against accused — Unless Magistrate has drawn attention of accused to those circumstances and called for his explanation thereto, he should not take into consideration those circumstances. (33) 34 Cri L Jour 411 (412) (Nag) \* (Vol 23) 1936 Mad 629 (630); 37 Cri L Jour 1074; 59 Mad 631 (DB). (The non-performance of this imperative duty will compel the appellate Court to order a fresh trial.) \* (Vol 23) 1936 Mad 715 (717); 38 Cri L Jour 45; 59 Mad 622 (DB). (Evidence entirely circumstantial—Conviction cannot be sustained where accused not asked to explain circumstances.)

[8] An objection, on the ground of failure to comply with the provisions of the section, can be taken at the hearing of an application for revision, although it was not urged in the Courts below and is not set forth in the application. (Vol 8) 1921 Pat 415 (418); 22 Cr L J 442.

[9] High Court is not bound to interfere in revision even if non-compliance is held to be illegal. (Vol 29) 1942 Oudh 342 (343); 43 Cri L Jour 503. (Prosecution witnesses cross examined — Accused not asked whether he wished to make further statement — High Court will not interfere in revision unless prejudice is shown.) \* (Vol 25) 1938 Lah 832 (832); 40 Cri L Jour 186. (High Court will order retrial only when prejudice is caused to the accused due to non-compliance.) \* (Vol 15) 1928 Lah 230 (231); 29 Cri L Jour 905 \* (Vol 19) 1932 Oudh 113 (113, 114); 33 Cri L Jour 811 \* (Vol 8) 1921 Pat 374 (375); 22 Cri L Jour 460 \* (08) 7 Cri L Jour 422 (422, 423); 4 Low Bur Rul 143.

Section 343—Note 1

[1] This section applies to accused persons and during the stage of inquiries and trials. (Vol 24) 1937

**344.** (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

*Power to postpone or adjourn proceedings.* Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

*Explanation.*—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

[1882 — S. 344 ; 1872 — Ss. 194, 208, 219, 264 ; 1861 — Ss. 224, 269, 253, 377.]

#### Provincial Amendment.

#### BENGAL

For the purpose of trials under the Bengal Criminal Law Amendment Ordinance, 1947 (No. 1 [I] of 1947), a new proviso was added to sub-section (1) by section 9 (2) of that Ordinance.

#### Section 343—Note 1 (contd.)

Nag 17 (21) : 38 Cri L Jour 237 & 251 : I L R (1937) Nag 315 (FB).

[2] The words "accused person" have the same meaning as the word "accused" in S. 342. (Vol 24) 1937 Nag 17 (21) : 38 Cri L Jour 237 & 251 : I L R (1937) Nag 315 (FB) & (Vol 13) 1926 Nag 426 (427) : 27 Cri L Jour 807.

[3] This section is inapplicable unless influence is used to a person who is "accused" within the meaning of S. 342. ('72-92) 1872-1892 Low Bur Rul 246 (248, 252).

[4] Inducement offered to a witness but not to accused under bail — This section does not apply. (Vol 3) 1916 Bom 229 (232, 233) : 17 Cri L Jour 256 (DB) & (Vol 7) 1920 Nag 255 (257) : 16 Nag L R 9 : 21 Cri L Jour 769.

[5] Conditional pardon cannot be tendered by any authority save as provided by Ss. 337 and 338. ('06) 4 Cri L Jour 44 (45) (DB) (Cal).

[6] Pardon tendered illegal under S. 337.—Examination of accused as witness unlawful — His statement inadmissible in evidence. ('02) 1902 Pun L R No. 52 Cr, p. 191 (192, 193) & ('02) 1902 Pun Re No. 12 Cr, p. 33 (36) (DB).

[7] No judicial officer should attempt to compel the accused to make any admission injurious to his interests. ('97) 19 All 291 (292, 293).

[8] Accused wishing to make a statement — Magistrate need not caution him. ('69) 5 Mad H C R App xi (xi).

[9] The eliciting of an admission by putting words into the mouth of the accused is unfair. ('92) 5 C P L R Cr 11 (11, 12).

[10] An accused person is not bound to produce his co-accused who are absconding.—The Court cannot exercise any pressure upon him for the purpose of producing them. (Vol 17) 1930 Lah 953 (954) : 32 Cri L Jour 344.

[11] An assurance of amnesty to a witness does not affect his competency. (Vol 12) 1925 Nag 313 (316) : 26 Cri L Jour 1467.

[12] This section does not declare what the consequences would be if an accused person did make a statement under inducement. (Vol 3) 1916 Bom 229 (233) : 17 Cri L Jour 256 (DB).

#### SECTION 344 — SYNOPSIS.

1. Scope and applicability.
2. Postponement and adjournment.
3. Postponement of case sine die.

4. Adjournment by public proclamation.

5. "May, if it thinks fit."

6. Reasonable cause for adjournment.

7. "Stating the reasons therefor."

8. Adjournment to and trial on holiday.

9. Advancement of hearing.

10. Stay of criminal proceedings.

11. Adjournment of one of two cross-cases.

12. Power of High Court to set aside order of adjournment.

13. "On such terms as it thinks fit"—Costs.

14. Adjournment for cross-examination of prosecution witnesses in trials of warrant-cases—Power to impose terms on accused.

15. Remand.

16. Detention under S. 344.

17. Grounds of remand.

18. Remand in absence of accused.

19. Period of detention.

20. "By a warrant."

21. Magistrate's liability for unreasonable detention.

1. Scope and applicability.—[1] After a Magistrate has taken cognizance of an offence, his powers of postponement and adjournment are regulated by this section. (Vol 11) 1924 Cal 614 (616) : 26 Cri L Jour 68 (DB).

[2] The policy of law is that criminal cases should be disposed of with the least possible delay. (Vol 32) 1945 Sind 32 (33) : I L R (1944) Kar 392 : 46 Cri L Jour 437 (DB) & (Vol 29) 1942 Cal 219 (221) : I L R (1941) 2 Cal 281 : 43 Cri L Jour 539 (DB) & (Vol 28) 1941 Sind 186 (187) : I L R (1941) Kar 352 : 43 Cri L Jour 68 (DB) & (Vol 16) 1929 Nag 42 (43) : 29 Cri L Jour 1092 & (Vol 4) 1917 Sind 73 (76) : 18 Cri L Jour 54 : 10 Sind L R 148. (Sind Courts Criminal Circulars, Ch. 5, R. 22.) & (Vol 4) 1917 Sind 46 (47) : 18 Cri L Jour 834 : 11 Sind L R 27 & (Vol 19) 1932 Pat 276 (278) : 34 Cri L Jour 263 & (Vol 17) 1930 Pat 241 (243) : 9 Pat 113 : 31 Cri L Jour 789 (DB) & ('99) 2 Bom L R 322 (323) (DB) & (Vol 16) 1929 Cal 776 (776) : 31 Cri L Jour 614 (DB) & (Vol 12) 1925 Oudh 501 (502) : 27 Oudh Cas 327 : 26 Cri L Jour 530.

[3] The object is to avoid hardship to the parties and witnesses. (1865) 4 Suth W R Cr Cir, No. 12, p. 1 (1).

[4] If long time is allowed between the arrest of accused and evidence of witnesses, great confusion may

Section 344—Note 1 (*contd.*)

result and truth obscured. (Vol 12) 1925 Cal 1017 (1020); 27 Cri L Jour 129 (D B).

[5] Sessions trial should be continued from day to day until it is finished. ('12) 13 Cri L Jour 861 (862); 35 All 68 (DB) ✕ (Vol 6) 1919 All 200 (201); 20 Cri L Jour 127.

[6] This section does not apply to appeals or revision. (Vol 7) 1920 Lah 289 (290); 1919 Pun Re No. 29 Cr : 21 Cri L Jour 201. (Appeals) ✕ (Vol 23) 1936 Sind 235 (236); 38 Cri L Jour 119 : 30 Sind L R 357 (DB). (Revision)

2. Postponement and adjournment. — [1] A Magistrate is not bound to pass any order under S. 202, S. 203 or S. 204, immediately after examining the complainant. (Vol 12) 1925 Pat 619 (620, 621); 26 Cri L Jour 1179 ✕ (Vol 16) 1929 Cal 261 (282); 31 Cri L Jour 262 (DB).

[2] There should be a fixed time each day for the purpose of appointing new dates for cases which cannot be reached on that day. (Vol 21) 1934 Bom 130 (133); 33 Cri L Jour 1189 (DB).

3. Postponement of case sine die. — [1] A postponement or adjournment of a case *sine die* is not in accordance with this or any other provision of the Code. (Vol 29) 1942 Cal 219 (221); I L R (1941) 2 Cal 281 : 43 Cri L Jour 539 (DB) ✕ (Vol 29) 1942 Lah 256 (257); I L R (1943) Lah 726 : 43 Cri L Jour 865 (D B) ✕ (Vol 28) 1941 Sind 186 (187); I L R (1941) Kar 352 : 43 Cri L Jour 63 (D B) ✕ ('09) 9 Cri L Jour 35 (36) (D B) (Cal) ✕ (Vol 20) 1933 Sind 358 (359); 27 Sind L R 219 : 35 Cri L Jour 517 (DB) ✕ (Vol 13) 1926 All 421 (422) : 27 Cri L Jour 560.

[But see ('10) 11 Cri L Jour 7 (8) (Cal).]

4. Adjournment by public proclamation. — (1) It is irregular and objectionable to adjourn a trial by public proclamation. (1870-71) 6 Mad H C R App xxix (xxx).

5. "May, if it thinks fit." — [1] The discretion to adjourn a case should be exercised judiciously and only in cases which come within the terms of this section. ('72) 9 Beng L R 354 (364) (D B).

[2] A Court is not obliged to pay attention to a telegram from a pleader of one of the parties asking for adjournment. (Vol 27) 1940 Nag 283 (283); 41 Cri L Jour 585.

6. Reasonable cause for adjournment. — [1] Witness absent—Adjournment can be granted. (Vol 11) 1924 Cal 534 (534); 24 Cri L Jour 370 (D B) ✕ ('96) 19 Mad 375 (381) (D B).

[2] Case can be adjourned for reasonable cause. (Vol 12) 1925 Pat 619 (621); 26 Cri L Jour 1179.

[3] Adjournments should not be granted unless necessitated for purposes of justice. (Vol 17) 1930 Pat 241 (243); 9 Pat 113 : 31 Cri L Jour 789 (D B).

[4] The following are good grounds for adjournment:

(a) To enable the accused to secure the attendance of his witnesses. (Vol 1) 1914 Lah 84 (84); 15 Cri L Jour 521.

(b) To enable an accused to examine such of his witnesses as he has produced. ('03) 7 Cal W N 714 (716) (DB).

(c) To enable an accused to engage the services of a pleader to properly defend himself in complicated cases. (Vol 3) 1916 Mad 142 (142, 143); 16 Cri L Jour 334 ✕ ('02) 1 Low Bur Rul 270 (271).

(d) Where the accused's advocate is absent at another place to fulfill a long-standing engagement. ('11) 12 Cri L Jour 474 (476) (Low Bur).

(e) Where a large number of witnesses have been examined for the prosecution and the accused wants two days' time to consider what evidence he should produce. (Vol 7) 1920 Pat 25 (28); 21 Cri L Jour 321 (D B).

(f) Where the counsel for the accused in a capital case wants to cross-examine the witnesses on the following day as he was not prepared to cross-examine on that day. (Vol 1) 1914 Cal 334 (335); 41 Cal 299 : 15 Cri L Jour 596.

(g) Where a party is asked to cross-examine a witness at 6-30 p. m. and he asks for time on the ground that the pleader is not then available. (Vol 15) 1928 Pat 277 (278); 29 Cri L Jour 299.

(h) Where the accused is tried for separate offences and an appeal is pending against the conviction in respect of one of such offences. ('09) 9 Cri L Jour 495 (496) (Mad). (*Obiter.*)

(i) Where a new witness is produced in the Sessions Court who was not examined before the committing Magistrate and the accused wants time on the ground that it is a surprise to him. ('89) 1889 Pun Re No. 1, Cr, page 1 (4) (D B).

(j) For producing material documents filed in a civil case. ('21) 22 Cri L Jour 335 (336) (DB) (Cal).

(k) Where in a sessions trial it is found that a witness is absent and therefore his deposition before the committing Magistrate could not be received and the witness has consequently to be summoned. ('74) 21 Suth W R Cr 56 (57) (D B).

[5] The following are not sufficient grounds for granting an adjournment :

(a) To enable the accused to get a ruling from the High Court on a point of law. ('07) 7 Cri L Jour 400 (401) (D B) (Cal) ✕ (Vol 20) 1933 Sind 17 (20); 26 Sind L R 255 : 33 Cri L Jour 908 (D B).

(b) The absence of a co-accused and desirability of a joint trial. ('01) 1 Low Bur Rul 60 (61) ✕ (Vol 9) 1922 Cal 334 (335); 49 Cal 132 : 22 Cri L Jour 465 (D B).

(c) To enable the complainant to examine witnesses whom he had not cared to have in attendance. (Vol 12) 1925 Sind 315 (316); 26 Cri L Jour 958 (D B).

(d) To enable a party to summon witnesses where sufficient time has already been allowed for the purpose. (Vol 10) 1923 Mad 185 (186); 46 Mad 253 : 24 Cri L Jour 84.

(e) To enable the prosecution to find out evidence, the existence of which is entirely problematical. (Vol 17) 1930 Rang 76 (77); 7 Rang 592 : 31 Cri L Jour 296.

[See however (Vol 29) 1942 Lah 256 (257); I L R (1943) Lah 726 : 43 Cri L Jour 865 (D B).]

(f) To enable the prosecution to examine witnesses not named in the chalan. (Vol 21) 1934 Nag 156 (157); 35 Cri L Jour 1163.

(g) To enable the pleader of one of the parties in a petty case to be present where the pleader of the opposite party was present and the date had been announced beforehand. (Vol 27) 1940 Nag 233 (283); 41 Cri L Jour 585.

(h) The absence of the counsel of one of the accused in a sessions case in which a number of witnesses had been summoned. (Vol 24) 1937 All 171 (174); 38 Cri L Jour 416.

[6] Contempt proceedings — Attempt to undermine and impair authority of the Court by scurrilous publication — Application by accused to His Majesty under S. 220 (2) (b), Government of India Act, is no ground for adjournment. (Vol 29) 1942 Lah 105 (107); I L R (1942) Lah 411 : 43 Cri L Jour 599 (F B).

7. "Stating the reasons therefor." — [1] The prisoner is entitled to know the cause for adjournment and an appellate Court cannot form an opinion of reasonableness of that cause unless it is stated on record. ('83) 6 Mad 63 (68) (D B).

8. Adjournment to and trial on holiday. — [1] Case tried on holiday—Accused could not engage pleader to defend him—Prejudice caused—Conviction would be

Section 344—Note 8 (*contd.*)

set aside. (Vol 2) 1915 Bom 254 (255) : 16 Cri L Jour 752 (D B) \* (Vol 17) 1930 Nag 255 (258, 259) : 31 Cri L Jour 705.

9. Advancement of hearing.—[1] The Court can advance the hearing of a case to an earlier date, provided due notice thereof is given to the parties. (Vol 18) 1929 Nag 42 (43) : 29 Cri L Jour 1092.

[2] An acceleration of the date of hearing against the wishes of the accused or his pleader is not proper. (198) 1898 Pun Re No. 14 Cr, p. 32 (33) (D B).

10. Stay of criminal proceedings. — [1] Every Court has an inherent power to stay a case pending on its file where it is necessary for the ends of justice to do so. (Vol 3) 1916 Lah 174 (175) : 17 Cri L Jour 7 \* (Vol 11) 1924 Mad 888 (888).

[But see (Vol 16) 1929 Sind 115 (116) : 23 Sind L R 225 : 30 Cri L Jour 899 (D B) \* (Vol 14) 1927 Mad 851 (351) : 28 Cri L Jour 849 \* (Vol 20) 1933 Sind 358 (359) : 27 Sind L R 219 : 35 Cri L Jour 517 (D B).]

[2] The power of the High Court to stay pending cases is expressly recognized by S. 561A of the Code. (28) 29 Cri L Jour 1053 (1055) (D B) (Bcm) \* (Vol 18) 1926 All 30 (33) : 43 All 60 : 26 Cri L Jour 1485.

[3] Magistrate's order under S. 344—High Court can interfere under S. 439 or S. 561A.—S. 224, Government of India Act is no bar. (Vol 30) 1943 Oudh 184 (185) : 18 Luck 419 : 44 Cri L Jour 169.

[4] High Court has no inherent powers of revision apart from statutory provisions. (Vol 25) 1938 F C 1 (3) : I L R (1939) Kar (F C) 1 : 1939 F C R 13 (F C).

[5] Criminal proceeding need not be stayed pending the issue of a civil suit. (Vol 30) 1943 Sind 10 (10) : I L R (1942) Kar 193 : 44 Cri L Jour 167 (D B) \* (Vol 22) 1935 Sind 187 (188) : 36 Cri L Jour 1350 (D B) \* (Vol 17) 1930 Pat 194 (194) : 20 Cri L Jour 1144 \* (Vol 20) 1933 Lah 37 (38, 39) : 34 Cri L Jour 96 \* (Vol 17) 1930 Lah 802 (803) : 31 Cri L Jour 1053 \* (Vol 17) 1930 Pat 351 (352) : 31 Cri L Jour 766 \* (Vol 14) 1927 Mad 308 (310) : 28 Cri L Jour 181 \* (Vol 14) 1927 Mad 778 (778, 779) : 50 Mad 839 : 28 Cri L Jour 812 \* (02) 26 Bom 785 (791) (D B) \* (22) 23 Cri L Jour 84 (84, 85) (All) \* (Vol 16) 1929 Cal 563 (566) : 57 Cal 558 : 31 Cri L Jour 211 (D B).

[But see (Vol 18) 1926 All 30 (33) : 48 All 60 : 26 Cri L Jour 1485 \* (Vol 2) 1915 Cal 596 (596) : 16 Cri L Jour 309 (D B) \* (Vol 1) 1914 Sind 80 (80) : 8 Sind L R 20 : 15 Cri L Jour 661 (D B) \* (Vol 1) 1914 Upp Bur 18 (19) : 15 Cri L Jour 488 \* (Vol 7) 1920 Low Bur 47 (48) : 10 Low Bur Rul 103 : 21 Cri L Jour 353 \* (Vol 3) 1916 Bom 163 (164) : 17 Cri L Jour 153 : 41 Bom 1 (D B) \* (Vol 3) 1916 Lah 174 (175) : 17 Cri L Jour 7 \* (Vol 17) 1930 Lah 664 (665) : 32 Cri L Jour 463 \* (Vol 14) 1927 Lah 17 (18) : 27 Cri L Jour 1114.]

[6] The staying of criminal proceeding pending a civil suit is within the discretion of the Court. (Vol 30) 1943 Oudh 184 (186) : 18 Luck 419 : 44 Cri L Jour 169 \* (Vol 29) 1942 Pat 45 (46) : 42 Cri L Jour 804 \* (Vol 24) 1937 Pat 8 (9) : 38 Cri L Jour 264 \* (Vol 22) 1935 Sind 187 (188) : 36 Cri L Jour 1350 (D B) \* (Vol 17) 1930 Lah 802 (803) : 31 Cri L Jour 1053 \* (Vol 14) 1927 Lah 744 (745) : 28 Cri L Jour 326 \* (Vol 12) 1925 Mad 39 (42) : 47 Mad 722 : 25 Cri L Jour 1009 \* (Vol 20) 1933 Bom 307 (309) : 34 Cri L Jour 900 (D B) \* (Vol 21) 1934 Sind 143 (144) : 36 Cri L Jour 94 (D B).

[7] The accused should not be prejudiced by non-stay of criminal proceeding pending a civil suit. (28) 29 Cri L Jour 1053 (1056) (D B) (Bom) \* (Vol 19) 1926 Nag 315 (316) \* (Vol 3) 1916 Mad 1123 (1123) : 16 Cri L Jour 637 \* (Vol 19) 1932 Nag 86 (87, 88) : 34 Cri L Jour 119 \* (Vol 4) 1917 Pat 621 (622) : 18 Cri L Jour 771 \* (Vol 7) 1920 Pat 816 (817) : 22 Ori L Jour 489.

[8] Question of validity of document in Civil Court

—Integrity of criminal Court not questioned—It cannot be assumed that there will be great injustice in not staying criminal proceeding. (Vol 18) 1931 Pat 411 (415, 416) : 33 Cri L Jour 147.

[9] Where a criminal proceeding is instituted with the motive of hampering the conduct of the civil proceeding, the former may be ordered to be stayed. (28) 29 Cri L Jour 1053 (1056) (D B) (Bom) \* (07) 6 Cri L Jour 131 (132) : 30 Mad 226 (D B) \* (Vol 20) 1933 Bom 307 (309) : 34 Cri L Jour 900 (D B).

[10] Public prosecution need not be stayed pending civil proceeding though the former is instituted to hamper the latter. (Vol 16) 1929 Cal 563 (566) : 57 Cal 558 : 31 Cri L Jour 211 (D B) \* (28) 29 Cri L Jour 1053 (1055) (D B) (Bom) \* (22) 23 Cri L Jour 84 (84) (All) \* (12) 13 Cri L Jour 848 (848) (D B) (Bom) \* (08) 8 Cri L Jour 435 (437) : 35 Cal 909 (D B).

[11] Where a civil proceeding is filed for the purpose of delaying the trial of the criminal case, no stay should be granted. (Vol 1) 1914 Mad 143 (143) : 15 Cr L J 568.

[12] Where the civil suit has been filed before the institution of the criminal proceeding and it appears that the decision in the former will be of value in arriving at the truth in the criminal case, the latter may be stayed. (Vol 30) 1943 Sind 10 (10) : I L R (1942) Kar 193 : 44 Cri L Jour 167 (D B) \* (Vol 29) 1942 Bom 330 (331) : 44 Cri L Jour 100 (D B) \* (Vol 24) 1937 Pat 8 (9) : 38 Cri L Jour 264 \* (Vol 22) 1935 Rang 487 (488) : 37 Cri L Jour 261 \* (Vol 14) 1927 Lah 744 (745) : 28 Cri L Jour 326 \* (Vol 22) 1935 Cal 182 (183) (D B).

[13] Where the civil suit is filed after the criminal case and there is no possibility of its being decided soon, a stay should not be ordinarily granted. (Vol 7) 1920 Lah 198 (198) : 21 Cri L Jour 399 \* (10) 11 Cri L Jour 291 (292) (D B) (Cal) \* (Vol 20) 1933 Lah 37 (39) : 34 Cri L Jour 96.

[14] Where the criminal prosecution in no way arises out of the civil suit and the decision in the Civil Court will not necessarily affect the decision of the Criminal Court, stay of proceeding in the Criminal Court is unreasonable. (Vol 30) 1943 All 14 (14, 15) : I L R (1943) All 27 : 44 Cri L Jour 278 \* (Vol 30) 1943 Nag 327 (328) : I L R (1944) Nag 238 : 45 Cri L Jour 175 \* (Vol 22) 1935 Rang 487 (488) : 37 Cri L Jour 261.

[15] Where the subject-matters of the dispute in the criminal and civil cases are not identical, a stay will not be granted. (Vol 8) 1921 Pat 434 (434) \* (Vol 8) 1921 Lah 386 (388) : 23 Cri L Jour 700.

[16] Object of criminal proceedings to obtain an adjudication on question of title — Civil suit pending—Criminal proceeding quashed. (23) 24 Cri L Jour 245 (247) (Pesh).

[17] Two separate criminal proceedings arising out of same facts should be held in a Court having jurisdiction to conduct both. (Vol 20) 1933 Nag 78 (80) : 29 Nag L R 201 : 34 Cri L Jour 519.

[18] The Court should consider where the public interest lies, and interest of the public is opposed to multiplicity of proceedings. (Vol 29) 1942 Bom 330 (331) : 44 Cri L Jour 100 (D B).

[19] A District Magistrate cannot stay proceedings in the Criminal Courts subordinate to him. (Vol 10) 1923 Mad 688 (688) : 25 Cri L Jour 277 \* (Vol 18) 1931 Pat 411 (414) : 33 Cri L Jour 147.

[But see (Vol 10) 1923 Mad 595 (595) : 25 Cri L Jour 280.]

[20] A Sessions Judge cannot stay a civil suit pending the decision of a criminal case. (87) 1887 All W N 102 (103).

[21] A Magistrate who has directed an inquiry by a subordinate Magistrate under S. 202, can stay proceed-



Section 344—Note 10 (*conid.*)

ings. (Vol 21) 1934 Sind 143 (144) : 36 Cri L Jour 94 (DB).

[22] Where there are two counter-complaints the Magistrate can stay proceedings in one pending the disposal of the other. (Vol 17) 1930 Pat 30 (32) : 30 Cri L Jour 534 \* (Vol 9) 1922 Pat 618(618) : 24 Cri L J 120.

[23] Order for criminal prosecution by Civil Courts—Application for stay of proceedings in criminal Court to be made to Bench in charge of criminal business. ('04) 8 Cal W N xxxi (xxx) (DB).

[24] Judgment of civil Court in actions *in personam* is not relevant to the same issue in criminal Court—Proceedings in criminal Courts need not be stayed pending such decision in a civil Court. (Vol 32) 1945 Lah 23 (27) : I L R (1944) Lah 408 : 46 Cri L Jour 296 (FB).

11. Adjournment of one of two cross-cases.—[1] Court deciding to try counter cases one after the other, has power under this section to adjourn the one and take up the other for trial. (Vol 16) 1929 Cal 281 (283) : 31 Cri L Jour 262 \* (Vol 22) 1935 Pat 214 (216) : 36 Cri L Jour 714 (SB).

[2] Courts of concurrent jurisdiction can try same offence simultaneously. (Vol 20) 1933 Lah 852 (853) : 14 Lah 320 : 35 Cri L Jour 171.

[See however (Vol 10) 1923 Cal 644 (645) : 24 Cri L Jour 940 (DB).]

12. Power of High Court to set aside order of adjournment.—[1] An improper order as to adjournment can be set aside by the High Court in revision. (Vol 30) 1943 Oudh 184 (186) : 18 Luck 419 : 44 Cri L Jour 169.

[2] High Court will not interfere ordinarily if the Court has exercised judicial discretion in the matter of adjournment. (Vol 30) 1943 Oudh 184 (186) : 18 Luck 419 : 44 Cri L Jour 169 \* (Vol 14) 1927 Mad 778 (779) : 50 Mad 839 : 28 Cri L Jour 812 \* (Vol 9) 1922 Pat 618 (618) : 24 Cri L Jour 120 \* (Vol 12) 1925 Sind 315 (316) : 26 Cri L Jour 958 (DB).

13. "On such terms as it thinks fit"—Costs.—[1] The words relating to terms include an order for the payment of costs. (Vol 32) 1945 Nag 209 (210) : 46 Cri L Jour 713 : I L R (1945) Nag 669 (DB) \* (Vol 29) 1942 Mad 178 (179) : 43 Cri L Jour 454 : I L R (1942) Mad 661 \* ('05) 2 Cri L Jour 808 (804) : 28 All 267 \* (Vol 5) 1918 Mad 538 (538, 540) : 18 Cri L Jour 612 : 40 Mad 1130 (DB) \* (Vol 5) 1918 Pat 656 (657) : 19 Cri L Jour 6.

[2] An order for payment of cost will be made only where the ordinary every-day method of conducting criminal cases has to be departed from owing to the conduct of a party. (Vol 5) 1918 Bom 253 (253) : 42 Bom 254 : 19 Cri L Jour 326 (DB).

[3] A complainant who is solely to blame for an adjournment can be ordered to pay costs. (Vol 9) 1922 Bom 239 (239) : 23 Cri L Jour 338 (DB).

[4] An informant to the police in a police case who is virtually conducting the prosecution by engaging a vakil and who asks for time, may be ordered to pay costs as a condition of the adjournment. (Vol 5) 1918 Mad 538 (540) : 18 Cri L Jour 612 : 40 Mad 1130.

[5] An accused person can be ordered to pay costs as a condition of an adjournment. (Vol 24) 1937 Pat 131 (133) : 38 Cri L Jour 484. (Proper defence of accused should not be prejudiced by order of costs.) \* ('05) 2 Cri L Jour 1 (7, 8) (DB). (Cal) \* (Vol 19) 1932 Bom 470 (472) : 56 Bom 536 : 33 Cri L Jour 802 (DB).

[6] Police Sub-Inspector responsible for securing attendance of witness—Adjournment granted—Complainant is not liable for costs. (Vol 9) 1922 Bom 239 (239) : 23 Cri L Jour 338 (DB).

[7] The complainant is not liable for costs when an adjournment becomes necessary owing to the absence of the accused. (Vol 13) 1926 Lah 407 (408) : 27 Cri L Jour 572.

[8] Non-compoundable warrant case—Complainant absent after charge—No adjournment cost will be ordered against him. (Vol 11) 1924 Lah 627 (627) : 25 Cri L Jour 87.

[9] Some accused appeared and others did not—Complainant did not go with process server—Complainant ordered to pay costs of the accused present—Held, the order was not proper. (Vol 20) 1933 Lah 720 (721) : 35 Cri L Jour 457.

[10] Where the accused is absent, and the case has perforce to be adjourned, no costs can be ordered against him. (Vol 9) 1922 All 184 (184) : 23 Cri L Jour 243 \* (Vol 21) 1934 Lah 441 (442) : 36 Cri L Jour 101.

[11] The power to order costs does not extend to previous adjournments granted without conditions. (Vol 19) 1932 Bom 470 (472) : 56 Bom 336 : 33 Cri L Jour 802 (DB).

[12] No costs of adjournment can be awarded in criminal appeals or criminal revisions. ('33) 1933 Mad W N 878 (879). (Appeals.) \* (Vol 23) 1936 Sind 235 (236) : 38 Cri L Jour 119 : 30 Sind L R 357 (DB). (Revisions.)

[13] Adjournment granted to move the High Court for transfer—No costs can be awarded of such adjournment. (Vol 29) 1942 Mad 178 (179) : I L R (1942) Mad 661 : 43 Cri L Jour 454 (DB).

14. Adjournment for cross-examination of prosecution witnesses in trials of warrant-cases—Power to impose terms on accused.—[1] Recall of the prosecution witnesses under S. 256 at the request of the accused—Accused asking for adjournment on the ground that his pleader is absent—Court can impose the condition that he has to pay the batta of the prosecution witnesses. ('34) 1934 Mad W N 100 (102).

15. Remand.—[1] A remand is a re-committal to custody of a person who has been brought up in custody. ('67) 2 Weir 409 (409).

[2] A Magistrate cannot order remand if a final report is not sent with the accused under S. 173 due to incomplete investigation. (Vol 11) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732 (DB).

[But see (Vol 18) 1931 All 617 (619, 620) : 53 All 729 : 32 Cri L Jour 1045.]

16. Detention under S. 344.—[1] This section applies to detention after police investigation and before or pending inquiry or trial. (Vol 18) 1931 All 617 (620) : 53 All 729 : 32 Cri L Jour 1045.

[2] Accused detained for a period less than fifteen days—Magistrate sending the accused to another Magistrate—Order by latter Magistrate remanding accused is one under this section. (Vol 24) 1937 Sind 251 (252, 253) : 31 Sind L R 494 : 39 Cri L Jour 10.

[3] The period of detention under this section cannot exceed fifteen days at a time. (Vol 11) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732 (DB) \* (Vol 18) 1931 Lah 99 (100, 101) : 12 Lah 435 : 33 Cri L Jour 180 \* (Vol 11) 1924 Cal 614(616) : 26 Cr L J 68 (DB).

[4] A detention under this section can only be in a judicial lock-up. (Vol 30) 1943 All 93 (94) : I L R (1943) All 289 : 44 Cri L Jour 327 \* (Vol 24) 1937 Sind 251 (253) : 31 Sind L R 494 : 39 Cri L Jour 10 \* (Vol 18) 1931 Lah 99 (100, 101) : 12 Lah 435 : 33 Cri L Jour 180 \* (Vol 18) 1931 Lah 353 (355, 356) : 12 Lah 604 : 32 Cri L Jour 785 (DB) \* (Vol 13) 1926 Cal 1121 (1130) : 54 Cal 218 : 27 Cri L Jour 1201 (FB).

[5] A Magistrate acting under this section must have jurisdiction to try the case. (Vol 11) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732 (DB) \* (Vol 11) 1924 Cal 614 (616) : 26 Cri L Jour 68 (DB).

**345.** (1) The offences punishable under the sections of the Indian Penal Code <sup>a</sup>[specified] *Compounding offences.* in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table :—

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt ... ..	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force ...	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ...	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.

#### Section 344 (contd.)

17. Grounds of remand. — [1] The Magistrate has a discretion in the matter of granting a remand. (Vol 18) 1931 All 617 (620) : 53 All 729 : 32 Cri L Jour 1045.

[2] The detention of an accused is intended to secure his attendance at the trial and not as a punishment. (Vol 14) 1927 Nag 53 (55) : 27 Cri L Jour 1063.

[3] An order of remand cannot be made without time reason sufficient to justify further detention. (Vol 22) 1935 Lah 230 (243) : 35 Cri L Jour 1180.

[4] In granting remand, the Court should see if the time asked by police for remand is reasonable. (Vol 18) 1931 All 617 (621) : 53 All 729 : 32 Cri L Jour 1045.

[5] A further remand for examination of witnesses with a view to have continuous inquiry, is justified. ('83) 6 Mad 63 (67) (DB).

[6] Conspiracy — Accused members of conspiracy — Magistrate keeping accused in custody for reasonable period was held justified. (Vol 20) 1933 Cal 752 (753) : 34 Cri L Jour 1194 (DB).

[7] Complainant and his witnesses not bound to appear—Accused remanded because they did not appear—Detention, held, not justified. ('69) 11 Suth W R Cr 47 (48) (DB).

[8] A remand for the purpose of getting a confession from the accused is most improper. ('86) 2 Weir 414 (415) (DB).

[9] Accused brought up for further remand — Some direct evidence of guilt should be required to order further detention. (Vol 2) 1915 Nag 28 (29) : 16 Cri L Jour 705 : 11 Nag L R 162 & ('83) 6 Mad 69 (70) (DB).

[10] Where the Magistrate properly directs a postponement, he has unfettered discretion to remand the accused to custody. (Vol 20) 1933 Cal 752 (753) : 34 Cri L Jour 1194 (DB).

18. Remand in absence of accused.—[1] A prisoner is brought up under custody and is re-committed to custody as remand cannot be granted in his absence. ('67) 2 Weir 409 (409) & ('67) 1867 Pun Re No. 39 Cr, p. 72 (76) (DB).

19. Period of detention. — [1] There is no limit set to the total period of a series of orders of remand under this section. (Vol 18) 1931 All 617 (620) : 53 All 729 : 32 Cri L Jour 1045.

[2] No single order of remand shall exceed fifteen days at a time. ('21) 22 Cri L Jour 669 (671) (Lah) & ('69) 5 Bom H C R Cr 31 (33) (DB).

[3] An accused is entitled to have the evidence against him recorded as early as possible. (Vol 11) 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732 (DB).

[4] Possibility of large body of evidence forthcoming against the accused is no ground for his detention for an inordinate period. ('83) 6 Mad 63 (67) (DB).

[5] Remand for six weeks — No incriminating evidence forthcoming—Further detention, held, not justified. ('08) 9 Cri L Jour 409 (412) : 36 Cal 174 (DB) & ('70) 13 Suth W R Cr 27 (32) : 5 Beng L R 274 (DB) & (Vol 11) 1924 Cal 476 (479) : 51 Cal 402 : 25 Cri L Jour 732 (DB).

[6] Conspiracy — Detention of accused for three months was held good. (Vol 18) 1931 All 617 (621) : 53 All 729 : 32 Cri L Jour 1045.

20. "By a warrant." — [1] The warrant for further detention must state that the prisoner is charged with some particular offence. ('70) 13 Suth W R Cr 1 (5).

21. Magistrate's liability for unreasonable detention.—[1] Magistrate delaying trial of accused without reasonable cause and good faith is liable for damages. ('69) 11 Suth W R Cr 19 (20) (DB).

#### SECTION 345—SYNOPSIS.

1. Scope and principle.
2. Withdrawal and composition compared.
3. What amounts to composition.
4. The offence must be compoundable.
5. Consideration.
6. Free will is necessary.
7. Compoundable offences.
8. Who can compound.
9. Minor.
10. Composition under sub-section (1).
11. Compositions under sub-section (2).
12. Proof of composition.
13. Stage at which a compounding may be effected.
14. Composition after committal or conviction.
15. High Court's powers in revision.
16. Rescission of compromise.
17. Effect of compromise.
18. Sub-section (7).
19. Civil suit.
20. Procedure in non-compoundable cases where injured party declines to prosecute.
1. Scope and principle. — [1] The law makes a difference between various classes of offences and



Offence	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Criminal trespass ... ..	447	The person in possession of the property trespassed upon.
House trespass ... ..	448	
Criminal breach of contract of service	490, 491, 492	The person with whom the offender has contracted.
Adultery ... ..	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman.	498	
Defamation ... ..	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory.	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
b. Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed.

#### Section 345—Note 1 (*contd.*)

allows compromise in some and no compromise in others. ('98) 3 Cal W N 5 (5) (DB).

[2] The institution of a prosecution is a duty which cannot be neglected in consideration of any private advantage. ('76) 1 Bom 147 (151) (FB).

[3] The tabulation of offences in this section now removes all uncertainty regarding compounding of offences. ('12) 8 Nag L R 97 (105).

[4] This tabulation must be taken as a complete guide and test on the matter. ('13) 14 Cri L Jour 292 (293) : 6 Sind L R 284\* ('04) 28 Bom 326 (328) (DB).

[5] In the case of certain minor offences the complainant should be permitted to come to terms with the party against whom he complains. (Vol 8) 1921 Bom 166 (166, 167) : 45 Bom 346 : 22 Cri L Jour 55 (DB).

[6] A person charged with compoundable offence can come to a settlement with the prosecution and the settlement so arrived at is legal. (Vol 29) 1942 Mad 173 (176) : 43 Cri L Jour 734\* (Vol 17) 1930 Oudh 196 (198) : 4 Luck 669.

[7] A case brought to the Court and settled by parties cannot be said to be hushed up. (Vol 16) 1929 Pat 512 (512) : 31 Cri L Jour 607.

[8] For compounding a case under this section, the accused need not have pleaded guilty. ('09) 10 Cri L Jour 228 (228, 229) : 2 Sind L R 16 (DB).

[9] The section does not apply to offences punishable under laws other than the Penal Code. ('84) Oudh Sel Cas No. 78, p. 89 (89).

[10] Sub-section (6) of this section does not apply to a Panchayat under Bihar and Orissa Village Administration Act, 1922. (Vol 28) 1941 Pat 169 (172) : 42 Cri L Jour 434.

#### 2. Withdrawal and composition compared.—

[1] A withdrawal must be by intimation to the Magistrate and the complainant is required to satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw it. ('94) 21 Cal 103 (113) (DB).

[2] Composition being an act of both parties, there is no annoyance caused to any one. (Vol 11) 1924

Lah 595 (596) : 5 Lah 239 : 25 Cri L Jour 629 (SB)\* (Vol 3) 1916 Pat 200 (201) : 18 Cri L Jour 107 (DB).

[3] The warrant-cases cannot be withdrawn. (Vol 14) 1927 Bom 410 (411) : 51 Bom 512 : 28 Cri L Jour 581 (D B) \* (Vol 11) 1924 Lah 595 (598) : 5 Lah 239 : 25 Cri L Jour 629 (S B).

[4] A complaint can be withdrawn by the complainant, who may not necessarily be the person injured. ('78) 2 Bom 653 (653) (D B).

[5] The word "compound" means to withdraw for a consideration, and not merely to withdraw. ('92-96) 1 Upp Bur Rul 219 (220).

[6] The substance of the petition should be considered to decide whether it is one for withdrawal or for composition. (Vol 11) 1924 Lah 595 (598) : 5 Lah 239 : 25 Cri L Jour 629 (S B).

[7] Complainant filing application saying "he did withdraw the case against one accused on his apology and he did not want to proceed against others"—Held there was composition and not withdrawal. (Vol 11) 1924 Lah 595 (597, 598) : 5 Lah 239 : 25 Cri L Jour 629 (S B).

[8] Complainant giving in writing to the accused that he has withdrawn the case—The case is compounded. (Vol 10) 1923 All 474 (476) : 45 All 145 : 24 Cri L Jour 758.

[9] Magistrate can question complainant to ascertain whether the application is for composition or for withdrawal. (Vol 3) 1916 Pat 200(201, 202) : 18 Cr L J 107.

3. What amounts to composition.—[1] A composition is a settlement of differences between the injured party and the person against whom the complaint is made. (Vol 8) 1921 Bom 166 (167) : 45 Bom 346 : 22 Cri L Jour 55 (D B).

[2] A mere application by the complainant for permission to withdraw the case because his witnesses had turned round is not a composition of the offence. ('02) 4 Bom L R 718 (720) (D B).

[3] The compounding of an offence supposes differences already settled and not a mere arrangement to settle in future. (Vol 12) 1925 Mad 1211 (1212) : 26 Cri L Jour 1594.

[12] The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt ...	325	Ditto.
Voluntarily causing grievous hurt on grave and sudden provocation.	335	Ditto.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	Ditto.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Ditto.
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongfully confining a person in secret.	346	Ditto.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Dishonest misappropriation of property.	403	The owner of the property misappropriated.

#### Section 345—Note 3 (contd.)

[4] An incomplete arrangement will not amount to an actual acquittal within the meaning of the law. (Vol 6) 1919 Mad 879 (881) : 41 Mad 685 : 19 Cri L Jour 359 (D B).

[5] Agreement to refer to arbitration by itself will not result in composition unless it has been carried out and the award is given. (Vol 12) 1925 Mad 1211 (1211) : 26 Cri L Jour 1594.

[6] Case referred to arbitration—Magistrate waiting for award—Award given—Award may amount to composition. (Vol 12) 1925 Mad 1211(1212) : 26 Cr L J 1594.

[See however (Vol 16) 1929 Lah 394 (395).]

[7] Parties entering into a compromise before muk-tear making local inquiry—Parties resiling from it before the Magistrate—Held accused could not take advantage of the compromise. (18) 22 Cal W N clxxii (clxxii) (D B).

[8] Procedure under Oaths Act, Ss. 8 to 11, does not apply to criminal proceedings. (88) 13 Bom 389 (391) (D B).

4. The offence must be compoundable. — [1] A criminal Court should not allow the withdrawal of the prosecution in a non-compoundable case. (Vol 32) 1945 Cal 218 (234) (DB). (Compounding non-compoundable offence is against public policy.) ✕(Vol 13) 1926 Cal 59 (63) : 53 Cal 51 (DB). (Do.) ✕(Vol 15) 1928 Bom 305 (305) : 52 Bom 693. (Do.) ✕(18) 22 Cal W N clxxii (clxxii) (Do.) ✕(Vol 16) 1929 All 456 (458). (Do.) ✕(04) 28 Bom 328 (328) (DB). (Court cannot go beyond the tests laid down in the section.) ✕(Vol 1) 1914 Oudh 278 (279) : 17 Oudh Cas 213 ✕(Vol 6) 1919 Pat 545 (546) : 20 Cri L Jour 552 (DB). (Composition of non-compoundable offence should not be sanctioned.)

[2] Before allowing the composition the Magistrate should consider all the circumstances and decide that only a compoundable offence is proved. (08) 16 C P L R 178 (179) ✕(1900-02) 1 Low Bur Rul 349 (349) ✕(Vol 17) 1930 Oudh 196 (198) : 4 Luck 669. (Offence with which accused is charged should be looked into.) ✕(Vol 16) 1929 All 456 (458). (Essential circumstances are to be seen.)

[3] Withdrawal of prosecution for a non-compoundable case does not operate as an acquittal. (75) 1 Bom 64 (66) (DB) ✕(93-1900) 1893-1900 Low Bur Rul 240.

[4] Whether an offence is compoundable or otherwise has to be decided with reference to facts as they exist on the date of the application to compound. (Vol 12) 1925 Nag 395 (395) : 26 Cri L Jour 1428 ✕(07) 6 Cri L Jour 336 (336, 337) : 1907 Pun Re No. 11 Cr (DB). (Non-compoundable offence of rioting allowed to be compounded on surmise that it may turn out to be a compoundable offence—Held Magistrate acted without power.)

[5] Complainant accusing accused of both non-compoundable and compoundable offences—Summons issued in respect of latter offence—Composition can be effected. (Vol 33) 1946 Mad 80 (80) ✕(Vol 3) 1916 Cal 917 (917, 918) (DB).

[6] Summons mentioning by oversight a compoundable offence in trial for non-compoundable offence — Party not deprived of right to compound. (Vol 8) 1921 Pat 75 (75) : 22 Cri L Jour 493.

[7] Person convicted of compoundable offence acquitted in appeal — Appellate Court holding that he should have been convicted of a non-compoundable offence for which he was not tried — Held he should be allowed to compound before conviction for that offence. (1900) 3 Oudh Cas 314 (315) ✕(10) 11 Cri L Jour 496 (497) : 13 Oudh Cas 161. (In revision High Court allowed him to do so.)

5. Consideration. — [1] The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification to act as an inducement for his desiring to abstain from a prosecution. (94) 21 Cal 103 (112, 115) (DB) ✕(Vol 11) 1924 Lah 595 (598) : 5 Lah 239 : 25 Cri L Jour 629 (SB).

[2] The composition spoken of in this section is in the nature of a contract, but monetary consideration is not necessary. (Vol 3) 1916 Mad 854 (855) : 16 Cri L Jour 803 : 39 Mad 946 (DB) ✕(09) 10 Cri L Jour 228 (229) : 2 Sind L R 16 (DB). (Complainant regarding his grievances redressed by the intervention of some

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Cheating ... ..	417	The person cheated.
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect.	415	Ditto.
Cheating by personation.	419	The person cheated.
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	Ditto.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.	430	The person to whom the loss or damage is caused.
House-trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark.	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowingly selling, or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark.	486	Ditto.
Marrying again during the lifetime of a husband or wife.	494	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it is intended to insult or whose privacy is intruded upon.]

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is <sup>a</sup>[under the age of eighteen years or is] an idiot or a lunatic, any person competent to contract on his behalf may <sup>b</sup>[with the permission of the Court] compound such offence.

#### Section 345—Note 5 (*contd.*)

respectable persons.) \* (Vol 10) 1923 All 474 (476) : 45 All 145 : 24 Cri L Jour 758. (Apology as consideration.)

[3] The essential thing required for composition is some arrangement arrived at between the parties, which settles their differences. ('96) 1896 Pun Re No. 9 Cr, p. 21 (23).

6. Free will is necessary. — [1] The agreement must appear to be freely entered into with the parties fully aware of their rights before it can be given effect to. ('94) 21 Cal 108 (115) (DB).

7. Compoundable offences. — [1] An offence under S. 143 of the Penal Code is not compoundable. (Vol 28) 1941 Sind 186 (188) : 1 L R (1941) Kar 352: 43 Cri L Jour 68 (DB).

[2] Offence which is the common object though compoundable will not annul the charge for the common object under S. 143, Penal Code — The prosecution for that may continue. (Vol 28) 1941 Sind 186 (188) : ILR (1941) Kar 352 : 43 Cri L Jour 68 (DB) \* (Vol 10) 1923 Mad 592 (592) : 46 Mad 257 : 24 Cri L Jour 114.

[See however ('13) 14 Cri L Jour 458 (459) (DB) (Cal).]

[3] Offence under S. 147 is not compoundable. ('07) 6 Cri L Jour 336 (337) : 1907 Pun Re No. 11 Cr (DB) \* (Vol 5) 1918 Mad 494 (495) : 18 Cri L Jour 329.

[4] The offences of extortion and fabricating false evidence are not compoundable. (Vol 23) 1936 Sind 146 (147) : 37 Cri L Jour 1086 : 30 Sind L R 217 (DB).

[5] Person charged under S. 323, Penal Code and S. 24, Cattle-trespass Act—Offence under former section compounded — Magistrate may regard the case withdrawn in respect of latter offence also. (Vol 6) 1919 All 31 (31) : 42 All 202 : 21 Cri L Jour 305.

8. Who can compound. — [1] Any person may set the criminal law in motion but it is only the person specified in S. 345 who can compound the offence. (Vol 24) 1937 Nag 72 (73) : 38 Cri L Jour 334 : 1 L R (1937) Nag 286 \* (Vol 14) 1927 Bom 410 (411) : 51 Bom 512 : 28 Cri L Jour 581.

[2] Wife's defamation—Husband can file complaint but wife alone can compound the case. ('91) 14 Mad 379 (381) (DB) \* ('72-92) 1872-1892 Low Bur Rul 617.

[3] Abduction — Father in custody of girl at the time of offence can file complaint but husband of the girl can alone compound. (Vol 9) 1922 Lah 177 (178) : 23 Cri L Jour 690 \* (Vol 11) 1924 Lah 330 (331) : 24 Cri L Jour 780.

[4] Hurt — Person to whom it is caused can alone compound. (Vol 2) 1915 All 443 (443) : 37 All 419 : 16 Cri L Jour 586 (DB) \* (Vol 2) 1915 Mad 635 (635) : 37 Mad 385 \* (Vol 4) 1917 All 377 (378) : 18 Cri L Jour 729 (DB).

[5] Criminal trespass — Offence is compoundable by person who was in possession of the property when offence was committed. ('95) 22 Cal 123 (130) (DB) \* (Vol 11) 1924 Mad 40 (40) : 24 Cri L Jour 824.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

<sup>b</sup>[(5A) A High Court acting in the exercise of its powers of revision under section 489 may allow any person to compound any offence which he is competent to compound under this section.]

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused <sup>b</sup>[with whom the offence has been compounded].

(7) No offence shall be compounded except as provided by this section.

[1892 — S. 345; 1872 — S. 188.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 90, for "described." [b] *Inserted, ibid.* [c] *Substituted, ibid.*, for the original sub-s. (2). [d] *Substituted, ibid.*, for "a minor."

#### Section 345—Note 8 (*contd.*)

[6] Wrongful restraint — Compoundable by person restrained. (Vol 14) 1927 All 375 (376); 49 All 484: 28 Cri L Jour 495.

[7] Wrongful confinement — Compoundable by person confined. (Vol 24) 1937 Nag 72 (73); 38 Cri L Jour 334; I L R (1937) Nag 286.

[8] Person representing complainant and filing complaint can compound the offence and Magistrate need not enquire into his authority to represent complainant. (Vol 11) 1924 All 778 (779); 26 Cri L Jour 98.

[See however ('23) 24 Cri L Jour 120 (123) (Pesh).]

9. Minor.—[1] Husband causing hurt to his minor wife—Wife filing complaint—Her father held competent to compound the case on her behalf. (Vol 16) 1929 Nag 278 (278, 279); 30 Cri L Jour 960.

[2] Permission of Court is necessary for compounding an offence on behalf of a minor. (Vol 24) 1937 Mad 825 (826); 39 Cri L Jour 133.

10. Composition under sub-section (1). — [1] In cases falling under sub-s. (1), no leave of the Court is necessary for compounding. (Vol 24) 1937 Mad 825 (826); 39 Cri L Jour 133 & (Vol 8) 1921 Cal 403 (404); 22 Cri L Jour 301 (DB) & ('86) 1886 All W N 167 (167). (Magistrate bound to allow compromise.) & ('10) 11 Cri L Jour 638 (639); 1910 Pun Re No. 30 Cr. (Do.) ('97-01) 1 Upp Bur Rul 350 (351). (Do.)

[2] Parties can compound unconditionally in cases falling under sub-s. (1) and when *razinama* is filed, Magistrate need not inquire whether the complaint was vexatious. ('09) 9 Cri L Jour 186 (187) (DB) (Bom).

[3] Proper person can compound even in case the accused is sent up by police. ('84) 10 Cal 551 (553) (DB).

[4] When the case is compounded, the Magistrate should acquit the accused without delay. (Vol 17) 1930 All 409 (410); 52 All 254; 31 Cri L Jour 1215 & ('99) 3 Cal W N 322 (323) (DB) & (Vol 1) 1914 Bom 258 (259); 16 Cri L Jour 68 (DB).

[5] The composition has effect of an acquittal and is complete immediately the complainant puts it forward in Court. (Vol 1) 1914 Lah 581 (583); 1914 Pun Re No. 29 Cr; 16 Cri L Jour 81 (PB).

[6] Where a Magistrate records a compromise he becomes *functus officio*, and an order that the parties should again appear is ineffective. (Vol 8) 1921 Pat 290 (291); 22 Cri L Jour 675.

[7] The composition is not limited to acts done in Court or to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court. (Vol 3) 1916 Mad 854 (855); 16 Cri L Jour 303; 39 Mad 946 (DB).

[8] There is no necessity for the composition to be effected in Court in cases falling under sub-s. (1). ('13) 14 Cri L Jour 292 (293); 6 Sind L R 284.

11. Compositions under sub-section (2). — [1] In cases falling under sub-s. (2), the Court cannot order an enquiry into the factum of compromise alleged by

one party and denied by the other unless the compromise was sanctioned by Court. (Vol 24) 1937 Mad 825 (826); 39 Cri L Jour 133 & (Vol 15) 1928 Lah 232 (234); 9 Lah 400; 29 Cri L Jour 585 (DB).

[2] An agreement to compound an offence falling within this sub-section can only be effected with the Court's permission after the institution of criminal proceedings. (Vol 29) 1942 Mad 662 (662); I L R (1943) Mad 183; 44 Cri L Jour 29 (DB) & (Vol 25) 1938 Nag 37 (38); 39 Cri L Jour 59; I L R (1940) Nag 195 & (Vol 24) 1937 Mad 825 (826); 39 Cri L Jour 133 & ('12) 8 Nag L R 97 (105).

[3] Composition made out of Court—Sanction given to it during the proceedings — The composition is not bad. (Vol 6) 1919 Mad 879 (881, 882); 41 Mad 685: 19 Cri L Jour 359 (DB).

[4] Permission to compound can be given only by the Court before which the prosecution is pending. (Vol 24) 1937 Nag 114 (115); 38 Cri L Jour 689; I L R (1937) Nag 183 & ('93-1900) 1893-1900 Low Bur Rul 392.

[5] The Magistrate can alone permit the withdrawal of a complaint and the police have no authority in this respect. ('75) 1875 Rat 91 (91) (DB) & ('92-96) 1 Upp Bur Rul 42 (42).

[6] The Magistrate should not refer the petition for withdrawal of complaint to the District Magistrate or the police for their opinion. (Vol 25) 1938 Nag 39 (40); 39 Cri L Jour 120 & (Vol 24) 1937 Nag 114 (115); 38 Cri L Jour 689; I L R (1937) Nag 183 & (Vol 13) 1926 Cal 590 (591); 27 Cri L Jour 545 (DB) & (Vol 17) 1930 Lah 272 (272); 32 Cri L Jour 20 & ('32) 1932 Mad W N 1088 (1089) & (Vol 22) 1935 Lah 226 (227); 35 Cri L Jour 1372.

[See however (Vol 26) 1939 Pat 141 (142); 40 Cri L Jour 460 & (Vol 25) 1938 Nag 37 (38); 39 Cri L Jour 59; I L R (1940) Nag 195.]

[7] The Magistrate should decide whether or not he should allow the compromise, and the responsibility rests with him where the offence is compoundable with his permission. (Vol 24) 1937 Nag 114 (115); 38 Cri L Jour 689; I L R (1937) Nag 183 & (Vol 9) 1922 Lah 138 (138); 23 Cri L Jour 85.

[8] Permission to compound is not to be granted as a matter of course. ('93-1900) 1893-1900 Low Bur Rul 392 & ('01) 1 Upp Bur Rul 83 (83).

[9] A Magistrate should not permit an offence to be compounded until he is satisfied that such permission may be legitimately granted. ('09) 1909 Pun L R No. 93, p. 343 (345).

[10] The Magistrate should record his reasons to enable the High Court to determine if the discretion has been exercised properly. ('02) 1 Low Bur Rul 349 (349) & ('92-96) 1 Upp Bur Rul 43 (43).

[11] The High Court will not entertain an appeal against an order of acquittal passed under this section in the absence of proof of the grossest misuse of his

Section 345—Note 11 (*contd.*)

discretion by a Magistrate. (Vol 29) 1942 Pat 58 (59) : 43 Cri L Jour 44 (DB).

[12] Application for leave to compound offence under S. 325 rejected by Bench Magistrate — High Court, in revision, remanded the application for disposal under sub-s. (2) of this section. ('06) 3 All L Jour 211n (211n).

[13] The High Court will not interfere unless permission to compound was improperly withheld. ('33) 1933 Mad W N 245 (245).

[14] In the following cases it was held that permission was withheld improperly :

(a) Third party not receiving injury refused to allow composition—Withholding of permission by Magistrate. (Vol 1) 1914 Oudh 167(167):17 Oudh Cas 92: 15 Cr L J 567.

(b) Offence relating to public property — Matters not capable of being unravelled in criminal case — Compromise at an early stage — Refusal of permission to compound. (Vol 12) 1925 Pat 583 (583, 584) : 26 Cri L Jour 1345.

(c) Refusing to compound on the ground that the accused was a Collectorate clerk. (Vol 16) 1929 Pat 512 (512) : 31 Cri L Jour 607.

(d) Parties nearly related patching up quarrels — Magistrate refusing permission to compound. (Vol 9) 1922 Cal 191(191, 192):24 Cri L Jour 355 (DB) (Vol 16) 1929 Nag 278 (279) : 30 Cr L J 960.

(e) Offence not serious — Compromise effected, at an early stage—Magistrate's refusal to record compromise. (Vol 9) 1922 Lah 138 (138) : 23 Cri L Jour 85 (Vol 16) 1929 Bom 375 (376) : 31 Cri L Jour 353 (DB). (Compromise at a late stage — Retracted by complainant — One of the offences not compoundable—Permission properly refused.)

[15] Before allowing compromise in cases falling under Ss. 324 and 325 I. P. C., prevalence of such offences should be considered. (1900-02) 1 Low Bur Rul 349 (349, 350).

[16] The High Court set aside a compromise when all circumstances were not considered. (Vol 1) 1914 Sind 134 (134) : 7 Sind L R 200 : 15 Cri L Jour 553 (DB).

[17] Accused clerk in High Court — Complainant induced by accused to pay certain sum as bribe to Judge —Sanction granted to compromise—High Court holding the matter of grave public concern to set aside the order of sanction. (Vol 32) 1945 Nag 104 (106) : 1 L R (1945) Nag 505 : 47 Cri L Jour 119 (D B).

[18] In allowing a compromise, a Magistrate may impose a condition as to payment of some compensation to the injured man. (Vol 9) 1922 Lah 138 (138) : 23 Cri L Jour 85.

[19] The mere fact that a petition for compromise is filed in Court is no ground for the reduction of a sentence. ('11) 12 Cri L Jour 243 (243) (Low Bur).

12. Proof of composition.—[1] The onus lies on the person alleging compromise to show that there has been a real and valid composition with the person entitled to compound. ('93) 21 Cal 103 (112, 115) (DB) (Vol 14) 1927 Bom 410 (411) : 51 Bom 512 : 28 Cri L Jour 581 (D B).

[2] Before a composition can be allowed, the Court must be satisfied that it is legal and valid in law. (Vol 16) 1929 Bom 375 (376) : 31 Cri L Jour 353 (D B).

[3] Where a compromise is alleged by one party and denied by the other, the Magistrate must try the issue. (Vol 6) 1919 Mad 879 (880) : 41 Mad 685 : 19 Cri L Jour 359 (D B) (Vol 18) 1931 Lah 402 (402) : 32 Cri L Jour 1034 (Vol 3) 1916 Mad 854 (855) : 16 Cri L Jour 803 : 39 Mad 946 (D B) (Vol 13) 14 Cri L Jour 292 (293) : 6 Sind L R 284.

[4] An order of the Magistrate, acquitting the accused without inquiry into the truth of the compromise, is bad

in law and may be set aside. (Vol 19) 1932 Sind 7 (8) : 25 Sind L R 341 : 33 Cri L Jour 109 (D B).

13. Stage at which a compounding may be effected.—[1] An offence, which is compoundable without the permission of the Court, may be compounded even before the filing of a complaint. (Vol 6) 1919 Mad 879 (881, 882) : 41 Mad 685 : 19 Cri L Jour 359 (DB) (Vol 14) 1927 All 875 (876) : 49 All 484 : 23 Cri L Jour 495.

[2] A case may be compounded at any time before judgment is pronounced. (Vol 5) 1918 Cal 238 (238) : 45 Cal 816 : 19 Cri L Jour 752 (D B) (Vol 28) 29 Cri L Jour 1058 (1059) (Lah). (May be compounded any time before passing of sentence.)

[3] District Magistrate calling for record of a case with a view to transfer that case — Magistrate trying that case loses his jurisdiction and is not entitled to record a compromise. (Vol 12) 1925 Bom 247 (247) : 49 Bom 583 : 26 Cri L Jour 996 (D B).

14. Composition after committal or conviction. — [1] A committal once made by a Magistrate cannot be annulled by his allowing the prosecutor to file a compromise. (1865) 2 Suth W R Cr 57 (57) (D B).

[2] After conviction a composition can be effected only with the leave of the appellate Court. (Vol 7) 1920 Mad 245 (245) : 20 Cri L Jour 832 (Vol 2) 1915 All 8 (9) : 37 All 127 : 16 Cri L Jour 247.

[3] Accused convicted of a compoundable offence — Conviction set aside and retrial ordered, in appeal—Case can be compounded without appellate Court's permission. ('06) 4 Cri L Jour 35 (35) (All).

[4] A compromise entered into after the hearing of the appeal does not come within S. 345. (Vol 20) 1933 All 434 (436) : 34 Cri L Jour 926 (D B).

[See however (Vol 12) 1925 Cal 14 (17) : 26 Cri L Jour 401 : 52 Cal 347 (D B).]

[5] Sub-section (5) applies to offences compoundable with the permission of Court under sub-s. (2) also. (Vol 28) 1941 Sind 216 (217) : 1 L R (1941) Kar 429 : 43 Cri L Jour 293 (D B).

[6] Offence under S. 325, Penal Code—Compounding not allowed and accused convicted — Appellate Court finding that compoundable offence had been committed can allow the offence to be compounded, and order acquittal. (Vol 28) 1941 Sind 216 (217) : 1 L R (1941) Kar 429 : 43 Cri L Jour 293 (D B).

15. High Court's powers in revision.—[1] High Court can permit composition even in cases where Courts below have refused permission. (Vol 21) 1934 Lah 317 (317) : 35 Cri L Jour 579.

[2] Where there has been a conviction and that conviction has been upheld in appeal, High Court will be slow to allow a compromise. (Vol 21) 1934 Sind 122 (122) : 28 Sind L R 109 : 36 Cri L Jour 210 (D B).

[3] The object of the Legislature in enacting sub-s. (5A) was, in suitable circumstances, to allow the parties to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them. (Vol 26) 1939 Cal 728 (730) : 41 Cri L Jour 125 : 1 L R (1939) 1 Cal 567.

[4] The sub-section should be interpreted very strictly and the discretion exercised very sparingly and only in suitable cases. (Vol 26) 1939 Cal 728 (730) : 41 Cri L Jour 125 : 1 L R (1939) 1 Cal 567.

[5] The complainant alone can invoke the jurisdiction of the High Court under sub-s. (5A). (Vol 26) 1939 Cal 728 (730) : 41 Cri L Jour 125 : 1 L R (1939) 1 Cal 567.

[6] The High Court cannot record a compromise unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded. (Vol 26) 1939 Cal 728 (730) : 41 Cri L Jour 125 : 1 L R (1939) 1 Cal 567.

*Procedure of Provincial Magistrate in cases which he cannot dispose of.*

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or

Section 345—Note 15 (*contd.*)

[7] Proceedings in the lower Court disclosing no irregularity—High Court should not use powers under sub-s. (5A) unless it appears that parties attempted compromise before the Court passed final orders. (Vol 26) 1939 Cal 728 (730); 41 Cri L Jour 125; ILR (1939) 1 Cal 567.

16. Rescission of compromise.—[1] A composition once effected cannot be withdrawn. (Vol 27) 1940 Nag 181 (182); 41 Cri L Jour 287.

[2] A breach of the agreement might give rise to other remedies. (Vol 17) 1930 All 409 (410); 52 All 254; 31 Cri L Jour 1215 (Vol 6) 1919 Mad 879 (880, 882); 41 Mad 685; 19 Cri L Jour 359 (DB) (13) 14 Cri L Jour 458 (459) (DB) (Cal) (Vol 12) 1925 Lah 159 (160); 25 Cri L Jour 810.

[But see ('04) 1 Cri L Jour 705 (706) (Lah).]

[3] Subsequent withdrawal from the compromise by any party can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case. (Vol 27) 1940 Nag 181 (182); 41 Cri L Jour 287 (Vol 26) 1939 Pat 141 (142); 40 Cri L Jour 460 (Vol 8) 1921 Cal 403 (405); 22 Cri L Jour 301 (DB) (Vol 3) 1916 Mad 854; 39 Mad 946; 16 Cri L Jour 803 (D.B.), Followed.)

17. Effect of compromise.—[1] When a case is compounded, it results in an acquittal and until such order of acquittal is properly set aside, the accused cannot be prosecuted again for the same offence or for any other offence based on the same facts. (Vol 11) 1924 All 778 (779); 26 Cri L Jour 98 (93) 21 Cal 103 (112) (DB) (10) 11 Cri L Jour 366 (368) (Lah) (13) 14 Cri L Jour 292 (293); 6 Sind L R 284 (Vol 21) 1934 Lah 317 (317); 35 Cri L Jour 579 (90) 1890 Rat 519 (520) (DB). (Compounding of offence under S. 324, Penal Code—Re-trial on same facts on a charge under S. 323, held, improper.)

[2] Offence under S. 323—Case compromised—Subsequently offence found to fall under S. 325—Court not entitled to re-start prosecution under latter section. ('84) 1884 All W N 13 (14).

[3] The composition of one offence will not bar a prosecution for a distinct offence of which the accused might have been charged on the same facts under S. 235(1). (Vol 16) 1929 Bom 283 (285); 53 Bom 604; 30 Cri L Jour 1059 (DB).

[4] A composition has the effect of an acquittal only in respect of the offence which has been compounded. (Vol 17) 1930 All 92 (93); 30 Cri L Jour 1149 (Vol 12) 1925 Lah 464 (464); 26 Cri L Jour 686.

[5] Composition has the effect of acquittal only as between the person who is entitled to compound and the accused with whom the composition takes place. (Vol 25) 1938 Lah 789 (740); 40 Cri L Jour 131 (Vol 24) 1937 Nag 72 (73); 38 Cri L Jour 334; 1 L R (1937) Nag 286 (30) 1920 Mad W N 692 (694) (Vol 10) 1923 Cal 168 (169); 24 Cri L Jour 578 (DB).

[6] Compromise with one accused does not affect the cases of other accused. (Vol 13) 1926 Lah 424 (424); 7 Lah 344; 27 Cri L Jour 576 (Vol 11) 1924 Lah 595 (596); 5 Lah 239; 25 Cri L Jour 629 (SB) (33) 1933 Mad W N 222 (222) (Vol 34) 1947 Cal 31 (31); 47 Cr L J 699 (DB).

[7] On parties coming to settlement, non-compoundable case dismissed—Dismissal amounts to discharge only and the prosecution can be revived. (Vol 28) 1941 Oudh 510 (511); 42 Cri L Jour 746 (75) 1 Bom 64 (66) (DB).

[8] An order of acquittal passed on an invalid com-

position, may be set aside in revision. ('23) 24 Cri L Jour 120 (122) (Pesh).

[9] A Magistrate is not competent to award compensation to the accused where an offence is compounded under S. 345. ('92) 7 C P L R Cr 2 (3) (90) 9 Cri L Jour 186 (187) (DB) (Bom) (10) 11 Cri L Jour 638 (639); 1910 Pun Re No. 30 Cr.

[But see ('83) 1883 Pun Re No. 24 Cr, p. 57 (57) (DB).]

[10] Though compensation cannot be awarded under this section the Court can consider the desirability of prosecution under S. 182, I. P. C. in the interests of justice. (Vol 5) 1918 All 100 (100); 19 Cri L Jour 730 (Complaint of theft found false in a dispute between two brothers—Held prosecution under S. 182 was not proper.)

[11] Case compounded—Complainant can be charged under S. 211 if the complaint is false. ('84) 11 Cal 79 (81) (DB). (Offence under S. 347, Penal Code.)

[See however ('88) 1888 Pun Re No. 19 Cr, p. 35 (37, 38) (DB) (Lah).]

[12] Person executing security bond under S. 107 commits an offence under S. 324, Penal Code—Offence under S. 324 compounded and accused acquitted. The Bond cannot be forfeited unless evidence shows that he committed breach of peace. (Vol 27) 1940 Lah 32 (32); 41 Cri L Jour 359.

[13] An order according sanction under S. 345 is appealable under S. 417. (Vol 32) 1945 Nag 104 (104); 1 L R (1945) Nag 505; 47 Cri L Jour 119 (DB).

18. Sub-section (7).—[1] The provisions of sub-s. (7) govern the composition of offences whether any steps have been taken or not to prosecute the offender. (Vol 5) 1918 Nag 181 (183).

[2] No offences shall be compounded except where the provisions of S. 345 are satisfied. (Vol 4) 1917 Cal 705 (706); 43 Cal 1143; 17 Cri L Jour 339 (DB) (Vol 3) 1916 Mad 483 (485); 39 Mad 604; 16 Cr L J 750 (DB).

19. Civil Suit.—[1] Compoundable offence—Complainant, suing accused on the same cause of action, obtaining damages—Accused need not be tried in Criminal Court for the same offence. (Vol 11) 1924 Mad 31 (31); 25 Cri L Jour 138.

[2] The effect of the compounding of an offence is that a suit for damages on the facts constituting the original offence would not lie. (Vol 20) 1933 Bom 413 (414); 57 Bom 678 (DB).

20. Procedure in non-compoundable cases where injured party declines to prosecute.—[1] The Magistrate must require the complainant to carry his prosecution through to the end once the process is issued in a non-compoundable case. ('81) 3 All 283 (286).

[2] In the case of a non-compoundable offence, the Magistrate must make a complete inquiry and see that the accused who is guilty is brought to punishment. ('74) 22 Suth W R Cr 83 (85) (DB).

[3] The final responsibility of non-compoundable cases, whether instituted on complaint or otherwise, rests with the State and the complainant has no voice in its progress. (Vol 14) 1927 Rang 174 (174, 175); 5 Rang 136; 28 Cri L Jour 649.

#### SECTION 346 — SYNOPSIS.

1. Scope and applicability.
2. Duty of the inferior Courts.
3. To whom the case should be submitted.
4. Trial must be de novo — Sub-s. (2).
5. Sub-section (2) — Reference to any sub-Magistrate having jurisdiction.
6. "Inquiry," "evidence," meaning of.

committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

[1882 — S. 346; 1872 — S. 45 Paras. 1, 2; 1861 — S. 276.]

#### Section 346 (contd.)

1. Scope and applicability. — [1] Magistrate having jurisdiction may still be of opinion that case "should be tried" by other Magistrate on such grounds as complexity of facts or convenience of parties. (94) 1894 All W N 200 (200) & (99) 1890 Rat 499 (499) (D B).

[See (Vol 6) 1919 Mad 907 (910) : 42 Mad 83 : 19 Cri L Jour 997 (D B).]

2. Case falls under S. 347, S. 348 or S. 349 — Court should only act under that section and not under S. 346. ('65) 2 Cri L Jour 820 (822, 823) : 1 Nag L R 187.

[But see (94) 1894 All W N 200 (200).]

[3] Magistrate of opinion that case ought to be tried by Court of Session and he is himself empowered to commit same to such Court — He should act under S. 347 and not under this section. ('03) 7 Cal W N 457 (460) (D B).

[4] Accused European British subject — Section applies. ('11) 12 Cri L Jour 436 (437) : 7 Nag L R 93.

[5] Complaint presented to Magistrate not having territorial jurisdiction to inquire into or try offence — Proper procedure is to return complaint for presentation to proper Court and not to submit papers to superior Magistrate under this section. (Vol 30) 1943 Mad 526 (527) : 44 Cri L Jour 776.

2. Duty of the inferior Courts. — [1] Magistrate finding that he has no jurisdiction to try case cannot discharge accused on that ground but should proceed under this section. See (Vol 28) 1941 Mad 883 (884).

[2] Magistrate cannot clutch at jurisdiction by trying accused for such offences as he is competent to try even though other offences are disclosed during trial which he is not competent to try. (Vol 32) 1945 Sind 125 (127) : I L R (1945) Kar 109 : 47 Cri L Jour 37 (D B) & ('86) 1886 Pun Re No 30 Cr, page 73 (74) & ('97-1901) 1 Upp Bur Rul 84 (84) & (Vol 31) 1944 Mad 166 (168) : 45 Cri L Jour 508 & (Vol 28) 1941 Pat 287 (287) : 42 Cri L Jour 622 & (Vol 28) 1941 Sind 36 (37, 38) : 42 Cri L Jour 460 & (Vol 14) 1927 Mad 307 (308) : 28 Cri L Jour 164 & ('89) 13 Bom 502 (505) (D B) & (Vol 7) 1920 Cal 40 (42) : 21 Cri L Jour 10 (D B) & ('95) 19 Bom 340 (348) (D B) & ('66) 6 Suth W R Cr 39 (40) (F B) & ('92-96) 1 Upp Bur Rul 231 (231).

[See (Vol 18) 1931 Mad 702 (703) : 54 Mad 1018 : 32 Cri L Jour 1215 (D B).]

[3] Graver offence disclosed — Sanction necessary — Sanction refused — Trial for lesser offence held competent. ('08) 7 Cri L Jour 6 (7) : 31 Mad 43.

[4] Fact that Magistrate ignores circumstances disclosing graver offence for which he is not competent to try, and tries for lesser offence, will not render proceeding void. ('89) 13 Bom 502 (505) (D B) & (Vol 14) 1927 Mad 307 (307) : 28 Cri L Jour 164 & ('01) 24 Mad 675 (677, 678) (D B).

[5] Conviction for minor offence — Facts disclosing graver offence not triable by Court — Conviction need not be quashed without proof of prejudice or sentence being inadequate. (Vol 2) 1915 Mad 9 (10) : 14 Cri L Jour 640 & ('89) 13 Bom 502 (505, 506) & (Vol 18) 1931 Mad 494 (495) : 32 Cri L Jour 971.

[See ('98) 2 Weir 482 (483) (D B).]

[6] Complainant's statement determines jurisdiction unless at outset allegations are exaggerated with intention of seeking particular Court for redress. (Vol 12) 1925 All 290 (291) : 47 All 64 : 26 Cri L Jour 586.

[7] Mere fact that to make his case more serious complainant alleges commission of offence which would not be tried by junior Magistrate will not render proceedings of that Magistrate illegal if he goes on to try that case and decide it holding that facts disclosed show that it is lesser offence which he is competent to try. (Vol 26) 1939 Lah 122 (123) : 40 Cri L Jour 515 : I L R (1938) Lah 619.

[8] Trying Magistrate finds that offence disclosed can only be tried by Magistrate of higher class — Order of District Magistrate cannot confer jurisdiction on him. (Vol 13) 1926 Cal 590 (592) : 27 Cri L Jour 545 (D B).

3. To whom the case should be submitted. — [1] Magistrate to whom case is submitted should be one having jurisdiction over it. ('82) 4 Mad 327 (328) (D B).

4. Trial must be *de novo* — Sub-section (2) — [1] It is only the authority who has heard all evidence that is competent to decide whether accused is innocent or guilty. (Vol 11) 1924 Nag 37 (37) : 22 Nag L R 166 : 24 Cri L Jour 738 & (Vol 10) 1923 Mad 327 (327) : 24 Cri L Jour 413 (Evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so.) & (Vol 20) 1933 Sind 191 (191) : 27 Sind L R 266 : 34 Cri L Jour 749 (D B). (Case stayed under S. 346 — Magistrate to whom case is submitted must try case *de novo*.) & ('05) 2 Cri L Jour 369 (370) : 1905 Pun Re No. 25 Cr & (Vol 3) 1916 Nag 115 (116) : 12 Nag L R 146 : 18 Cri L Jour 35.

[2] Magistrate to whom case is submitted must try case *de novo* — Failure to do so is illegality vitiating trial. (Vol 5) 1918 Pat 676 (677, 678) : 19 Cri L Jour 625 & (Vol 30) 1943 Lah 27 (28) : 43 Cri L Jour 925 & (Vol 25) 1938 Cal 415 (416) : 39 Cri L Jour 606 (D B) & (Vol 20) 1933 Sind 191 (191) : 27 Sind L R 266 : 34 Cri L Jour 749 (D B) & ('97-01) 1 Upp Bur Rul 85 (85) & ('05) 2 Cri L Jour 689 (690) (Lah & (Vol 10) 1923 Mad 327 (327) : 24 Cri L Jour 413 & (Vol 15) 1928 Cal 183 (183) : 55 Cal 65 : 29 Cri L Jour 464 (D B).

[3] If Magistrate to whom case is submitted under sub-s. (1) of this section refers case to subordinate Magistrate for trial, latter must try it *de novo*. (Vol 25) 1938 Cal 415 (416) : 39 Cri L Jour 606 (D B) & (Vol 5) 1918 Pat 676 (678) : 19 Cri L Jour 625.

[4] Accused cannot waive his right to trial *de novo*. (Vol 5) 1918 Pat 676 (677, 678) : 19 Cri L Jour 625 & ('04) 1 Cri L Jour 1056 (1057) : 17 C P L R Cr 159 & ('05) 2 Cri L Jour 369 (370) : 1905 Pun Re No. 25 Cr & (Vol 10) 1923 Mad 327 (327) : 24 Cri L Jour 413.

[But see ('70) 14 Suth W R Cr 3 (3) (D B).]

[5] Superior Magistrate, under sub-s. (2), committing case to sessions, acting on evidence recorded by submitting Magistrate — Procedure is not illegal. ('07) 6 Cri L Jour 429 (430, 431) (D B) (Cal) & (Vol 3) 1916 Nag 115 (116) : 18 Cri L Jour 35 : 12 Nag L R 146 & ('89) 1889 Rat 472 (472) (D B).

5. Sub-section (2) — Reference to any sub-Magistrate having jurisdiction. — [1] Offence committed in township Magistrate of H — Sub-divisional



347. (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall <sup>a</sup> commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

[1882 — S. 347 ; 1872 — Ss. 46, 221, 436 : 1861 — S. 256.]

[a] The words "stop further proceedings and" were repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 91.

#### Section 346 — Note 5 (cont'd.)

Magistrate under sub-s. (2) transferred case for trial to township Magistrate of P — Transfer held legal. (02) 1 Low Bur Rul 308 (309).

[2] Magistrate to whom proceedings are submitted under this section can refer case back to very Magistrate who made submission. (Vol 17) 1930 Mad 765 (766) : 54 Mad 16 : 31 Cri L Jour 1010 (F B).

[But see (Vol 29) 1942 Bom 84 (85) : I L R (1942) Bom 198 : 43 Cri L Jour 562 (D B).]

[3] District Magistrate cannot cancel or set aside order of Sub-divisional Magistrate transferring case referred to him under this section. (Vol 23) 1936 Nag 220 (221) : 38 Cri L Jour 15 : I L R (1937 Nag 135).

6. "Inquiry," "evidence," meaning of. — [1] Magistrate directing inquiry by police or another person under S. 202 — All facts and statements disclosed by such inquiry, including report by police or other person, are "evidence" on which Magistrate can act under this section. (Vol 14) 1927 Mad 591 (591, 592) : 28 Cri L Jour 384.

#### SECTION 347—SYNOPSIS.

1. Scope.
2. "Before signing judgment."
3. "Ought to be tried."
4. "Under the provisions hereinbefore contained."

1. Scope. — [1] Magistrate thinking from first that case ought to be tried by Court of Session — This section does not apply — Magistrate must conform to provisions of S. 208 from start. (12) 13 Cri L Jour 877 (883) : 6 Low Bur Rul 129 (F B). (Robinson J., *dissenting*.)

[2] In application of this section no distinction is made between summons and warrant-cases. (Vol 7) 1920 Sind 55 (57) : 14 Sind L R 85 : 21 Cri L Jour 791.

[But see (06) 3 Cri L Jour 94 (95) (All).]

[3] Calendar cases triable by first class Magistrate cannot be transferred to second class Magistrate with direction to treat them as sessions cases — Magistrate should proceed under S. 347. (Vol 6) 1919 Mad 907 (910) : 42 Mad 83 : 19 Cri L Jour 997 (D B).

[See (Vol 25) 1938 Mad 529 (530) : 39 Cri L Jour 715.]

2. "Before signing judgment". — [1] Magistrate can commit case to sessions on deciding that he should not try it provided evidence is completed. (Vol 17) 1930 Cal 666 (667) : 32 Cri L Jour 243 (D B) \* ('98) 1898 Rat 975 (975) (D B).

[2] Discretion given to Magistrate by this section is not taken away even though charge may have been drawn up. (78) 3 Cal 495 (496, 497) (D B).

[3] Discretion under this section is not taken away because Magistrate has issued summons to defence witnesses. (Vol 2) 1915 Mad 947 (948) : 15 Cri L Jour 704.

[4] Magistrate passed no order of discharge — He can commit case to sessions. (Vol 7) 1920 Mad 94 (95) : 43 Mad 330 : 21 Cri L Jour 91 (D B).

[5] Once judgment is pronounced, Magistrate cannot

commit case to sessions. (Vol 1) 1914 Mad 149 (149) : 38 Mad 552 : 15 Cri L Jour 188.

3. "Ought to be tried." — [1] If evidence discloses offence triable only by Sessions Court, Magistrate must commit case to sessions. (26) 27 Cri L Jour 871 (872) (D B) (Cal) \* ('89) 1889 Rat 476 (477) (D B).

[2] Evidence disclosing offence exclusively triable by Sessions Court and offence which Magistrate himself can try — Trial and conviction by Magistrate in respect of latter offence is not illegal. (Vol 8) 1921 Cal 114 (115) : 22 Cri L Jour 666 (D B).

[3] If offence is one which is not exclusively triable by Court of Session Magistrate can commit accused to Court of Session only if he be of opinion that case is one which ought to be tried by that Court. (Vol 15) 1928 Pat 551 (552) : 29 Cri L Jour 612.

[4] Magistrate should state his grounds for committing in order to enable Court of Session or High Court to Judge whether committal is a sound exercise of discretionary power. (Vol 17) 1930 Lah 312 (313) : 31 Cri L Jour 178 \* (Vol 15) 1928 Pat 551 (552) : 29 Cri L Jour 612 \* ('09) 9 Cri L Jour 163 (164) (D B) (Bom).

[But see (Vol 6) 1919 Mad 907 (908) : 42 Mad 83 : 19 Cri L Jour 997 (D B).]

[5] Reasons given should be not only for not discharging the accused but for committing him to Sessions Court when the case is not exclusively triable by Court of Session. (Vol 1) 1914 Bom 237 (238) : 38 Bom 114 : 14 Cri L Jour 609 (D B).

[6] Failure to give reasons for committal as required by S. 213 may be irregularity where case is triable by Sessions Court, but where it is not exclusively triable by Sessions Court failure amounts to illegality. (Vol 1) 1914 Bom 237 (238) : 38 Bom 114 : 14 Cri L Jour 609 (D B).

[7] If no reasons are given or if reasons given are bad in law, committal may be quashed. (Vol 13) 1926 Bom 251 (252) : 27 Cri L Jour 479 (D B) \* (Vol 4) 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342 (D B) \* (Vol 11) 1924 Sind 61 (64) : 17 Sind L R 188 : 26 Cri L Jour 148 (D B) \* (Vol 11) 1924 All 185 (185) : 25 Cri L Jour 665 \* ('97) 24 Cal 429 (431, 432) (D B) \* (Vol 6) 1919 All 368 (366) : 41 All 454 : 20 Cri L Jour 273 \* (Vol 5) 1918 Nag 141 (142) : 20 Cri L Jour 97 \* (Vol 5) 1918 Sind 60 (61) : 11 Sind L R 79 : 19 Cri L Jour 319 (D B).

[See also (Vol 27) 1940 Oudh 15 (15) : 40 Cri L Jour 903 \* (Vol 19) 1932 Lah 168 (169) : 33 Cri L Jour 255 \* (Vol 19) 1932 Lah 263 (264) : 33 Cri L Jour 680.]

[8] This section is not controlled by S. 254 and want of jurisdiction or inability to punish adequately are not the only grounds on which Magistrate may commit case to sessions. (Vol 30) 1943 Sind 112 (113) : I L R (1943) Kar 90 : 44 Cri L Jour 631 \* (Vol 17) 1930 Sind 145 (146) : 24 Sind L R 157 : 31 Cri L Jour 596 \* (Vol 33) 1946 Mad 349 (350, 351) \* ('76) 1 Mad 289 (290) (F B) \* (Vol 16) 1929 Bom 313 (319) : 53 Bom 611 : 30 Cri L Jour 1090 (D B) \* (Vol 13) 1928 Bom 251 (251) : 27 Cri L Jour 479 (D B) \* (Vol 12) 1925 Rang 207 (208) : 3



Section 347 — Note 3 (*contd.*)

Rang 42 : 26 Cri L Jour 1389 \* (Vol 4) 1917 Lah 251 (251, 252) : 18 Cri L Jour 524 : 1917 Pun Re No. 13 Cr.

[See also (Vol 20) 1933 Lah 500 (501) : 34 Cri L Jour 314 \* (Vol 15) 1928 Pat 551 (552) : 29 Cri L Jour 612]

[But see (Vol 25) 1938 Sind 79 (79) : 39 Cri L Jour 507 \* (Vol 16) 1929 Cal 777 (777) : 56 Cal 735 : 31 Cri L Jour 184.]

9. Magistrate can take broad and commonsense view of facts and determine whether correct charge to be framed is or is not one which necessitates trial by Court of Session. (Vol 10) 1923 Cal 108 (111) : 24 Cr L J 674 (DB) \* ('09) 9 Cri L Jour 163 (165) (DB) (Bom).

[10.] Committal made under misapprehension of correct offence may be quashed. ('10) 11 Cri L Jour 54 (54, 55) (All).

11. Magistrate should not try case in which complicated or difficult questions of law or fact arise which he is neither by training nor experience qualified to try. (Vol 19) 1932 Rang 193 (194) : 10 Rang 495 : 34 Cri L Jour 187 \* (Vol 33) 1946 Mad 349 (350, 351).

[12.] Magistrate may consider special difficulties in case or its peculiar importance, and other matters might enter into his consideration. (Vol 4) 1917 Bom 33 (34) : 42 Bom 172 : 19 Cri L Jour 342 (DB). (But Magistrate must not determine whether he is to commit the case or try it himself, solely by the wish of the parties and the terms of a Government resolution.) (Vol 19) 1932 Bom 63 (63, 64) : 56 Bom 61 : 33 Cri L Jour 262 (DB).

[13.] Desirability that case be tried by jury, or gravity of case — Good ground for committal. (Vol 16) 1929 Bom 313 (316) : 53 Bom 611 : 30 Cri L Jour 1090 (DB) \* ('12) 13 Cri L Jour 443 (444) (All) \* (1900-02) 1 Low Bur Rul 259 (260).

[See (Vol 17) 1930 Sind 145 (146) : 24 Sind L R 157 : 31 Cri L Jour 596.]

[See however (Vol 25) 1933 Bom 430 (431) : 39 Cri L Jour 928]

14. Magistrate put himself in position of witness by local investigation — Case may be committed. ('12) 13 Cri L Jour 638 (638) (DB) (Cal).

[See however (Vol 11) 1924 All 185 (186) : 25 Cri L Jour 665]

[15.] Fact that in respect of same transaction another party of accused is being tried by sessions is good ground for committal. (Vol 4) 1917 Lah 251 (251) : 18 Cri L Jour 524 (525) : 1917 Pun Re No. 13 Cr.

[16.] Facts constituting offence forming part of same transaction with another offence triable by sessions — Case may be committed. (Vol 7) 1920 Sind 55 (57) : 14 Sind L R 85 : 21 Cri L Jour 791.

[17.] Apparent connexion of one case with another is no ground for committal. (Vol 19) 1932 Lah 168 (169) : 33 Cri L Jour 255 \* (Vol 17) 1930 Lah 312 (313) : 31 Cri L Jour 178.

[See however (Vol 20) 1933 Lah 500 (501) : 34 Cri L Jour 314.]

[18.] Connected matter before Court of Session — Good ground for committal. (Vol 6) 1919 Mad 907 (908) : 42 Mad 83 : 19 Cri L Jour 997 (DB).

[19.] It is not absolute rule that all charges and counter-charges must be tried by same Court. (Vol 19) 1932 Mad 502 (504) : 33 Cri L Jour 765.

[See also ('40) 1940 Mad W N 530 (530).]

[20.] Fact that case is connected with another committed to sessions is no ground for committal when connexion between two cases is not such as would embarrass or prejudice accused in absence of such commitment. ('13) 14 Cri L Jour 657 (658) (DB) (Bom).

[21.] Mere wish of parties is not sufficient ground for committal. (Vol 32) 1945 Bom 493 (494) (DB) \* (Vol 13) 1926 Bom 251 (252) : 27 Cri L Jour 479 (DB).

[22.] Fact that accused wants to have benefit of trial by jury is not sufficient ground for committal. (Vol 19) 1932 Bom 63 (64) : 56 Bom 61 : 33 Cri L Jour 262 (DB).

[23.] Mere fact that case has caused sensation in particular community is not sufficient ground for committal. (Vol 13) 1926 Bom 251 (252) : 27 Cri L Jour 479 (DB).

[24.] If committal would result in unwarrantable waste of time without advantage to anybody and Magistrate is competent to try case, he acts properly in not committing. (Vol 12) 1925 Pat 755 (759) : 27 Cri L Jour 318.

[See also ('08) 8 Cri L Jour 360 (361) : 1 Sind L R 103.]

25. Offender appears to be deserving of greater punishment than Magistrate can inflict — Magistrate should commit case. (Vol 21) 1934 Oudh 185 (185) \* (Vol 20) 1933 Lah 500 (501) : 34 Cri L Jour 314 \* ('13) 14 Cri L Jour 304 (304) (All) \* ('71) 15 Suth W R Cr 58 (60) (FB) \* ('92) 16 Bom 580 (583, 586) (DB) \* ('89) 11 All 393 (395).

[26.] Committal to sessions of case which ought to have been tried by Magistrate himself does not affect jurisdiction of Sessions Court to try case and conviction of accused by Sessions Court cannot be impeached. (Vol 32) 1945 All 340 (341, 342) : ILR (1945) All 422.

4. "Under the provisions hereinbefore contained." — [1] This section is controlled by provisions contained in Chap. XVIII and Magistrate must follow that procedure. (Vol 23) 1936 All 134 (136) : 37 Cri L Jour 337 : 58 All 671 (FB) \* (Vol 16) 1929 Mad 862 (863) : 52 Mad 995 : 31 Cri L Jour 273.

[2] Magistrate need not recommence inquiry or take evidence *de novo* but further proceedings necessary for commitment shall be taken as directed in Chapter XVIII. (Vol 27) 1940 Lah 389 (391) : ILR (1940) Lah 151 : 42 Cri L Jour 29 (DB) \* (Vol 23) 1936 All 134 (137) : 37 Cri L Jour 337 : 58 All 671 (FB).

[3] From the moment Magistrate decides to commit what has hitherto been trial becomes enquiry under Chapter XVIII. (Vol 17) 1930 Cal 666 (667) : 32 Cri L Jour 243 (DB) \* (Vol 20) 1933 Cal 354 (357) : 60 Cal 643 : 34 Cri L Jour 611 (DB) \* (Vol 18) 1931 All 434 (435) : 53 All 692 : 32 Cri L Jour 849.

[4] Charge already framed must be set aside in order that Magistrate may get back to the stage at which preliminary case proceedings may be applied. (Vol 19) 1932 Mad 502 (504) : 33 Cri L Jour 765.

[5] Magistrate taking cognizance under Chapter XXI — Accused found not guilty with respect to part but Magistrate finding grounds for commitment with respect to another part — He should acquit for former and commit for latter. (Vol 12) 1925 Oudh 547 (548) : 26 Cri L Jour 520 (DB).

[6] Though Magistrate need not commence proceedings *de novo*, once he decides to commit he must not deprive accused of any right which he might have exercised under Chapter XVIII, had case been treated from outset as preliminary enquiry. (Vol 28) 1941 Oudh 409 (412) : 42 Cri L Jour 536 \* (Vol 27) 1940 Lah 389 (391) : ILR (1940) Lah 151 : 42 Cri L Jour 29 (DB) \* (Vol 23) 1936 All 134 (137) : 37 Cri L Jour 337 : 58 All 671 (FB).

[7] Accused has had no opportunity of adducing evidence before committal — Committal should be quashed. (Vol 23) 1936 All 134 (138, 139) : 37 Cri L Jour 337 : 58 All 671 (FB) \* (Vol 19) 1932 Mad 502 (502, 503) : 33 Cri L Jour 765.

[8] Evidence not read over to witnesses as required by S. 208 read with S. 360 — Held that it was not mere formal omission but one that may deprive accused of valuable right to contradict witnesses during

<sup>a</sup>[348. (1) Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall <sup>b</sup>[if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused] be committed to the Court of Session or High Court, as the case may be, unless the Magistrate <sup>c</sup>[is competent to try the case and] is of opinion that he can himself pass an adequate sentence if the accused is convicted :

Provided that, if <sup>d</sup>[any Magistrate in the district] has been invested with powers under S. 30, the case may be transferred to him instead of being committed to the Court of Session.

<sup>b</sup>[(2) When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209.]

[1882 — S. 348; 1872 — S. 315.]

[a] *Re-numbered* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 92.

[b] *Inserted, ibid.* [c] *Substituted, ibid.*, for "before whom the proceedings are pending." [d] *Substituted ibid.*, for "the District Magistrate."

#### Section 347—Note 4 (*contd.*)

sessions trial by reference to their prior statements. (Vol 16) 1929 Mad 862 (863) : 52 Mad 995 : 31 Cri L Jour 273.

[9] If accused has cross-examined witnesses before Magistrate decides to commit, he has no further right of cross-examination after charge is amended. (Vol 18) 1931 All 434 (435) : 53 All 692 : 32 Cri L Jour 849.

[10] During examination of first witness for prosecution Magistrate intimating to accused his intention of committing him to Court of Session but accused declining to cross-examine witnesses — After charge is framed if accused prays for cross-examining witnesses, he cannot be allowed. (Vol 16) 1929 Cal 593 (595) : 57 Cal 44 : 30 Cri L Jour 1107 (DB).

[11] If accused was led to believe that he would have right of cross-examination after charge is framed, accused should not be prejudiced by conversion of trial into preliminary enquiry and should be afforded opportunity of cross-examination. (Vol 16) 1929 Cal 593 (596) : 57 Cal 44 : 30 Cri L Jour 1107 (DB) \* (Vol 19) 1932 Mad 502 (504) : 33 Cri L Jour 765. (Obiter.)

[12] Application to cross-examine made, before Magistrate frames charge and decides to commit case — It must be granted. (Vol 11) 1924 Cal 780 (780) : 51 Cal 442 : 26 Cri L Jour 63 (DB).

[13] Accused would be allowed to cross-examine witnesses if his application was made before prosecution closed its case, but not if application was made after. (12) 13 Cri L Jour 688 (688) (DB) (Cal).

[See however (Vol 16) 1929 Cal 593 (597) : 57 Cal 44 : 30 Cri L Jour 1107 (DB).]

[14] In order that committal may be quashed on ground that provisions of Chapter XVIII have not been followed, it must be shown that accused has been prejudiced by irregularity. (Vol 18) 1931 Bom 517 (518) : 33 Cri L Jour 68 (DB) \* (Vol 1) 1914 Mad 643 (644) : 15 Cri L Jour 366 (DB).

[15] Before committal, accused can claim that provisions relating to enquiries before commitment shall be observed irrespective of any question as to prejudice. (Vol 16) 1929 Mad 862 (864) : 52 Mad 995 : 31 Cri L Jour 273.

[16] If there be change of Magistrates before actual committal accused cannot have *de novo* inquiry. (Vol 17) 1930 Cal 666 (668) : 32 Cri L Jour 243 (DB).

#### SECTION 348 — SYNOPSIS.

1. Previous conviction should have been under Chapter XII or Chapter XVII of the Penal Code.

2. "Having been convicted."

3. "For a term of three years or upwards."

4. "Shall be committed."

5. Magistrate cannot act under section 349.

6. "Unless he can himself pass an adequate sentence."

7. Procedure before specially empowered Magistrate.

1. Previous conviction should have been under Chapter XII or Chapter XVII of the Penal Code.—

[1] Conviction under S. 411, Penal Code — Previous conviction under S. 369 cannot be taken into account under S. 75, Penal Code. (Vol 10) 1923 Lab 236 (286) : 24 Cri L Jour 944 (DB).

[2] Trial for offence under S. 511.—Previous conviction for same offence will not count for purposes of this section. ('95) 17 All 123 (125) (DB) \* ('80) 5 Bom 140 (142) (SB) \* ('06) 5 Cri L Jour 85 (85) : 1906 Pun Re No. 14 Cr \* ('87) 14 Cal 357 (357) (DB) \* ('84) 1884 Pun Re No. 34 Cr, p. 59 (60) (DB).

[3] Previous conviction under Chapter XII or XVII will not be reckoned against the person charged subsequently under S. 511. ('06) 5 Cri L Jour 85 (85) : 1906 Pun Re No. 14 Cr.

[4] A previous conviction under any local or special law will not count for the purposes of this section. ('93-1900) 1893-1900 Low Bur Rul 378 \* ('04) 1 Cri L Jour 1061 (1062) : 1904 Pun Re No. 17 Cr. (DB).

[See however (Vol 4) 1917 Sind 17 (19) : 11 Sind L R 46 : 18 Cri L Jour 909 (DB) \* ('93) 7 C P L R Cr 24 (26) \* (Vol 20) 1933 Pesh 6 (8) (DB).]

[5] A previous conviction given before the Penal Code came into force cannot be taken into account for the purposes of this section. ('66) 4 Bom H O R Cr 11 (12) (DB) \* (1865) 5 Suth W R Cr 66 (67) (DB) \* ('82) 10 Cal L Rep 392 (392) (DB) \* ('68) 1868 Pun Re No. 31 Cr, p. 89 (90) (DB).

2. "Having been convicted." — [1] The previous conviction should have been before the commission of the offence with which the accused is subsequently charged. ('75) 1 All 637 \* ('87) \* ('82) 1882 Pun Re No. 39 Cr, p. 65 (65) (DB) \* (Vol 5) 1918 Low Bur 121 (121) : 19 Cri L Jour 47 : 9 Low Bur Rul 77.

[2] A conviction by a Court in a Native State not acting under any authority of the Central Government cannot be reckoned. (Vol 6) 1919 All 63 (63) : 42 All 136 : 21 Cri L Jour 144 \* ('08) 2 Cri L Jour 749 (750) : 1 Nag L R 137 \* ('13) 14 Cri L Jour 527 (527) : 1913 Pun Re No. 17 Cr.

[3] Previous conviction by Court-martial cannot be taken into account. (Vol 20) 1933 Pesh 2 (2) (DB).

**349. (1)** Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

**a**[(11)] When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section 1, in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.]

#### Section 348 (contd.)

3. "For a term of three years or upwards." — [1] Where the subsequent offence, though falling under Chapter XII or Chapter XVII of the Penal Code, is punishable with imprisonment for less than three years, this section will not apply. ('93-1900) 1893-1900 Low Bur Rul 496\*(11) 12 Cri L Jour 439 (440) (Lah).

4. "Shall be committed." — [1] The Magistrate should commit the accused to the Sessions Court or the High Court, if the conditions of the section are satisfied. ('99) 2 Weir 422 (422)\* ('78) 1878 Pun Re No. 18 Cr, p. 45 (45) (DB)\* (1864) 2 Bom H C R Cr 126 (127)\* ('72-92) 1872-1892 Low Bur Rul 335 (335).

[2] Magistrate not able to pass sufficiently severe sentence—Evidence not warranting discharge of accused—Magistrate should frame a charge under S. 210 and commit the accused for trial under Chapter XVIII of the Code. (Vol 1) 1914 Mad 149 (149, 150) : 38 Mad 552 : 15 Cri L Jour 188.

[3] Old convict from circumstances appearing to be guilty of stealing — Presumption of criminal habit of accused, if un rebutted, justifies the Magistrate applying this section. ('81) 1881 All W N 153 (153, 154).

[4] The fact that the property stolen was small in value is no reason by itself for not committing the accused and for passing a small sentence on him. ('87) 1887 All W N 194 (194) (DB) \* ('04) 1 Cri L Jour 111 (111)\* 1903 Pun Re No. 28 Cr, p. 72 (73) (DB).

[See however (Vol 1) 1924 Bom 453 (453) : 26 Cri L Jour 759 (DB).]

[5] Lapse of long time since previous conviction — Accused leading blameless life — Application of S. 75, Penal Code is appropriate. (Vol 14) 1927 Lah 647 (647) : 28 Cri L Jour 160 \* ('08) 7 Cri L Jour 293 (294) (Lah) \* ('35) 1935 Mad W N 1294 (1295)\* (Vol 16) 1929 Lah 278 (278) : 30 Cri L Jour 876.

[6] Accused convicted many times — This is no reason to sentence him to an incommensurate punishment for a trivial offence. ('33) 1933 Mad W N 1259 (1260).

[7] Where conditions in the section are satisfied the Magistrate must commit the case to the sessions or transfer it to a duly empowered Magistrate. (Vol 3) 1916 Low Bur 65 (66) : 17 Cri L Jour 201. (Previous conviction under Chapter XVII—Magistrate, after noting that offence calls for severe punishment which he could not impose cannot convict himself.)\* ('08) 8 Cri L Jour 478 (480) : 4 Low Bur Rul 282 (DB) \* ('72) 1872 Pun Re No. 31 Cr, p. 41 (41) (DB)\* ('89) 11 All 393 (395)\* (Vol 1) 1914 Mad 149 (149) : 38 Mad 552 : 15 Cri L Jour 188. (Magistrate cannot find the accused guilty.)

[8] Previous conviction not known to Magistrate — Magistrate passing a sentence not adequate for the first offence, commits no material irregularity. ('05) 2 Cri L Jour 228 (229) : 1905 Pun Re No. 19 Cr.

[9] Previous convictions alleged—Magistrate without calling for proofs held that they were not proved and convicted the accused.—*Held*, there was material irregularity and case remanded with a view to proceed under

this section. ('74) 1874 Pun Re No. 12 Cr, p. 21 (21) (DB).

5. Magistrate cannot act under section 349.— [1] In cases where the accused is liable to enhanced punishment under S. 75 of the Penal Code, and the Magistrate thinks he cannot pass an adequate sentence, he must act under S. 348 and not under S. 349. (Vol 33) 1946 Mad 171 (172) \* (Vol 28) 1941 Mad 748 (748) \* (Vol 3) 1916 Low Bur 65 (66) : 17 Cri L Jour 201.

[2] Magistrate acts irregularly under S. 349—District Magistrate can try the case or transfer it to competent Magistrate, proceedings being taken *de novo*. ('99) 2 Weir 422 (422, 423).

6. "Unless he can himself pass an adequate sentence." — [1] Where the Magistrate can pass an adequate sentence, he should try and dispose of the case himself. ('99) 2 Weir 423 (424).

[2] Magistrate thinking he can award an adequate sentence, trying the case and convicting the accused — Though more adequate sentence could have been passed on committal, the Magistrate has not acted without jurisdiction. ('73) 1873 Rat. 70 (72) (DB)\* ('80) 2 Weir 31 (32). (The Magistrate has a discretion to try the case himself.)

[3] Even though the Magistrate feels that he can award an adequate sentence, he can commit the accused to the Sessions Court for trial. (Vol 1) 1914 Mad 149 (150) : 38 Mad 552 : 15 Cr L J 188.

[4] Old offenders should generally be charged before First Class Magistrate so that adequate sentence can be awarded. ('99) 2 Weir 422 (422).

7. Procedure before specially empowered Magistrate.—[1] The Magistrate cannot proceed to recommence the enquiry and at the same time rely upon the previously recorded evidence. (Vol 14) 1927 Lah 238 (238) : 28 Cri L Jour 302.

[2] The Magistrate empowered under S. 30 must try the accused as a special Magistrate and not as a Sessions Court. ('73) 1873 Pun Re No. 12 Cr, p. 13 (14) (DB).

#### SECTION 349 — SYNOPSIS.

1. Scope.
2. Who can make a reference under this section.
3. "Having jurisdiction."
4. Record of opinion.
5. Punishment "different in kind."
6. "More severe."
7. "Or that he ought to be required to execute a bond under section 106."
8. Procedure of referring Magistrate.
9. Sub-section (1A)—Several accused.
10. To whom reference can be made.
11. Procedure of the Magistrate to whom a case is referred.
12. "Shall pass such judgment, sentence or order."
13. Committal to sessions.
14. Whether superior Magistrate can quash proceedings.
15. Whether superior Magistrate can return case.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law :

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

[1882 — S. 349; 1872 — S. 46; 1861 — S. 277.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 93.

#### SECTION 349—SYNOPSIS (*contd.*)

16. Transfer to another Magistrate.
17. Whether superior Magistrate can order.
18. Proviso.

1. Scope.—[1] This section provides an exception to the general rule that the authority who heard the evidence alone is competent to decide as to the guilt or innocence of the accused. (Vol 11) 1924 Nag 37 (37, 38); 22 Nag L R 166 : 24 Cri L Jour 738. (The section should be strictly interpreted.) \* ('05) 2 Cri L Jour 369 (370) : 1905 Pun Be No. 25 Cr.

[See however ('91) 2 Weir 690 (690).]

[2] Before the Magistrate proceeds under this section, he must feel that accused deserves more punishment than he can award. (Vol 16) 1929 Pat 511 (512) : 31 Cri L Jour 608.

[3] This section must be read subject to the provisions of S. 348. (Vol 28) 1941 Mad 748 (748) \* ('08) 8 Cri L Jour 478 (480) : 4 Low Bur Rul 282 (DB).

[4] Where the Magistrate thinks that only some of the convicted persons should be dealt with under S. 562, it is not necessary to invoke aid of this section. Sections 380 and 582 provide the machinery to meet such cases. ('47) 1947-1 Mad L Jour 17 (19).

2. Who can make reference under this section.—[1] This section does not apply to first class Magistrates. ('85) 7 All 414 (419, 423) (FB) \* ('08) 8 Cri L Jour 475 (475) : 4 Low Bur Rul 277.

[2] This section does not apply to Magistrates trying cases summarily. ('08) 8 Cri L Jour 475 (475) : 4 Low Bur Rul 277.

[But see (Vol 19) 1932 All 507 (507, 508) : 33 Cri L Jour 472.]

[3] An order by a superior Magistrate directing a subordinate Magistrate to send up a case under this section is *ultra vires*. (1886) 9 Mad 377 (378).

[4] A District Magistrate is not competent to forbid all subordinate Magistrates in his district from taking up cases if they think they shall have to act under this section in disposing of the case. ('66) 3 Bom H C R Cr 29 (32).

3. "Having jurisdiction." — [1] If a Magistrate refers a case over which he has no jurisdiction to try, his proceedings are illegal and void and will not empower the superior Magistrate to proceed under sub-s. (2) of this section. ('99) 1 Bom L R 27 (29) (DB).

[2] Magistrate not empowered to try a case but which he can commit to sessions—The Magistrate to whom case is referred can commit it to sessions. ('86) 13 Cal 305 (307) (DB).

4. Record of opinion. — [1] Third Class Magistrate transferring a case to District Magistrate without stating any of the grounds mentioned in the section — Held transfer was not under this section. ('90) 12 All 66 (68).

5. Punishment "different in kind." — [1] A submission of proceedings for the purpose of taking action under S. 562 cannot be considered to be one under this section. (Vol 11) 1924 Nag 37 (38) : 22 Nag L R 166:24 Cri L Jour 738.

[2] Magistrate convicting two accused and sending

the third who was young, under this section—Held, the case of all the three accused should have been referred. ('28) 29 Cri L Jour 624 (624) (Mad).

6. "More severe." — [1] Third Class Magistrate referring case of theft with a recommendation for a fine of Rs. 15 — Held the submission was improper as the fine could have been inflicted by himself. ('81) 1881 All W N 99 (99).

7. "Or that he ought to be required to execute a bond under section 106." — [1] Magistrate wanting accused to execute a bond—He should not sentence the accused before referring the case under this section for bond. ('94) 21 Cal 622 (625, 626) (DB) \* ('09) 9 Cri L Jour 72 (73, 74):35 Cal 1093 (DB) \* ('09) 10 Cri L Jour 309 (311) : 1909 Pun Re No. 7 Cr (DB).

[2] Before referring the case of accused for execution of bond, the Magistrate convicting him — The conviction is not necessarily defective though the recommendation is bad. ('10) 11 Cri L Jour 170 (171) (DB) (Cal).

[3] Second Class Magistrate sending case to Joint Magistrate for order under S. 106 against the accused—Joint Magistrate passing orders for bond but sending back the case for conviction—Held, he acted without jurisdiction. (Vol 11) 1924 All 141 (142) : 24 Cri L Jour 784.

8. Procedure of referring Magistrate. — [1] A Magistrate submitting proceedings under this section cannot legally convict the accused. (Vol 15) 1928 Bom 240 (240) : 52 Bom 456 : 29 Cri L Jour 904 (DB) \* (Vol 11) 1924 Pat 764 (765):3 Pat 1015:25 Cri L Jour 1276 (DB).

[2] If the Magistrate submitting proceedings, convicts the accused, that conviction does not prohibit the District Magistrate from acting under this section. (Vol 15) 1928 Bom 240 (240) : 52 Bom 456 : 29 Cri L Jour 904 (DB). (The conviction is a legal nullity—Magistrate can proceed without reference to High Court for quashing the conviction.) \* (Vol 13) 1946 Pat 412 (413) : 25 Pat 153 : 47 Cri L Jour 10 (DB).

[See however (Vol 11) 1924 Pat 764 (765) : 3 Pat 1015 : 25 Cri L Jour 1276 (DB).]

9. Sub-section (1A) — Several accused. — [1] All the accused must be forwarded where the Magistrate considers it necessary to proceed against one of them only. (Vol 13) 1926 Sind 48 (48) : 18 Sind L R 216 : 26 Cri L Jour 1363 (DB). (Failure to do so will not vitiate jurisdiction to try the accused actually sent up.) \* ('28) 29 Cri L Jour 624 (624) (Mad).

[2] An order, referring the case of those accused who in the opinion of the Magistrate are not guilty, is illegal. (Vol 13) 1926 All 176 (176):26 Cri L Jour 1630.

[3] In a case falling under S. 562, a Magistrate can sentence some of the accused and refer the rest of the accused for the application of S. 562. (Vol 30) 1943 Mad 390 (391) : 44 Cri L Jour 568.

[4] Three accused, one of whom was a boy—Magistrate referring his case alone to be dealt with under Madras Children Act, 1920—Held that all the accused should have been sent up under this sub-section and all cases should be referred. ('45) I L R (1945) Mad 594 (596) (DB) \* ('41) 1941 Mad W N 768 (768).

10. To whom reference can be made.—[1] The Magistrate should submit his proceedings to the District

**350.** (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his

*Conviction or commitment  
evidence partly recorded  
one Magistrate and partly  
another.*

section 349—Note 10 (*contd.*)

Magistrate or to a Sub-divisional Magistrate, who alone has jurisdiction to dispose of the matter. (Vol 1) 1914 Bom 217 (218) : 38 Bom 719 : 16 Cri L Jour 273 (DB) (Vol 14) 1927 Nag 209(210):28 Cr L J 489. (The City Magistrate of Nagpur is not a Sub-divisional Magistrate.) [2] A Magistrate posted in a division temporarily referring the case to the Magistrate of that division of the district — Held, the procedure is valid. ('82) 4 All 366 71) (DB).

11. Procedure of the Magistrate to whom a case is referred. — [1] When proceedings are sent up a superior Magistrate under this section, the whole case opened up for him to deal with according to his discretion. ('97) 1897 Rat 948 (948) (DB).

[2] The Magistrate on reference is not bound to hold trial *de novo*. (Vol 13) 1926 Sind 48 (48):18 Sind L R 16 : 26 Cri L Jour 1363 (DB).

[3] Magistrate dealing with referred case must exercise his independent judgment in the matter and write judgment according to the provisions of S. 367. (Vol 3) 1943 Mad 345 (346) : 44 Cri L Jour 573 \* (Vol 26) 1939 Oudh 35 (36) : 39 Cri L Jour 1005 \* (Vol 7) 1920 Mad 171 (172) : 21 Cri L Jour 52 (DB) \* (Vol 6) 1919 at 290 (290) : 20 Cri L Jour 444.

[4] The nature of the trial is not altered by the proceedings being submitted under this section. (Vol 19) 1932 All 507 (507) : 33 Cri L Jour 472.

[5] The superior Magistrate cannot convict the accused sent up for an aggravated form of offence. ('91) 2 Weir 21 (22).

[6] The superior Magistrate cannot, where the case was triable summarily, pass a sentence of imprisonment exceeding three months. (Vol 19) 1932 All 507 (507):33 Cri L Jour 472.

[7] Where the superior Magistrate examines the accused, the examination should be reduced to writing. ('08) 7 Cri L Jour 177 (177) (Mad).

[8] A Magistrate acting irregularly under this section — District Magistrate can take the case himself or transfer it to a competent Magistrate and the trial should start *de novo*. ('91) 2 Weir 422 (422, 423) (D B).

12. "Shall pass such judgment, sentence or order." — [1] The superior Magistrate must form his own judgment and pass sentence on the case referred to him. (Vol 26) 1939 Oudh 35 (36) : 39 Cri L Jour 1005 \* (Vol 7) 1920 Mad 171 (172) : 21 Cri L Jour 52 (D B).

[2] The superior Magistrate may direct an acquittal or discharge. ('80) 4 Bom 240 (246) (F B) \* ('02) 1 Low Bur Rul 141 (142) \* ('82) 1882 Pun Re No. 44 Cr, p. 73 (74) (D B).

[3] The judgment of the superior Magistrate should conform to the requirements of S. 367 of the Code. (Vol 26) 1939 Oudh 35 (36) : 39 Cri L Jour 1005 \* (Vol 7) 1920 Mad 171 (172) : 21 Cri L Jour 52 (D B) \* (Vol 6) 1919 Pat 290 (290) : 20 Cri L Jour 444.

[4] The word "order" in sub-s. (2) must be taken to be a final order disposing of the case. ('80) 4 Bom 240 (245) (F B) \* ('02) 1 Low Bur Rul 124 (125) \* ('12) 13 Cri L Jour 16 (16): 36 Mad 470 (D B).

13. Committal to sessions. — [1] A Magistrate to whom the proceedings are submitted under this section has power to commit the case to a Court of Session if necessary. ('86) 9 Mad 377 (378) (D B) \* ('86) 10 Bom 196 (197) (D B) \* ('87) 13 Cal 305 (307) (D B) \* ('02) 1 Low Bur Rul 141 (141) \* ('76) 1 Mad 289 (290) (F B).

14. Whether superior Magistrate can quash proceedings. — [1] Superior Magistrate considering the proceedings referred to him, incorrect or illegal — He should report them for orders under S. 438. (1900) 1900 Pun L R Cr, p. 37 (38) (D B).

15. Whether superior Magistrate can return case. — [1] A Magistrate to whom proceedings are submitted under this section cannot return the case to the submitting Magistrate. (Vol 29) 1942 Mad 281 (282): 43 Cri L Jour 457 \* ('92-96) 1 Upp Bur Rul 274 (274) \* ('86) 10 Bom 196 (197) (D B) \* (1900-02) 1 Low Bur Rul 124 (125) \* ('04) 1 Cri L Jour 137 (138) : 26 All 344 \* ('80) 6 Cal L Rep 276 (277). (Case cannot be returned for passing such sentence as the referring Magistrate can — Such conviction was set aside by the High Court.) \* ('12) 13 Cri L Jour 16 (16) : 36 Mad 470 (D B).

[2] Case returned for committal — Committal allowed though procedure was incorrect. ('86) 9 Mad 377 (378) (D B) \* ('88) 2 Weir 423 (428) (D B) \* ('87) 14 Cal 355 (356) (D B).

[See however ('86) 10 Bom 196 (197) (D B).]

[3] Superior Magistrate can return the case if the inquiry is defective — The submitting Magistrate after remedying the defect can come to a different finding. ('91) 2 Weir 426 (426, 427).

[See however ('07) 5 Cri L Jour 416 (417) : 3 Low Bur Rul 279. (Warrant case — Reference after recording plea of guilty — Held, superior Magistrate has no power to return it for supplying omission — He must deal with it himself.)]

16. Transfer to another Magistrate. — [1] A Sub-divisional Magistrate to whom a case is submitted under this section cannot transfer it to a Magistrate who is not empowered to act under this section. (Vol 1) 1914 Bom 217 (218) : 38 Bom 719 : 16 Cri L Jour 273 (D B) \* ('90) 5 Mad H C R App xliii (xliii) \* ('05) 2 Cri L Jour 464 (465) : 1905 Upp Bur Rul Cr P C 33.

[2] A Superior Magistrate to whom case is submitted can commit the case to a Court of Session or transfer to a District Magistrate who can act under the section. (1900-02) 1 Low Bur Rul 141 (141).

17. Whether superior Magistrate can order. —

[1] The superior Magistrate can acquit the accused on the charge framed and order a fresh trial under another section. (1900-02) 1 Low Bur Rul 141 (142).

[2] Superior Magistrate desiring to sentence the accused on charge framed as also to try him for another charge should set aside the proceedings and direct a fresh trial before himself *ab initio*. ('92-96) 1 Upp Bur Rul 241 (243).

18. Proviso. — [1] A District Magistrate acting under this section must be regarded as a Magistrate not empowered under S. 30 and cannot pass a longer sentence than two years. ('07) 6 Cr L J 289 (290):4 Low Bur Rul 53 \* ('69) 1869 Pun Re No. 16 Cr, p. 31 (32).

[2] If the District Magistrate passes a sentence in excess of his powers, an appeal will lie to the Sessions Court under S. 408 of the Code and not to the High Court. ('07) 6 Cri L Jour 289 (290):4 Low Bur Rul 53 \* ('73) 1873 Pun Re No. 2 Cr, p. 3 (3) (D B).

#### SECTION 350 — SYNOPSIS.

1. Scope and applicability.
2. Applicability of the section to summary trials.
3. "Ceases to exercise jurisdiction."
4. "Is succeeded by another Magistrate."

predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the inquiry or trial :

Provided as follows :—

- (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard ;
- (b) the High Court, or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

(2) Nothing in this section applies to cases in which proceedings have been stayed under S. 346 <sup>a</sup>[or in which proceedings have been submitted to a superior Magistrate under S. 349.]

<sup>a</sup>[(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1).]

[1882 — S. 350 ; 1872 — Ss. 328, 329.]

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 94.

#### OBJECTS AND REASONS.

Amendment made in 1923.—“Our colleague, Sir B. C. Mitter, pointed out that in regard to sections 346 and 350 the general principle is recognized that a Court which convicts an accused should ordinarily act only on evidence heard by itself, and suggested the advisability of applying the same principle to cases coming under section 349. The official members of the Joint Committee were of opinion that a distinction could be drawn in the case of section 349 inasmuch as under that section a Magistrate who is competent to try the offence has heard the whole of the prosecution evidence and has formed his opinion thereon, whereas under section 346 a Magistrate who finds that he had not jurisdiction has only heard part of the evidence. The official members also thought that, if the provisions of section 350 were to be applied to cases under section 349, the latter would probably become inoperative as Magistrates would prefer to dispose of cases themselves and pass what in their opinion was an inadequate sentence

rather than run the risk of having the cases re-heard. The non-official members were of opinion that in those circumstances section 349 might be repealed. The Committee, however, as a whole agreed that they would not be justified in making such a drastic alteration in the Code until the point had been specifically put to Local Governments and their opinions had been invited. Clause 92 has, therefore, in this respect, been left unaltered.

We think, however, that the new sub-section (4) which has been introduced in the Bill to deal with the case of Benches goes somewhat too far, and we have substituted for it a new section after section 350 which in our opinion gives effect to the law as laid down by the High Courts. Briefly, it provides that a judgment of a Bench shall be valid when the Bench is duly constituted at time of passing the judgment and the judgment is passed by Magistrates, all of whom have heard the proceedings throughout.”—S. C. R. [XVIII of 1923].

#### PROVINCIAL AMENDMENT.

##### PUNJAB.

For the purpose of trials under the Punjab Public Safety Ordinance, 1946 (No. XIV of 1946), section 350 was deemed to have been omitted ; see section 34 (2) of that Ordinance. [19-11-1946].

#### SECTION 350.—SYNOPSIS (*contd.*)

5. “May act on the evidence so recorded.”
6. Delivery of judgment of predecessor.
7. Proviso (a).
8. Application for re-hearing, when to be made.
9. Who can demand de novo trial.
10. Proviso, if applicable to inquiries.
11. Duty of Magistrate under Proviso (a).
12. Re-commence the inquiry or trial.
13. From what stage inquiry may be re-commenced.
14. Case coming again before original Magistrate.
15. Transfer of a case from a Bench of Magistrates to a Magistrate.
16. Proviso (b)—Prejudice to the accused.
17. Sub-section (2).
18. Sub-section (3)—Transfer of cases.

1. Scope and applicability. — [1] It is a general principle of law that only a person who has heard the evidence in the case is competent to decide whether the accused is innocent or guilty. (Vol 25) 1988 All 536 (537) : 1 L R (1938) All 794 : 39 Cri L Jour 978 & (37) 1937 Mad W N 1245 (1247) & (Vol 24) 1937 Nag 147 (148) : 38 Cri L Jour 697 : 1 L R (1937) Nag 538.

[2] This section has been introduced purely for administrative convenience. (05) 2 Cri L Jour 820 (823) : 1 Nag L R 187.

[3] The section is intended to meet the cases of transfers of the Magistrates, and to obviate the necessity for retrial of partly heard cases. (93) 20 Cal 870 (873) (DB).

[4] The section is wide enough to cover every trial or enquiry under the Code. (10) 11 Cri L Jour 440 (440) : 37 Cal 812 (DB) & (Vol 11) 1924 Pat 786 (786, 787) : 25 Cri L Jour 89 & (Vol 12) 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cri L Jour 1380. (Applies to both summons and warrant cases.) & (Vol 12) 1925 All 245 (245) : 25 Cri L Jour 651. (Applies to enquiries under S. 247, U. P. Municipalities Act.)

[But see (75) 23 Suth W R Cr 62 (63) (DB). (Decided with reference to S. 530 of the Code of 1872.)]

[5] The section does not cover trials before Sessions Judges. (81) 8 Mad 112 (113) (DB) & (94) 7 C P L R Cr 1 (2) & (74) 21 Suth W R Cr 47 (47) (DB) & (90) 1890 Pun Re No. 1 Cr, p. 1 (2) (DB). (Such defect cannot be cured by S. 537.) & (12) 13 Cri L Jour 861 (862) : 35 All 65 (DB) & (02) 26 Bom 50 (53) (DB) & (75) 23 Suth W R Cr 52 (60) (DB).

Section 350—Note 1 (*contd.*)

[See (Vol 29) 1942 Sind 122 (180) : I L R (1942) Kar 252 : 44 Cri L Jour 367 (DB).]

[6] Even the accused's consent will not give the Sessions Judge jurisdiction to act upon evidence recorded by his predecessor. (75) 23 Suth W R Cr 59 (60) (DB) \* (90) 1890 Pun Ra No. 1 Cr. p. 1 (2) (DB) \* (01) 26 Bom 50 (53) (DB) \* (08) 8 Cri L Jour 121 (123) (Cal) \* (Vol 17) 1930 Rang 354 (354) : 32 Cri L Jour 115.

[7] Sessions trial not actually commenced — Only preliminary proceedings of swearing in jury and reading out of charges gone through — Preliminary proceeding need not be taken by the successor on the change of Judges. (Vol 14) 1927 Bom 161 (162) : 28 Cri L Jour 402.

[8] The word "predecessor" means "predecessors" where there is more than one transfer and thus each succeeding Magistrate can act upon the evidence recorded by his predecessors. (Vol 25) 1938 Nag 288 (289) : 39 Cri L Jour 815 : I L R (1938) Nag 79 \* (Vol 11) 1924 Mad 227 (228) : 47 Mad 245 : 25 Cri L Jour 566 (DB).

[9] Proceedings in enquiry closed by one Magistrate by an order of discharge—Sessions Judge reopening it when another has succeeded—Successor can act under this section. (Vol 18) 1931 Mad 483 (489) : 54 Mad 512 : 32 Cri L Jour 635 \* (Vol 14) 1927 Pat 5 (6) : 27 Cri L Jour 1125.

[10] Magistrate transferred pending trial—Case also transferred to his file — *De novo* trial not necessary — This section or any other section does not provide for such a case. (98) 22 Mad 47 (48) (DB).

[11] Bench of two Magistrates — Evidence recorded by only one — Subsequent dissolution of bench case transferred to the Magistrate who recorded evidence but sitting singly — Section does not apply. (Vol 22) 1935 Cal 287 (288, 289) : 62 Cal 266 : 36 Cri L Jour 857 (DB).

[12] Magistrate recording part of evidence still having jurisdiction — Another who recorded the other part cannot commit upon the evidence recorded by the former. (93-1900) 1893-1900 Low Bur Rul 52.

[13] Magistrate having jurisdiction over a case transferred to him cannot act upon evidence recorded by one who had no jurisdiction. (Vol 15) 1928 Cal 183 (183) : 55 Cal 65 : 29 Cri L Jour 464 (DB).

2. Applicability of the section to summary trials. — [1] This section applies to summary trials. (Vol 27) 1940 Nag 239 (240) : 41 Cri L Jour 782.

[But see (Vol 23) 1936 Sind 40 (40) : 37 Cri L Jour 455 (DB).]

[2] Case tried summarily transferred to Magistrate having no power of summary trial—*De novo* trial must commence. (Vol 19) 1932 Mad 505 (507) : 33 Cri L Jour 658 : 55 Mad 79.

3. "Ceases to exercise jurisdiction." — [1] Magistrate transferred from one district to another ceases to have jurisdiction in the former district when the transfer takes effect. (81) 3 All 563 (565, 566) (FB) \* (02) 15 C P L R Cr 15 (16) \* (Vol 11) 1924 All 770 (771) : 46 All 851 : 25 Cri L Jour 1277. (He ceases to be the presiding officer of Court from which he was transferred.) \* (10) 11 Cri L Jour 440 (440) : 37 Cal 812 (DB). (Jurisdiction in a case in which he was engaged gets vacated.)

[2] The words "ceases to exercise jurisdiction therein" do not mean that the Magistrate should have ceased to occupy the particular post, but mean that his jurisdiction in the enquiry or trial has ceased. (12) 13 Cri L Jour 218 (220) : 39 Cal 781 (DB) \* (06) 4 Cri L Jour 140 (142) (All) \* (Vol 4) 1917 Upp Bur 11 (11) : 2 Upp Bur Rul 108 : 17 Cri L Jour 401. (Case transferred — Magistrate ceases to have jurisdiction in it.)

\* (Vol 7) 1920 Pat 693 (694) : 22 Cri L Jour 82. (Do.) \* (09) 32 Mad 218 (219) : 9 Cri L Jour 146 (DB). (Do.) \* (08) 7 Cri L Jour 220 (221) : 35 Cal 457 (DB). (Do.) \* (Vol 1) 1914 All 45 (46) : 15 Cri L Jour 354 : 36 All 315. (Do.)

[3] Particular areas removed from the jurisdiction of a Magistrate — He does not automatically lose jurisdiction in cases on his file. (12) 13 Cri L Jour 203 (204) (All).

[4] A Magistrate does not cease to have jurisdiction in a case merely by absenting himself from a subsequent hearing. (Vol 10) 1923 Oudh 163 (163) : 25 Cr L J 198.

4. "Is succeeded by another Magistrate." — [1] When a new officer is appointed to any magisterial office he becomes the successor of the outgoing Magistrate. (09) 9 Cri L Jour 278 (280) (DB) (Cal).

[2] Case transferred from one Magistrate to another — Latter succeeds the former and has jurisdiction. (10) 11 Cri L Jour 440 (440) : 37 Cal 812 (D B).

[3] Death of Magistrate empowered under S. 30 — District Magistrate taking pending cases to his file must be regarded as having succeeded him. (Vol 4) 1917 Nag 63 (64) : 19 Cri L Jour 705.

5. "May act on the evidence so recorded." —

[1] The succeeding Magistrate can act upon evidence recorded by his predecessor only if the accused does not insist upon the re-hearing of witnesses. (Vol 25) 1938 Mad 742 (743) : 39 Cri L Jour 828 \* (13) 9 All L Jour 3n (3n) \* (Vol 8) 1921 All 122 (122) : 22 Cri L Jour 406 \* (Vol 8) 1921 Pat 472 (473) : (91) 5 C P L R Cr 20 (25). (Evidence wholly recorded by first Magistrate.)

[2] The Magistrate cannot re-commence enquiry and at the same time rely upon evidence already recorded. (Vol 14) 1927 Lah 238 (238) : 28 Cri L Jour 302 \* (03-04) 2 Law Bur Rul 17 (18).

[3] Statement of accused recorded by Magistrate — Magistrate subsequently transferred — Case committed to sessions by another — *Held*, the statement could be admitted as evidence in the sessions by virtue of this section. (Vol 13) 1926 Lah 271 (271) : 7 Lah 70 : 27 Cr.L.J. 627.

6. Delivery of judgment of predecessor. — [1] A succeeding Magistrate cannot deliver a judgment written by his predecessor. (Vol 18) 1931 Cal 637 (638) : 33 Cri L Jour 60 (D B) \* (Vol 11) 1924 Cal 55 (55) : 50 Cal 664 : 24 Cri L Jour 489 (D B) \* (Vol 26) 1939 Rang 249 (250, 251) : 1939 Rang L R 570 : 40 Cri L Jour 829 (D B). (Succeeding Magistrate delivering judgment written by his predecessor must adopt it as his own judgment before doing so.) \* (42) 1942 Nag L Jour 302 (302).

[But see (08) 7 Cri L Jour 459 (459) (D B) (Mad) \* (Vol 20) 1933 Mad 251 (251) : 34 Cri L Jour 117 \* (Vol 12) 1925 Oudh 62 (63) : 28 Oudh Cas 109 : 25 Cri L Jour 1075 \* (Vol 4) 1917 Mad 340 (341) : 17 Cri L Jour 166 : 40 Mad 108 (D B). (He cannot be compelled to do so.)]

[2] Succeeding Magistrate delivering a judgment written by his predecessor — There is only an irregularity curable under S. 537. (Vol 10) 1923 All 276 (277) : 24 Cri L Jour 173. (1889 All W N 181, distinguished.) \* (Vol 27) 1940 Lah 289 (290) : 41 Cri L Jour 808 \* (Vol 26) 1939 Lah 21 (22) : I L R (1938) Lah 567 : 40 Cri L Jour 288.

[3] Magistrate has got the right to refuse a re-hearing even though demanded by accused. (Vol 26) 1939 Lah 21 (22) : 40 Cri L Jour 288 : I L R (1938) Lah 567 \* (Vol 20) 1933 Mad 251 (251) : 34 Cri L Jour 117.

[See However (Vol 4) 1917 Mad 340 (341) : 17 Cri L Jour 166 : 40 Mad 108 (DB). (Whether there can be refusal doubted.)]

[But see (Vol 13) 1925 Oudh 62 (63) : 28 Oudh Cas 109 : 25 Cri L Jour 1075.]



## Section 350—Note 6 (contd.)

[4] There is no provision in the Code for delivery of a judgment written by a Magistrate after he had ceased to have jurisdiction in the district. (Vol 11) 1924 Cal 55 (55) : 50 Cal 664 : 24 Cri L Jour 489 (D B) \* (42) 1942 Nag L Jour 302(302). (Judgment written after ceasing to have jurisdiction in the district is no judgment.) \* (Vol 4) 1917 Cal 310 (310) : 18 Cri L Jour 10 (D B). (Do.)

7. Proviso (a).—[1] The discretion to act or not under this section is controlled by this proviso. (Vol 24) 1937 Nag 147 (148) : 38 Cri L Jour 697 : I L R (1937) Nag 538 \* (Vol 17) 1930 Nag 59 (60) : 31 Cri L Jour 282 \* (Vol 21) 1934 Oudh 324 (325) : 35 Cri L Jour 1147.

[2] Under this proviso the accused is entitled to demand that witnesses already examined be recalled and re-heard. (Vol 24) 1937 All 438 (439) : 38 Cri L Jour 804 \* (1900-02) 1 Low Bur Rul 139 (140).

[3] Refusal by a Magistrate to re-summon witnesses is a defect which is not curable by S. 537. ('98) 25 Cal 863 (868) : 2 Cal W N 465 (D B) \* ('03) 1903 Pun Re No. 3 Cr, p. 8 (9, 10) \* (Vol 5) 1918 Low Bur 63 (63) : 9 Low Bur Rul 92 : 19 Cri L Jour 321 \* (Vol 12) 1925 All 245 (245) : 25 Cri L Jour 651. (Case under U. P. Municipalities Act.) \* (Vol 8) 1921 All 35 (36) : 22 Cri L Jour 668.

[See However (Vol 25) 1938 Mad 724 (725) : 39 Cri L Jour 932. (Proviso (b) applies and proceedings not vitiated.) \* ('37) 1937 Mad W N 1245 (1247). (Do.)]

[4] The option lies with the Magistrate to start the inquiry or trial all over again or not subject to accused's right to ask for re-examination. (Vol 23) 1936 Nag 153 (154) : 37 Cri L Jour 983 : I L R (1936) Nag 92.

[5] Magistrate commencing trial *de novo*—Accused has no right to object. (Vol 25) 1938 Oudh 218 (221) : 39 Cri L Jour 858 : 14 Luck 156 (D B) \* (Vol 24) 1937 Nag 147 (148) : 38 Cri L Jour 697 : I L R (1937) Nag 538 \* (Vol 22) 1935 Mad 318 (319) : 36 Cri L Jour 1265.

[But see (Vol 21) 1934 Oudh 324 (325) : 35 Cri L Jour 1147 \* (Vol 17) 1930 Nag 59 (60) : 31 Cri L Jour 282.]

[6] Accused first demanding re-examination of all the witnesses may later choose only certain witnesses. (Vol 28) 1941 Mad 825 (825) : I L R (1942) Mad 410 : 43 Cri L Jour 218. (Magistrate's option to examine all not barred.)

[7] The proviso does not apply unless the accused asks for a re-hearing. (Vol 5) 1918 All 279 (281, 282) : 40 All 307 : 19 Cri L Jour 378 \* (Vol 7) 1920 Pat 693 (694) : 22 Cri L Jour 82.

[8] Allegation of improper refusal to re-examine should contain details as to date and person to whom application was made and the order made therein. (Vol 10) 1923 Cal 320 (320) : 23 Cri L Jour 502 (D B).

[9] Accused not wishing to recall witness at the time charge was framed — Succeeding Magistrate cannot refuse to act under this section when required. ('12) 14 Cri L Jour 175 (176) : 1912 Upp Bur Rul 151.

[10] Case remanded for further evidence — Change in Magistrate — Magistrate dealing with the remanded case must accede to accused's request even though remand was made for a definite purpose. (Vol 14) 1927 Pat 5 (6) : 27 Cri L Jour 1125.

[11] Accused or his pleader applying for transfer giving undertaking not to recall witness — Subsequent repudiation—Transferee Court is not bound by any directions by the transferring Court in this respect. (Vol 5) 1918 All 279 (281) : 40 All 307 : 19 Cri L Jour 378. (Obiter.) \* (Vol 5) 1918 Nag 22 (26) : 19 Cri L Jour 657.

[12] The accused's right is to have the witnesses re-summoned and re-heard and not merely that their former statements be read out to him. (Vol 7) 1920 Lah 344 (344) : 22 Cri L Jour 119 \* (Vol 5) 1918 Low Bur 63 (63) : 9 Low Bur Rul 92 : 19 Cri L Jour 321.

[See also (Vol 32) 1945 Nag 207 (208) : I L R (1945) Nag 605. (Merely allowing witness to be cross-examined is not enough.) \* (Vol 32) 1945 Nag 127 (129) : I L R (1945) Nag 419. (Further cross-examination or a reading of, or a summary of the previous evidence will not do.)]

[13] The accused cannot be asked to pay the expenses of re-summoning the witnesses. (Vol 2) 1915 Low Bur 107 (107) : 15 Cri L Jour 687 \* (Vol 22) 1935 Rang 108 (109) : 13 Rang 297 : 36 Cri L Jour 953.

[14] The accused can exercise his right to recall witnesses if he wants, but if he does not he can insist on their being re-summoned and re-heard. (Vol 32) 1945 Nag 207 (208) : I L R (1945) Nag 605.

[15] The extent of the right of the accused is only to have the witnesses re-called and re-examined. (Vol 25) 1938 Oudh 218 (221) : 39 Cri L Jour 858 : 14 Luck 156 (D B) \* (Vol 23) 1936 Nag 153 (154) : 37 Cri L Jour 983 : I L R (1936) Nag 92 (D B). (Accused cannot demand retrial.) \* (Vol 22) 1935 Mad 318 (319) : 36 Cri L Jour 1265. (Do.) \* (Vol 20) 1933 Mad 841 (842) : 35 Cri L Jour 79.

[16] Accused is not entitled under the proviso to claim a re-hearing on the ground that his pleader's arguments were not heard by the previous Magistrate. (Vol 12) 1925 Oudh 62 (63) : 28 Oudh Cas 109 : 25 Cri L Jour 1075.

[17] Warrant-case — Charges framed, witnesses re-summoned and re-heard — Witnesses cannot be further recalled and cross-examined. (Vol 22) 1935 Mad 258 (259) : 37 Cri L Jour 150 \* (Vol 20) 1933 Mad 841 (842) : 35 Cri L Jour 79.

[18] Magistrate re-summoning—Witnesses and re-commencing trial or inquiry — Accused who demanded it can object to the evidence of any particular witness being taken afresh. (Vol 22) 1935 Mad 318 (319) : 36 Cri L Jour 1265 \* (Vol 21) 1934 Nag 209 (212, 213) : 36 Cri L Jour 41.

[19] Order in which the prosecution witnesses re-summoned at the request of accused should be examined-in-chief rests with prosecution. (Vol 21) 1934 Nag 209 (211) : 36 Cri L Jour 41.

[20] *De novo* trial — One of the witnesses dead — His evidence may be admitted under S. 33 of the Evidence Act. (Vol 14) 1927 Lah 332 (333) : 8 Lah 570 : 28 Cri L Jour 451 (D B). (Disapproving of (Vol 9) 1922 Lah 49 : 3 Lah 115 : 23 Cri L Jour 330 (D B).)

8. Application for re-hearing when to be made.—[1] The time when the accused may apply under proviso (a) is when the case is called on, with the Magistrate on the Bench and the accused in the dock and the representatives for the prosecution and for the defence (if the accused are defended) are present in the Court for the hearing of the case. ('98) 25 Cal 863 (865) (D B) \* (Vol 9) 1922 Lah 49 (54) : 3 Lah 115 : 23 Cri L Jour 330 (D B).

[2] The option given to the accused can be exercised by him only once. (Vol 17) 1930 Nag 59 (60) : 31 Cri L Jour 282.

[3] An accused can change his mind and leave the Court its statutory option to act upon the evidence already recorded. (Vol 25) 1938 Nag 288 (289) : 39 Cri L Jour 815 : I L R (1939) Nag 79 \* (Vol 13) 1926 Mad 815 (816) : 27 Cri L Jour 659 \* (Vol 12) 1925 Mad 317 (317) : 26 Cri L Jour 526.

[But see (Vol 17) 1930 Nag 59(60):31 Cr L J 282.]

9. Who can demand *de novo* trial. — [1] The complainant has no privilege under S. 350, and cannot



Section 350 — Note 9 (*contd.*)

demand a re-hearing. (Vol 25) 1938 Oudh 218 (220) : 39 Cri L Jour 558 : 14 Luck 156 (DB) \* (Vol 12) 1925 Mad 317 (317) : 26 Cri L Jour 526 \* (Vol 13) 1926 Mad 515 (516) : 27 Cri L Jour 659.

10. Proviso, if applicable to inquiries. — [1] This proviso is limited to criminal trials and is not applicable to inquiries. (Vol 31) 1944 Bom 14 (14) : 45 Cri L Jour 287 (D B) \* (Vol 23) 1936 Nag 153 (154) : 37 Cri L Jour 983 : I L R (1936) Nag 92 \* (Vol 23) 1936 Nag 220 (221) : 38 Cri L Jour 15 : I L R (1937) Nag 135 \* (Vol 10) 1923 Cal 483 (484) : 24 Cri L Jour 569 (D B) \* (Vol 7) 1920 Mad 337 (342, 344) : 43 Mad 511 : 21 Cri L Jour 402 (F B) \* (Vol 11) 1921 Pat 786 (787) : 25 Cri L Jour 89 \* (Vol 17) 1930 Cal 666 (668) : 32 Cri L Jour 243 (D B). (Inquiries preparatory to commitment.) \* (1909) 9 Cri L Jour 146 (146, 147) : 32 Mad 218 (D B). (Do.)

[See (Vol 29) 1942 Mad 221 (221) : 43 Cri L Jour 278.]

[2] This proviso does not apply to proceedings in warrant cases before a charge is framed. (Vol 25) 1938 Mad 742 (743) : 39 Cri L Jour 828 \* (Vol 23) 1936 Nag 153 (155) : 37 Cri L Jour 983 : I L R (1936) Nag 92 \* (Vol 23) 1936 Nag 220 (221) : 38 Cri L Jour 15 : I L R (1937) Nag 135 \* (Vol 10) 1923 Mad 660 (661) : 46 Mad 719 : 24 Cri L Jour 192 (D B).

[But see (Vol 9) 1922 Lah 49 (54) : 3 Lah 115 : 23 Cri L Jour 330 (D B) \* (Vol 21) 1934 Sind 106 (110) : 28 Sind L R 239 : 35 Cri L Jour 1261 (DB) \* (Vol 31) 1944 Bom 14 (15) : 45 Cri L Jour 287 (D B) \* (Vol 24) 1937 Bom 55 (56) : 38 Cri L Jour 250 : I L R (1937) Bom 211 (D B).]

[3] Section 350 applies to proceedings under Ch. VIII of the Code. (Vol 7) 1920 Mad 337 (341) : 43 Mad 511 : 21 Cri L Jour 402 (F B) \* (79) 4 Cal L Rep 452 (454) (D B) \* (Vol 24) 1937 All 438 (439) : 38 Cri L Jour 804. (Proviso applicable by reason of S. 117, sub-s. (2).) \* (87) 20 Nag L Jour 117 (118). (Do.) \* (Vol 12) 1925 Oudh 228 (229) : 27 Oudh Cas 323 : 25 Cri L Jour 1380. (Do.)

[4] Proviso does not apply to enable the summoning of the witness who was examined on commission. (Vol 27) 1940 Sind 193 (193, 194) : I L R (1940) Kar 498 : 42 Cri L Jour 80 (D B) \* (Vol 27) 1940 Pesh 17 (17) : 41 Cri L Jour 681 \* (Vol 24) 1937 Pesh 67 (68) : 38 Cri L Jour 748.

[5] Interrogatories issued to witness and answered by him. — *De novo* trial—Answer to interrogatories already made can be considered as evidence against the accused. (Vol 27) 1940 Pesh 17 (17) : 41 Cri L Jour 681.

[6] The proviso does not apply to maintenance proceedings taken under Chapter XXXVI of the Code. (Vol 24) 1937 Rang 536 (537) : 39 Cri L Jour 205.

11. Duty of Magistrate under Proviso (a). — [1] It is not obligatory that the Magistrate should ask the accused whether he intends to exercise the right under this section. (Vol 26) 1939 Rang 249 (250) : 1939 Rang L R 570 : 40 Cri L Jour 829. (Though desirable to inform accused of his right.) \* (12) 14 Cri L Jour 175 (176) : 1912 Upp Bur Bul 151.

[2] The failure to inform the accused of his right under the section is only an irregularity curable by S. 537. (84) 1884 Pun Re No. 6 Cr, p. 7 (8) (D B) \* (08) 1903 Pun Re No. 3 Cr, p. 8 (10).

12. Re-commence the inquiry or trial. — [1] There is *de novo* trial when the Magistrate re-commences the enquiry *suo motu*. But where the evidence is re-heard at the instance of accused there is no question of *de novo* trial. (Vol 28) 1941 Sind 160 (161, 162) : I L R (1941) Kar 171 : 43 Cri L Jour 82 (DB) \* (Vol 24) 1937 Mad 448 (448, 449) : 38 Cri L Jour 537. (Previous proceedings are not completely wiped out—Application that accused made before need not to be renewed.)

\* (Vol 23) 1936 Nag 153 (154, 155) : 37 Cri L Jour 983 : I L R (1936) Nag 92 \* (Vol 22) 1935 Mad 318 (319) : 36 Cri L Jour 1265.

[2] Witnesses re-summoned—Magistrate intending to re-commence enquiry at that time — He can change his mind until he actually re-commences the enquiry. (Vol 25) 1938 Mad 742 (743) : 39 Cri L Jour 828.

[3] The Magistrate must re-summon and re-hear the witnesses and not merely allow further cross-examination whether he acts *suo motu* to have *de novo* trial or at the instance of accused. (Vol 35) 1938 Nag 493 (495) : 40 Cri L Jour 73 \* (Vol 13) 1926 Sind 153 (159) : 20 Sind L R 50 : 27 Cri L Jour 332 (DB).

[4] The witnesses should be examined afresh in chief and then cross-examined, if the accused so desires. (Vol 32) 1945 Nag 207 (208) : I L R (1945) Nag 605 \* (Vol 32) 1945 Nag 127 (129) : I L R (1945) Nag 419 : 47 Cri L Jour 240.

[5] The object in granting a re-hearing is to enable the Magistrate who hears the case to judge of the credibility of the witnesses by their demeanour. (Vol 27) 1940 Sind 193 (193) : I L R (1940) Kar 498 : 42 Cri L Jour 80 (DB) \* (Vol 27) 1940 Pesh 17 (17) : 41 Cri L Jour 681 \* (Vol 24) 1937 All 438 (439) : 38 Cri L Jour 804 \* (Vol 12) 1925 Mad 1280 (1281) : 26 Cri L Jour 1596. (Object will be lost if cross-examination only is allowed.) \* (Vol 5) 1918 Low Bur 63 (63) : 19 Cri L Jour 321 : 9 Low Bur Bul 92. (Do.) \* (Vol 13) 1926 Sind 158 (159) : 20 Sind L R 50 : 27 Cri L Jour 332 (DB).

[6] Re-summoned witnesses allowed to be cross-examined only — The trial is vitiated—Acquiescence of accused will not estop him from raising the plea of illegality subsequently. (Vol 25) 1938 Nag 493 (495) : 40 Cri L Jour 73 \* (07) 6 Cri L Jour 431 (432) (DB). (Prosecution declining to re-examine — Accused cross-examining — It cannot be said that accused was not prejudiced.)

[See however (Vol 25) 1938 Oudh 212 (213) : 39 Cri L Jour 854 : 14 Luck 172. (Evidence of witness who was only cross-examined discarded in arriving at conclusion—Trial not vitiated.)]

[7] Witnesses further cross-examined by the Magistrate himself — Non-compliance with the demand to have witnesses re-summoned—*Held* no prejudices caused. (Vol 25) 1938 Mad 724 (725) : 39 Cri L Jour 932.

[8] Merely reading depositions to the witnesses is not re-hearing them. (Vol 7) 1920 Lah 344 (344) : 22 Cri L Jour 119 \* (Vol 5) 1918 Low Bur 63 (63) : 19 Cri L Jour 321 : 9 Low Bur Bul 92.

[9] Merely exhibiting the depositions of witnesses is not re-hearing them. (Vol 10) 1923 Mad 32 (33) : 46 Mad 117 : 23 Cri L Jour 748 (DB).

[10] Superior Court directing enquiry by Magistrate other than who originally heard the case — Direction that the case should be proceeded with from a particular stage should not be given. (01) 28 Cal 594 (597) (DB).

[11] Where a direction to start the enquiry from a particular stage was made, and it was found that the original Magistrate had been transferred, the directions do not apply to his successor. (98) 25 Cal 863 (864) (DB).

[12] The operation of S. 350 cannot be checked by any restrictions in the order of transfer. (Vol 17) 1930 Mad 983 (984) : 32 Cri L Jour 226.

[13] The right of the Magistrate under sub-s. (1) to re-commence the proceedings applies also to cases where the stage of trial has not been reached. (Vol 23) 1936 Nag 220 (221) : 38 Cri L Jour 15 : I L R (1937) Nag 135.

[14] When a *de novo* trial is held the prosecution is not bound to examine all the witnesses who were ex-

<sup>3</sup>[360A. No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.]

[a] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 95.

### OBJECTS AND REASONS

See under section 350.

#### Section 350—Note 12 (contd.)

mined at the original trial. (Vol 25) 1938 Oudh 212 (212) : 39 Cri L Jour 854 : 14 Luck 172.

[See however (Vol 22) 1935 Mad 318 (319) : 36 Cri L Jour 1265.]

13. From what stage inquiry may be re-commenced. — [1] Succeeding Magistrate electing to conduct a *de novo* trial cannot summarily dismiss the complaint under S. 203. ('94) 7 C P L R Cr 36 (37).

[2] The succeeding Magistrate cannot refer the matter to the police under S. 202. The inquiry which he can re-commence is the inquiry as defined in S. 4. ('86) 9 Mad 282 (282) (DB).

[3] A Magistrate who re-commences an inquiry or trial does not thereby modify its nature or the stage at which it has arrived. (Vol 2) 1915 Mad 23 (24) : 15 Cri L Jour 673 : 38 Mad 585 (DB) \* (Vol 34) 1947 Mad 245 (246) : 48 Cri L Jour 97 \* (Vol 22) 1935 All 834 (836) : 36 Cri L Jour 912 \* (Vol 20) 1933 Oudh 86 (88) : 8 Luck 286 : 34 Cri L Jour 124.

[See however (Vol 25) 1938 Oudh 247 (248) : 39 Cri L Jour 849. (Magistrate framing new charge—Accused cannot have any grievance.)]

[But see ('03) 1903 Pun Re No. 14 Cr, p. 35 (38, 39) (DB) \* (Vol 23) 1936 Nag 153 (156) : I L R (1936) Nag 92 : 37 Cri L Jour 983 \* ('94) 7 C P L R Cr 36 (38) \* (Vol 20) 1933 Pesh 78 (79) : 35 Cri L Jour 170 (DB) \* ('03-04) 2 Low Bur Rul 17 (18) \* (Vol 5) 1918 Low Bur 63 (63) : 9 Low Bur Rul 92 : 19 Cri L Jour 321 \* (Vol 21) 1934 Mad 475 (475) : 57 Mad 1019 : 35 Cri L Jour 363 \* (Vol 24) 1937 Bom 55 (56) : 38 Cri L Jour 250 : I L R (1937) Bom 211 (DB). (Warrant case.)]

[4] Number of accused persons proceeded against — Some discharged — Proceedings transferred to the file of another Magistrate afterwards — Order of discharge thereby not cancelled. ('99) 1 Bom L R 782 (783) (DB).

14. Case coming again before original Magistrate. — [1] Succeeding Magistrate starting trial afresh — Case once again coming before the original Magistrate—He cannot take it up at the point where he left. (Vol 14) 1927 Mad 81 (82) : 28 Cri L Jour 23 \* (Vol 23) 1936 Nag 220 (221) : 38 Cri L Jour 15 : I L R (1937) Nag 135 \* (Vol 6) 1919 Pat 311 (311) : 20 Cri L Jour 820 (DB) \* (Vol 6) 1919 Pat 578 (580) : 20 Cri L Jour 638 \* (Vol 21) 1934 Mad 475 (475) : 57 Mad 1019 : 35 Cri L Jour 1363.

[See however ('37) 1937 Mad W N 1245 (1247).]

[2] Where the second Magistrate has not ordered a new trial, the original Magistrate to whom the case comes back is not bound to grant a *de novo* trial. (Vol 25) 1938 All 536 (537) : 39 Cri L Jour 978 : I L R (1938) All 794.

[See also (Vol 28) 1941 Lah 322(324):43 Cr L J 165.]

15. Transfer of a case from a Bench of Magistrates to a Magistrate. — [1] Difference of opinion between an even number of Honorary Magistrates—Case referred back to Sub-divisional Officer under R. 6 framed by the Bengal Government under this Code — Held, the Sub-divisional Officer could take up the case from the stage at which it was transferred. (Vol 5) 1918 Cal 304 (305) : 19 Cri L Jour 312 (DB).

[2] Case partly tried summarily by a bench of first class Magistrates transferred to second class Magistrate

having no summary powers — Held, he should start *de novo* trial. (Vol 19) 1932 Mad 505 (507) : 55 Mad 79 : 33 Cri L Jour 653.

16. Proviso (b) — Prejudice to the accused. —

[1] A judgment by a Magistrate upon evidence not wholly recorded by himself is liable to be set aside without an appeal where the accused is actually prejudiced thereby. ('12) 13 Cri L Jour 218 (220) : 39 Cal 781 (DB) \* (Vol 5) 1918 All 56 (59, 60) : 41 All 116 : 19 Cri L Jour 1004. (Failure of accused to object is irrelevant.) \* (Vol 4) 1917 Upp Bur 11 (12) : 17 Cri L Jour 401 : 2 Upp Bur Rul 103 \* (1900-02) 1 Low Bur Rul 238 (240) (DB) \* ('92) 14 All 346 (347) \* ('84) 1884 Pun Re No. 6 Cr, p. 7 (8) (DB). (Where there was no prejudice High Court refused to interfere.) \* ('05) 9 Cal W N celxxxv (celxxxvi) (DB). (Do.)

[2] Case of defamation—Held, that the Magistrate who decided the case on the evidence recorded by his predecessor could not adequately do so without examining the complainant himself. ('09) 10 Cri L Jour 493 (493) (DB) (Cal).

[3] Under S. 350 District Magistrate is empowered by the Code to set aside the convictions recorded by first class Magistrate. ('84) 9 Bom 100 (103) (DB).

17. Sub-section (2). — The provisions of the section are inapplicable to proceedings stayed under S. 346. ('04) 1 Cri L Jour 1056 (1057) : 17 C P L R Cr 159.

[2] Magistrate to whom a case is sent under S. 346 must hear it *de novo* and cannot act on evidence already recorded by the Magistrate transferring the case. (Vol 25) 1938 Cal 415 (416) : 39 Cri L Jour 606 (DB).

[3] The discretion of the superior Magistrate under S. 349 is uncontrolled by the proviso to S. 350. (Vol 25) 1938 Cal 415 (416) : 39 Cri L Jour 606 (DB) \* (Vol 13) 1926 Sind 48 (48) : 18 Sind L R 216 : 26 Cri L Jour 1363 (DB).

18. Sub-section (3) — Transfer of cases. — [1] The Magistrate to whom the case was transferred could re-summon witness in exercise of the discretion vested in him under sub-s. (1). (Vol 17) 1930 Mad 983 (984) : 32 Cri L Jour 226.

[2] This section is applicable to a case where it has been sent from one Magistrate to another for retrial, even if only from a particular point and as a result of the order of the Sessions Court. (Vol 28) 1941 Sind 144 (145, 146) : I L R (1941) Kar 167 : 42 Cri L Jour 837 (DB).

[3] It is desirable that the second Magistrate to whom the case is transferred commences the hearing *de novo*. (Vol 6) 1919 Low Bur 50 (51) : 20 Cri L Jour 496.

#### Section 350A — Note 1

[1] Three Magistrates present at starting of case — Quorum of two present throughout and judgment signed by those two Magistrates—Trial held legal. (Vol 20) 1933 All 355 (355) : 34 Cri L Jour 701 : 55 All 459 \* (Vol 19) 1932 Nag 95 (96) : 28 Nag L R 190 : 33 Cri L Jour 559 \* (Vol 21) 1934 All 144 (146) : 56 All 599 : 36 Cri L Jour 38 (DB).

[But see (Vol 19) 1932 All 127 (127) : 33 Cri L Jour 200.]

**351. (1)** Any person attending a Criminal Court, although not under arrest or upon a *Detention of offenders attending Court.* summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.

[1882 — S. 351 ; 1872 — S. 104 ; 1861 — S. 206.]

**352.** The place in which any Criminal Court is held for the purpose of inquiring into or *Courts to be open.* trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them.

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

[1882 — S. 352 ; 1872 — S. 187 ; 1861 — S. 279.]

#### Section 350A—Note 1 (*contd.*)

[2] Bench consisting of number of Magistrates and less than quorum fixed, is not duly constituted Bench. (Vol 13) 1926 Sind 192 (192) : 20 Sind L R 134 : 27 Cri L Jour 542 (DB) \* (92) 16 Mad 410 (414) (DB) \* (Vol 6) 1919 Mad 274 (274) : 20 Cri L Jour 823.

[3] Evidence recorded by not duly constituted Bench is not recorded by Court. (Vol 13) 1926 Sind 192 (192) : 20 Sind L R 134 : 27 Cri L Jour 542 (DB).

[4] Rules requiring that trial must be completed by some Magistrates by whom it was begun — Trial continued and finished by two of three Magistrates constituting Bench — Trial held void. (Vol 7) 1920 Bom 300 (301) : 21 Cri L Jour 369 : 44 Bom 400 (DB).

[5] Some of Magistrates constituting Bench who pass judgment or order not present throughout proceedings — Judgment or order is invalid. (Vol 21) 1934 Oudh 85 (86) : 35 Cri L Jour 417 \* (Vol 19) 1932 All 191 (192) : 54 All 413 : 33 Cri L Jour 885 \* (Vol 19) 1932 All 127 (127) : 33 Cri L Jour 200 \* (Vol 13) 1926 Lah 304 (304) : 27 Cri L Jour 463 : 7 Lah 122 \* (Vol 19) 1932 Nag 95 (96) : 28 Nag L R 190 : 33 Cri L Jour 559 \* (Vol 15) 1928 Oudh 212 (214) : 29 Cri L Jour 310.

[See also (Vol 7) 1920 Bom 300 (301) : 44 Bom 400 : 21 Cri L Jour 369 (DB).]

[But see (Vol 21) 1934 All 144 (147) : 56 All 599 : 36 Cri L Jour 33 (DB) \* (Vol 22) 1935 All 814 (815) : 36 Cri L Jour 907 \* (Vol 30) 1943 All 20 (20) : I L R (1943) All 23 : 44 Cri L Jour 203.]

#### Section 351 — Note 1

[1] Person who appears to have committed offence must be present in Court. (Vol 29) 1942 Sind 161 (162) : I L R (1942) Kar 323 : 44 Cri L Jour 137 (DB) \* (11) 12 Cri L Jour 92 (92) : 5 Sind L R 1 (DB).

[2] Code does not state that Magistrate must at any stage of trial stop proceedings and arrest any person against whom he thinks there is chance of getting conviction, and start original trial *de novo*. (Vol 12) 1925 Rang 122 (126) : 3 Rang 11 : 26 Cri L Jour 492.

[3] To order fresh enquiry against discharged co-accused after examining and cross-examining him is contrary to justice. (Vol 12) 1925 Cal 104 (104) : 25 Cri L Jour 311 (DB).

[4] Court of Sessions is not "Criminal Court" within

the meaning of this section and by virtue of S. 193, Court of Sessions cannot commence proceedings against person unless he has been duly committed to sessions. (Vol 29) 1942 Sind 161 (162) : I L R (1942) Kar 323 : 44 Cri L Jour 137 (DB).

#### Section 352 — Note 1

[1] Courts held in remote parts of Province — No members of public available to attend — Courts must be open to any who may present themselves for admission. (Vol 23) 1936 P C 246 (250) : 1936 A C 177 (PC).

[See also (Vol 30) 1943 Lah 14 (18) : I L R (1943) Lah 791 : 44 Cri L Jour 181.]

[2] Trial in jail is not illegal when there is nothing to show that admission was refused to anyone who desired it. (Vol 4) 1917 Lah 311 (312) : 18 Cri L Jour 852.

[3] Magistrate deciding to hold trial in jail premises should pass formal order directing that trial should be held there — Absence of such order is irregularity. (Vol 27) 1940 Rang 72 (73) : 41 Cri L Jour 497 : 1940 Rang L R 122.

[4] Accused objecting to presence of police officer — Reasonableness of his fear is guiding factor and not convenience of prosecution. (Vol 12) 1925 Nag 296 (296) : 26 Cri L Jour 1130.

[5] To hold Court in private house, in spite of protests from accused and where he cannot get his pleader to attend or call his witnesses, is material irregularity. (Vol 5) 1918 Pat 197 (199) : 3 Pat L Jour 147 : 19 Cri L Jour 249 (DB).

[6] Case tried in Magistrate's private room instead of in Court room without any objection by parties — The trial is not illegal. (1906) 3 Cri L Jour 433 (435, 436) (Low Bur).

[7] Accused entered private room of Judge, wherein trial was proceeding, and when asked to leave it, disobeyed order — Accused could not be convicted under S. 438 of Penal Code. (Vol 10) 1923 Rang 145 (145, 146) : 25 Cri L Jour 653.

[8] Presiding Judge or Magistrate conducting trial in camera in exercise of his discretion and no objection raised to such procedure — Proceedings cannot be upset unless one of the parties can be shown to have been prejudiced. (Vol 23) 1936 Rang 471 (471) : 38 Cri L Jour 48.

## CHAPTER XXV.

## OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

**353.** Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

[1882 — S. 353 ; 1872 — S. 191 ; 1861 — S. 194.]

*Manner of recording evidence outside presidency-towns.*

**354.** In inquiries and trials (other than summary trials) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

[1882 — S. 354 ; 1872 — S. 332.]

*Record in summons-cases and in trials of certain offences by first and second class Magistrates.*

**355.** (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

## Section 353 — Note 1

[1] Sections 32 and 33 of Evidence Act and Extra-dition Act 1870 are express provisions contemplated by this section.

[2] Words "all evidence" will include evidence for defence as well as evidence for prosecution. ('13) 14 Cri L Jour 287 (288) : 1912 Upp Bur Rul 152.

[3] Name, parentage, age, residence and profession given in heading of deposition do not form part of deposition. ('04) 26 All 108 (118) : 31 Ind App 38 (P C).

[But see (Vol 15) 1928 Pat 420 (424) : 7 Pat 361 : 29 Cri L Jour 804 (DB).]

[4] It is not sufficient under this section to read out to witness his previous deposition in former case and ask him if statements made therein are true. ('06) 4 Cri L Jour 89 (91, 92) (DB) (Bom) \* ('95) 1895 Rat 792 (793) (DB) \* (Vol 10) 1923 Cal 196 (197) : 50 Cal 223 : 24 Cri L Jour 198 (DB) \* (Vol 13) 1926 Lah 378 (379) : 27 Cri L Jour 555 \* (Vol 20) 1933 Lah 231 (232) : 34 Cri L Jour 637 \* ('99) 22 Mad 455 (456) : 1 Weir 789 (DB) \* ('99) 2 Weir 360 (361) (DB) (Mad) \* (Vol 4) 1917 Low Bur 112 (113) : 17 Cri L Jour 512 \* (Vol 15) 1928 Rang 284 (285) : 30 Cri L Jour 736.

[5] It is not sufficient to read out to accused deposition of complainant taken in absence of accused. ('11) 12 Cri L Jour 585 (587) : 36 Mad 457 (SB).

[6] Merely recording statement that what witness has to say is contained in document which is filed as exhibit is not enough. (Vol 15) 1928 Lah 69 (69) : 28 Cri L Jour 969 (DB) \* (Vol 12) 1925 Lah 19 (20) : 5 Lah 396 : 27 Cri L Jour 170 (DB).

[See also (Vol 10) 1923 Mad 32 (33) : 46 Mad 117 : 23 Cri L Jour 748 (DB).]

[7] Contravention of provisions of this section is not a mere error, omission or irregularity and cannot be cured by S. 537. (Vol 28) 1941 Oudh 20 (21) : 16 Luck 353 : 41 Cri L Jour 816 \* (Vol 15) 1928 Pat 143 (143, 144) : 6 Pat 691 : 29 Cri L Jour 260 (DB) \* ('12) 14 Cri L Jour 287 (288) : 1912 Upp Bur Rul 152 \* ('06) 3 All L Jour 43n (43n) \* ('01) 5 Cal W N 110 (113) (DB) \* ('93) 20 Cal 857 (866) (DB) \* (Vol 12) 1925 Nag 457 (458) : 26 Cri L Jour 1289 \* (Vol 21) 1934 Mad 691 (692) : 58 Mad 285 : 36 Cri L Jour 319 \* (Vol 22) 1935 Oudh 488 (489) : 11 Luck 348 : 36 Cri L Jour 1198.

[8] In cross-cases and cases which are intimately

connected with each other, Court cannot consider evidence given in one case for purpose of reaching its conclusions in other—But they should be tried separately and determined on evidence recorded in each. (Vol 28) 1941 Oudh 20 (21) : 16 Luck 353 : 41 Cri L Jour 816 \* (Vol 20) 1933 Mad 367 (369) : 56 Mad 159 : 34 Cri L Jour 175 (FB) \* (Vol 27) 1940 Lah 466 (467) : 1 L R. (1941) Lah. 66 : 42 Cri L Jour 151 (DB) \* (Vol 25) 1938 Oudh 249 (249) : 39 Cri L Jour 929 \* (Vol 24) 1937 Rang 100 (100) : 38 Cri L Jour 641 (DB) \* (Vol 15) 1928 All 593 (593) : 50 All 457 : 30 Cri L Jour 337 (DB) \* (Vol 11) 1924 Cal 813 (814) : 25 Cri L Jour 941 (DB) \* (Vol 15) 1928 Lah 380 (381) : 29 Cri L Jour 282 (DB) \* (Vol 7) 1920 Low Bur 90 (90) : 22 Cri L Jour 707 \* (Vol 3) 1916 Cal 912 (913) : 17 Cri L Jour 439 (DB) \* (Vol 2) 1915 Bom 14 (15) : 16 Cri L Jour 538 (DB).

[See (Vol 8) 1921 Low Bur 51 (55) : 11 Low Bur Rul 73 : 23 Cri L Jour 49.]

[But see (Vol 25) 1938 Oudh 253 (255, 256) : 40 Cri L Jour 1.]

[9] More than one similar cases consolidated and evidence recorded in one and used in other with consent of accused — No contravention of this section but only contravention of rule as to direct evidence which is curable under S. 537. (Vol 13) 1926 Bom 231 (232) : 50 Bom 174 : 27 Cri L Jour 1335 (DB) \* (Vol 17) 1930 Mad 505 (506) : 53 Mad 775 : 31 Cri L Jour 1191 (DB) \* (Vol 15) 1928 All 593 (593, 595) : 50 All 457 : 30 Cri L Jour 337 (DB).

## Section 354 — Note 1

[1] Words "in the following manner" refer to manner as provided in Ss. 355 to 361. (Vol 13) 1926 Pat 58 (59) : 26 Cri L Jour 1475.

## Section 355 — Note 1

[1] In summary trials no evidence need be recorded by Magistrate. (Vol 27) 1940 Pat 272 (274) : 41 Cri L Jour 283. (Section 263 must be read as exception to general provision contained in S. 355 (1).) \* (Vol 22) 1935 Rang 106 (107) : 13 Rang 225 : 36 Cri L Jour 892 (DB) \* (Vol 21) 1934 Bom 157 (158) : 58 Bom 298 : 35 Cri L Jour 841 (DB).

[2] This and following sections do not apply to summary trials. (Vol 27) 1940 Pat 272 (274) : 41 Cri L Jour 283 \* (Vol 23) 1936 All 319 (319) : 37 Cri L Jour 710 \* ('05) 2 Cri L Jour 375 (376) : 3 Low Bur

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

[1882 — S. 355; 1872 — S. 333; 1861 — S. 267.]

**356. (1)<sup>a</sup>** In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge.

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

(2.1) When the evidence of such witness is given in any other language, not being English than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.]

(3)<sup>a</sup> In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

[1882 — S. 356; 1872 — S. 334; 1861 — S. 195.]

[a] As to the record of evidence in a proceeding before the Special Tribunal constituted under the Criminal Law Amendment Ordinance, 1943 (No. 29 of 1943), see second proviso to S. 6 of that Ordinance.

[b] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 96.

#### Section 355—Note 1 (contd.)

Rul 3 \* (Vol 14) 1927 Bom 426 (427, 428): 28 Cri L Jour 537 (DB) \* (Vol 14) 1927 All 124 (124, 125): 49 All 261: 28 Cri L Jour 97 (DB).

[But see (Vol 9) 1922 Pat 5 (7): 23 Cri L Jour 114. (Submitted not correct).]

[3] If Magistrate makes memorandum of substance of evidence of each witness in summary trials, notes do not form part of record. (Vol 14) 1927 All 124 (124): 49 All 261: 28 Cri L Jour 97 (DB).

[4] If Magistrate does not try offences under provisions of S. 260 but tries them in ordinary course, he is required under this section to make memorandum of evidence. (Vol 23) 1936 All 319 (319): 37 Cri L Jour 710.

[5] Memorandum, if taken, would form part of record and cannot be destroyed by Magistrate. (Vol 8) 1921 Cal 165 (165, 166): 48 Cal 280: 22 Cri L Jour 462 (DB). (Section 263 must be read with S. 355.)

[6] Offence of theft under Ss. 379, 380 and 381, Penal Code, is one falling under S. 260, Cl. (d), and when tried regularly, is governed by this section. (Vol 23) 1936 All 319 (319): 37 Cri L Jour 710 \* (Vol 10) 1923 All 432 (433).

[7] Memorandum of substance of evidence should not be inadequate or vague. (82) 5 All 224 (226).

[8] Memorandum of substance of evidence must be full. (Vol 11) 1924 Cal 541 (541): 24 Cri L J 688 (DB).

[9] If Subordinate Magistrate, not authorized to take down evidence in English, records memorandum or substance of such evidence in English, there is nothing illegal in it. (96) 19 Mad 269 (270) (DB). (Even if it is irregular, S. 587 applies.)

[10] Memorandum under this section need not be read over to witness. (Vol 10) 1923 Pat 157 (157): 22 Cri L Jour 120 \* (94) 2 Weir 433 (433) (Mad).

[11] Failure of Magistrate merely to sign memorandum cannot vitiate conviction. (Vol 27) 1940 Pat 27 (274): 41 Cri L Jour 283. ((Vol 9) 1922 Pat 5: 2 Cri L Jour 114, Distinguished and (Vol 14) 1927 Pat 44: 54 Ind App 96: 5 Rang 53: 28 Cri L Jour 259 (PC relied on.)

[12] Magistrate cannot attend to other work during hearing of case and plead that other work was reason for his inability to comply with requirement under sub-s. (3). (Vol 24) 1937 Oudh 126 (127): 38 Cri L Jour 150.

#### SECTION 356 — SYNOPSIS.

1. Scope.
2. Proceedings for security for good behaviour.
3. Record of evidence — Sub-section (1).
4. Evidence of each witness shall be taken.
5. "Shall be signed."
6. Record of oath.
7. Sub-section (2).
8. Sub-section (3).
9. Sub-section (4).

1. Scope. — [1] This section provides the manner of recording evidence in all other cases than those falling under S. 355 and enquiries under Chapter XI (Vol 19) 1932 Sind 145 (146): 26 Sind L R 353: 2 Cri L Jour 216 (DB) \* (Vol 12) 1925 Cal 822 (826) 52 Cal 721: 26 Cri L Jour 1194 (FB) \* (Vol 12) 1925 Oudh 286 (286): 26 Cri L Jour 70 \* (Vol 15) 1928 Oudh 112 (112): 29 Cri L Jour 70.

357. (1) The <sup>a</sup>[Provincial Government] may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the <sup>a</sup>[Provincial Government] may direct the Sessions Judge or Magistrate to take down the evidence in the English language or in the language of the Court although such language is not his mother-tongue.

[1882—S. 357; 1872—S. 335; 1861—S. 196.]

[a] Substituted by A. O. for "Local Government".

#### Section 356 — Note 1 (contd.)

[2] This section applies only to cases to which the provisions of S. 355 do not apply. (Vol 23) 1936 All 319 (319): 37 Cri L Jour 710.

2. Proceedings for security for good behaviour.

— [1] Evidence inquires under S. 117, on an order for security for good behaviour, should be taken in the manner prescribed by this section. (Vol 12) 1925 Cal 720 (721): 52 Cal 632: 26 Cri L Jour 1240 (DB).

3. Record of evidence — Sub-section (1).—[1]

Under this section the entire evidence must be recorded fully. (Vol 9) 1922 Pat 40 (41): 23 Cri L Jour 218 (DB).

[2] An omission to record the evidence in the manner provided is a material irregularity sufficient to set aside the proceedings. (Vo 2) 1915 Cal 664 (665): 16 Cri L Jour 192: 42 Cal 381 (DB) & (Vol 6) 1919 All 64 (64): 21 Cri L Jour 28.

[3] Evidence of each witness must be taken down in writing. ('03) 6 Oudh Cas 73 (75).

[But see (Vol 4) 1917 Pat 41 (41): 19 Cri L Jour 235.]

[4] Procedural error not causing prejudice to the accused or failure of justice is curable under S. 537. (Vol 18) 1931 All 2 (3): 32 Cri L Jour 368 & (Vol 18) 1931 All 3 (6): 53 All 172: 32 Cri L Jour 372 & (Vol 19) 1932 Sind 145 (146): 26 Sind L R 353: 34 Cri L Jour 216 (DB).

[5] The vernacular record of evidence of a witness is more reliable than the memorandum which the Judge makes in English. (Vol 10) 1923 Lah 167 (168): 24 Cri L Jour 625.

[6] Deposition in Court language destroyed—Conviction based on full and careful memorandum in English made by the Judge is not invalid. ('83) 1883 All W N 226 (226).

4. Evidence of each witness shall be taken. —

[1] Taking down evidence means taking down the statement of a witness in full as he deposes. (Vol 31) 1944 Nag 320 (323): I L R (1945) Nag 533: 46 Cri L Jour 601.

[2] Medical witness — Statements not taken down — Judge recording "injuries on accused fully detailed in medical certificate" — Held, the procedure was improper. (Vol 15) 1928 Lah 69 (69): 23 Cri L Jour 969.

[3] A mere record that a witness "deposes as the last witness did" or "corroborates" another witness is not taking of evidence as the examination proceeds. (1863) 1 Bom H C R Cr. 91 (92). (Deposes as the last witness.) & (64) 1864 Suth W R Gap Cr 18 (18). (Do.) & (1900-02) 1900-02 Low Bur Rul 238 (241). ("Corroborates" another witness.) & (93-1900) 1893-1900 Low Bur Rul 626 (627). (Do.)

[4] The practice of recording evidence piecemeal and

not at a stretch is highly irregular. (Vol 2) 1915 Cal 558 (562): 16 Cri L Jour 424: 42 Cal 313 (DB) & (Vol 5) 1918 Cal 588 (590): 18 Cri L Jour 609 (DB) & (Vol 15) 1928 Lah 152 (153): 29 Cri L Jour 200.

[5] The deposition of a witness in the Sessions Court should not be based on the deposition as recorded by the committing Court (Vol 31) 1941 Nag 320 (323): I L R (1945) Nag 533: 46 Cri L Jour 601.

5. "Shall be signed."—[1] The object of signing the deposition by the Court is to ensure the accuracy of the record. (Vol 15) 1928 Lah 125 (127): 29 Cri L Jour 212 & (91) Oudh Sel Cas No. 192, p. 248 (249).

[2] Where the Court is composed of more than one Judge, the presiding Judge should sign the deposition. (Vol 15) 1928 Lah 125 (127): 29 Cri L Jour 212.

[3] The depositions should be taken and attested in the presence of the accused with some remarks in it to show that this was done. ('88) 10 All 174 (178) (DB).

[4] A refusal by a deponent to sign a deposition is not an offence under S. 180 of the Penal Code. ('71) 1 Weir 112 (113) (Mad).

6. Record of oath.—[1] In the absence of anything on record, the presumption is that the oath was duly admitted. ('14) 15 Cri L Jour 19 (20): 35 All 575.

7. Sub-section (2).—[1] Provincial Government empowering Court of Sessions, under S. 357, to record evidence in English—S. 356 (2) does not apply. (Vol 30) 1943 Cal 32 (35): ILR (1942) 2 Cal 136: 44 Cri L Jour 386 (DB).

8. Sub-section (3).—[1] This sub-section applies to cases where evidence is not recorded in the Magistrate's own hand. (Vol 2) 1915 Cal 664 (665): 16 Cri L Jour 192: 42 Cal 381 (DB).

[2] The provision of this sub-section cannot override that of sub-section (1). (Vol 2) 1915 Cal 664 (665): 16 Cri L Jour 192: 42 Cal 381 (DB).

[3] Memorandum in English not prepared during the examination of witness—Not signed by Judge—Irregularity serious enough to quash conviction. ('91) 1891 All W N 145 (145, 146) (DB).

[4] Evidence recorded in Court language—No memorandum in English made—Irregularity is curable by S. 537. (Vol 15) 1928 Oudh 112 (112): 29 Cri L Jour 70.

9. Sub-section (4). — [1] Pressure of other work is not a valid reason for not making a memorandum of the substance of evidence. (Vol 24) 1937 Oudh 126 (127): 38 Cri L Jour 150.

#### Section 357 — Note 1

[1] This section applies only to evidence taken under S. 356. ('96) 19 Mad 269 (270) (DB).

[2] The authority conferred under this section is personal to the particular officer and is in force only while he is in the district in which it is conferred. ('69) 2 Weir 434 (434).

**358.** In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, *Option to Magistrate* take down the evidence of any witness in the manner provided in *in cases under S. 355.* section 356, or, if within the local limits of the jurisdiction of such Magistrate the <sup>a</sup>[Provincial Government] has made the order referred to in section 357, in the manner provided in the same section.

[1882—S. 358 ; 1872—S. 336 ; 1861—S. 265.]

[a] *Substituted by A. O. for "Local Government."*

*Mode of recording evidence* **359.** (1) Evidence taken under section 356 or section 357 shall *under S. 356 or S. 357.* not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

[1882—S. 359 ; 1872—S. 339 ; 1861—S. 198.]

*Procedure in regard to such evidence when completed.* **360.** (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

[1882—S. 360 ; 1872—S. 339 ; 1861—S. 198.]

#### Section 357 — Note 1 (*contd.*)

[3] Judge dictating evidence to a stenographer.—The typed transcription and not the short-hand notes signed by the Judge and kept as part of record — *Held*, procedure was irregular and vitiated the trial. (Vol 30) 1943 Pesh 21 (22) : 44 Cri L Jour 329 (DB).

#### Section 359 — Note 1

[1] Recording a paraphrase of the evidence given by the witness is not compliance with law. ('05) 2 Cri L Jour 133 (142) (DB) (Low Bur) ✕ ('93-1900) 1893-1900 Low Bur Rul 626 (627).

[2] The evidence should be taken down exactly as spoken by the witness. ('71) 8 Beng R L App 21 (22) (DB) ✕ ('83) 1883 All W N 12 (12).

[3] The Judge himself asking questions and recording the answers should do it in such a manner as to avoid anticipating or breaking the thread of his cross-examination. ('05) 2 Cri L Jour 133 (143, 144) (DB) (Low Bur).

[4] Recording of questions disallowed is entirely a matter for the discretion of the Magistrate. (Vol 27) 1940 Lah 527 (528) : 42 Cri L Jour 284.

[But see (Vol 7) 1920 Pat 25 (28) : 21 Cr L J 321 (DB).]

#### SECTION 360 — SYNOPSIS.

1. Scope and applicability.
2. Shall be read over to the witness — Sub-section (1).
3. In the presence of the accused or of his pleader.
4. "As the evidence of each witness . . . is completed."
5. "And shall, if necessary, be corrected."
6. Shall be interpreted to the witness.
7. Non-compliance with the section—Effect of.
8. Revision.

1. *Scope and applicability.* — [1] The object of reading over is to obtain accurate record from the witness and not to enable accused to suggest corrections. (Vol 14) 1927 P C 44 (47) : 5 Rang 53 ; 54 Ind App 96 : 28 Cri L Jour 259 (PC).

2. *Shall be read over to the witness — Sub-section (1).*—[1] The Magistrate may not record that the deposition was read over to the witness in the presence of the accused, though it is desirable to do so. (Vol 12) 1925 Pat 723 (725) : 26 Cri L Jour 927 ✕ (Vol 14) 1927 Pat 100 (102) : 28 Cri L Jour 77.

[2] This section is not mandatory and non-compliance with its provision is an irregularity curable under S. 537. (Vol 14) 1927 P C 44 (49) : 54 Ind App 96 : 28 Cri L Jour 259 : 5 Rang 53 (PC).

[3] Handing over the deposition to the witness to read is not sufficient compliance with the section. (Vol 14) 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (PC).

[4] Deposition of a witness can be read over to him while other stages of the case are proceeding. (Vol 14) 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (PC).

3. *In the presence of the accused or of his pleader.*—[1] Several accused in a case—Evidence of a witness read over in the presence of a pleader for one of the accused—*Held*, the statement is not inadmissible in a case of perjury against such witness. ('09) 10 Cri L Jour 150 (154, 155) : 36 Cal 808 (DB).

[2] Where the accused "appears by a pleader" a reading over of the evidence in the presence of such pleader is sufficient. (Vol 13) 1926 Cal 528 (528) : 27 Cri L Jour 509 (DB) ✕ (Vol 15) 1928 Cal 27 (32) : 29 Cri L Jour 49 (SB). (The evidence need not be read within the hearing of the accused.)

[3] The accused is not necessarily entitled to the opportunity of suggesting corrections. (Vol 14) 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cri L Jour 259 (PC) ✕ (Vol 14) 1927 Pat 100 (102) : 28 Cri L Jour 77 ✕ (Vol 27) 1940 Nag 410 (413) : 41 Cr L J 697.

[4] The provisions of this section apply to proceedings under Chap. XII of the Code. (Vol 12) 1925 Cal 822 (823, 831) : 52 Cal 721 : 26 Cri L Jour 1194 (FB) ✕ (Vol 9) 1922 Pat 371 (371) : 23 Cri L Jour 125.



*Interpretation of evidence to accused or his pleader.*

361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

[1882—S. 361; 1872—S. 340; 1861—S. 200.]

362. (1) In every case [tried by a Presidency Magistrate in which an appeal lies, such Magistrate] shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

#### Section 360 (contd.)

4. "As the evidence of each witness . . . is completed."—[1] The section is not complied with if the deposition is read over at the end of the day after all the witnesses are examined. (Vol 13) 1926 Cal 157 (158); 27 Cri L Jour 375 (DB) \* (Vol 13) 1926 Cal 563 (564); 53 Cal 129; 27 Cri L Jour 688 (DB) \* (Vol 33) 1946 Nag 321 (327); I L R (1946) Nag 946; 47 Cr L J 918 (DB). (Reading or interpreting.)

[2] Magistrate, asking all the witnesses examined to be in a room, read over the deposition to them—*Held*, the procedure was illegal. (Vol 12) 1925 Mad 1206 (1206); 49 Mad 71; 26 Cri L Jour 1587.

[3] The deposition must be read over after it is completed. (21) 22 Cri L Jour 669 (671) (Lah).

[4] Evidence read over to the witness some days after examination-in-chief but immediately after the cross-examination—*Held*, this section was complied with. (Vol 16) 1929 Cal 390 (391); 31 Cri L Jour 373 (DB) \* (Vol 5) 1918 Pat 448 (450); 19 Cri L Jour 169. [But see (Vol 13) 1926 Pat 58(60); 26 Cr L J 1475.]

5. "And shall, if necessary, be corrected."—[1] Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain. (Vol 3) 1916 Bom 49 (51); 18 Cri L Jour 480 (DB).

6. Shall be interpreted to the witness.—[1] Reading of deposition to the witness in the language in which it is taken is not necessary—Mere interpretation is sufficient. (Vol 15) 1928 Cal 27 (31); 29 Cri L J 49 (SB).

[2] When the deposition is read over, it is to be interpreted to the witness in his own language. (Vol 14) 1927 P C 44 (47, 48); 54 Ind App 96; 5 Rang 53; 28 Cri L Jour 259 (PC).

7. Non-compliance with the section—Effect of.—[1] Non-compliance with the strict provisions of this section is an irregularity curable by S. 537 in the absence of prejudice. (Vol 27) 1940 Nag 410 (413); 41 Cri L Jour 697. (Correctness of the evidence taken in non-compliance with the section, cannot be presumed.) \* (Vol 14) 1927 P C 44 (49); 54 Ind App 96; 5 Rang 53; 28 Cri L Jour 259 (PC).

[2] A failure to read over the evidence to the witness would not necessarily vitiate the trial of the accused. (Vol 13) 1925 Pat 414 (419); 4 Pat 488; 26 Cri L Jour 811 (DB) \* (Vol 14) 1927 All 757 (758); 28 Cri L Jour 596 \* (Vol 14) 1927 All 764 (765); 28 Cri L Jour 514 (DB) \* (Vol 11) 1924 Pat 786 (787); 25 Cri L Jour 89.

[3] A witness cannot be prosecuted on the basis of evidence in respect of which procedure under this section

has not been followed. (Vol 33) 1946 Nag 38 (40); I L R (1945) Nag 788 \* (Vol 6) 1919 Mad 45 (47); 42 Mad 561; 20 Cri L Jour 379 (DB) \* (Vol 15) 1928 Lah 125 (128); 25 Cri L Jour 212 \* (Vol 1) 1914 Cal 789 (790); 42 Cal 240; 15 Cri L Jour 483 (DB) \* (Vol 15) 1928 Cal 271 (271) (DB) \* (12) 13 Cri L Jour 569 (571); (1912) 1 Upp Bur Rul 123 \* (Vol 8) 1921 Pat 149 (150); 22 Cri L Jour 568 \* (Vol 5) 1918 Low Bur 129 (130); 18 Cri L Jour 986.

[But see (Vol 27) 1940 Nag 410 (413); 41 Cri L Jour 697 \* (Vol 8) 1921 Sind 151 (154); 16 Sind L R 255; 26 Cri L Jour 657 \* (Vol 6) 1919 Low Bur 129 (130); 20 Cri L Jour 506; 10 Low Bur Rul 16 \* (10) 11 Cri L Jour 482 (482); 34 Mad 141.]

[3] Accuracy of deposition challenged—Relevant statement of a witness not read to him and omitted from record—*Held*, the conviction should be quashed. (Vol 13) 1926 Rang 78 (79); 3 Rang 612; 27 Cri L J 857.

[4] Absence of a memorandum sub-joined to deposition, and stating the fact of compliance does not itself prove non-compliance with the section. (Vol 12) 1925 Pat 378 (380); 4 Pat 231; 26 Cri L Jour 932 (DB).

8. Revision.—[1] The question whether a deposition was read over to the witness in accordance with this section is one of the fact and cannot be raised for the first time in revision before the High Court. (Vol 12) 1925 Pat 414 (419, 421); 4 Pat 488; 26 Cri L Jour 811 (DB).

#### Section 361—Note 1

[1] Sub-sections (1) and (2) are not mutually exclusive and even where the accused appears by a pleader, it is necessary to interpret the evidence to the accused. The non-compliance with this requirement is, however, only an irregularity which can be cured under S. 537. (Vol 17) 1930 Mad 186 (186); 31 Cri L Jour 827.

#### Section 362—Note 1

[1] This section does not apply to cases under S. 110. (109) 10 Cri L Jour 122 (123) (D B) (Cal). (Evidence of reputation.)

[2] Offence under Companies Act punishable with fine and imprisonment—Presidency Magistrate may try case summarily and apply procedure laid down by S. 362, unless he imposes appealable sentence. (Vol 31) 1944 Bom 129 (130); I L R (1944) Bom 382; 45 Cri L Jour 631 (F B).

[3] In cases coming under S. 282, sub-s. (1), it is the duty of the Magistrate to take note of all the material facts, whether they appear in the examination-in-chief or in the course of cross-examination. (Vol 6) 1919 Cal 696 (700, 701); 46 Cal 411; 20 Cri L Jour 24 (D B).



<sup>b</sup>[2A] In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.]

(3) Sentences <sup>b</sup>[unless they are sentences of imprisonment ordered to run concurrently] passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

<sup>b</sup>[4] In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.]

[1882—S. 362; 1872—Ss. 335, 338; 1861—Ss. 196, 198.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (15 [XVIII] of 1923), S. 97, for "in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a term exceeding six months, he." <sup>b</sup> Inserted, *ibid*.

#### Objects and Reasons.

*Amendment made in 1923.*—"We are inclined to agree with those critics who point out that the re-draft proposed by sub-clause (1) in sub-section (1) of Section 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We do not see how this difficulty can be got rid of; but we think that the amendment proposed has the advantage of bringing the language of this Section into conformity with the language of Sections 263 and 264, and we would, therefore, retain this sub-clause.

In order to meet difficulties that have arisen, we have introduced a sub-section laying down that Presidency Magistrates in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused, and we have introduced a new Clause making a consequential amendment in sub-section (4) of Section 364.

The non-official members, who constituted a majority in the Committee, expressed their dissatisfaction with the distinctions drawn in the Code between Presidency Magistrates and other Magistrates, and in particular with regard to this Clause would have liked to see Presidency Magistrates required, in warrant cases at all events, to keep as full a record as any other Magistrate. But the Committee as a whole held that there was some force in the contention put forward by numerous High Court Judges that no change should be made in the Code affecting to any extent the special powers of Presidency Magistrates until a much fuller inquiry had been made into the question of their status, power and procedure. We desire to take this opportunity of placing on record our hope that it may be possible to appoint a small Committee to undertake this investigation."—S. C. R. [XVIII] of 1923.]

**363.** When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall

*Remarks respecting demeanour of witness.* also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

[1882—S. 363; 1872—S. 341; 1861—S. 267.]

#### Section 362—Note 1 (*contd.*)

[4] Where the Magistrate finds that he has tried a case without recording the evidence and that a longer sentence than six months ought to be passed, his course is to record the evidence afresh. This happens generally in cases where after he has convicted the accused, he is informed for the first time that the accused is an old criminal with many previous convictions. In such cases, it has been held that though the prosecution should not inform the Magistrate about previous convictions, they may indicate to the Magistrate that they think that the case is one in which it is desirable that the evidence should be recorded, so as to avoid recording of evidence afresh. (Vol 22) 1935 Bom 37 (38) : 36 Cri L Jour 527 (DB).

[5] Under sub-s. (4), it is not necessary for a Presidency Magistrate to record the evidence. In one sense he has a discretion, because it is not illegal for him to record evidence if he likes to do so. But his right to refuse to record evidence is absolute and the High Court has no jurisdiction to require him to record evidence. (Vol 31) 1944 Bom 129 (130) : 1 L R (1944) Bom 382 : 45 Cri L Jour 631 (F B) (Vol 19) 1932 Bom 180 (181) : 56 Bom 200 : 33 Cri L Jour 404 (DB).

[But see (Vol 12) 1925 Bom 147 (147) : 26 Cri L Jour 454 (DB) (Vol 18) 1931 Bom 142 (143) : 32 Cri L Jour 276 (DB).]

[6] Where a Presidency Magistrate recorded certain portions of the depositions of some of the witnesses which were of a more or less formal nature in the form of indirect narration as "P. W. 4 speaks to the identification by P. W. 1 of some of the jewels" and "P. W. 3 proves his signature to the search lists," it was held

that the trial was not vitiated, as this mode of recording evidence occasioned no failure of justice. (Vol 5) 1918 Mad 1197 (1198) : 18 Cri L Jour 336.

[7] Where in recording the examination-in-chief of two witnesses the Magistrate merely recorded the words "Corroborates P. W. 1," it was held that the Magistrate failed to follow the directions given by this section so far as these witnesses were concerned and that the conviction could not be upheld. (Vol 26) 1939 Cal 623 (624) : 41 Cri L Jour 40 (D B).

[8] In non-appealable cases the only record of the examination of the accused is what is filled up under cl. (f) of S. 370. Where the accused, both at the time he took the plea and when he was examined, denied that he committed the offence, the entry "denies" is sufficient. (Vol 16) 1929 Cal 406 (406) : 56 Cal 1067 : 30 Cri L Jour 526.

[9] In appealable cases where charges have to be framed under S. 254, the Presidency Magistrates are bound to frame charges. (Vol 19) 1932 Cal 865 (865) : 33 Cri L Jour 828 (D B).

[10] Parties to criminal proceedings are entitled to get the copies of depositions taken by Presidency Magistrates. Where on the dismissal of a complaint the complainant asked for copies of depositions, and they were refused, the High Court under S. 45, Specific Relief Act, had those records sent for and kept with the Registrar so that the party might take copies of them. (11) 11 Ind Cas 499 (499) (Cal). (Party applying for certified copies of Presidency Magistrate's notes).

#### Section 363 — Note 1

[1] A mere record of the deposition of a witness in a language different from that in which it was deposed

364. 1. Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter for the Chief Court of Oudh [or the Chief Court of Sind], the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

Section 363—Note 1 (contd.)

and in a narrative form is but a very imperfect representation of what passes between a witness and a counsel more especially in cross-examination. ('74) 21 *Suth W R Cr* 13 (14) (DB).

[2] A mere record of deposition is the dead body of the evidence without its spirit which is supplied when given openly or orally to the ear and to the eye of those who receive it. This "spirit" consists in the manner in which the evidence is given or in the language of this section "demeanour... whilst under examination." ('69) 3 *Beng L R App Cr* 20 (22) (D B).

[3] This demeanour may be such as is not calculated to inspire confidence or it may be such as to lead to the inevitable conclusion that the witness is perjuring himself. (Vol 15) 1928 *Cal* 769 (770): 30 *Cri L Jour* 825 (DB) \* (Vol 17) 1930 *Pat* 58 (59).

[4] When the credibility of a witness turns upon his manner and demeanour, or where the issue is simple and depends on the credit which attaches to one or the other of conflicting witnesses, or where the evidence is all oral and its credibility is a matter of opinion, the opinion of the Magistrate who heard and saw the witnesses cannot be lightly set aside and is generally taken as conclusive. (Vol 13) 1926 *P C* 29 (30, 31): 4 *Rang* 513 (PC) \* (Vol 14) 1927 *Rang* 200 (200) \* (Vol 4) 1917 *All* 35 (39): 39 *All* 426 (DB) \* (Vol 2) 1915 *P C* 1 (2): 39 *Bom* 386: 42 *Ind App* 110 (P C) \* (Vol 1) 1914 *Lah* 427 (431): 15 *Cri L Jour* 203 (D B) \* ('04) 1 *Cri L Jour* 781 (787): 1904 *Pun Re No.* 7 *Cr* (D B).

[5] The High Court was prepared to accept the evidence of a girl of six years who was the only eye-witness to the murder as the Sessions Judge stated that "her evidence was given without hesitation and without the slightest suggestion of tutoring or anything of that sort." (Vol 8) 1921 *Pat* 109 (110, 111): 22 *Cri L Jour* 417: 6 *Pat L Jour* 147 (D B).

[6] While the appellate Court should be guided by the remarks made by the Magistrates about the demeanour of the witnesses, yet it is bound to, independently, consider the facts of the cases. ('98) 1898 *Pun Re No.* 6 *Cr p.* 15 (18) (D B).

[7] Where the opinion of the lower Court is based not so much on the demeanour of the witness as on the inherent improbabilities of the story deposed to, or the supposed discrepancies in the case as put forward by the party, the appellate Court is not very much bound by the opinion of the trial Court. (Vol 13) 1926 *P C* 29 (30): 4 *Rang* 513 (P C) \* (Vol 14) 1927 *Rang* 200 (200).

[8] Unsatisfactory demeanour is not always a sure indication of falsehood. It is dangerous to reject on the grounds of unsatisfactory demeanour statements in themselves probable made under the sanction of an oath by witnesses of good reputation. ('09) 9 *Cri L Jour* 261 (264): 1 *Sind L R* 20 (D B).

[9] Good or satisfactory demeanour is not always a real test of truth. A good demeanour on the part of an accomplice cannot be sufficient corroboration of his evidence. (Vol 12) 1925 *Oudh* 1 (4): 27 *Oudh Cas* 40: 25 *Cri L Jour* 49.

[10] The attestation of a Magistrate that at the time the deposition of a certain witness was taken, he was in such a weak state of mind that the Magistrate was

unable to proceed with his examination and that the witness could not answer more than two questions is *prima facie* proof of those facts and can be put before the jury. ('69) 12 *Suth W R Cr* 51 (51) (DB).

[11] A Magistrate is not authorised under this section to record any remarks about the credibility or the substance of the deposition of the witness until the whole evidence has been taken. (Vol 15) 1928 *Lah* 975 (978): 10 *Lah* 778: 30 *Cri L Jour* 129 \* ('83) 2 *Weir* 435 (436) (Mad).

[12] Where a Magistrate, while recording the evidence of a witness, made a note not only as to his demeanour, but also that he had not spoken the truth, it was held that there was sufficient ground for transfer of the case to some other Magistrate. (Vol 12) 1925 *Cal* 430 (480): 26 *Cri L Jour* 852 (D B).

SECTION 364 — SYNOPSIS.

1. Scope and applicability.
2. Record of examination should be full.
3. Language of the record.
4. "Shall be shown or read to him, or . . . interpreted to him."
5. "To explain or add to his answers."
6. The record shall be signed.
7. "Shall certify under his own hand."
8. Sub-section (3).
9. Sub-section (4).

1. Scope and applicability.— [1] This section prescribes the manner in which the examination of an accused person (under S. 342) is to be recorded. ('02) 4 *Bom L R* 461 (462) (DB) \* (1900) 1900 *All W N* 183 (183) (DB).

[2] Section does not apply where person examined is not accused person. (Vol 4) 1917 *Mad* 316 (317, 318): 17 *Cri L Jour* 195: 39 *Mad* 977 (DB) \* ('06) 3 *Cri L Jour* 138 (140): 32 *Cal* 1085 (DB).

[3] Accused not examined.—Note made by Magistrate that accused is unwilling to be examined and therefore not examined — Section has no application. (Vol 4) 1917 *Sind* 24 (24): 11 *Sind L R* 52: 18 *Cri L Jour* 913 (DB).

[4] Accused examined under S. 263 — Section does not apply. ('36) 37 *Cri L Jour* 1098 (1100) (Cal) \* (Vol 22) 1935 *Sind* 193 (193): 36 *Cri L Jour* 1484 (DB).

[5] Confession recorded under S. 164 is to be recorded in manner prescribed by this section. (Vol 32) 1945 *Lah* 105 (108): 1 *L R* (1945) *Lah* 290: 47 *Cri L Jour* 4 (FB) \* (Vol 31) 1944 *Sind* 113 (120): 1 *L R* (1943) *Kar* 371: 45 *Cri L Jour* 704 (DB) \* (Vol 27) 1940 *Nag* 186 (190): 1 *L R* (1940) *Nag* 232: 41 *Cri L Jour* 757 \* (Vol 4) 1917 *Mad* 316 (317): 17 *Cri L Jour* 195: 39 *Mad* 977 (DB) \* ('83) 1883 *All W N* 243 (243) \* ('87) 1887 *Pun Re No.* 52 *Cr*, p. 139 (141) (DB).

[6] Section does not apply where no evidence has as yet been produced against the accused. (Vol 22) 1935 *Oudh* 416 (420): 36 *Cri L Jour* 927.

2. Record of examination should be full. —

[1] The whole examination of an accused person including every question put to him and every answer

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, <sup>d</sup>[ \* \* \* \*] as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 <sup>e</sup>[or in the course of a trial held by a Presidency Magistrate].

[1882—S. 324; 1872—S. 346; 1861—S. 205.]

[a] Inserted by the Oudh Courts (Supplementary) Act, 1925 (32 [XXXII] of 1925), S. 2 and Schedule. [b] The words "or the Chief Court of the Punjab" were repealed by the Repealing and Amending Act, 1919 (18 [XVIII] of 1919). [c] The words "or the Chief Court of Lower Burma" were repealed, *ibid.*, 1923 (11 [XI] of 1923), S. 3 and Sch. II. [cc] Inserted by the Sind Courts (Supplementary) Act, 1926 (34 [XXXIV] of 1926) which came into force on 15-4-1940, see Sind Government Notification (Home Department, Political) No. 1499H 39 dated 28-3-1940. [d] The words "unless he is a Presidency Magistrate" were repealed by the Code of Criminal Procedure (Second Amendment) Act, 1923 (37 [XXXVII] of 1923), S. 2. [e] Substituted, *ibid.*, for "or S. 362, sub-s. (2A)" which had been inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 98.

#### Section 364 — Note 2 (*contd.*)

given by him must be recorded in full. (Vol 18) 1981 Oudh 166 (170) : 32 Cri L Jour 854 (DB) (Vol 8) 1921 Pat 109 (113, 114) : 6 Pat L Jour 147 : 22 Cri L Jour 417 (DB) (Vol 2) 1915 Lah 16 (45) : 1915 Pun Re No. 17 Cr : 16 Cri L Jour 354 (DB) (Vol 2) 4 Bom L R 461 (462) (DB) (Vol 69-70) 5 Mad H C R App iv (iv) (Vol 9) 1922 Mad 40 (41) : 45 Mad 230 : 23 Cri L Jour 680 (DB) (Vol 21) 1934 Pat 651 (652) : 36 Cr L J 447.

[2] As far as possible, the record should be made in the exact words used by him. (Vol 12) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761 (DB) (Vol 75) 24 Suth W R Cr 54 (55) (DB) (Vol 103) 5 Bom L R 999 (1000) (DB) (Vol 22) 1935 Cal 489 (490) : 62 Cal 1127 : 36 Cri L Jour 1460 (DB).

[3] The section does not except even irrelevant questions from being taken down. The Magistrate or Court is responsible for putting such questions, but if they are put, they must be recorded as also the answers given. (Vol 71) 15 Suth W R Cr L 3 (3) (DB).

[4] Even where accused gives an answer, but says that it should not be taken down in his statement, the Magistrate should record it under this section. (Vol 19) 1932 Bom 279 (282) : 56 Bom 434 : 33 Cri L Jour 613 (DB).

3. Language of the record.—[1] The examination of an accused person should be taken down in the language in which the person is examined. (Vol 24) 1937 Oudh 425 (426) : 38 Cri L Jour 169 (Vol 12) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761 (DB) (Vol 94) 21 Cal 642 (660) (DB) (Vol 75) 24 Suth W R Cr 54 (55) (DB) (Vol 93) 1893 Rat 633 (633) (DB) (Vol 72) 4 N W P H C R 16 (22).

[See (Vol 23) 1936 Oudh 405 (407) : 37 Cri L Jour 955 : 12 Luck 261 (DB).]

[See also (Vol 27) 1940 Pat 163 (170) : 19 Pat 301 : 41 Cri L Jour 533 (DB).]

[2] If the record of examination in the language in which a person is examined is not practicable, the law directs that the statement or confession shall be recorded in the language of the Court or in English. (Vol 21) Cal 642 (652, 660) (DB) (Vol 88) 15 Cal 595 (607, 608) (DB) (Vol 91) 1891 All W N 55 (56).

4. "Shall be shown or read to him, or . . . . . interpreted to him."—It is obligatory on the Court to show or read the record of the statements of an accused

person to him or to have it interpreted to him if it is in a language not understood by him, so that he might be assured that his words have been correctly taken down and, if necessary, have it corrected. (Vol 24) 1937 Oudh 425 (425, 426) : 38 Cri L Jour 169 (Vol 12) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761 (DB) (Vol 8) 1921 Pat 109 (113, 114) : 6 Pat L Jour 147 : 22 Cri L Jour 417 (DB) (Vol 10) 1923 Pat 13 (15, 16) : 24 Cri L Jour 497 (DB).

[2] Statement not read over to accused but his signature taken—Magistrate giving accused another opportunity to make further statement—Trial held could not be impeached as being illegal. (Vol 36) 37 Cri L Jour 1089 (1089) (Cal).

5. "To explain or add to his answers."—[1] Accused is entitled to explain or add to his answers, so that the whole shall be made conformable to what the accused declares to be the truth. (Vol 16) 1929 Lah 382 (384) : 10 Lah 223 : 29 Cr L J 769 (Vol 8) 1921 Pat 109 (113, 114) : 6 Pat L Jour 147 : 22 Cri L Jour 417 (DB) (Vol 12) 1925 Cal 575 (576) : 52 Cal 403 : 26 Cri L Jour 761 (DB) (Vol 102) 4 Bom L R 461 (462) (DB).

[2] It is the statement as finally declared by him to be true that is to be accepted as representing his statement. (Vol 16) 1929 Lah 382 (384) : 10 Lah 223 : 29 Cri L Jour 769.

6. The record shall be signed.—[1] To take a signature in an adjoining room before a clerk, and not in the Magistrate's immediate presence, is not a proper compliance with the provisions of the section. (Vol 94) 1894 Rat 687 (687, 688) (DB).

7. "Shall certify under his own hand."—[1] The certificate need not be in the handwriting of the Magistrate or Judge. It is sufficient if it is under his hand only, i. e., signed by him. (1900) 1900 All W N 203 (204) (Vol 87) 8 Suth W R Cr 55 (56) (DB).

[2] When duly recorded, the certificate is sufficient *prima facie* proof of such examination and it is to be presumed that the proceedings were regular. (Vol 71) 7 Beng L R App 62 (64) (DB) (Vol 86-86) 2 Bom H C R Cr 125 (125, 126) (DB) (Vol 69) 7 Beng L R 67 (DB).

8. Sub-section (3).—[1] The examination need not be taken down in the Magistrate's own handwriting. It is enough if it is taken down in his presence and hearing. (Vol 97) 21 Bom 495 (500) (Vol 73) 20 Suth W R Cr 50 (50) (DB).

365. Every High Court established by Royal Charter <sup>a</sup>(and the Chief <sup>aa</sup>[Courts of Oudh and Sind]) <sup>b</sup>[\*] <sup>c</sup>[\* \* \*] <sup>d</sup>[\* \* \*] <sup>e</sup>[shall] from time to time, by *Record of evidence in High Court.* general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, <sup>f</sup>[and the evidence shall be taken down in accordance with such rule].

[1882—S. 365.]

[a] *Inserted* by the Oudh Courts (Supplementary) Act, 1925 (32 [XXXII] of 1925), S. 2 and Schedule. [aa] *Substituted* by the Sind Courts (Supplementary) Act, 1926 (34 [XXXIV] of 1926) for "Court of Oudh," (effective from 15-4-1940, see S. 364, *supra*, foot note (cc)). [b] The word "and" was *repealed* by the Lower Burma Courts Act, 1900 (6 [VI] of 1900). [c] The words "the Chief Court of the Punjab" were *repealed* by the Repealing and Amending Act, 1919 (18 [XVIII] of 1919). [d] The words "and the Chief Court of Lower Burma" were *repealed, ibid.*, 1923 (11 [XI] of 1923), S. 3 and Sch. II. [e] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 99, for 'may'. [f] *Substituted, ibid.*, for "and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed."

## CHAPTER XXVI.

### OF THE JUDGMENT.

*Mode of delivering judgment.*

366. (1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained,—

- (a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and
- (b) in the language of the Court, or in some other language which the accused or his pleader understands :

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend, to hear judgment delivered, except where his personal attendance during the trial

#### Section 364 (contd.)

9. Sub-section (4).— [1] Section does not apply to cases coming under S. 263. ('36) 37 Cri L Jour 1098 (1100) (Cal) \* (Vol 14) 1927 Oudh 42 (43) : 28 Cri L Jour 76 \* (Vol 14) 1927 Pat 369 (370) : 6 Pat 504 : 28 Cri L Jour 1037 (DB).

[2] The effect of sub-section (4) as amended is that : (1) In the cases of Presidency Magistrates, no record of the examination of the accused need be made in non-appealable cases and only a memorandum of the examination need be made in appealable cases. (2) In the case of Magistrates other than Presidency Magistrates, the examination must be recorded in full as provided by the section in all cases except those that come under S. 263 and in cases under S. 263, the examination must be recorded but need not be in full as provided in this section. In other words, some notes must be made of the examination of an accused person in a summary trial if he is examined. (Vol 29) 1936 Oudh 16 (17) : 36 Cri L Jour 1303 : 11 Luck 461.

#### SECTION 366—SYNOPSIS.

1. Scope and applicability.
2. Delivery of judgment cannot be delegated.
3. Judgment must be pronounced.
4. Loss of records—Effect.
5. "In open Court."
6. Time of pronouncing judgment.
7. Presence of accused — Sub-section (2).
8. Sentence or release to be after judgment.

1. Scope and applicability.— [1] The requirements of this section are not mere matters of form—They are based upon good and substantial grounds of public policy and must be obeyed. (Vol 29) 1942 Lah 100 (101) : 48 Cri L Jour 619 \* ('92) 14 All 242 (272) (SB).

[2] The section does not apply to orders which are not judgments in trials. ('04) 1 Cri L Jour 969 (970) (DB) (Bom). (Order under Sec. 195, Cr. P. C.) \* ('06) 4 Cri L Jour 284 (284, 285) : 1906 Upp Bur Rul Cr P C 49. (Order dismissing complaint under S. 203.)

2. Delivery of judgment cannot be delegated.—

[1] The judgment must be pronounced by the Judge or Magistrate who held the trial. The latter cannot delegate this function to others. ('69) 1889 All W N 181 (184).

[2] A Magistrate, who has gone on leave, or who has been transferred to another district and has handed over charge, has no jurisdiction to pronounce judgment in a trial held by him. ('81) 3 All 563 (565) (FB) \* (Vol 19) 1932 All 582 (582) : 34 Cri L Jour 112 (DB) \* (Vol 11) 1924 Cal 192 (193) : 25 Cri L Jour 192 (DB) \* ('79) 1879 Pun Re No. 20 Cr, p. 59 (60) (DB) \* (Vol 11) 1924 Cal 55 (55) : 50 Cal 664 : 24 Cri L Jour 489. (S. 350 does not give Magistrate jurisdiction to deliver judgment written by his predecessor.)

Also see notes on Ss. 12 and 350.

[3] Where the Court consists of a Bench of Magistrates, a judgment prepared and delivered by the presiding officer in the absence of the other members of the Bench is not a proper judgment. (Vol 15) 1928 Mad 1172 (1173) : 52 Mad 237 : 29 Cri L Jour 973.

3. Judgment must be pronounced — [1] Every judgment ought to be pronounced by Court in accordance with the section. (Vol 29) 1942 Mad 668 (669) : 44 Cri L Jour 5 \* ('92) 14 All 242 (272) (SB).

[2] Till it is pronounced it cannot operate as a judgment and is nothing more than the private expression of an opinion by the Judge which can be changed and altered. (Vol 16) 1929 Lah 692 (694) : 31 Cri L Jour 675 : ('13) 14 Cri L Jour 562 (563) (All).

has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader.

(3) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 537.

[1882—S. 366; 1872—Ss. 211, 462.]

**367. (1)** Every such judgment shall, except as otherwise expressly provided by this Code, be *Language of judgment.* written by the presiding officer of the Court <sup>a</sup>[or from the dictation of *Contents of judgment.* such presiding officer] in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it <sup>a</sup>[and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him].

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) When the conviction is under the Indian Penal Code and it is doubtful under which of *Judgment in alternative.* two sections, or under which of two parts of the same section, of that

#### Section 366 (contd.)

4. Loss of records—Effect.—[1] Where the portion of the material records in a case is lost, it is open to the Judge, to rewrite the judgment from memory and from the materials before him and place it on the record. (Vol 2) 1915 Mad 1038 (1039); 14 Cri L Jour 595; 38 Mad 498.

5. "In open Court."—[1] A judgment pronounced by a Magistrate in his private house instead of in the usual court-hall by reason of his illness is not necessarily illegal and will not be set aside in the absence of proof of prejudice. ('66) 1 Agra HCR Cr 17 (18) (DB).

6. Time of pronouncing judgment.—[1] A judgment pronounced before the closing of the case is a nullity. ('32) 1932 Mad W N 648 (649).

[2] An unreasonable delay in pronouncing the judgment after the closing of the case is unjust to the accused and also opposed to the general principles of law. ('92) 5 C P L R Cr 24 (24).

7. Presence of accused—Sub-section (2).—[1] Where the accused was not required to attend to hear the judgment delivered and could not be so required as he had absconded before judgment was held to be wholly illegal. (Vol 14) 1927 Lah 870 (870); 28 Cri L Jour 971.

[2] Accused person absconding before judgment—Magistrate re-pronouncing judgment on his re-arrest—*Held*, that the defect was cured under S. 537. ('87) 1887 Rat 325 (325) (DB).

[3] Where the accused is convicted and the sentence is not one of fine only, the Court must, under sub-s. (2) of this section, direct the personal attendance of the accused for hearing the judgment.—See notes on S. 265

[4] When the proceedings in a case tried by a Subordinate Magistrate are submitted to a District Magistrate to pass sentence upon the accused, the accused is entitled to be present at the passing of such a sentence before the District Magistrate.—The order so passed in his absence is illegal. ('70) 7 Bom HCR Cr 31 (34) (DB).

8. Sentence or release to be after judgment.—[1] A sentence in the case of conviction, or a direction to set the accused at liberty in the case of an acquittal can only follow the judgment and not precede it. A breach of this rule, however, is only an irregularity which can be cured under the provisions of S. 537. (Vol 20) 1933 All 660 (662); 55 All 886; 34 Cri L Jour 1086. (14 All 242 (SB) Distinguished.) \* ('96) 23 Cal 502 (505) (DB)

\* ('11) 12 Cri L Jour 457 (458, 459) (DB) (Bom). (Distinguishing 1 Bom LR 160 (DB)). \* (Vol 12) 1925 Lah 187 (187); 25 Cr L Jour 705. (Dissenting from 14 All 242 (SB)). \* (Vol 9) 1922 Mad 502 (503); 45 Mad 913; 23 Cri L Jour 583 (FB) \* ('79) 2 Weir 488 (489). (A Magistrate passed sentence and then died before writing judgment—*Held* it was only an irregularity.) \* (Vol 17) 1980 Rang 77 (78); 7 Rang 370; 30 Cri L Jour 1166 \* ('11) 12 Cri L Jour 610 (610); 5 Sind L R 131 (DB).

[But see ('92) 1892 All W N 157 (157, 158) (DB) \* ('03) 27 Mad 237 (238) \* ('09) 19 Mad L Jour 9 (N R O) (D B).]

[2] Pronouncing of judgment before completing the judgment makes the sentence illegal. (Vol 17) 1930 Pat 143 (149); 8 Pat 904; 31 Cri L Jour 416. (14 All 242 (272) (S B), Followed.)

#### SECTION 367—SYNOPSIS.

1. Object and applicability.
2. Judgment—Meaning of.
3. Language of judgment.
4. "Written by presiding officer."
5. Contents of judgment—General.
6. Points for determination.
7. "Decision thereon"—Appreciation of evidence.
8. Reasons for decision.
9. Remarks in the judgment.
10. Offence to be specified.
11. "Punishment to which he is sentenced."
12. "Shall be dated and signed by the presiding officer. . . at the time of pronouncing it."
13. Judgment in the alternative—Sub-section (3).
14. Judgment in cases of acquittal.
15. Judgment in capital cases—Sub-section (5).
16. Trial by jury—Heads of charge to the jury—Proviso.
17. Judgment not in conformity with section—Procedure in appeal.
18. Sub-section (6).

1. Object and applicability.—[1] The provisions of this section are based upon good and substantial grounds of public policy. (Vol 29) 1942 Lah 100 (101); 43 Cri L Jour 619 \* ('92) 14 All 242 (272) (SB).

Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed :

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

“(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3) shall be deemed to be a judgment.]

[1882—S. 367 ; 1872—Ss. 255, 287, 461, 463, 464 ; 1861—Ss. 379, 380, 381, 429, 430.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 100.*

#### Section 367—Note 1 (*contd.*)

[2] This section applies to judgments in trial. ('04) 1 Cri L Jour 969 (970) (DB) (Bom). (Order under S. 195—Record of reasons not necessary.)

[3] This section does not apply to orders on petitions. ('72) 1872 Rat 61 (61) (DB).

[4] This section has no application to appeals. (Vol 27) 1940 Oudh 369 (371) : 41 Cri L Jour 711 : 15 Luck 662 (D B).

2. Judgment — Meaning of. — [1] The word “judgment” means a decision in a trial which decides a case finally so far as the Court trying the case is concerned, and terminating in either a conviction or acquittal of the accused. ('01) 28 Cal 652 (660) (FB). (Order of discharge is not a judgment.) \* (1902) 29 Cal 726 (733) (FB). (Do.) \* ('09) 9 Cri L Jour 80 (82) : 31 Mad 543 (D B). (Do.) \* ('07) 5 Cri L Jour 255 (256) (D B) (Bom). (Do)

[2] An order of appellate Court requiring the trial Court to take further evidence is not a judgment. (Vol 27) 1940 Oudh 396 (397) : 41 Cri L Jour 725.

3. Language of the judgment. — [1] Writing the judgment in any other language than the Court language or in English is only an irregularity which can be cured by the provisions of S. 537. ('06) 4 Cri L Jour 162 (163) (D B) (Cal).

4. “Written by the presiding officer”. — [1] Trial by Bench of Magistrates—President of the Bench in a minority as to conviction or acquittal — Judgment should be written by some member of the majority. (Vol 15) 1928 Mad 197 (197) : 51 Mad 338 : 29 Cri L Jour 207 \* (Vol 13) 1926 Mad 354 (355) : 27 Cri L Jour 90.

5. Contents of judgment — General. — [1] The provisions of the section are mandatory and are intended to constitute the substance as distinguished from mere form of the judgment. ('12) 13 Cri L Jour 559 (560) : 8 Nag L R 84 \* (Vol 27) 1940 Sind 113 (114) : 41 Cri L Jour 724 (DB) \* (Vol 24) 1937 Nag 122 (122) : 1 L R (1936) Nag 217 : 39 Cri L Jour 370.

[2] The object of the section is that the Court should direct its own attention to every material question of fact or law and arrive at definite conclusions after considering the evidence in the case. ('97) 19 All 506 (507) (F B) \* (Vol 19) 1932 Sind 180 (180) : 34 Cri L Jour 163 (D B) \* (Vol 17) 1930 Lah 1054 (1055) : 32 Cri L Jour 252. (Judgment consisting of few notes of arguments and a vague conclusion is no judgment.) \* (Vol 28) 1941 Oudh 575 (576) : 42 Cri L Jour 633. (Order-sheet is no substitute for judgment.) \* (Vol 23) 1936 Nag 160 (160) : 1 L R (1937) Nag 38 : 39 Cri L Jour 349. (Recording order of a few brief sentences in order-sheet—No legal judgment.)

[3] Substantial compliance indicated in the body of the judgment. — Failure to conform to provisions of

the section is a mere irregularity curable under S. 537. (Vol 24) 1937 Nag 122 (122) : 1 L R (1936) Nag 217 : 39 Cri L Jour 370.

[4] Section 367 is not exhaustive—It merely states as to what must be found in the judgment—Trial by assessors — Passages under heading ‘General remarks’ form part of the judgment. (Vol 33) 1946 Sind 121 (124) : 47 Cri L Jour 374 (D B).

[5] Trial of two closely connected cases — Detailed judgment containing complete recital of facts in the more important case is enough and the judgment in lesser important case need not refer to it—But evidence admissible only in one of the two cases should not be referred to or relied upon to acquit or convict in the other case. (Vol 7) 1920 All 79 (79, 80) : 21 Cri L Jour 442 \* (Vol 14) 1927 Mad 56 (57) : 27 Cri L Jour 1164. (Joint trial of several accused for various offences, some triable by jury and some by assessors — Judgment in respect of offences triable by assessors merely referring to the charge to the jury but not giving reasons for agreeing with them—*Held*, S. 367 was not complied with in respect of offences triable with assessors.)

[See (Vol 33) 1946 Mad 465 (465, 466).]

[6] A judgment once delivered cannot be supplemented by means of an explanation furnished to the superior Court. ('08) 7 Cri L Jour 312 (312) (D B) (Cal) \* ('98) 25 Cal 625 (626) (D B).

[7] Case forwarded to superior Magistrate under S. 349 — Superior Magistrate should write an independent judgment. (Vol 26) 1939 Oudh 35 (36) : 39 Cri L Jour 1005 \* (Vol 6) 1919 Pat 290 (290) : 20 Cri L Jour 444.

[8] Document prepared by a party should not be incorporated in the judgment unless its correctness has been checked by the Court. (Vol 7) 1920 Cal 87 (89) : 47 Cal 154 : 21 Cri L Jour 386 (D B). (Certain statements prepared by the Public Prosecutor.)

[9] A judgment should not be unnecessarily long. (Vol 20) 1933 Mad 233 (239) : 56 Mad 231 : 34 Cri L Jour 481 (D B).

[10] Judgment merely recording a finding on facts and evidence as explained to the assessors in summing up does not comply with this section. ('09) 10 Cri L Jour 325 (334) (DB) (Cal).

6. Points for determination. — [1] To ascertain and define distinctly the point or points for determination is the very essence of a sound and stable judgment. (Vol 21) 1934 Sind 89 (92) : 28 Sind L R 12 : 36 Cri L Jour 53 (D B).

[2] Judgment which does not set forth the points for determination is defective. (Vol 21) 1934 Sind 89 (92) : 28 Sind L R 12 : 36 Cri L Jour 53 (D B) \* ('96) 1896 Rat 844 (845).

[3] A judgment should commence with a statement of the facts in respect of which the accused is charged

Section 367 — Note 6 (*contd.*)

and not with circumstances which might be held to provide a motive for the offence. (Vol 22) 1935 Nag 31 (33).

[4] Court should set forth points of decision in such a shape that at the first glance it may be apparent to itself and the appellate tribunal that nothing which is material has been overlooked. (Vol 19) 1932 Sind 143 (144) : 33 Cri L Jour 900 (DB).

[5] Where the appellate Court is other than a High Court the appellate judgment should embody the point for determination, the decision thereon and the reasons therefor. Otherwise grave injustice will be caused to the accused. (Vol 32) 1945 Oudh 52 (53) : 46 Cri L Jour 684.

7. "Decision thereon" — Appreciation of evidence.—[1] In criminal cases, before the accused can be convicted, there should be such a moral certainty of his guilt as convinces the mind of the tribunal as reasonable men beyond the possibility of doubt or suspicion. (Vol 33) 1946 All 191 (195) (D B) \* (Vol 31) 1944 Sind 33 (38) : ILR (1944) Kar 123 : 45 Cri L Jour 650 (D B) \* (Vol 30) 1943 Lah 298 (299, 301) : 45 Cri L Jour 149 (D B) \* (Vol 30) 1943 Lah 56 (58) : 44 Cri L Jour 397 (D B) \* (Vol 27) 1940 Mad 1 (2) : 41 Cri L Jour 369 \* (Vol 20) 1933 P C 218 (221) : 34 Cri L Jour 886 (P C).

[2] It is primarily the duty of the prosecution to establish the guilt of the accused to the satisfaction of the Court. (Vol 31) 1944 Pat 345 (346) : 23 Pat 1 : 46 Cri L Jour 86 (DB) \* (Vol 30) 1943 Mad 590 (591) : 44 Cri L Jour 783 \* (Vol 20) 1933 All 893 (894) : 56 All 250 : 35 Cri L Jour 621 \* (Vol 4) 1917 All 81 (84) : 18 Cri L Jour 317 (D B) \* (Vol 21) 1934 Cal 407 (408) : 35 Cri L Jour 712 (D B) \* (Vol 13) 1926 Lah 375 (376) : 27 Cri L Jour 593 \* (Vol 19) 1932 Cal 293 (294) : 59 Cal 136 : 33 Cri L Jour 441 (D B) \* (Vol 17) 1930 Oudh 321 (323) : 31 Cri L Jour 1078 : 6 Luck 68 \* (Vol 20) 1933 Oudh 372 (373) : 35 Cri L Jour 66 (D B).

[3] It is the duty of the accused to establish his own innocence. (Vol 31) 1944 Lah 113 (115) : 45 Cri L Jour 571 \* (Vol 31) 1944 Lah 97 (101) : 45 Cri L Jour 634 (DB) \* (Vol 31) 1944 Sind 94 (96) : I L R (1943) Kar 294 : 45 Cri L Jour 526 (DB) \* (Vol 30) 1943 Pat 446 (452) : 22 Pat 614 : 45 Cri L Jour 557 (DB) \* (Vol 30) 1943 Pat 361 (363) : 22 Pat 423 : 45 Cri L Jour 301 (DB) \* (Vol 27) 1940 Mad 1 (2) : 41 Cri L Jour 369 \* (Vol 14) 1927 All 618 (619) : 28 Cri L Jour 808 \* (Vol 20) 1933 Cal 532 (534) : 60 Cal 656 : 34 Cri L Jour 1059 \* (Vol 5) 1918 Nag 123 (124) : 20 Cri L Jour 747.

[4] Prosecution should establish the case against the accused by positive affirmative evidence of his guilt and not by merely creating a suspicion. (Vol 27) 1940 Pat 365 (371) : 41 Cri L Jour 114 (DB) \* (Vol 22) 1935 Oudh 33 (34, 35) : 36 Cri L Jour 246 (DB) \* (Vol 21) 1934 Cal 407 (408) : 35 Cri L Jour 712 (DB) \* (Vol 13) 1926 Pat 5 (8) : 26 Cri L Jour 1589 (DB) \* (25) 26 Cri L Jour 33 (40) (DB) (Cal) \* ('92) 5 C P L R 11 (12) \* (Vol 18) 1931 Lah 406 (408) : 32 Cri L Jour 1049 \* (Vol 20) 1933 Oudh 148 (151) : 34 Cri L Jour 498 : 8 Luck 301 (DB) \* (Vol 15) 1928 Lah 272 (273) : 9 Lah 531 : 29 Cri L Jour 481 (DB) \* (Vol 2) 1915 Low Bur 115 (118) : 16 Cri L Jour 25 (DB) \* (Vol 20) 1933 Pesh 28 (30) : 34 Cri L Jour 386 (DB) \* (Vol 21) 1934 Lah 693 (694) : 36 Cri L Jour 778 \* (Vol 20) 1933 All 394 (395) : 34 Cri L Jour 754 (DB).

[5] The onus cast on the prosecution is not discharged by any absence of explanation or weakness on the part of the accused. (Vol 31) 1944 F C 1 (17, 18) : 1944 F C R 61 : I L R (1944) Nag 300 : 23 Pat 159 : ILR (1944) Kar F C 8 : 45 Cri L Jour 418 (FC) \* (Vol 30) 1943 Lah 293 (301) : 45 Cri L Jour 149 (DB) \* (Vol 29) 1942 All 47 (50) : I L R (1941) All 912 : 48 Cri L Jour 380.

[6] The fact that the defence put forward by the accused was found to be false does not discharge the prosecution from clearly proving the guilt. (Vol 27) 1940 Pat 365 (370) : 41 Cri L Jour 114 (DB) \* (Vol 22) 1935 All 162 (173) : 36 Cri L Jour 634 (DB) \* (Vol 21) 1934 Sind 22 (26) : 36 Cri L Jour 318 : 28 Sind L R 84 \* (Vol 3) 1916 All 63 (64) : 17 Cri L Jour 23 \* (Vol 12) 1925 Lah 42 (43) : 26 Cri L Jour 393 \* (Vol 20) 1933 Lah 946 (947) : 35 Cri L Jour 79 \* (11) 12 Cri L Jour 584 (584) (Low Bur) \* (Vol 8) 1921 Cal 531 (532) : 23 Cri L Jour 220 (DB) \* (Vol 20) 1933 Cal 603 (605) : 34 Cri L Jour 1073 (DB).

[7] Prosecution evidence exaggerated — Prosecution evidence should not be rejected wholly on that ground. (Vol 34) 1947 Sind 41 (43) (DB).

[8] The guilt of the accused should be proved strictly in accordance with law. (Vol 8) 1921 Pat 406 (408) (DB) \* ('32) 33 Cri L Jour 514 (516) (DB) (Oudh) \* ('32) 33 Cri L Jour 677 (677) (DE) \* (Vol 12) 1925 Oudh 676 (676) : 26 Cri L Jour 1042 \* (Vol 33) 1946 Nag 321 (332) : I L R (1946) Nag 946.

[9] The procedure adopted in the following cases has been held to be improper :

(a) Enquiring after close of case and acting upon statements and matters not made evidence on records. (Vol 28) 1941 Bom 412 (413) : 43 Cri L Jour 213 (DB) \* ('81) 7 Cal L Rep 193 (195) (DB) \* (Vol 15) 1928 Lah 113 : 9 Lah 537 : 29 Cri L Jour 815 \* (Vol 15) 1928 Lah 125 (131) : 29 Cri L Jour 212 \* ('89) 1889 All W N 181 (184) \* ('85) 1885 All W N 31 (31) \* (Vol 20) 1933 Cal 36 (39) : 34 Cri L Jour 36.

(b) Judge allowing himself to be influenced by proceedings in another trial. (Vol 1) 1914 Cal 634 (634) : 15 Cri L Jour 191 (DB) \* (Vol 13) 1926 Cal 945 (946) : 53 Cal 471 : 27 Cri L Jour 975 (DB) \* (Vol 17) 1930 All 481 (482) : 31 Cri L Jour 716 (DB) \* (Vol 12) 1925 All 443 (444) : 26 Cri L Jour 981 \* (Vol 15) 1928 Lah 923 (924) : 29 Cri L Jour 734.

(c) Judge becoming influenced by a proceeding or evidence in that which is before him. ('95) 22 Cal 998 (1002, 1003) (DB) \* ('71) 6 Beng L R App 83 (84) (DB) \* ('85) 1885 All W N 28 (29) (DB) \* (Vol 15) 1928 Lah 923 (924) : 29 Cri L Jour 734.

[10] Judge recording conviction — Care should be taken to see whether offence has been established and also whether they bring the case under any of the exception to the offence. (Vol 16) 1929 Cal 346 (348) : 56 Cal 1013 : 31 Cri L Jour 369 \* (Vol 9) 1922 Lah 314 (315) : 22 Cri L Jour 507 \* (Vol 4) 1917 All 54 (58) : 18 Cri L Jour 803. (It becomes imperative to see whether facts bring the case under an exception where accused raises the plea.) \* (Vol 12) 1925 Rang 133 (134) : 26 Cri L Jour 409 : 2 Rang 558. (Do.) \* (Vol 14) 1927 Lah 786 (788) : 28 Cri L Jour 838. (Do.) \* ('12) 13 Cri L Jour 470 (471) (Mad). (Do.) \* (Vol 14) 1927 Cal 324 (326) : 28 Cri L Jour 334 (DB). (Do.) \* (Vol 13) 1926 Pat 433 (434) : 27 Cri L Jour 1322 : 5 Pat 520 (DB). (Do.)

[11] Effect of evidence adduced, depends on the quality and weight of the evidence adduced and not to the number of witnesses examined. (Vol 22) 1935 All 850 (851) : 36 Cri L Jour 1362 (DB) \* (Vol 7) 1920 Pat 366 (367) : 21 Cri L Jour 33 \* (Vol 15) 1928 Mad 1135 (1136) : 29 Cri L Jour 1041 \* (Vol 8) 1921 Oudh 115 (115) : 22 Cri L Jour 647 : 24 Oudh Cas 225 \* (Vol 12) 1925 Oudh 501 (501) : 27 Oudh Cas 327 : 26 Cri L Jour 530 \* (Vol 18) 1931 All 362 (363) : 53 All 598 : 32 Cri L Jour 780 \* (Vol 9) 1922 Pat 88 (91) (DB) \* (Vol 17) 1930 Lah 892 (893) : 32 Cri L Jour 444 \* (Vol 21) 1934 Lah 158 (160) : 36 Cri L Jour 108 (DB).

[12] It is open to the Court in its judgment to rely on the evidence of a particular person even though such person may be interested. (Vol 17) 1930 Cal 645 (646) : 31 Cri L Jour 1225 \* (Vol 15) 1928 Mad 1186



Section 367—Note 7 (*contd.*)

(1190) : 51 Mad 956 : 50 Cri L Jour 317 (FB) \* (29)  
1920 Mad W N 587 (560) (DB) \* (Vol 34) 1947 Lah 73  
(75) (DB).

[See however (Vol 27) 1940 Pat 365 (370) : 41 Cri  
L Jour 114 (DB).]

[13] Evidence of witness whose relations with accused  
are strained—Such evidence must be received with great  
caution, but need not be rejected on that ground alone.  
(Vol 34) 1947 All 67 (67).

[14] The whole evidence should be rejected where a  
part is found false unless the other part is corroborated  
by independent evidence. (Vol 31) 1944 F C 1 (17) :  
1944 F C R 61 : I L R (1944) Nag 300 : 23 Pat 159 :  
I L R (1944) Kar F C 8 : 45 Cri L Jour 413 (FC) \*  
(Vol 27) 1940 Lah 157 (158) : 41 Cri L Jour 576 (DB).

[See however (Vol 1) 1914 Lah 93 (94) : 15 Cri  
L Jour 148 (DB) \* (Vol 18) 1931 Pat 384 (385) : 10 Pat  
590 : 33 Cri L Jour 111 (DB).]

[15] In capital cases the evidence of persons who  
have resiled from their former statements should not be  
relied upon. (Vol 21) 1934 Oudh 507 (512) : 36 Cri  
L Jour 86 (DB) \* (Vol 11) 1924 Nag 281 (282) : 25 Cri  
L Jour 356 \* (Vol 12) 1925 Mad 879 (880) : 27 Cri L Jour  
18 (DB).

[See however ('30) 1930 Mad W N 345 (346) (DB).]

[16] The Court should not accept the following  
evidence blindly in preference to respectable eye-wit-  
nesses:

(a) Medical men. ('89) 1889 All W N 74 (75) (DB) \*  
(Vol 11) 1924 Bom 457 (459) (DB) \* (Vol 10) 1923 Cal  
116 (120) : 50 Cal 100 (DB).

(b) Experts. ('12) 13 Cri L Jour 226 (231) : 36 Mad  
159 (DB) \* ('10) 11 Cri L Jour 114 (116) : 13 Oudh Cas 1 \*  
(09) 9 Cri L Jour 498 (501) (DB) (All) \* (Vol 12) 1925 Oudh  
413 (415) : 26 Cri L Jour 929 : 29 Oudh Cas 1 \*  
(Vol 19) 1932 Lah 490 (490) : 33 Cri L Jour 593 \* ('12)  
13 Cri L Jour 563 (564) (Lab) \* ('05) 2 Cri L Jour 353  
(355) (DB) (All) \* (Vol 9) 1922 Pat 73 (75) : 1 Pat 242  
: 23 Cri L Jour 638 (DB).

[See however (Vol 10) 1923 Mad 178 (179) : 46 Mad  
715 : 23 Cri L Jour 694 (DB).]

[But see (Vol 17) 1930 Lah 667 (668) : 31 Cri L  
Jour 877.]

(c) Identifying witness. (Vol 14) 1927 Cal 820 (821)  
: 28 Cri L Jour 874 (DB) \* (Vol 19) 1932 Oudh 99 (102)  
: 7 Luck 552 : 33 Cri L Jour 381 (DB) \* (Vol 20) 1933  
Oudh 49 (49, 50) : 34 Cri L Jour 382 \* (Vol 19) 1932  
Sind 55 (58) : 33 Cri L Jour 641 (DB) \* (Vol 16) 1929  
Sind 149 (149, 150) : 30 Cri L Jour 456 (DB) \* ('04) 1  
Cri L Jour 475 (476) : 2 Low Bur Rul 206 \* (Vol 21)  
1934 Lah 641 (647) : 36 Cri L Jour 121 \* (Vol 16)  
1929 All 928 (929) : 31 Cri L Jour 206 \* (Vol 17) 1930  
All 746 (748) : 32 Cri L Jour 152 (DB) \* (Vol 12) 1925  
Lah 19 (20) : 5 Lah 396 : 27 Cri L Jour 170 (DB).

[See however (Vol 14) 1927 Oudh 196 (197) : 2  
Luck 444 : 28 Cri L Jour 460 \* (Vol 3) 1916 Lah 297  
(297) : 17 Cri L Jour 156 (DB).]

[17] Judgment should not be based upon :

(a) Judge's own theories unsupported by evidence.  
(Vol 29) 1942 All 47 (48) : I L R (1941) All 912 : 43  
Cri L Jour 380 \* (Vol 21) 1934 All 714 (715) : 35 Cri L  
Jour 1289 \* (Vol 20) 1933 Oudh 566 (567) : 35 Cri L  
Jour 278 \* (Vol 11) 1924 Pat 813 (815) : 25 Cri L Jour  
724 \* (Vol 4) 1917 Lah 48 (48) : 18 Cri L Jour 490 :  
1917 Pun. Re No. 1 Or (DB) \* (Vol 11) 1924 Cal  
611 (613) : 26 Cri L Jour 71 (DB) \* (Vol 17) 1930  
Oudh 460 (463) : 32 Cri L Jour 94 (DB).

(b) Judge's personal knowledge. (Vol 29) 1942 Lah  
232 (234) : 43 Cri L Jour 308 \* (Vol 21) 1934 All 776  
(782) : 35 Cri L Jour 919 (DB) \* (Vol 11) 1924 Rang  
17 (171) : 1 Rang 290 : 25 Cri L Jour 185 \* ('02) 6  
Oudh Cas 204 (211) \* (Vol 6) 1919 Pat 111 (115) : 20

Cri L Jour 289 (DB) \* (Vol 6) 1919 All 345 (347) : 20  
Cri L Jour 283 (DB) \* ('04) 1 Cri L Jour 539 (539)  
(DB) (Bom) \* ('04) 1 Cri L Jour 99 (101) : 1903 Pun  
Re No 27 Cr \* (Vol 18) 1931 Sind 127 (128) : 25 Sind  
L R 213 : 32 Cri L Jour 923 (DB) \* (Vol 12) 1925 Lah  
166 (167) : 25 Cri L Jour 808.

(c) Hypothetical facts not put forward by the pro-  
secution or suggested to the accused as the case he has  
to meet with. (Vol 14) 1927 Lah 728 (728) : 28 Cri L  
Jour 405 \* ('10) 11 Cri L Jour 245 (246) (DB) (Cal) \*  
(26) 27 Cri L Jour 1346 (1346) (All).

[18] Suggestions by counsel in cross-examination  
are of no evidentiary value unless accepted by the wit-  
ness or proved by other evidence. (Vol 19) 1932 Cal 375  
(377) : 33 Cri L Jour 725 (DB).

[19] The evidence relating to alibi should be scru-  
tinised very carefully. (Vol 15) 1928 Mad 791 (793) : 29  
Cri L Jour 717 (DB) \* (Vol 20) 1933 Oudh 369 (370) :  
34 Cri L Jour 1146.

[20] The standard of proof required in criminal  
cases does not vary with the magnitude or enormity of  
the crime. (Vol 30) 1943 Pat 163 (168) : 21 Pat 865 :  
44 Cri L Jour 507 (DB) \* (Vol 20) 1933 All 834 (835) :  
55 All 639 : 35 Cri L Jour 353 (DB) \* (Vol 20) 1933  
Sind 166 (168) : 34 Cri L Jour 808 (DB) \* (Vol 5) 1918  
Cal 314 (316) : 19 Cri L Jour 81 (DB) \* (Vol 7) 1920  
Pat 616 (620) : 23 Cri L Jour 154 (DB).

[21] In cases based on circumstantial evidence, such  
evidence should very clearly point to the guilt of the  
accused. ('34) 35 Cri L Jour 286 (288) (DB) (Oudh) \*  
(Vol 17) 1930 Mad 632 (635) : 53 Mad 590 : 31 Cri L  
Jour 712 (DB) \* (Vol 33) 1946 All 191 (193) (DB).  
(Inculpatory facts should be incompatible with inno-  
cence.) \* (Vol 30) 1943 Lah 56 (58) : 44 Cri L Jour  
397 (DB). (Do.) \* (Vol 27) 1940 Mad 1 (4) : 41 Cri L  
Jour 369. (Do.) \* ('35) 36 Cri L Jour 304 (305) (DB).  
(Lab). (Do.) \* (Vol 21) 1934 Cal 124 (126) : 60 Cal 1339 :  
35 Cri L Jour 567 (DB). (Do.) \* (Vol 19) 1932 Oudh 251  
(253) : 6 Luck 658 : 32 Cri L Jour 1184. (Do.) \* ('29) 30  
Cri L Jour 757 (759) (DB) (All). (Do.) \* (Vol 7) 1920 Pat  
674 (676) : 21 Cri L Jour 278 (DB). (Do.) \* (Vol 15) 1928  
Nag 257 (261) : 29 Cri L Jour 561 (Do.) \* (Vol 15) 1928 Bom  
130 (131) : 52 Bom 385 : 29 Cri L Jour 403 (DB). (Do.) \*  
(Vol 19) 1932 Oudh 324 (325, 326) : 7 Luck 623 : 33 Cri L  
Jour 379 (DB). (Do.) \* ('04) 1 Cri L Jour 124 (130) (FB)  
(Cal). (Do.) \* (Vol 31) 1944 Sind 113 (118, 119) : ILR (1943)  
Kar 371 : 45 Cri L Jour 704 (DB). (Two constructions pos-  
sible—Theory of innocence must prevail.) \* (Vol 14) 1927  
Pat 292 (296) : 28 Cri L Jour 611. (Do.) \* ('13) 14 Cri L  
Jour 251 (252) (DB) (Bom). (Do.) \* (Vol 17) 1930 Sind  
99 (101) : 24 Sind L R 96 : 31 Cri L Jour 117 (DB).  
(Do.) \* (Vol 18) 1931 Mad 689 (693) : 54 Mad 931 : 33  
Cri L Jour 51 (DB). (Do.)

[22] Absolute certainty amounting to a demonstration  
of guilt can seldom be had and it must only be judged  
whether, in the circumstances of each particular case, the  
degree of probability is so high as to justify one in regard-  
ing it as certainty and in acting accordingly. (Vol 3) 1916  
Cal 524 (523) : 16 Cri L Jour 576 (SB) \* (Vol 20) 1933  
Oudh 340 (342) : 34 Cri L Jour 538 (DB) \* ('26) 27  
Cri L Jour 775 (775) (DB) (Lab). (Number of facts each  
having probative value—Cumulative effect justifying  
conviction sufficient.) \* (Vol 14) 1927 Pat 257 (261) : 28  
Cri L Jour 497 (DB). (Collection of facts each insufficient  
for conviction but indicating innocence—They have no  
evidentiary value.)

[23] Evidence for the prosecution case is in the main  
trustworthy. (Vol 21) 1934 Sind 6 (7) : 35 Cri L Jour  
736 (DB) \* (Vol 21) 1934 Oudh 405 (411) : 35 Cri L  
Jour 1113 (DB) \* (Vol 17) 1930 Sind 225 (238, 243) :  
31 Cri L Jour 1026 (DB) \* (Vol 9) 1922 Nag 172 (174) :  
28 Cri L Jour 391 \* (Vol 21) 1934 Lah 413 (415) : 15



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Lah 814 : 36 Cri L Jour 97 (DB) \* (Vol 17) 1930 Lah 490 (490) : 31 Cri L Jour 1069 (DB) \* ('29) 1929 Mad W N 946 (950) (DB) \* ('29) 1929 Mad W N 592 (595) (DB) \* (Vol 8) 1921 Pat 109 (111) : 6 Pat L Jour 147 : 22 Cri L Jour 417 (DB) \* (Vol 20) 1933 Oudh 333 (335, 336) : 35 Cri L Jour 45 : 8 Luck 570 (DB).

[24] Discrepancies in detail does not make the evidence unsupportable. (Vol 31) 1944 Lah 97 (101) : 45 Cri L Jour 634 (DB) \* (Vol 10) 1923 Cal 463 (466) : 24 Cri L Jour 193 (DB) \* (Vol 10) 1923 Oudh 217 (219) : 24 Cri L Jour 770 (DB) \* ('12) 13 Cri L Jour 300 (300) (DB) (Bom) \* (Vol 15) 1928 Pat 190 (101) : 6 Pat 627 : 29 Cri L Jour 239 (DB) \* (Vol 21) 1934 Lah 710 (714) : 36 Cri L Jour 419 (DB).

[See however (Vol 22) 1935 All 162 (171) : 36 Cri L Jour 684 (DB). (Discrepancies in detail going to the root—Evidence is not supportable.) \* ('29) 1929 Mad W N 592 (595) (DB). (Do.) \* (Vol 20) 1933 Oudh 226 (228, 229) : 3 Luck 397 : 34 Cri L Jour 935 (DE). (Do.) \* (Vol 2) 1915 Lah 433 (438) : 16 Cri L Jour 699 : 1915 Pun Re No. 51 Cr. (Do.)]

[25] Defence witnesses not cross-examined and their evidence standing un rebutted—The evidence may be accepted. (Vol 30) 1943 Mad 590 (591) : 44 Cri L Jour 783.

[26] Case against jail official for offence committed in jail premises — Evidence of other convicts is not unreliable. (Vol 27) 1940 Lah 210 (213, 214) : ILR (1940) Lah 521 : 41 Cri L Jour 639.

[27] The accused is entitled to the benefit of any doubt which may reasonably arise in the prosecution case. (Vol 30) 1943 Pat 82 (87) : 21 Pat 667 : 44 Cri L Jour 337 (DB) \* (Vol 28) 1941 Mad 870 (872) : 43 Cri L Jour 596 (DB) \* (Vol 23) 1941 Mad 238 (243, 244) : 42 Cri L Jour 654 (DB) \* (Vol 27) 1940 Lah 217 (220, 221) : 41 Cri L Jour 667 (DB) \* (Vol 27) 1940 Pat 365 (371) : 41 Cri L Jour 114 (DB) \* (Vol 21) 1934 Pesh 53 (57) : 35 Cri L Jour 860 (DB) \* (Vol 21) 1934 Rang 44 (47) : 35 Cri L Jour 855 (DB) \* (Vol 20) 1933 Oudh 457 (459) : 35 Cri L Jour 299 (DB) \* (Vol 20) 1933 Oudh 399 (400) : 35 Cri L Jour 185 (DB) \* (Vol 9) 1922 Lah 55 (56) (DB) \* (Vol 4) 1917 All 394 (395) : 18 Cri L Jour 435 \* (Vol 4) 1917 Cal 687 (687) : 17 Cri L Jour 9 (DB) \* ('29) 30 Cri L Jour 727 (728) (Nag) \* (Vol 20) 1933 Rang 117 (118) : 34 Cri L Jour 794 \* (Vol 3) 1916 All 363 (366) : 17 Cri L Jour 102 (DB) \* (Vol 18) 1931 Cal 752 (757) : 33 Cri L Jour 85 (DB).

[28] The judgment should scrutinise and discuss the oral and documentary evidence in the case. (Vol 30) 1943 Pat 131 (133) : 21 Pat 854 : 44 Cri L Jour 356 (DB) \* (Vol 21) 1934 All 776 (782) : 35 Cri L Jour 919 (DB).

[29] The judgment should contain findings that all the ingredients required to make up the offence are proved or are not proved as the case may be. (Vol 7) 1920 Nag 71 (73) : 21 Cri L Jour 140 \* (Vol 17) 1930 Lah 1051 (1052) : 32 Cri L Jour 271.

[30] Where the Judge makes any local inspection, the nature of such inquiry should be set forth in the judgment if it has influenced his judgment. ('96) 1896 All W N 73 (74) \* (Vol 12) 1925 Cal 353 (353) : 25 Cri L Jour 705 (DB).

8. Reasons for decision. — [1] The judgment should contain a discussion of the evidence. (Vol 30) 1943 Cal 612 (613) : 45 Cri L Jour 170 (DB) \* (Vol 24) 1937 Nag 394 (395, 396) : 39 Cri L Jour 75 : I L R (1938) Nag 157. (A mere statement in the judgment that the Magistrate has gone carefully through the whole evidence and that there are many discrepancies in the depositions of witnesses is no discussion of the evidence at all.) \* (Vol 25) 1938 Cal 551 (552) : 39 Cri

L Jour 835 (DB). (Merely stating that Judge agrees with the assessors is no judgment)

[2] A Court is entitled to and should select such important evidence as it considers necessary to support a decision on the material points arising for consideration. (Vol 21) 1934 All 776 (782) : 35 Cri L Jour 919 (DB) \* (Vol 24) 1937 Cal 99 (112) : 38 Cri L Jour 818 (SD) \* (Vol 26) 1939 Rang 263 (266) : 40 Cri L Jour 871 (DB) \* (Vol 20) 1933 All 690 (696) : 34 Cri L Jour 967 : 55 All 1040 (DE) \* (Vol 11) 1924 Pat 181 (182) : 24 Cri L Jour 181.

[3] It is not proper to base a conviction merely on the appearance and manner of speech of the accused. ('22) 23 Cri L Jour 161 (162) (Lah).

[4] Where there are several accused persons, the judgment should analyse the evidence against each of them separately. (Vol 27) 1940 Sind 113 (113, 114) : 41 Cri L Jour 724 (DB) \* (Vol 25) 1938 Pat 34 (35) : 39 Cri L Jour 221 \* (Vol 24) 1937 Sind 26 (27, 28) : 30 Sind L R 332 : 38 Cri L Jour 363 (DB) \* (Vol 11) 1924 Oudh 335 (336) : 27 Oudh Cas 32 : 25 Cri L Jour 913 \* (Vol 11) 1924 Mad 350 (351) : 25 Cri L Jour 790 \* (Vol 11) 1924 Rang 67 (67) : 25 Cri L Jour 205 \* ('33) 1883 All W N 145 (146) \* (Vol 3) 1916 Mad 834 (834) : 16 Cri L Jour 809.

[See also (Vol 30) 1943 Pat 417 (418) : 45 Cri L Jour 406.]

[5] The Court should arrive at an independent conclusion on the case before it. (Vol 27) 1940 All 18 (19) : ILR (1939) All 865 : 41 Cri L Jour 220. (Appellate judgment.)

[6] A reference to the opinion of the Advocate-General or the Public Prosecutor in the judgment is irrelevant. (Vol 5) 1918 Bom 226 (227, 228) : 42 Bom 400 : 19 Cri L Jour 607 (DB).

9. Remarks in the judgment. — [1] Remarks against persons neither parties nor witnesses before the Court should be avoided in the judgment. (Vol 30) 1943 Lah 298 (302) : 45 Cri L Jour 149 (DB) \* (Vol 29) 1942 Lah 232 (233, 234) : 43 Cri L Jour 808 \* (Vol 27) 1940 Mad 134 (134) : 41 Cri L Jour 317 \* (Vol 25) 1938 Sind 103 (105) : 39 Cri L Jour 524 (DB) \* (Vol 21) 1934 Sind 68 (69) : 35 Cri L Jour 1138 (DB) \* (Vol 8) 1921 Bom 394 (395) : 45 Bom 1127 : 22 Cri L Jour 335 (DB) \* ('97) 21 Mad 83 (91) (DB) \* ('90) 18 Cal 201 (214) : 17 Ind App 159 (PC). (Civil case.)

[2] Any unfounded and unnecessary observations which are calculated to injure the reputation or wound the feelings of parties or witnesses should be avoided in the judgment. (Vol 24) 1937 Oudh 277 (278, 279) : 38 Cri L Jour 376 \* ('67) 8 Suth W R Cr 13 (15) (DB) \* ('11) 12 Cri L Jour 464 (465) (Low Bur) \* ('75) 23 Suth W R Cr 65 (66) (DB) \* (Vol 30) 1943 Lah 298 (302) : 45 Cri L Jour 149 (DB) \* (Vol 27) 1940 Lah 42 (43) : 41 Cri L Jour 380. (Judge is entitled to pass remarks in judgment on conduct of party or witness provided remarks are justified by findings.)

[3] Unfounded remarks against the conduct of counsel should not find a place in the judgment. (Vol 1) 1914 Oudh 171 (173) : 15 Cri L Jour 420 \* ('77) 1 Cal L Rep 62 (64).

[4] Factionous comments which do not contribute to the disposal of the case and which are likely to wound the feelings of persons should be avoided. ('11) 12 Cri L Jour 464 (464) (Low Bur) \* ('82) 5 C P L R Cr 24 (27) \* ('31) 1931 Mad W N 1152 (1156) \* ('12) 13 Cri L Jour 259 (265) (Low Bur) \* (Vol 33) 1946 Nag 321 (329) : I L R (1946) Nag 946 (DB).

[5] A judgment should not contain any remarks calculated to throw doubt on the conclusion which it embodies. (Vol 25) 1938 Sind 103 (105) : 39 Cri L Jour 524 (DB) \* (Vol 33) 1946 Sind 121 (124) : ILR (1946) Kar 263 (DB). (Mere fact that Judge while acquitting accused

**Section 367—Note 9 (contd.)**

says that benefit of doubt was given to him and there remained suspicion though not proof against him does not make it inconsistent with acquittal.) \* (Vol 9) 1922 Pat 97 (99) : 23 Cri L Jour 371 \* ('78) 2 All 33 (35) (SB) \* ('80) 1930 Mad W N 1253 (1254).

[6] In cases which have assumed a communal aspect, the language of the judgment should not be such as to promote communal enmity. (Vol 23) 1936 Lah 429 (433) : 37 Cri L Jour 661.

10. Offence to be specified.—[1] Where a Judge convicts the accused on a charge of culpable homicide not amounting to murder, he should state in his judgment under which of the exceptions in S. 300 of the Penal Code the case falls. ('66) 1 Agra H C R Cr 3 (6) (DB).

11. "Punishment to which he is sentenced."—[1] Where a Court finds an accused person guilty, it is bound to pass some sentence. ('84) 1884 All W N 219 (219) \* ('95) 22 Cal 805 (809) (DB).

[But see (Vol 15) 1928 Nag 188 (189) : 24 Nag L R 110 : 29 Cri L Jour 506.]

[2] A Court has no power to postpone the passing of the sentence to some future date once it convicts the accused. ('12) 13 Cri L Jour 288 (288) (DB) (Bom).

[3] The sentence ought to be self-contained so that the functionary who has to execute it should have nothing to do but to obey the directions given therein. ('01) 24 Mad 13 (15, 16) (DB) \* ('93) 15 All 208 (209) (DB). (Direction to detain for 5 years in Reformatory School unless he attains majority before the period — Not a legal sentence.)

[4] Order disqualifying a person from holding driving licence is not a punishment falling within this section. (Vol 32) 1945 Mad 27 (28) : 1 L R (1945) Mad 315 : 46 Cri L Jour 300.

12. "Shall be dated and signed by the presiding officer . . . . at the time of pronouncing it."—[1] A judgment is not complete until (1) it is written, (2) signed, (3) dated and pronounced in open Court. The last three must take place on the same occasion. (Vol 4) 1917 Mad 340 (341) : 17 Cri L Jour 166 : 40 Mad 108 (DB) \* ('89) 1889 Rat 429 (429) (DB).

[See (Vol 10) 1923 Rang 44 (44, 45) : 24 Cri L Jour 584 (DB). (Judgment dated and signed and sent to the clerk to deliver — Held, it cannot be treated as a mere irregularity.)]

[2] Merely putting the initials of the presiding officer has been held not to amount to signing the judgment within the meaning of this section. (Vol 17) 1930 Mad 867 (868) : 54 Mad 252 : 32 Cri L Jour 430.

[3] The signature should be made with a pen and ink and not with a stamp. ('83) 6 Mad 396 (398, 399) (DB). (Only an irregularity curable under S. 537.) \* ('70) 14 Suth W R Cr 81 (81) (DB).

[4] Omission to date and sign a judgment — Only an irregularity covered by S. 537. ('98) 2 Weir 711 (712) (DB) \* (Vol 12) 1925 All 299 (300) : 47 All 284 : 26 Cri L Jour 688 \* (Vol 17) 1930 Rang 77 (78) : 7 Rang 370 : 30 Cri L Jour 1166.

[5] Case heard by three Magistrates of a bench — Signing of it by seven is an illegality. (Vol 18) 1931 Mad 494 (495) : 32 Cri L Jour 971.

[6] The presiding officer referred to is the presiding officer at the trial who is assumed to have written and pronounced his judgment while still holding the same office. (Vol 34) 1947 Mad 248 (251, 252) : 1 L R (1947) Mad 365 : 48 Cr L J 81 (DB).

13. Judgment in the alternative — Sub-section (3). — [1] When there is a doubt as to which of the two sections or which of two parts of the same section applies an alternative judgment can be given. (Vol 32) 1945 Cal 421 (423) (DB) \* (Vol 27) 1940 Pat 289 (290) : 19 Pat 869 : 41 Cri L Jour 910 (DB) \* (Vol 8)

1921 Bom 3 (13) : 45 Bom 834 : 22 Cri L Jour 241 (FB) \* ('86) 1886 Pan Re No. 5 Cr, p. 7 (8) (DB).

[2] A judgment in the alternative can be passed only in cases in which, not the facts, but the application of the law to the facts is doubtful. (Vol 1) 1914 Lah 549 (550) : 14 Cri L Jour 664 : 1913 Pan Re No. 11 Cr \* ('75) 7 N W P H C R 137 (143) \* ('87) 1887 Pan Re No. 11 Cr, p. 19 (21, 22) (DB).

14. Judgment in cases of acquittal. — [1] Acquittal—Judgment to state of which acquitted and also direct the liberation of accused. ('92) 1892 All W N 157 (157) (DB).

[2] A mention of acquittal in the order sheet is not sufficient compliance with the provisions of sub-section (4). (Vol 28) 1941 Oudh 575 (576) : 42 Cri L Jour 638.

[3] A verdict of not guilty recorded — The Court should not, in its judgment, make any suggestion against the accused. (Vol 9) 1922 Pat 97 (99) : 23 Cri L Jour 371.

[4] As soon as a judgment of acquittal is pronounced, the accused is entitled to be discharged from custody and no formal warrant of release addressed by the Court to the Superintendent of the jail is necessary. ('69) 5 Mad H C R App ii (ii, iii).

[See also (Vol 25) 1938 All 534 (535) : 39 Cri L Jour 971.]

15. Judgment in capital cases — Sub-section (5). — [1] The reason for not giving capital sentence must be stated in the judgment. (Vol 27) 1940 Pesh 49 (51) : 42 Cri L Jour 254 (DB) \* (Vol 22) 1935 Lah 337 (338) : 36 Cri L Jour 1001 : 16 Lah 1131 (DB) \* ('10) 11 Cri L Jour 481 (481, 482) (DB) (Mad) \* (Vol 14) 1927 Oudh 583 (590) : 28 Cri L Jour 980 (DB) \* (Vol 9) 1922 Low Bur 32 (33) : 11 Low Bur Rul 323 : 23 Cri L Jour 437 (DB) \* (Vol 20) 1933 Rang 61 (61) : 34 Cri L Jour 699 (DB) \* (1864) 1864 Suth W R Cr Gap 27 (27) (DB).

[2] While imposing the lesser sentence it is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so. (1900-02) 1 Low Bur Rul 216 (219) (FB) \* (Vol 22) 1935 Oudh 265 (268) : 36 Cri L Jour 529 (DB) \* (Vol 20) 1933 Nag 307 (309) : 34 Cri L Jour 1168 : 30 Nag L R 9 (DB) \* (Vol 9) 1922 Low Bur 32 (33, 34) : 11 Low Bur Rul 323 : 23 Cri L Jour 437 (DB) \* (Vol 11) 1924 Rang 179 (180) : 25 Cri L Jour 1121 : 1 Rang 751 (DB).

[See also (Vol 30) 1943 Mad 69 (71) : 1 L R (1943) Mad 148 : 44 Cri L Jour 299 (DB). (That accused were between 16 and 18 years is no ground for reducing sentence to transportation for life.)]

[3] Judge in doubt as to whether capital punishment should be given — The benefit must go to the accused. ('72-92) 1872-1892 Low Bur Rul 459 (461).

[But see (1900-02) 1 Low Bur Rul 216 (220) (FB).]

[4] This section does not indicate what reasons should be considered sufficient for not passing capital sentence. ('06) 4 Cri L Jour 132 (133) : 3 Low Bur Rul 163.

[5] The reasons for not passing capital sentence must be in accordance with established legal principles. (Vol 13) 1926 Lah 428 (429) : 7 Lah 141 : 27 Cri L Jour 764.

[See (Vol 22) 1935 Lah 337 (338) : 36 Cri L Jour 1001 : 16 Lah 1131 (DB). (Common intention to murder brutally carried out—All accused taking part in beating. — Merely because by whom the fatal blow is caused is not known, is no reason for awarding lesser penalty.) \* (Vol 20) 1933 Nag 307 (309) : 34 Cri L Jour 1168 : 30 Nag L R 9 (DB). (Fact that assessors gave their opinion that accused was not guilty is no reason for passing lesser sentence.) \* (Vol 16) 1929 All 160 (161) : 30 Cri L Jour 559 (DB). (It should not be a practice to assume that where the particular person cannot be found to be guilty

*Sentence of death.* 368. (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

*Sentence of transportation.* (2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

[1882—S. 368; 1872—Ss. 319, 321; 1861—Ss. 50, 51, 53.]

369. <sup>a</sup>[Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court], when it has signed its judgment, shall alter or review the same, except <sup>b</sup>[<sup>c</sup> \*] to correct a clerical error.

[1882—S. 369; 1872—S. 484.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 101, for "No Court other than a High Court." [b] The words and figures "as provided in sections 395 and 484 or" were repealed, *ibid*.

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of the fatal blow the capital sentence should not be inflicted.]

16. Trial by jury — Heads of charge to the jury—Proviso. — [1] The Judge should record the heads of the charge to any jury in such a form as to enable the Court of appeal to judge whether the facts and circumstances of the case were properly placed before the jury and the law correctly explained to them. (Vol 24) 1937 Cal 266 (268): 38 Cri L Jour 767 (D B) \* (Vol 13) 1926 Cal 139 (145): 53 Cal 372: 27 Cri L Jour 266 (D B) \* (Vol 4) 1917 All 173 (175): 18 Cri L Jour 491: 39 All 348 \* ('08) 8 Cri L Jour 35 (37) (D B) (Bom) \* ('95) 2 Weir 499 (499) (D B) (Mad) \* ('98) 2 Weir 385 (385) (D B) (Mad) \* (Vol 3) 1916 Pat 236 (237, 238): 17 Cri L Jour 353: 1 Pat L Jour 317 (D B).

[2] It is not sufficient for the Judge merely to state that the law on the subject was explained and that the abstract of the evidence recorded was given to the jury. ('03) 1903 All W N 232 (232) \* (Vol 15) 1923 Pat 420 (425): 7 Pat 861: 29 Cri L Jour 804 (D B) \* (Vol 7) 1920 Cal 564 (564): 47 Cal 795: 21 Cri L Jour 694 (D B) \* (Vol 17) 1930 Cal 712 (713): 32 Cri L Jour 236 (D B) \* (Vol 17) 1930 Pat 243 (244, 245): 9 Pat 148: 31 Cri L Jour 786 (D B).

[See however (Vol 19) 1932 Cal 786 (786): 34 Cri L Jour 56 (D B).]

[3] It is desirable that the Judge should write the heads of charge as soon as possible after the delivery of the charge to the jury and while the facts are still fresh in his mind. ('09) 9 Cri L Jour 452 (453): 38 Cal 281 (D B).

[4] In cases of trials by jury, the Court of appeal must perforce base its decision in an appeal upon record of the written heads of charge. ('03) 8 Cri L Jour 35 (37) (D B) (Bom).

[5] Under proviso to S. 357 (5) of the Cr. P. C. it is not necessary for the Sessions Judge to record the heads of re-charge in respect of the fresh charge under a particular section, when the fresh charge is the same as the original charge already recorded; and the omission to do so is not fatal to a conviction. (Vol 22) 1935 Cal 31 (32): 36 Cri L Jour 480 (D B).

[6] Practice of Rangoon High Court in taking only shorthand notes in murder cases deprecated — Record of charge must be made in all appealable cases. (Vol 17) 1930 Rang 351 (352): 8 Rang 372: 32 Cri L Jour 23 (D B).

17. Judgment not in conformity with section—Procedure in appeal. — [1] Judgment not in conformity with the section — Appellate Court should reverse it and order *de novo* trial. (Vol 7) 1920 Mad 171 (172): 21 Cri L Jour 52 (D B).

18. Sub-section (6). — [1] An order passed under either of the two sections must be self-contained and must show that the Court has considered the evidence

against each of the suspected persons and has found that the evidence proves the case against each of them individually. (Vol 27) 1940 Sind 113 (114): 41 Cri L Jour 724 (D B) \* (Vol 24) 1937 Sind 26 (27): 30 Sind L R 382: 38 Cri L Jour 363 (D B).

#### Section 363—Note 1

[1] An order that the accused is sentenced "to receive the supreme penalty is not in proper form. (Vol 23) 1936 Rang 46 (47): 37 Cri L Jour 290 (D B).

#### SECTION 369—SYNOPSIS.

1. Scope.
2. Judgment when final.
3. "Alter or review the same."
4. Power of High Court to review its judgment.
5. "Save as otherwise provided by this Code."

1. Scope. — [1] The judgment of a Criminal Court is final, as far as that Court is concerned; and on signing and pronouncing it, such Court becomes *functus officio* and has, therefore, no power to review, override, alter or interfere with the judgment in any manner except where it is otherwise provided by the Code or by any other law for the time being in force or for the purpose of correcting clerical errors. ('66) 5 Suth W R Cr 61 (64) (FB). (Dissenting from 3 Suth W R Cr 45). \* (Vol 17) 1930 Mad 1001 (1002): 53 Mad 870: 32 Cri L Jour 429 (DB) \* ('70) 7 Bom H O R Cr 67 (67) \* (Vol 4) 1917 Pat 110 (111): 19 Cri L Jour 225. (Assumes the applicability of this section to orders under S. 146 of the Code). \* ('12) 13 Cri L Jour 301 (301) (DB) (Low Bur). (An order under S. 437 cannot be reviewed.) \* (Vol 21) 1934 Oudh 85 (85, 86): 35 Cri L Jour 417. (Order of reference under S. 438 cannot be reviewed by subsequent order.)

[2] The Court cannot entertain any fresh application on the same facts for the same relief, as it would, in effect, amount to a re-consideration of the previous order. ('12) 13 Cri L Jour 301 (301) (D B) (Low Bur). (First order in revision refusing to interfere—Subsequent order directing further inquiry under S. 437 was held an order reviewing the first.) \* ('11) 12 Cri L Jour 556 (557) (D B) (Mad). (First order declining to proceed under S. 476—Subsequently on motion of the opposite party Court passing order under S. 476 — Second order amounts to review of the first.)

[See however ('70) 12 Suth W R Cr 40 (41) (D B). (But where the Magistrate first passes an order under S. 133 he is not precluded from passing another order under S. 144 on the same facts.)]

[3] The section does not bar any application to consider a matter which was not the subject of the prior adjudication. Where therefore a prior appeal by an accused against his conviction was dismissed, it was held that a revision application by the Government for enhancement of the sentence is not barred. (Vol 13) 1926 Bom 555 (556, 557): 50 Bom 783: 27 Cri L Jour 1173 (D B) \* (Vol 26) 1939 Rang 392 (394): 40 Cri L

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Jour 108 : 1940 Rang L R 145. (Assumed.) \* (Vol 20) 1933 All 485 (486) : 55 All 715 : 34 Cri L Jour 1205 (D B) \* (Vol 20) 1933 Pat 126 (127, 128) : 12 Pat 18 (D B).

[See (Vol 12) 1926 Nag 323 (324) : 27 Cri L Jour 380 (D B) \* (Vol 12) 1925 Mad 993 (994, 996) : 26 Cri L Jour 582 (D B) \* (Vol 21) 1934 Bom 471 (473) : 36 Cri L Jour 351 (D B).]

[4] The word "Judgment" for the purposes of this section means a decision in a trial which decides a case finally, so far as the Court trying the case is concerned and terminating in a conviction or acquittal. (Vol 27) 1940 Oudh 398 (397) : 41 Cri L Jour 725 \* (Vol 26) 1939 F C 43 (48) : 40 Cri L Jour 468 : I L R (1939) Kar (F C) 132 : 1939 F C R 159 : I L R (1940) Lah 400 (F C). (Judgment does not include an interlocutory order) \* (Vol 26) 1939 Sind 193 (195) : 40 Cri L Jour 745 : I L R (1946) Kar 74 (F B). (Order dismissing complaint under S. 203 or discharging accused under S. 259 is not judgment.) \* (Vol 24) 1937 All 76 (77) : 38 Cri L Jour 318. (Complaint under S. 476 is not judgment.) \* ('08) 9 Cri L Jour 80 (82) : 31 Mad 543 (D B). (Order of discharge under S. 253 is not judgment.) \* ('01) 28 Cal 652 (660) (F B) \* (Vol 30) 1943 Cal 29 (29) : I L R (1942) 2 Cal 403 : 44 Cri L Jour 11 (D B). (Order of acquittal passed under S. 247 is final.) \* (Vol 30) 1943 Mad 6 (7) : 44 Cri L Jour 176. (Do.) \* (Vol 29) 1942 Mad 240 (240) : 43 Cri L Jour 401. (An order of acquittal passed under S. 247 on absence of complainant cannot be reviewed.).

[See also (Vol 32) 1945 Oudh 52 (53) : 46 Cri L Jour 684. (Dismissal of appeal for default of appearance of appellant—Assumed that it is a judgment to which the section applies.)]

[5] The following are held to be final orders disposing of the case, so far as the Court passing the order is concerned, and not liable to be reviewed or reconsidered by such Court:—

(a) Orders under Ss. 145, 146 or 488. (Vol 12) 1925 Nag 457 (458) : 26 Cri L Jour 1289. (Order under S. 145.) \* ('08) 7 Cri L Jour 401 (402, 403) : 35 Cal 350 (D B). (Do.) \* (Vol 13) 1926 All 242 (242) : 48 All 258 : 27 Cri L Jour 466. (Do.) \* (Vol 4) 1917 Pat 28 (30) : 19 Cri L Jour 105. (Order under S. 146.) \* ('69) 11 Suth W R Civ 532 (533) (D B). (Do.) \* ('13) 14 Cri L Jour 605 (606) : 16 Oudh Cas 192. (Assumed that S. 369 applies.) \* (Vol 4) 1917 Pat 110 (111) : 19 Cri L Jour 225. (Do.) \* (Vol 27) 1940 Rang 222 (223) : 41 Cri L Jour 333. (Order under S. 488.) \* (Vol 4) 1917 Cal 799 (800) : 18 Cri L Jour 556 (D B). (Do.).

(b) Orders accepting the verdict of a jury and postponing the case for passing the sentence. (1900) 4 Cal W N 683 (683) (D B). (Assumed that S. 369 would apply.)

(c) Order 'enter as false, mistake of law' passed on perusal of police report. (Vol 10) 1923 Pat 532 (535) : 24 Cri L Jour 481. (S. 369 assumed to apply.)

(d) Order refusing to deliver property seized by police. ('98) 22 Bom 949 (958) (D B). (Order refusing to deliver property seized by the police.)

[6] No Court subordinate to the High Court has any inherent jurisdiction to review its own judgment, save in a few circumstances, such as, where there has been an abuse of process of Court, fraud played upon the Court or where petty clerical errors or mistakes have been made—Order for restoration of property to complainant—On application by another party order set aside and property ordered to be delivered to applicant—Subsequent order is illegal. (Vol 30) 1943 Mad 392 (392) : 44 Cri L Jour 554.

[7] The orders mentioned below being neither a "judgment" within the meaning of this section nor a

final order, there is nothing in law preventing the Court which passed it from reconsidering it or from entertaining a fresh application for the same relief:

(a) Interlocutory orders such as order for transfer of a case. ('81) 8 Cal 63 (72) \* ('93) 20 Cal 513 (519) (D B). [See also (Vol 7) 1920 Pat 563 (564 565) : 21 Cri L Jour 594 : 5 Pat L Jour 47. (Inadvertent order of transfer.)]

(b) For issue of summons to accused under S. 204 or to a witness. (Vol 10) 1923 Cal 662 (662) : 25 Cri L Jour 464 (D B) \* (Vol 18) 1931 Pat 81 (81, 82) : 32 Cri L Jour 551.

(c) Order of discharge not amounting to acquittal. (Vol 17) 1930 Cal 61 (62) : 31 Cri L Jour 260. (Order of discharge under S. 209.) \* ('01) 28 Cal 652 (653, 662) (F B) \* (Vol 12) 1925 Nag 432 (432) : 26 Cri L Jour 1040. (Order of dismissal under S. 256.) \* ('09) 9 Cri L Jour 80 (82) : 31 Mad 543 (F B) \* (Vol 14) 1927 Mad 503 (503, 504) : 28 Cri L Jour 304. (Discharge under S. 259.) \* ('02) 29 Cal 726 (732) (F B). (No difference between order of discharge passed by a Presidency Magistrate and one passed by a Provincial Magistrate.) \* (Vol 16) 1929 Bom 134 (134) : 30 Cri L Jour 594 (D B) \* (Vol 26) 1939 Sind 193 (195) : 40 Cri L Jour 745 : I L R (1940) Kar 74 (F B).

[But see (Vol 22) 1935 All 59 (60) : 36 Cri L Jour 123.]

(d) Order of dismissal under S. 203. (Vol 17) 1930 Cal 61 (62) : 31 Cri L Jour 260 (D B) \* ('06) 3 Cri L Jour 274 (275) : 29 Mad 126 (F B) \* (Vol 19) 1932 Mad 369 (371) : 55 Mad 622 : 33 Cri L Jour 454 (F B).

[See also (Vol 26) 1939 Sind 193 (195) : 40 Cri L Jour 745 : I L R (1940) Kar 74 (F B).]

(e) Order cancelling notice under S. 107, Criminal P. C., for absence of the complainant. (Vol 10) 1923 All 332 (333) : 24 Cri L Jour 232. (Magistrate cannot re-institute the enquiry though a fresh complaint is not barred.)]

[8] The general principle underlying the section does not apply to administrative or ministerial orders. (Vol 20) 1933 Pat 242 (243) : 12 Pat 234 : 34 Cri L Jour 1198 (D B).

2. Judgment when final. — [1] A judgment of a criminal Court becomes final only after it is pronounced and signed. ('12) 13 Cri L Jour 120 (120, 121) : 38 Cal 828 (D B) \* ('87) 14 Cal 42 (48) (F B).

[But see ('70) 5 Mad H C R App xix (xx). (Under old law, the Magistrate had power to alter sentence or order, before despatch of Calendar to appellate authority.)]

[2] A judgment which though signed has not been pronounced is inoperative and incomplete and the Judge has power to alter or vary it before pronouncing it. ('13) 14 Cri L Jour 562 (563) (All).

[3] Magistrate pronouncing judgment before signing it—His attention drawn to error or mistake therein—He has ample powers to correct any mistake or alter the judgment before signing it. (Vol 31) 1944 Pat 209 (209, 210) : 23 Pat 28 : 46 Cri L Jour 30 (D B) \* ('66) 5 Suth W R Cr 61 (64) (F B) \* ('93) 1893 Rat 659 (663) (D B).

[4] Under the rules of the Allahabad High Court, a judgment becomes final only after it is sealed, and, therefore, the High Court has power to alter or add to its judgment before it is actually sealed. (Vol 3) 1916 All 183 (184) : 38 All 134 : 17 Cri L Jour 47 (D B) \* (21 All 177 and 1 Cri L Jour 710; 27 All 92, followed.)

[5] Chief Court of Oudh holds that the sealing of the judgment is not what creates finality in the judgment and that it is only a ministerial act. (Vol 27) 1940 Oudh 371 (374) : 41 Cri L Jour 682. (21 All 177; 27 All 92 : 1 Cri L Jour 710; (Vol 3) 1916 All 183 : 38 All 134 : 17 Cri L Jour 47 (D B); 7 Cal W N vii, dissented from.)

[6] According to the practice of the Bombay High Court in its ordinary original criminal jurisdiction, no

Section 369 — Note 2 (*contd.*)

judgment nor any other pronouncement of its decision is signed until the warrant is signed by the presiding Judge and therefore before signing the warrant the Court can alter or review its sentence, though already pronounced. (Vol 23) 1936 Bom 193 (195); 37 Cri L Jour 753 : 60 Bom 485.

[7] The word 'judgment' does not refer to any formal orders which are contemplated to be drawn up and issued in consequence by a ministerial officer of the Court. Such ministerial orders, which are issued, may be corrected or altered. (Vol 13) 1926 Mad 420 (420, 421); 27 Cri L Jour 184 \* ('70) 2 N W P H C R 117 (118, 119) (F B).

3. "Alter or review the same." — [1] The Court after signing and pronouncing its judgment becomes *functus officio* and has no power thereafter to add to or alter such judgment in any manner. Any such alteration or addition, if made would be without jurisdiction, and a nullity. (Vol 32) 1945 Oudh 32 (53) : 46 Cri L Jour 684 \* (Vol 29) 1943 Mad 240 (240) : 43 Cri L Jour 401 \* (Vol 6) 1919 All 329 (330) : 20 Cri L Jour 486. (Alteration in the order requiring security under S. 107.)

[See however (1865) 3 Suth W R Cr 16 (16) (D B). (An amendment referring to the time at which the sentence should commence is not an alteration of the sentence itself.)]

[2] The following alterations and additions are illegal:

(a) The addition of an explanatory note to the judgment after it is pronounced. ('78-80) 2 All 33 (35) (SB).

[See (Vol 27) 1940 Lah 192 (193) : 41 Cri L Jour 708. (High Court has no power to amend its own order by way of explanation or otherwise.)]

(b) Subsequent enhancement of sentence under S. 75, Penal Code. (Vol 5) 1918 Bom 250 (250) : 42 Bom 202 : 19 Cri L Jour 279 (DB).

(c) The enhancement of the sentence passed, even though it be at the request of the accused himself in order to make his case appealable. ('83) 1883 All W N 16 (16). (See however S. 413, Note 4.)

(d) The addition of a sentence of imprisonment in default of payment of fine omitted to be passed by oversight. (Vol 8) 1921 Bom 368 (368) : 22 Cri L Jour 608 (DB). (Court can only report to High Court under S. 438.) \* ('92-96) 1 Upp Bur Rul 18 (18).

[3] In cases where the Court finds that the conviction and sentence passed by it are illegal, or where the innocence of the accused is discovered from facts which come to light subsequent to the conviction and sentence passed by the Court, the only remedy would be to report the matter to the High Court under S. 438 or to refer the matter to the Provincial Government for necessary action under chapter XXIX. ('75) 23 Suth W R Cr 49 (49) (DB) \* ('04) 2 Low Bur Rul 43 (45) \* (Vol 17) 1930 Mad 1001 (1002) : 53 Mad 870 : 32 Cri L Jour 429 (DB). (Court cannot treat its order of acquittal as a nullity.) \* (Vol 10) 1923 All 473 (474) : 45 All 143 : 24 Cri L Jour 766. (Subsequent discovery of innocence of accused.)

[4] Where a mistake is pointed out to the Magistrate subsequent to his passing an order under S. 438, he cannot amend the order but can only submit the proceedings to the Sessions Judge for submission to the High Court for rectification. (Vol 27) 1940 Rang 222 (223) : 41 Cri L Jour 833.

[5] The rule against review does not apply where the portion of the judgment or order sought to be reviewed does not form an integral part of the judgment and can be treated as separate and distinct from such judgment. (Vol 4) 1917 Lah 163 (164) : 18 Cri L Jour 332 : 1916 Pun Re No. 25 \* ('10) 11 Cri L Jour

178 (179) (DB) (Lah). (Judgment containing damaging observations against witness — Judgment against accused not affected by reconsideration of the portion — Judge can reconsider the portion for expunging the observation.)

[6] Where the Magistrate accidentally omits to pass an order regarding the disposal of property at the time of the judgment, he or his successor can subsequently pass an order for its disposal, as such an addition is not an alteration of the judgment. (Vol 9) 1922 Mad 329 (329) : 24 Cri L Jour 159.

[But see ('01) 4 Bom L R 12 (13) (DB).]

[7] A judgment cannot be said to be altered within the meaning of this section in the following cases:—

(a) Where the Sessions Judge sentences the accused to transportation not knowing that he is already serving a sentence of imprisonment and after becoming aware of it, directs that the sentence of transportation should take effect immediately. ('88) 1888 Rat 391 (391) (DB).

(b) Where the Court adds a direction as to costs in proceeding under S. 145. (Vol 7) 1920 Cal 320 (320) : 47 Cal 974 : 21 Cri L Jour 751 (DB).

(c) Where the appellate Court setting aside a conviction on the ground of want of jurisdiction but omitting to order a re-trial, adds the necessary directions subsequently. ('81) 3 Mad 48 (51) (DB).

4. Power of High Court to review its judgment.

[1] Where the High Court has pronounced its judgment and signed it, neither the Judge, who passed the judgment nor any other Bench of the High Court has power to review, re-consider or alter it except for correcting a clerical error, where the judgment was passed:—

(a) In revision or appeal. (Vol 31) 1944 Pat 209 (209) : 23 Pat 28 : 46 Cri L Jour 30 (DB) \* (Vol 20) 1933 Cal 870 (871, 874) : 34 Cri L Jour 1100 : 61 Cal 155 (DB). (Reversed in (Vol 22) 1935 P C 89 : 62 Ind App 129 : 62 Cal 983 : 36 Cri L Jour 838 (PC) on another point.) \* ('87) 14 Cal 42 (48) (FB) \* (Vol 4) 1917 Bom 238 (238) : 18 Cri L Jour 889 (DB) \* (Vol 22) 1935 All 466 (467) : 36 Cri L Jour 1286 : 57 All 867 (DB) ((Vol 14) 1927 All 724 : 29 Cri L Jour 88, Dissented from.) \* (Vol 16) 1929 Lah 797 (799) : 10 Lah 241 : 30 Cri L Jour 815 (DB). (Overruled in (Vol 32) 1945 Lah 130 : 1 L R (1944) Lah 391 : 46 Cri L Jour 566 (SB) on another point.) \* ('85) 10 Bom 176 (180) (SB) \* (Vol 26) 1939 Lah 244 (245) : 40 Cri L Jour 763. (The only authority that can interfere with the sentence is the Provincial Government.) \* (Vol 23) 1936 Nag 132 (134) : 1 L R (1936) Nag 99 : 38 Cri L Jour 390 (DB) \* (Vol 10) 1923 All 473 (474) : 45 All 143 : 24 Cri L Jour 766. (Even if any new materials had been discovered.)

[See (Vol 14) 1927 Mad 961 (962) : 28 Cri L Jour 974 (SB). (But where a Bench of the High Court heard the case, but did not finally dispose of the case, held another Bench of the Court had power to hear and dispose of the case.)]

(b) Or on a reference to it under S. 432 or 434 or 438. ('93) 1893 Rat 638 (638) (DB). (Reference under S. 432, or S. 434.) \* (Vol 33) 1946 Bom 276 (278, 279) (FB). (Reference under S. 438 by Sessions Judge—High Court passing order on reference without issuing notice, viz., 'No order on reference' — Order amounts to judgment — Subsequent revision application by party at whose instance the reference was made — Revision application is barred as in effect it seeks to alter or review previous judgment of High Court.)

[2] The powers of revision vested in the High Court under S. 439 can only be exercised at the direction of the Court if the circumstances require it and ordinarily no party has a right to be heard in support of his case. (Vol 11) 1924 Mad 640 (644) : 47 Mad 428 : 26 Cri L Jour 370 (DB).

*Presidency Magistrate's judgment.*

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars:—

- (a) the serial number of the case ;
- (b) the date of the commission of the offence ;
- (c) the name of the complainant (if any) ;
- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence ;
- (e) the offence complained of or proved ;
- (f) the plea of the accused and his examination (if any) ;
- (g) the final order ;
- (h) the date of such order ; and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

[ 1882 — S. 370. ]

**Section 369 — Note 4 (contd.)**

[3] Where an order is passed to the prejudice of an accused, and by mistake or inadvertence no opportunity had been given to him to be heard in his defence, such an order being without jurisdiction is not a judgment and the High Court has power to entertain a fresh revision application to re-consider the matter. (Vol 11) 1924 Mad 640 (644) : 47 Mad 428 : 26 Cri L Jour 370 (DB)\* (Vol 14) 1927 Cal 702 (704) : 55 Cal 417 : 28 Cri L Jour 831 (DB).

[4] Where the sentence against an accused is reduced without notice to the Crown, the Court has no power to re-consider the matter as the Crown has no right to be heard in the matter of sentence. (Vol 20) 1933 Cal 870 (872, 873) : 61 Cal 155 : 34 Cri L Jour 1100 (DB).

[5] Where a criminal revision application is dismissed for default of the petitioner, the High Court has no right to entertain a fresh application for the same relief. (12) 13 Cri L Jour 710 (711) (DB) (Mad) \* (Vol 10) 1923 Mad 276 (276) : 23 Cri L Jour 746. (Revision rejected for non-payment of printing charges—*Held* Court had no power to re-hear.)

[See (Vol 3) 1916 Mad 516 (517) : 16 Cri L Jour 697. (Revision dismissed on merits—No fresh petition lies on the same matter.)]

[See however (Vol 11) 1924 Lah 310 (310) : 23 Cri L Jour 750. (Order of dismissal can be set aside by High Court as it is not judgment.)\* (Vol 15) 1928 Rang 288 (288) : 30 Cri L Jour 749. (Do.)\* ('09) 10 Cri L Jour 287 (288, 289) (DB) (Cal). (Application dismissed not heard and determined on merits — It can be restored to file and heard.)]

5. "Save as otherwise provided by this Code."

— [1] The following provisions admit of review of judgments in particular cases :

[a] Section 395 providing for review of the sentence of whipping.

[b] Section 432 providing for review of a case where questions of law are referred for decision by the High Court.

[c] Section 484 providing for review of judgment in contempt cases where the accused tenders an apology. (Vol 22) 1935 All 60 (61) : 56 All 990 : 35 Cri L Jour 1485.

[d] Section 436 providing for a District Magistrate making further inquiry himself in respect of an order passed by himself. ('01) 28 Cal 102 (104) (DB)\* ('06) 11 Cal W N xi (DB).

[e] Section 489 (2) providing for cancellation or variation of an order passed under section 488. (Vol 24) 1937 Cal 394 (395) : 39 Cri L Jour 381.

[f] Judgments and orders made by an appellate

Court are final except in cases provided for in Chapter XXXII. (See S. 430.)

[2] The inherent powers of the High Court, as stated in S. 561A, do not include the power to review an order made by the High Court in its criminal jurisdiction as it does not confer on the Court any new powers. (Vol 15) 1928 Lah 462 (463) : 10 Lah 1 : 29 Cri L Jour 669 (DB). ((Vol 14) 1927 Lah 139 : 28 Cri L Jour 239, Overruled.)\* (Vol 26) 1939 Lah 244 (245) : 40 Cri L Jour 763. (The only authority that can interfere is the Provincial Government.)\* (Vol 25) 1938 Nag 74 (75) : 39 Cri L Jour 116 : 1 L R (1940) Nag 267. ((Vol 15) 1928 Oudh 402 : 3 Luck 680 : 29 Cri L Jour 893 dissented from.)\* (Vol 20) 1933 Cal 870 (874) : 61 Cal 155 : 34 Cri L Jour 1100 (DB). (Reversed in (Vol 22) 1935 P C 89 : 62 Ind App 129 : 62 Cal 983 : 36 Cri L Jour 838 (PC) on another point.)\* (Vol 22) 1935 All 466 (467, 468) : 36 Cri L Jour 1286 : 57 All 867 (DB). (Case law discussed.)

[But see (Vol 15) 1928 Oudh 402 (403) : 29 Cri L Jour 893 : 3 Luck 680. (Following (Vol 14) 1927 Lah 139 : 28 Cri L Jour 239, which was overruled by (Vol 15) 1928 Lah 462 : 10 Lah 1 : 29 Cri L Jour 669.)]

**Section 370 — Note 1**

[1] This section is an exception to S. 367 and enacts that a Presidency Magistrate shall record the particulars specified instead of recording a judgment as provided by S. 367. (Vol 8) 1921 Bom 374 (375) : 45 Bom 672 : 22 Cri L Jour 17 (DB).

[2] This section does not apply to proceedings started under S. 2, sub-s. (1) and S. 3 of the Workman's Breach of Contract Act, 1859. (1900) 27 Cal 131 (132, 133) : 4 Cal W N 201 (DB).

[3] The direction to record particulars should be strictly followed. (Vol 19) 1932 Cal 62 (63) : 33 Cri L Jour 264 \* (Vol 19) 1932 Cal 64 (64) : 33 Cri L Jour 265.

[4] The various particulars should be recorded in the form prescribed by the various High Courts. Where, however, all the important particulars have been recorded, the omission to record all the particulars in the form prescribed is only an irregularity which can be cured under S. 537. (Vol 13) 1926 Cal 1109 (1110) : 27 Cri L Jour 1131.

[5] The words "if any" in clause (f) do not control the provision of S. 342, under which the Magistrate is bound to record the examination of the accused. (Vol 8) 1921 Bom 374 (375, 376) : 45 Bom 672 : 22 Cri L Jour 17 (DB).

[6] The entry "denies" in the column was held sufficient compliance with the section where, when the

**371. (1)** On the application of the accused a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost.

**(2)** In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

*Case of person sentenced to death.* **(3)** When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

[1882 — S. 371; 1872 — S. 464.]

**372.** The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

[1882 — S. 372; 1872 — S. 464; 1861 — S. 429.]

*Court of Session to send copy of finding and sentence to District Magistrate.* **373.** In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

[1882 — S. 373; 1872 — S. 302; 1861 — S. 384.]

## CHAPTER XXVII.

### OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

*Sentence of death to be submitted by Court of Session.* **374.** When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

[1882 — S. 374; 1872 — S. 287, para. 1; 1861 — S. 380.]

#### Section 370 — Note 1 (*contd.*)

plea was taken and the accused was examined, he merely denied having committed the offence. (Vol 16) 1929 Cal 406 (406, 407) : 56 Cal 1067 : 30 Cri L Jour 526.

[7] As to the effect of non-compliance with the clause, see notes under S. 537.

[8] It is enough if the reasons are briefly stated, but it should be done in such a manner that the High Court may in revision be in a position to judge whether there were sufficient materials before the Magistrate to support the conviction. (Vol 29) 1942 Mad 603 (604) : 43 Cri L Jour 859 \* ('04) 1 Cri L Jour 839 (841) : 31 Cal 983 (DB)\* (Vol 13) 1926 Cal 1109 (1111) : 27 Cri L Jour 1181 (DB)\* (Vol 10) 1923 Mad 144 (144) : 23 Cri L Jour 602.

[9] The following statements are not sufficient.

[a] That the offence is proved. (1900) 27 Cal 461 (462) (DB)\* ('86) 13 Cal 272 (273) (DB).

[b] That the accused has no defence to make. (1900) 27 Cal 461 (461, 462) (DB).

[c] That the Magistrate believes the prosecution witnesses. (Vol 29) 1942 Mad 603 (604) : 43 Cri L Jour 859 \* (Vol 2) 1915 Bom. 137 (137) : 16 Cri L Jour 771 (DB).

[10] Where the omission to record the reasons has not seriously prejudiced the accused as where the trying Magistrate has made a record of the evidence and other important matters and the records are made available to the Court, the irregularity will be cured under S. 537. (Vol 11) 1924 Mad 799 (800) : 25 Cri L Jour 1084 (DB) \* (1900) 27 Cal 461 (462) (DB)\* (Vol 19) 1932 Cal 655 (656) : 33 Cri L Jour 729\* (Vol 10) 1923 Mad 185 (186) : 46 Mad 253 : 24 Cri L Jour 84.

[See (Vol 2) 1915 Bom 137 (137) : 16 Cri L Jour 771 (DB).]

[11] Where the conviction is passed without proper reasons therefor, on evidence of which no record is taken and which is, therefore, not available to the High Court, the omission to record the reasons in such cases is a grave irregularity. (Vol 10) 1923 Mad 185 (186) : 46 Mad 253 : 24 Cri L Jour 84\* ('29) 1929 Mad W N 892 (893)\* ('86) 13 Cal 272 (274) (DB).

[12] The Presidency Magistrate is not bound to give any statement of reasons in case he inflicts a fine of less than Rs. 200, but if he chooses to write a judgment in such a case it is his duty to give his findings on the facts proved. (Vol 20) 1933 Cal 532 (533) : 60 Cal 656 : 34 Cri L Jour 1059.

[13] The word "imprisonment" contemplated by this section refers to the substantive sentence passed; it does not include the sentence of imprisonment ordered in default of payment of fine. ('87) 14 Cal 174 (175) (DB).

#### Section 371 — Note 1

[1] Where a copy is granted free of cost, it is not necessary to affix any court-fee stamp on it when preferring an appeal. ('88) 1888 Rat 364 (364) (DB).

#### Section 374 — Note 1

[1] The High Court has been given wide powers in the confirmation proceedings in order to prevent any possible miscarriage of justice. (Vol 8) 1921 Sind 84 (85, 89) : 23 Cri L Jour 33 : 15 Sind L R 103 (FB).

[2] Reference for confirmation by High Court is provided under special laws in the case of sentences of death passed thereunder. (Vol 31) 1944 F C 1 (12, 18) : 1944 F C R 61 : 1 I L R (1944) Nag 300 : 23 Pat 159 : 1 I L R (1944) Kar (FC) 8 : 45 Cri L Jour 413 (FC). (Death sentence passed by Special Court under Special Criminal Courts Ordinance, 2 [II] of 1942.) \* (Vol 31) 1944



**375.** (1) If when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

*Power to direct further inquiry to be made or additional evidence to be taken.*

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

[1882 — S. 375; 1872 — S. 299; 1861 — S. 400.]

*Power of High Court to confirm sentence or annul conviction.*

**376.** In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed

#### Section 374 — Note 1 (contd.)

Sind 83 (85) : 45 Cri L Jour 598 (FB). (Do.) \* (Vol 20) 1933 Cal 1 (2) : 33 Cri L Jour 837 (FB). (See S. 3 (2), Bengal Criminal Law Amendment Supplementary Act.) \* (Vol 19) 1932 Cal 818 (818, 820) : 33 Cri L Jour 722 (FB). (Do.)

[3] The records transmitted to the High Court in a confirmation case must be complete. (71) 15 Suth W R Cr 16 (17) (DB).

[4] Sessions Judge omitting to send record for confirmation — High Court can in the exercise of its powers of revision call for the record and deal with it according to law. (Vol 31) 1944 Sind 83 (85) : 45 Cri L Jour 598 (FB).

#### Section 375 — Note 1

[1] Where the question was, if the accused was insane at the time he committed the murder of his wife, and where there was evidence that the accused spoke like an insane man on the day previous to the murder, and there was no evidence of any reasonable or probable cause for any jealousy on his part by reason of any evil conduct on the part of his wife, and the assessors found that the accused was not of sound mind, the High Court directed the Court of Session to place the convicted person under medical observation for a month, and then forward the case to them, with the evidence of the medical officer and opinion of the Sessions Judge. (1864) 1 Suth W R Cr 1 (1) (DB).

[2] Where the prisoner was convicted on the sole evidence of his confession, which he alleged had been tutored by the Magistrate who recorded it, the High Court directed the examination of that Magistrate on the question of the alleged tutoring. (95) 19 Bom 195 (198) (DB).

[3] "Further inquiry" includes the consideration of the evidence already taken. (91) 14 Mad 334 (337, 341) (FB). (Case under S. 436.)

[4] Evidence improperly rejected or insufficient for arriving at a proper decision — Additional evidence is necessary. (01) 25 Bom 168 (174) (DB). (Confession wrongly rejected.) \* (86) 1886 Rat 229 (236, 237) (DB). (Evidence as to prisoner's state of mind insufficient.)

[5] Accused improperly refused permission to call certain evidence material to his defence — High Court permitted him to produce such evidence. (11) 12 Cri L Jour 412 (420) (DB) (Lah) \* (Vol 12) 1925 Mad 106 (109) : 25 Cri L Jour 401 (DB).

[6] High Court cannot refer to the earlier statements made by the witnesses to the police, with a view to discredit such witnesses. (Vol 4) 1917 P C 25 (29) : 44 Cal 876 : 18 Cri L Jour 471 : 44 Ind App 137 : 13 Nag L R 100 (P C).

[See however (Vol 30) 1943 Cal 521 (527) : 1 L R (1943) 1 Cal 543 : 45 Cri L Jour 99 (DB). (Sessions Judge bringing to the notice of the High Court that certain valuable materials such as statements to police which did not implicate the name of the accused which could and should have been put in evidence in favour of the accused were not so put High Court can make full use of such materials for the purpose of doing justice as a Court of reference.)]

[7] Where the circumstances called for the re-opening of the whole case owing to a grave irregularity in procedure, it was held that the proper course was to set aside the conviction and order a re-trial instead of directing additional evidence to be taken. (Vol 22) 1935 Sind 145 (179) : 28 Sind L R 397 : 36 Cri L Jour 1161. (Failure to supply to accused copies of statements made to police by witnesses under S. 162.)

[8] Where on a reference, the High Court had pronounced its decision, it was held that the accused had no further right of appeal, though at the time of reference he could have preferred an appeal. (67) 1867 Pun Re No. 33 Cr, p. 55 (55) (DB).

#### SECTION 376 — SYNOPSIS.

1. Scope.
2. May confirm the sentence.
3. Commutation of sentence.
4. May annul the conviction.
5. "Convict the accused of any offence."
6. New trial.

1. Scope. — [1] It is open to the High Court to go into the facts and to come to the conclusion that the finding of the jury is an unsafe finding, or is not justified by the evidence on record. (Vol 32) 1945 Lah 105 (113) : 1 L R (1945) Lah 290 : 47 Cri L Jour 4 (FB) \* (Vol 24) 1937 Sind 162 (164) : 38 Cri L Jour 808 : 31 Sind L R 82 (DB) \* (Vol 23) 1936 Cal 73 (83) : 37 Cri L Jour 394 : 63 Cal 929 (DB) \* (Vol 18) 1931 Cal 178 (183) : 32 Cri L Jour 190 (FB) \* (Vol 8) 1921 Sind 84 (87, 88) : 15 Sind L R 103 : 23 Cri L Jour 33 (FB) \* (Vol 19) 1932 Pat 302 (302) : 34 Cri L Jour 63 (DB).



for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

[1882 — S. 376 ; 1872 — S. 288 ; 1861 — S. 399.]

### OBJECTS AND REASONS.

"*Clause 376.* — We considered a suggestion of the Calcutta High Court that, where one accused is sentenced to death and the other accused is sentenced to transportation only, the Court should have power to inquire into the facts of the case so far as relates to the latter.

We think that the law should be left as it stands, as the Court can always communicate with the Local Government if it thinks that the sentence of the accused not sentenced to death should be remitted or reduced."

— S. C. R., 1898.

#### Section 376 — Note 1 (*contd.*)

[2] The High Court is empowered to substitute its own finding in the place of the verdict of the jury, even though the verdict is unanimous. (Vol 33) 1946 Bom 446 (452) ; 47 Cri L Jour 962 (DB) \* (Vol 2) 1915 Bom 243 (244) ; 16 Cri L Jour 818 (DB) \* (Vol 8) 1921 Sind 84 (87, 83) ; 15 Sind L R 108 ; 23 Cri L Jour 33 (FB). (The whole broad question of the guilt or innocence of the accused is before High Court.) \* (Vol 25) 1938 Cal 6 (10) ; 39 Cri L Jour 308 (DB). (High Court is obliged to come to independent conclusion as to guilt or innocence of accused — The question of misdirection is not important.) \* (Vol 23) 1936 Cal 73 (83) ; 37 Cri L Jour 394 ; 63 Cal 929 (DB).

[3] High Court will act with great circumspection before it sets aside the verdict of the jury. (Vol 25) 1938 Cal 220 (221) ; 39 Cri L Jour 541 (DB) \* (Vol 23) 1936 Cal 73 (83) ; 37 Cri L Jour 394 ; 63 Cal 929 (DB) \* (Vol 8) 1921 Sind 84 (88) ; 15 Sind L R 108 ; 23 Cri L Jour 33 (FB). (High Court will interfere where material evidence is improperly rejected or admitted or where jury are improperly charged or misunderstood or where proved facts are insufficient to support verdict.)

[4] An order of retrial by the jury is the only course left to the High Court if it does not acquit or discharge the accused. (Vol 29) 1942 Cal 524 (527) ; 43 Cri L Jour 860 (DB). (*Obiter.*)

[5] Accused sentenced to death — Inadmissible evidence admitted before jury — High Court may after excluding inadmissible evidence maintain conviction if remaining evidence clearly establishes guilt of accused. (Vol 33) 1946 P C 82 (85) ; 47 Cri L Jour 616 ; I L R (1946) Lah 119 ; 73 Ind App 77 (PC). (Affirming (Vol 32) 1945 Lah 105 (123) ; I L R (1945) Lah 290 ; 47 Cri L Jour 4 (FB).)

2. May confirm the sentence. — [1] Before the High Court confirms the sentence of death, it will see if the verdict of the jury is supported by the evidence on record. (26) 27 Cri L Jour 378 (379) (DB) (Cal) \* (Vol 13) 1926 Nag 368 (370) ; 27 Cri L Jour 731 (DB) \* (Vol 11) 1924 Cal 625 (628) ; 26 Cri L Jour 5 (DB).

[2] Misdirection in the charge to the jury causing failure of justice — Verdict of murder and sentence of death set aside. (Vol 9) 1922 Cal 124 (127) ; 23 Cri L Jour 567 (DB).

[3] Evidence totally circumstantial — Sentence of death should not be confirmed but commuted to one of transportation. (Vol 23) 1936 Cal 73 (80) ; 37 Cri L Jour 394 ; 63 Cal 929 (DB).

[4] There is no rule of law that where the evidence is wholly circumstantial, death sentence should not be awarded. (Vol 16) 1929 Mad 667 (668) ; 30 Cri L Jour 971 (DB) \* (Vol 2) 1915 Mad 821 (824) ; 16 Cri L Jour 20. (Accused woman of 60 years — Evidence circumstantial — Sentence of transportation for life enhanced to death sentence.)

[5] Evidence entirely circumstantial — Accused, a young man of nineteen years — Sentence of transportation for life not enhanced to one of death. (Vol 2) 1915 Mad 542 (543, 544) ; 16 Cri L Jour 28 (DB).

[6] The age of the accused might well be taken into

consideration in determining the sentence to be passed in cases of murder. (37) 1937 Mad W N 728 (728) (DB) \* (Vol 2) 1915 Mad 821 (823, 824) ; 16 Cri L Jour 20 \* (Vol 5) 1918 Low Bur 58 (59) ; 9 Low Bur Rul 165 ; 19 Cri L Jour 648 (DB) \* (Vol 18) 1931 Lah 177 (178) ; 32 Cri L Jour 682 (DB) \* (Vol 20) 1933 Rang 134 (136) ; 34 Cri L Jour 835 \* (Vol 20) 1933 Lah 229 (231) ; 34 Cri L Jour 875 (DB) \* (Vol 15) 1928 Nag 108 (111) ; 29 Cri L Jour 400 (DB).

[7] The age or sex of the accused is not of itself a sufficient reason for awarding the lesser sentence. (Vol 30) 1943 Mad 69 (71, 72) ; I L R (1943) Mad 148 ; 44 Cri L Jour 299 (DB) \* (Vol 11) 1924 Rang 179 (181) ; 1 Rang 751 ; 25 Cri L Jour 1121 (DB). (Accused being woman not conclusive reason for not awarding death penalty.) \* (Vol 27) 1940 Mad 710 (716) ; I L R (1940) Mad 254 ; 42 Cri L Jour 582 \* (Vol 24) 1937 Lah 399 (401) ; I L R (1937) Lah 481 ; 38 Cri L Jour 579 (DB) \* (Vol 20) 1933 Cal 1 (2, 3) ; 33 Cri L Jour 837 (FB) \* (Vol 11) 1924 Nag 29 (32) ; 25 Cri L Jour 147 (DB) \* (Vol 18) 1931 Rang 171 (172) ; 9 Rang 81 ; 32 Cri L Jour 941 (DB) \* (Vol 20) 1933 Oudh 52 (53) ; 34 Cri L Jour 250 (DB) \* (Vol 20) 1933 Lah 305 (306) ; 34 Cri L Jour 720 (DB) \* (Vol 9) 1922 Nag 65 (66) ; 22 Cri L Jour 757 ; 18 Nag L R 101 \* (Vol 18) 1931 Oudh 89 (89) ; 32 Cri L Jour 83 (DB).

[But see (Vol 13) 1926 Nag 461 (463) ; 22 Nag L R 104 ; 27 Cri L Jour 955 (DB). (It cannot be affirmed that the tender age of an accused is not of itself a sufficient reason for passing the lesser sentence — (Vol 9) 1922 Nag 65 ; 22 Nag L R 104 ; 27 Cri L Jour 955, dis-sented.)]

[8] Delay in hearing the appeal for which the accused were in no way responsible has been considered a sufficient ground for not confirming the sentence of death. (13) 14 Cri L Jour 642 (658) (DB) (Cal) \* (Vol 13) 1926 Nag 461 (463) ; 22 Nag L R 104 ; 27 Cri L Jour 955 (DB).

[See also (Vol 23) 1936 Cal 73 (80) ; 37 Cri L Jour 394 ; 63 Cal 929 (DB).]

[See however (Vol 17) 1930 Sind 225 (244) ; 31 Cri L Jour 1026 (DB). (There is no ground for passing the lesser sentence on account of delay in confirming death sentence where the murder is not an ordinary one.)]

[9] In determining whether the sentence is to be confirmed, the High Court may consider if the commitment and the conviction were by Courts of competent jurisdiction. (80) 2 All 218 (233, 234, 235) (FB).

[10] Satisfactory proof of motive is not always necessary before confirming the sentence. (Vol 4) 1917 Cal 492 (492) ; 17 Cri L Jour 386 (DB).

3. Commutation of sentence. — [1] Death should ordinarily be imposed unless mitigating circumstances justify the lesser sentence. (Vol 30) 1943 Mad 69 (71, 72) ; I L R (1943) Mad 148 ; 44 Cri L Jour 299 (DB) \* (Vol 17) 1930 Pat 252 (255) ; 31 Cri L Jour 727 (DB) \* (28) 29 Cri L Jour 540 (541) (Lah) \* (Vol 19) 1932 Sind 201 (205, 206) ; 26 Sind L R 302 ; 34 Cri L Jour 147 \* (Vol 19) 1932 Lah 245 (246) ; 33 Cri L Jour 576 (DB).

[2] Court must not pass the more severe sentence when circumstances of extenuation exist, merely because the consequences of the crime have been more serious

Section 376—Note 3 (*contd.*)

than in an ordinary case. (Vol 24) 1937 Rang 466 (467): 39 Cri L Jour 137 (DB).

[3] The fact that for the murder of one person more than one have to be sentenced to death is no ground for commuting the sentence. (Vol 24) 1937 Pat 497 (499): 38 Cri L Jour 1007 (DB) (Vol 23) 1936 Cal 227 (230): 37 Cri L Jour 676: 63 Cal 1089 (DB) (Vol 3) 1916 Lah 408 (410): 1916 Pun Re No. 12 Cr: 17 Cri L Jour 267.

[4] Accused only son of his widowed mother sincerely penitent and filled with remorse for his conduct — Sentence not commuted. (Vol 22) 1935 Cal 591 (594, 595): 36 Cri L Jour 1254 (DB).

[5] Doubt as to the guilt of the accused is a ground not for awarding the lesser punishment but for acquitting the accused. (Vol 13) 1926 Nag 368 (370): 27 Cri L Jour 731 (DB) (Vol 17) 1930 Pat 247 (252): 9 Pat 474: 31 Cri L Jour 721 (DB) (Vol 17) 1930 Pat 252 (255): 31 Cri L Jour 727 (DB).

[6] Accused sentenced to death—High Court quashing conviction on ground of want of territorial jurisdiction—Accused for second time sentenced to death by Court of competent jurisdiction—High Court commuted sentence of death to one of transportation. (Vol 13) 1926 Lah 582 (584): 7 Lah 396: 27 Cri L Jour 1168 (DB).

[7] The Federal Court has power, where there has been inordinate delay in executing death sentences to substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. (Vol 31) 1944 F C 1 (14): 1944 F C R 61: 1 L R (1944) Nag 300: 23 Pat 159: 1 L R (1944) Kar 8: 45 Cri L Jour 413 (FC).

[8] Murder committed under grave provocation but not under grave and sudden provocation — Sentence of death commuted to one of transportation. (Vol 3) 1916 Oudh 138 (138): 17 Cri L Jour 190 (DB) (Vol 19) 1932 Lah 369 (370): 33 Cri L Jour 338 (DB) (Vol 10) 1923 Lah 408 (409): 25 Cri L Jour 298 (DB) (Vol 20) 1933 All 533 (535): 35 Cri L Jour 232 (DB) (Vol 3) 1916 Mad 833 (833): 16 Cri L Jour 611 (DB).

[9] Murder not committed under the "immediate influence" of provocation — High Court confirmed sentence of transportation but expressed that Government might consider question of reduction of sentence. ('01) 28 Cal 613 (620) (DB).

[10] Accused at time of murder "suffering from mental derangement of some sort" — Accused not by reason of such unsoundness of mind incapable of knowing the nature of his act—*Held* that he was entitled to every indulgent consideration though guilty of murder. ('96) 23 Cal 604 (609) (DB) (Vol 31) 1931 Mad W N 719 (723) (Vol 20) 1933 Lah 123 (124): 34 Cri L Jour 909 (DB) (Vol 19) 1932 All 233 (236): 33 Cri L Jour 714 (DB) (Vol 19) 1932 Oudh 18 (21): 7 Luck 341: 33 Cri L Jour 163 (DB) (Vol 20) 1933 Rang 144 (146): 34 Cri L Jour 791 (DB) (Vol 1) 1914 Upp Bur 81 (33): 2 Upp Bur Rul 28: 16 Cri L Jour 95 (Vol 86) 10 Bom 512 (518). (Accused killing his children of whom he was very fond when suffering from fever.) ('89) 12 Mad 459 (461) (DB). (Murder committed in *post febrile* lunacy.)

[See (Vol 19) 1932 Cal 658 (660): 33 Cri L Jour 476 (SB).]

[See however (Vol 18) 1931 Oudh 77 (79): 32 Cri L Jour 327 (DB). (Accused was shown to have been eccentric in the past and had very inadequate motive for the murders — *Held*, that there were not sufficient grounds for not passing death sentence.)]

[11] Murder committed in the honest and strong belief, though superstitious, "absurd and unfounded" that witchcraft was practised upon his wife or children as a result of which they took ill, and that it is only the murder of the supposed witch that will cure them—

Death sentence commuted to transportation for life. (Vol 8) 1921 Pat 63 (66): 21 Cri L Jour 608 (DB).

[12] Dead body not found—Conviction under S. 302 altered into one under S. 307 of the Penal Code. (Vol 11) 1924 All 662 (663): 25 Cri L Jour 900 (DB).

[13] Murder proved by retracted confession — Dead body not discovered—Sentence should be one of death. (Vol 12) 1925 All 627 (631, 637): 26 Cri L Jour 1431 (FB). (Mears, C. J. and Bannerji, J., Mukerji, J., *contra*.)

[14] Lapse of time between commission of offence and arrest of the accused does not entitle him to a lesser sentence, although it may be taken into account in fixing the appropriate sentence. ('87) 1937 Mad W N 571 (571) (DB).

[15] Accused under influence of liquor committing murder with hardly any premeditation—Sentence of death reduced to one for transportation. (Vol 33) 1946 Bom 416 (452): 47 Cri L Jour 962 (DB).

[16] Crime committed in a state of drunkenness, as result of provocation — Although provocation is very slight, sentence of death should not be passed — Sentence reduced to one of transportation for life. (Vol 25) 1938 Rang 448 (448): 40 Cri L Jour 67 (DB).

[17] Where there has been some provocation and there is no premeditation, and the crime is committed in the heat of passion, sentence of transportation for life is enough. (Vol 14) 1927 All 105 (106): 27 Cri L Jour 1392 (DB).

[18] The fact that a murder was committed in his desire to escape, when the offender a dacoit was being brought to bay is not an extenuating circumstance. (Vol 19) 1932 Cal 818 (820): 33 Cri L Jour 722 (FB).

[19] Man rushing into a brawl with a heavy hatchet and striking with all his force one of his neighbours who is unable to defend himself, upon the head and killing him—It is not a case for the exercise of clemency and capital sentence should not be reduced. (Vol 15) 1928 Oudh 221 (223): 29 Cri L Jour 230 (DB).

[20] The so-called Baluch custom justifying murder for suspicion as to unchastity is no ground for mitigation of sentence. (Vol 1) 1914 Sind 136 (136): 7 Sind L R 118: 15 Cri L Jour 501 (DB).

[21] Brutal and premeditated and concerted assassination — Sentence of death confirmed. (Vol 19) 1932 Pat 209 (212): 11 Pat 280: 33 Cri L Jour 574 (DB).

[22] Where a woman in order to hide her shame, murders her newly born illegitimate child there are mitigating circumstances sufficient to reduce the penalty of death very much below transportation for life, so also father killing illegitimate child born of him to his own sister—Sentence of death commuted. (Vol 11) 1924 Nag 119 (120): 25 Cri L Jour 63 (DB).

[23] Party fight not started by accused—Sentence reduced. (Vol 20) 1933 Lah 843 (345): 34 Cri L Jour 711 (DB).

[24] Sentence of death commuted into one of transportation for life as crime was result of sudden quarrel and some provocation. ('29) 1929 Mad W N 789 (790) (DB).

4. May annul the conviction.—[1] The High Court will annul the conviction though the verdict of the jury was unanimous and there was no misdirection, if the evidence is not enough to sustain a conviction for murder. (Vol 20) 1933 Cal 426 (429): 34 Cri L Jour 553 (SB) (Vol 28) 29 Cri L Jour 633 (834) (Cal). (No eye-witnesses—Doubt as to identification of accused and retracted confession of accused not voluntary.)

[2] Where suspicion fell upon the accused on account of certain ill-feeling between them and the deceased, and the case depended solely on the evidence of the servant of the deceased, it being doubtful whether the servant could recognize the assailants, the High Court

*Confirmation of new sentence to be signed by two Judges.*

**377.** In every case so submitted, the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

[1882 — S. 377; 1872 — S. 290; 1861 — S. 401.]

*Procedure in case of difference of opinion.*

**378.** When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

[1882 — S. 378.]

*Procedure in cases submitted to High Court for confirmation.*

**379.** In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court and attested with his official signature, to the Court of Session.

[1882 — S. 379; 1872 — S. 301 Para 1; 1861 — S. 383.]

**Section 376—Note 4 (contd.)**

annulled the conviction and set the accused free. (Vol 25) 1936 Cal 220 (221, 222): 39 Cri L Jour 541 (DB).

[3] When a unanimous opinion that the accused is guilty is given by assessors in a murder trial the High Court is entitled to lay some stress upon it. (Vol 32) 1945 Oudh 74 (79): 46 Cri L Jour 389 (DB).

[4] Valuable materials in favour of accused not brought on record — High Court can make full use of materials. (Vol 30) 1943 Cal 521 (525): 1 L R (1943) 1 Cal 543: 45 Cri L Jour 99 (DB).

**5. "Convict the accused of any offence."**—[1] Where the evidence on record showed that the accused took no actual part in the murder but that he helped in the disposal of the dead body and other articles, the High Court acquitted him of the charge of murder, but convicted him under S. 201, Penal Code. ('13) 14 Cri L Jour 278 (280): 1913 Pun Re No. 8 Cr (DB).

[2] Intention to kill not clearly proved—Conviction for murder annulled and altered into one for an offence under S. 326, Penal Code. (Vol 15) 1928 Cal 430 (432, 435): 29 Cri L Jour 546 (DB).

[3] Husband stabbing his wife fatally on the latter's affirmation as to her cohabitation with another man — Provocation held to be grave and sudden — Conviction altered from S. 302 to S. 304, Penal Code. (Vol 24) 1937 Rang 466 (467): 39 Cri L Jour 137 (DB).

[4] High Court holding that trial was vitiated by misdirection to jury—High Court should direct re-trial and not record conviction on its own appreciation of facts. (Vol 29) 1942 Cal 524 (527): 43 Cri L Jour 860 (DB).

**6. New trial.**—[1] Evidence incomplete—Further evidence felt necessary for giving judgment—New trial may be ordered. (Vol 23) 1936 Cal 73 (84): 37 Cri L Jour 394: 63 Cal 929 (DB).

[2] Accused tried for murder—Pleader or advocate not appointed to defend him—Difficulties appearing in evidence not cleared up in the course of cross-examination—High Court felt it difficult to confirm sentence of death on the evidence before it and ordered a re-trial. (Vol 3) 1916 Cal 79 (79, 80): 16 Cri L Jour 481 (DB).

[3] Where the Judge practically withdrew the case from the jury by so summing it up as to make the jury register merely his own opinion, it was held that there was no proper trial and that there should be a new trial. (Vol 14) 1927 Cal 631 (632, 633): 28 Cri L Jour 42 (DB).

[4] Accused convicted of murder and conspiracy—Conviction on murder charge set aside—Occurrence of

murder two years before—Likelihood of witnesses confusing what they saw at time of occurrence—Accused convicted separately for conspiracy and sentenced to transportation for life—Case not sent back for retrial on charge of murder. (Vol 24) 1937 Cal 269 (273): 38 Cri L Jour 1018 (DB).

[5] Inadmissible evidence admitted in trial Court—High Court can maintain conviction if other evidence is sufficient for the purpose and need not order re-trial. (Vol 33) 1946 P C 82 (85).

#### Section 377 — Note 1

[1] Where the Court consists of two or more Judges and the order of confirmation of sentence of death is only passed by one of them, the sentence of death is not validly confirmed but remains submitted to the Court which has to dispose of the same under Ss. 375 to 379. (Vol 24) 1937 P C 119 (121): 38 Cri L Jour 498: 64 Ind App 148: ILR (1937) Bom 711 (PC).

#### Section 378 — Note 1

[1] The Judge to whom the case is referred is entitled to pass any order he thinks proper including an order directing re-trial of the accused. (Vol 8) 1931 Mad 679 (681).

[2] Where a Bench was equally divided in its opinion as to the guilt of the accused, the order should, as a general rule, be one of acquittal. ('86) 1886 All W N 275 (276, 277) (DB).

[But see ('87) 1887 All W N 125 (127) (DB).]

[3] Conviction for murder based on evidence of a lad of 18 years—One of the Judges for confirming the conviction for murder but in favour of commuting death sentence to one of transportation for life on grounds of extenuating circumstances—Another Judge for acquitting the accused — The third Judge to whom the case was referred passed the sentence of death, without even considering the extenuating circumstance. ('04) 1 Cri L Jour 641 (661): 27 Mad 271 (DB).

[4] The Judge to whom the case was referred to on a difference between two Judges as to the guilt of accused passed the sentence of transportation for life, even when the Judge who confirmed the conviction was for passing the sentence of death. ('13) 14 Cri L Jour 642 (646, 649, 653) (SB) (Cal).

[5] Difference of opinion as to sentence—One Judge favouring death penalty, and the other recommending transportation for life—Difference of opinion itself would be a sufficient ground for holding that the death sentence should not be passed. (Vol 17) 1930 Cal 193 (198): 31 Cri L Jour 817 (DB).

**380.** Where proceedings are submitted to a Magistrate of the first class or a Sub-divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

## CHAPTER XXVIII.

## OF EXECUTION.

**381.** When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. [1882 — S. 381; 1872 — S. 301 Para. 2; 1861 — S. 383.]

**382.** If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life. [1882 — S. 382; 1872 — S. 306.]

**383.** Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall, forthwith forward a warrant to the jail in which he is, or is to be confined, and, unless the accused is already confined in such jail, shall forward him to such jail with the warrant. [1882 — S. 383; 1872 — S. 302, Para. 2.]

**384.** Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined. [1882 — S. 384; 1872 — S. 303; 1861 — S. 222.]

**385.** When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor. [1882 — S. 385; 1872 — S. 304; 1861 — S. 223.]

## Section 380 — Note 1

[1] Where a second class Magistrate finding the accused guilty of voluntarily causing grievous hurt under S. 325, Penal Code, sent the case to the District Magistrate under the proviso to S. 562, it was held that the order of the District Magistrate sending the case to the second class Magistrate on the ground that S. 32 did not apply to the case was illegal. ('08) 7 Cri L Jour 449 (450); 4 Low Bur Rul 150.

[2] The first class or Sub-divisional Magistrate to whom a case is sent under the proviso to S. 562 is not empowered to acquit the accused. (Vol 32) 1945 Mad (302); ILR (1945) Mad 891; 47 Cri L Jour 178 & 30; 1943 Mad 390 (391); 44 Cri L Jour 568 & (Vol 1942) Mad 657 (657); 44 Cri L Jour 91.

But see (Vol 2) 1915 Upp Bur 12 (12); 2 Upp Bur 55; 16 Cr L J 535 & (Vol 5) 1918 Nag 241 (242).

[3] A Sub-divisional Magistrate to whom proceedings submitted is not competent to make a reference to District Magistrate under S. 435. ('41) 42 Cri L : 89 (90) (Mad).

## Section 382 — Note 1

[1] Postponing execution of death sentence on a pregnant woman should be made only by the High Court. 2 Weir 441 (442) & (1864) 1864 Suth W R Gap 1 (1) (D B).

[2] Execution of death sentence on a pregnant woman can be postponed till after the delivery of the child. (1864) 1864 Suth W R Gap Cr 1 (1) (D B) & ('71) Suth W R Cr 66 (66) (D B) & ('79) 2 Weir 441 (442).

[3] In cases where the High Court thinks it fit it can commute the sentence to one of transportation for life. 1865 3 Suth W R Cr 15 (15).

## Section 383 — Note 1

[1] Court as Court of reference may forward offender to any jail within its jurisdiction as Court of reference. ('02) 29 Cal 286 (297) (F B).

[2] The Magistrate cannot sentence an offender to suffer imprisonment in a police lock-up. (Vol 1) 1914 Low Bur 156 (157); 7 Low Bur Rul 62; 15 Cri L Jour 10.

[3] Accused being on bail not present when the Court upholds the sentence — Court should issue a warrant for his arrest. (Vol 27) 1940 All 386 (386); 41 Cri L Jour 741; I L R (1940) All 507 (D B).

[4] The Court cannot ask the sureties to ask the accused to surrender. (Vol 27) 1940 All 386 (387); 41 Cri L Jour 741; I L R (1940) All 507 (D B).

[5] A sentence of transportation or imprisonment will commence from the time it is passed unless otherwise provided. (Vol 4) 1917 Low Bur 159 (159); 17 Cri L Jour 480.

[6] The Court has no power to direct that such sentence should commence on a future date. ('68-69) 4 Mad H C R App i (ii) & ('69-70) 5 Mad H C R App i (ii) (D B).

[See however ('81) 7 Cal L Rep 893 (395) (D B).]

[7] The Court has no power to make the sentence precede conviction. ('93-1900) 1893-1900 Low Bur Rul 42 (43).

[8] It is illegal to antedate the execution of sentence. (Vol 20) 1933 Rang 28 (28); 34 Cri L Jour 447.

[9] Half the period of custody as undertrial prisoner, ordered to be counted as part of sentence—Illegal. (Vol 10) 1923 Lah 104 (105); 23 Cri L Jour 593.

<sup>a</sup>[386. (1) Whenever an offender has been sentenced to pay a fine, the Court passing the Warrant for levy of sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may—

- (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;
- (b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The <sup>b</sup>[Provincial Government] may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Courts issue a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree or a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly:

#### Section 383—Note 1 (*contd.*)

[10] It is illegal to sentence an offender for the period already undergone by him in the police custody. ('07) 5 Cri L Jour 217 (218) (Lah) \* ('08) 7 Cri L Jour 153 (453): 4 Low Bur Rul 152.

[11] A sentence of transportation or imprisonment should be definite in respect of each offence. ('68-69) 4 Mad H C R App xxvii (xxvii).

#### SECTION 386—SYNOPSIS.

1. Recovery of fine.
2. "Has been sentenced to pay a fine."
3. Offender undergoing whole term of imprisonment in default—Levy of fine.
4. "Court passing the sentence."
5. "May take action."
6. Priority over other debts.
7. Death of offender.
8. Attachment of movable property—Clause (a).
9. "Belonging to the offender."
10. Claims to property attached under sub-section (1) (a).
11. Execution according to civil process—Sub-section (1) (b).
12. Revision.

1. Recovery of fine. — [1] The undergoing of imprisonment in default of payment of fine does not operate as a discharge or satisfaction of the order for payment of the fine which may be levied in the manner prescribed by this section. ('01) 23 All 497 (498).

[2] Offender liable to imprisonment for a longer period than six years—Fine cannot be levied after the expiration of the period. (Vol 28) 1941 Bom 158 (159): I L R (1941) Bom 147: 42 Cri L Jour 534 (D B).

[3] Fine written off as irrecoverable—Offender acquiring means of paying it—Court can take action under this section to recover fine. ('06) 4 Cri L Jour 404 (404) (All).

[4] The provisions of this section apply to the recovery of toll or compensation under S. 221 of the Madras Local Boards Act (XIV of 1920). (Vol 10) 1923 Mad 275 (275): 24 Cri L Jour 464.

[5] Money found on the accused at the time of arrest can be used for recovery of fine imposed on him.

(Vol 21) 1934 Bom 193 (194): 35 Cri L Jour 1344 (DB).

2. "Has been sentenced to pay a fine." — [1] Court cannot issue a warrant on a report of a Railway Traffic Inspector that damage has been done to the railway carriage and it should be recovered. (Vol 16) 1929 Pat 108 (108, 109): 30 Cri L Jour 635.

[2] A sentence of fine should be specific as to each offender fined. ('69-70) 5 Mad H C R App v (v).

[3] Two or more offenders should not be sentenced to pay a fine jointly. (Vol 4) 1917 Cal 348 (356, 359, 364): 18 Cri L Jour 945: 44 Cal 1025 (F B).

3. Offender undergoing whole term of imprisonment in default—Levy of fine.—[1] Where the offender has not completed full term of imprisonment for default, a warrant can be issued for levy of fine. (Vol 26) 1939 Cal 337 (338): 40 Cri L Jour 654: I L R (1939) 1 Cal 471 (D B) \* (Vol 22) 1935 Cal 546 (547): 36 Cri L Jour 1267 (D B).

[2] Where the full term of imprisonment in default of fine is served, the warrant issued for fine need not be withdrawn. (Vol 22) 1935 Bom 160 (161): 59 Bom 350: 36 Cri L Jour 1034 (D B).

[3] If there are special reasons for not withdrawing the warrant the Court should refuse to withdraw it. (Vol 22) 1935 Bom 160 (161): 36 Cri L Jour 1034: 59 Bom 350 (DB).

[4] The special reasons for issuing the warrant or for not withdrawing it should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served and any reasons which are directed to that point would be relevant. (Vol 23) 1936 Cal 149 (151): 37 Cri L Jour 524: 63 Cal 1139 (DB) \* (Vol 22) 1935 Bom 160 (161): 36 Cri L Jour 1034: 59 Bom 350 (DB). (The facts that the offence was serious and that complainant was allotted part of the fine are irrelevant.)

[5] Offender, though he paid a portion of fine, had to serve full term—Court had no jurisdiction to return the fine—Local Government should be approached. ('66-67) 4 Bom H C R Cr 37 (38) (DB).

4. "Court passing the sentence." — [1] The Judge or Magistrate passing the sentence or his successor can alone levy the fine. ('68) 9 Suth W R Cr 50 (50) (FB).

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.]

[1882 — S. 386; 1872 — S. 307; 1861 — S. 61.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 102  
[b] Substituted by A. O. for "Local Government."

#### OBJECTS AND REASONS.

"We approve generally of the principle embodied in this Clause in that it enables a fine to be recovered by procedure against immovable property through the agency of the civil Court, but we do not think that the matter can suitably be dealt with as a proviso to a rule-making power dealing with warrants of attachment against movable property. We have, therefore, re-drafted a great deal of this Clause, introducing execution through the civil Court as a substantive provision. We think it should be made clear that the civil Court should not arrest or detain an offender who has already been sentenced to imprisonment in default of payment of the fine.

We recognize that the procedure prescribed may in some cases involve considerable delay and we attempted to find some more summary method of proceeding against immoveable property on the lines of those laws which enable moneys due to the Crown to be recovered as arrears of land revenue. We have, therefore, found ourselves unable to devise any procedure which will not be open to most of the objections put forward against the present Clause." — S. C. R., [XVIII of 1923.]

#### Section 386—Note 4 (contd.)

[See however (Vol 23) 1936 Cal 149 (150, 151) : 37 Cri L Jour 524 : 63 Cal 1139 (DB).]

5. "May take action."—[1] Order for payment of money — Court has no discretion to refuse to recover the amount under this section. (Vol 10) 1923 Pat 57 (57) : 24 Cri L Jour 126.

6. Priority over other debts. — [1] A fine imposed or an order for payment of money passed by a criminal Court is a debt due to the Crown and takes precedence over ordinary contract debts even though it is to be paid over to the complainant. (Vol 5) 1918 Mad 1111 (1112, 1115) : 40 Mad 767 : 18 Cri L Jour 426 (D B).

7. Death of offender. — [1] A warrant for the levy of the fine may be issued under this section, after the death of the offender, against properties in the hands of his legal representatives. (78) 2 Bom 564 (567) (SB).

8. Attachment of movable property — Clause (a). — [1] An undivided share in specific movable property belonging to a member of a joint Hindu family cannot be attached. (Vol 20) 1933 Nag 248 (248, 249) : 29 Nag L R 320 : 34 Cri L Jour 1263.

[See however (Vol 13) 1926 Bom 103 (104, 105) : 49 Bom 906 : 27 Cri L Jour 625 (D B). (Doubted).]

[2] The following views are held in respect of the mode of attachment of a debt or share of the joint movable property where the accused is a member of a joint family :

[a] In the absence of rules by the Provincial Government, it cannot be seized and sold. (Vol 26) 1939 All 373 (374) \* (Vol 20) 1933 Cal 402 (403, 404) : 60 Cal 932 : 34 Cri L Jour 503 (DB) \* (Vol 20) 1933 Cal 401 (402) : 60 Cal 851 : 34 Cri L Jour 579 (DB) \* (Vol 19) 1932 Mad 538 (540) : 55 Mad 1041 : 33 Cri L Jour 622 \* (Vol 19) 1932 Pat 292 (293) : 12 Pat 29 : 33 Cri L Jour 872 (SB) \* (Vol 20) 1933 Nag 248 (248, 249) : 29 Nag L R 320 : 34 Cri L Jour 1263.

(b) To proceed under O. 21, Rr. 46 and 47. (Vol 19) 1932 Mad 538 (540) : 55 Mad 1041 : 33 Cri L Jour 622.

(c) To proceed under cl. (b) of this section. (Vol 19) 1932 Pat 212 (213) : 33 Cri L Jour 671 (DB) \* (Vol 20) 1933 Sind 43 (44) : 34 Cri L Jour 354 (DB).

[3] The provisions of the Civil Procedure Code exempting certain property from attachment and sale do not apply to criminal Courts. (Vol 24) 1937 Lah 367 (367).

[4] Salary not yet drawn by the offender is not movable property within the meaning of this section. (Vol 21) 1934 Rang 82 (83) : 36 Cri L Jour 850.

9. "Belonging to the offender."—[1] The Court cannot order the attachment of the money deposited by

a surety for the appearance of the offender, in execution of a sentence of fine passed against the offender: (Vol 11) 1924 Oudh 396 (396) : 26 Cri L Jour 113 \* (Vol 8) 1921 All 71 (71) : 22 Cri L Jour 744 \* (Vol 19) 1932 Pat 301 (301) : 33 Cri L Jour 958 (FB).

[2] Joint movable property passing by survivorship to the other members on the death of the offender, cannot be attached. (Vol 19) 1932 Pat 301 (301) : 33 Cri L Jour 958 (FB).

[3] A sentence of fine against a coparcener cannot be executed by attachment and sale of joint movable property of the family. (Vol 26) 1939 All 373 (374).

[4] An officer entrusted with the execution of a warrant of attachment should ascertain by all possible means whether the property belongs to the offender. (Vol 22) 1935 Pat 214 (217) : 36 Cri L Jour 714 (DB).

10. Claims to property attached under sub-section (1) (a).—[1] The Court should hold a proper inquiry into the title of the claimant in respect of property attached under sub-section (1) (a). (Vol 26) 1939 Cal 337 (338) : 40 Cri L Jour 654 : I L R (1939) 1 Cal 471 (DB) \* (Vol 20) 1933 All 135 (135) : 34 Cri L Jour 847 \* (Vol 18) 1931 Lah 543 (543) : 32 Cri L Jour 812.

[2] In the absence of rules framed by Provincial Government, procedure of inquiry under S. 88 should be followed. (Vol 19) 1932 Mad 538 (541) : 55 Mad 1041 : 33 Cri L Jour 622.

[But see (Vol 19) 1932 Bom 476 (477, 478) : 33 Cri L Jour 805 : 56 Bom 364 (DB).]

[3] Money attached and credited to the Government — Held, application for refund does not lie. (Vol 21) 1934 Pat 181 (182, 184) : 13 Pat 317 : 35 Cri L Jour 682 (SB).

11. Execution according to civil process.—Sub-section (1) (b). — [1] A warrant issued by a Magistrate to a Collector must be accepted as a decree by the civil Court to which it is sent for execution. (Vol 25) 1938 Pesh 40 (40).

[2] A warrant under this section is deemed to be a decree of the civil Court only for the purposes of execution and therefore the exemption of agriculturists' lands from execution of decrees under S. 22 of the Dekkhan Agriculturists' Relief Act does not extend to such warrants. (Vol 13) 1926 Bom 582 (583, 584) : 50 Bom 844 (DB).

[See however (Vol 16) 1929 Lah 667 (669) : 30 Cri L Jour : 1006. (The land of agriculturist cannot be attached).]

[3] The executing Court cannot go behind the warrant sent for execution or question the validity of the warrant in respect of some antecedent defect in proceedings before the criminal Court. (Vol 18) 1929 Mad 388 (384).

387. <sup>a</sup>[A warrant issued under section 886, sub-section (1), clause (a), by any Court] may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the <sup>b</sup>[attachment] and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

[1882—S. 387 ; 1872—S. 307 ; 1861—S. 61.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 103, for "such warrant". [b] Substituted. *ibid.*, for "distress".

*Suspension of execution of sentence of imprisonment.* <sup>a</sup>[388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may —

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.]

[1882 — S. 388.]

[a] Substituted by the Code of Criminal Procedure (Second Amendment) Act, 1923 (37 [XXXVII] of 1923), S. 3.

389. Every warrant for the execution of any sentence may be issued either by the Judge or *Who may issue warrant.* Magistrate who passed the sentence, or by his successor in office.

[1882—S. 389 ; 1872—S. 307, para 4.]

390. When the accused is sentenced to whipping only, the sentence shall <sup>a</sup>[subject to the provisions of section 391] be executed at such place and time as the Court *Execution of sentence of whipping only.* may direct.

[1882—S. 390 ; 1872—S. 302 para 2.]

[a] Inserted by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 21.

#### Section 386 (contd.)

12. Revision. — [1] An order of the Magistrate passed under this section in his judicial capacity is subject to revision under S. 435. ('96) 23 Cal 421 (423) (DB).

[See however (Vol 13) 1926 Sind 57 (57, 58) : 20 Sind L R 63 : 26 Cri L Jour 1263 (DB).]

#### Section 387 — Note 1

[1] The Court has no power to levy a fine against property situate outside British India. ('79) 2 Weir 444 (444, 445).

#### Section 388 — Note 1

[1] The section has no application to cases where an offender has been sentenced to fine in addition to a sentence of imprisonment. (Vol 20) 1933 Cal 308 (310) : 34 Cri L Jour 530 (DB) \* (Vol 21) 1934 Rang 11 (12) : 11 Rang 451 : 35 Cri L Jour 608 (DB).

[2] Offender not sentenced to imprisonment in default of the payment of the fine.—This section does not apply. ('05) 2 Weir 445 (445) (DB).

[3] Sub-section (2) of this section refers to an order

made by a criminal Court for the payment of money but which is not a punishment inflicted on an offender for a criminal offence. (Vol 21) 1934 Rang 11 (12) : 35 Cri L Jour 608 : 11 Rang 451 (DB).

[4] The Court has no power to order imprisonment in default of payment of any such amount unless it is specifically provided for by a statute. ('93) 18 Bom 440 (441) (DB) \* ('97) 20 Mad 385 (386) (DB) \* ('96) 19 Mad 238 (239) (DB) \* ('97) 11 C P L R Cr 10 (11).

#### Section 389 — Note 1

[1] The Sub-Divisional Magistrate who succeeded the Special Magistrate appointed under Ordinance XI of 1931 was held to be not a successor in office of the Special Magistrate and had no power to issue the warrant. (Vol 23) 1936 Cal 149 (150) : 37 Cri L Jour 424 : 63 Cal 1139 (DB).

#### Section 390 — Note 1

[1] Trial of youthful offender — Ordered to be detained in a Borstal Institution for one offence and sentenced to whipping for another — Magistrate must act



*Execution of sentence of whipping, in addition to imprisonment.*

### 391. (1) When the accused —

<sup>a</sup>[(a)] is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or

(b) is sentenced to whipping in addition to imprisonment,]

the whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months.

[1882 — S. 391; 1872 — Ss. 310, 311.]

[a] *Substituted* by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 22, for "is sentenced to whipping in addition to imprisonment in a case which is subject to appeal".

### 392. (1) In the case of a person of or over sixteen years of age whipping shall be inflicted

*Mode of inflicting punishment.* with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the <sup>a</sup>[Provincial Government] directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instruments, as the <sup>a</sup>[Provincial Government] directs.

*Limit of number of stripes.* (2) In no case shall such punishment exceed thirty stripes <sup>b</sup>[and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.]

[1882 — S. 392; 1872 — S. 311.]

[a] *Substituted* by A. O., for "Local Government". [b] *Inserted* by the Whipping Act, 1909 (4 [IV] of 1909), S. 7.

#### Section 390 — Note 1 (*contd.*)

under this section. (Vol 23) 1936 Rang 485 (486, 487): 38 Cri L Jour 33: 14 Rang 625 (FB).

[2] The sentence of whipping need not be executed on the same day it was passed but can be done so on a date fixed in the future. (Vol 15) 1928 Bom 138 (138, 139): 29 Cri L Jour 573 (DB).

[3] The Court cannot postpone a sentence of whipping only till after the accused has undergone a sentence of imprisonment in another case. (1900-02) 1 Low Bur Rul 53 (53).

#### Section 391 — Note 1

[1] Conviction under S. 392, Penal Code — Sentence of whipping and fine—Imprisonment in default of fine —Sentence of whipping set aside. (Vol 9) 1922 All 245 (246): 44 All 538: 23 Cri L Jour 274 (DB).

[2] Combined sentence of whipping and imprisonment—Sentence of whipping alone legal and was executed—Sentence of imprisonment set aside. (1900-02) 1 Low Bur Rul 362 (363) (SB).

[3] It is imperative that a sentence of whipping in addition to imprisonment should be carried out immediately on the expiry of the fifteen days from the date on which it was passed unless an appeal be made within that time. ('78) 1878 Pun Re No. 31 Cr, p. 73 (74) (DB). (It is illegal to postpone the punishment of whipping.) \* ('80) 1880 Pun Re No. 34 Cr, p. 81 (82) (DB). (Do.) \* ('93-1900) 1893-1900 Low Bur Rul 78 \* ('02) 4 Bom L R 929 (930) (DB) \* (Vol 21) 1934 Pat 551 (551): 36 Cri L Jour 100.

[4] An accused who has been released after having undergone his sentence of imprisonment cannot be called back to undergo the sentence of whipping. ('81) 1881 All W N 138 (138) \* ('79) 20 Suth W R Cr 72 (73) (DB). (Whipping should be cancelled as having

become inoperative.)

[5] Three separate convictions, first for imprisonment, second for whipping at the expiry of first and then third for imprisonment — *Held*, the sentence of whipping is illegal and the third sentence begins to run after expiry of first. ('71-74) 7 Mad H C R App xxix (xxx).

[6] A sentence of whipping not inflicted within the statutory period or within the period prescribed therefor, becomes inoperative. ('81) 1 Weir 931 (931, 932) \* ('71) 6 Mad H C R App xxxviii (xxxviii) \* ('80) 1880 Pun Re No. 34 Cr, p. 81 (82) (DB).

[But see ('78) 1878 Rat 136 (136) (DB).]

[7] Sentence of whipping ought not to be inflicted before the expiry of the period prescribed by the section for appeal. ('02) 1902 Pun L R No. 45 Cr, p. 170 (172).

[8] Sentences for separate offences — Appeal against sentence of imprisonment — Whipping ought not to be postponed on that account. ('02) 4 Bom L R 436 (437) (DB).

[9] Legality of double sentence of whipping for two offences doubted and altered by the High Court into one sentence for both offences. ('98) 1898 Rat 955 (955) (DB).

[10] A sentence of whipping cannot be carried out in the presence of the officer in charge of a Borstal institute. (Vol 23) 1936 Rang 485 (487, 488): 38 Cri L Jour 33: 14 Rang 625 (FB).

[11] It is illegal to award the sentence of whipping in addition to the imprisonment for a period of less than three months. ('02) 2 Weir 447 (448) \* ('02) 4 Bom L R 436 (437) (DB) \* (1900) 2 Bom L R 54 (55) (DB).

#### Section 392 — Note 1

[1] At one time not more than thirty stripes should be inflicted. ('06) 4 Cri L Jour 281 (281): 1906 Upp Bur Rul 47 \* ('98) 1898 Rat 955 (955) (DB).



*Not to be executed by instalments. Exceptions.* **393.** No sentence of whipping shall be executed by instalments: and none of the following persons shall be punishable with whipping, namely:—

(a) females;

(b) males sentenced to death or to transportation, or to penal servitude, or to imprisonment for more than five years;

(c) males whom the Court considers to be more than forty-five years of age.

[1882 — S. 393; 1872 — S. 312.]

**394.** (1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

[1882 — S. 394; 1872 — S. 312, paras. 1, 2.]

**395.** (1) In any case in which, under section 394, a sentence of whipping is, wholly or partially, prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, \* [or to a fine not exceeding five hundred rupees], which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term \* [or a fine of an amount] exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

[1882—S. 395; 1872—S. 313.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 105.*

#### Section 393 — Note 1

[1] The sentence of whipping is not to be executed by instalments. ('66) 1866 Pun Re No. 82 Cr, p. 86 (87) (DB) \* (1864) 3 Mad H O R App i (i). (Ruling under S. 11 of Act 6 [VI] of 1864.)

[2] Original sentence of whipping inflicted — Subsequent application for enhancement — *Held* the section bars the awarding of additional sentence. ('91) 1891 Rat 537 (537) (DB).

[3] The provisions of Whipping Act and this Code should be read together for the purpose of exempted persons from the punishment of whipping. (Vol 28) 1941 Sind 48 (48) : I L R (1940) Kar 477 : 42 Cri L Jour 403 (DB).

[4] Women or persons under sentence of death cannot be sentenced to whipping. ('76) 1 Mad 56 (56) (FB).

[5] A sentence the execution of which is prohibited is illegal and cannot be passed. (Vol 7) 1920 Lah 364 (367) : 1919 Pun Re No. 30 Cr : 21 Cri L Jour 306 (DB). (Though the section refers to the execution only.)

[6] The word 'sentenced' in cl. (b) must be understood in a general sense and if a person is sentenced for any period exceeding that fixed by the Act, whether in conviction in one case, or more than one, he cannot be punished with whipping. (Vol 26) 1939 Pesh 17 (20) : 40 Cri L Jour 681 (DB) \* (Vol 24) 1937 Lah 104 (106) : 39 Cri L Jour 4 \* ('76) 1 Mad 56 (57) (FB) \* (Vol 24) 1937 Pesh 22 (23) : 38 Cri L Jour 429 \* (Vol 17) 1930 Rang 138 (139) : 7 Rang 769 : 31 Cri Jour 176.

[7] In computing the maximum period of imprisonment under this section, the period of imprisonment to which a man has already been sentenced before the commission of the offence for which the sentence of whipping is passed cannot be taken into account. (Vol 21) 1934 Rang 58 (59, 60) : 12 Rang 404 : 35 Cri L Jour 1027.

#### Section 394 — Note 1

[1] Where the question is whether a sentence of whipping should be passed, a Magistrate should not reject the punishment of whipping merely on the ground that the accused is too young and frail unless he has medical opinion in support of his own. (Vol 26) 1939 Rang 383 (384) : 41 Cri L Jour 22.

[2] The section does not authorise the medical officer to certify before inflicting the punishment, that the accused can bear only a part of it. ('08) 7 Cri L Jour 5 (5, 6) : 31 Mad 84 (DB).

#### Section 395 — Note 1

[1] It cannot be said that by reading S.392, sub-s. (2), with this section the sentences of thirty stripes and twelve months' rigorous imprisonment are of equal degree of severity. (Vol 15) 1928 Rang 265 (265) : 30 Cri L Jour 328.

[2] A substitute of thirty stripes for a sentence of one year's rigorous imprisonment is not an "enhancement" within the meaning of S. 423, sub-s. (1) (b). (Vol 16) 1929 Rang 177 (179) : 7 Rang 319 : 30 Cri L Jour 986 (FB).

[But see (Vol 15) 1928 Rang 265 (265) : 30 Cri L Jour 328.]

[3] Medical Officer granting certificate before execution of sentence that accused can bear only part of it and that part executed — No imprisonment can be given under this section in lieu of unexecuted portion. ('08) 7 Cri L Jour 5 (5, 6) : 31 Mad 84 (DB).

[4] It is the Court that passed the sentence of whipping that can revise it. ('89) 1889 Pun Re No. 10 Cr, p. 50 (53, 54). (Power not taken away by the sentence being confirmed in appeal.)

[5] When the Magistrate who passed the sentence of whipping is absent, the District Magistrate can be held

**396.** (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say :—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

*Explanation.*—For the purposes of this section—

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment ;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

[1882—S. 396; 1872—S. 316; 1861—S. 47.]

**397.** When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which

**Section 395—Note 1 (contd.)**

to be “the Court which passed the sentence.” (‘01) 1901 Pun Re No. 33 Cr, p. 96 (97, 98) (DB).

[6] The Court has no power to take a bond under S. 562 from the accused in lieu of the sentence. (Vol 25) 1938 Rang 218 (218) : 39 Cri L Jour 707.

[7] The Court can remit the sentence altogether even though it is competent to inflict a term of imprisonment in lieu of whipping. (1900-02) 1 Low Bur Rul 202 (202).

[8] The word “imprisonment” means a substantive sentence of imprisonment and not imprisonment in default of payment of fine. (‘89) 11 All 308 (310).

[9] Where imprisonment for the maximum period is inflicted in addition to whipping, the entire sentence of whipping should be remitted. (‘98) 21 All 25 (26) \* (‘01) 1901 Pun Re No. 11 Cr, p. 32 (33) \* (‘79) 2 Weir 449 (449).

[10] Where the sentence of whipping that has been passed is illegal, the Magistrate is not competent to revise such illegal sentence. (‘93-1900) 1893-1900 Low Bur Rul 241.

[11] Sentence of imprisonment made conditional upon the sentence of whipping becoming not executable is illegal—Magistrate should act under this section. (‘93-1900) 1893-1900 Low Bur Rul 631.

[12] When imprisonment in lieu of whipping is awarded, solitary confinement may be ordered, though it is not specifically mentioned in the section. (‘99) 1899 Pun Re No. 14 Cr, p. 38 (39).

**Section 396 — Note 1**

[1] A person detained in custody for the purpose of giving security for good behaviour, is not under a “sentence” of imprisonment and his conviction under S. 224, Penal Code, is illegal. (‘67) 3 Mad H C R App xxiii (xxiii) \* (‘74) 7 Mad H C R App xli (xli) \* (‘03-04) 2 Low Bur Rul 72 (75) (EB).

[But see (‘95) 1895 Bat 774 (774) (DB) \* (‘08) 8 Cri L Jour 402 (402) : 31 Mad 515.]

[2] The place of trial under S. 224, Penal Code, for an escaped convict is the place from where he escaped. Trial and conviction by a Magistrate of another district will be quashed. (1864) 1 Bom H C R Cr 189 (189).

[3] The Court in passing additional sentence for escaping from lawful custody must comply with the provisions of this section. (‘82) 1 Weir 203 (204) \* (‘67) 8 Suth W R Cr 85 (86) (DB).

[4] When a life-convict under sentence of transportation was convicted under S. 224 of the Penal Code, and sentenced to four months’ rigorous imprisonment, it was held that it was illegal to give priority to the sentence of rigorous imprisonment. (‘98) 1898 Rat 965 (965, 966) (DB).

[5] Accused under sentence of transportation for seven years escaped from custody before transportation—Accused convicted and sentenced to two years’ rigorous imprisonment—Latter punishment was directed to take effect after the period of transportation. (‘12) 13 Cri L Jour 54 (55) (Upp Bur).

[6] When a person who escaped from custody while under sentence of death was convicted under S. 244, Penal Code, the original sentence of death ought to be executed immediately. (‘82) 1882 All W N 164 (164) (DB) \* (‘73) 20 Suth W R Cr Cir No. 9, p. 6.

[7] Accused sentenced to substantive punishment of imprisonment and also in default of fine to imprisonment—Release of accused after expiry of period for default due to mistake in warrant of commitment—Held he could be re-arrested and directed to undergo substantive sentence from the date of re-arrest. (‘97-01) 1 Upp Bur Rul 89 (89, 90).

**SECTION 397 — SYNOPSIS.**

1. Several sentences—Execution of.
2. “Unless the Court directs . . . concurrently with such previous sentence.”
3. Imprisonment in default of payment of fine if it can be made concurrent.
4. “Already undergoing a sentence of imprisonment,” etc.
5. Order for imprisonment under S. 123—Subsequent sentence for offence—Second proviso.
6. Detention in civil prison, if “sentence of imprisonment.”
7. Detention under Madras Borstal Schools Act if it can be made consecutive.

he has been previously sentenced, <sup>a</sup>[unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence] :

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced :

<sup>a</sup>[Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.]

[1882—S. 397; 1872—S. 317; 1861—S. 48.]

[a] *Insered* by the Code of Criminal Procedure (Amendment) Act, [1923 (18 XVIII) of 1923], S. 106.

#### OBJECTS AND REASONS.

Amendments made in 1923. — “We agree with those critics who point out that the drafting of this Clause [i. e. clause 103 of the Bill] will not have the effect which the Committee of 1916 contemplated. The result of the amendments introduced will ordinarily be that imprisonment for a subsequent offence will not be concurrent with detention under S. 123. The bill in fact appears to alter the law as laid down by the High Courts, which is that when a person is in jail in default of giving security, a sentence of imprisonment for a subsequent offence passed subsequently must take effect at once. We think that in most cases this is what the

law should be; that is to say, in cases where an offence has been committed prior to the order under S. 123, but the conviction takes place subsequently, the sentences should ordinarily run concurrently; but where the offence is committed after the order under S. 123 has been passed, e. g., cases of escape from custody or jail, or of offences committed in jail, then we think that the imprisonment for the subsequent offence should ordinarily not be concurrent; otherwise the prisoner might in some cases receive no further punishment for his subsequent offence. We have therefore, re-drafted this Clause on these lines.”—S. C. R., [XVIII of 1923].

#### SECTION 397 — SYNOPSIS (*contd.*)

8. Effect of reversal of one of two sentences in appeal.

9. Transportation—First proviso.

10. Sentence cannot be ante-dated.

11. Order as to commencement of sentence is not a judgment.

12. Power of High Court to pass concurrent sentences.

13. Appeal.

1. Several sentences — Execution of. — [1] Where several sentences are passed against the same person in one trial such sentences should run consecutively unless the Court directs that they should run concurrently by reason of S. 35 of the Code. (1864) 1 Suth W R Cr Cir 2 (2) \* (Vol 7) 1920 All 211 (211) : 21 Cri L Jour 398 \* (Vol 15) 1928 Oudh 507 (508) : 30 Cri L Jour 473 (DB).

[2] Under this section sentences in each separate trial of the same person should run consecutively unless otherwise ordered. ('36) 38 Pun L R 223 (223) \* ('10) 11 Cri L Jour 679 (680) (DB) (Lab).

2. “Unless the Court directs . . . concurrently with such previous sentence.”—[1] After the amendment of 1923, orders that sentences should run concurrently even in cases not falling within S. 35 have been held to be competent. (Vol 11) 1924 Rang 307 (308) : 25 Cri L Jour 1310 \* (Vol 13) 1926 Nag 426 (429) : 27 Cri L Jour 807.

[But see (Vol 12) 1925 Lah 334 (335) : 26 Cri L Jour 731.]

3. Imprisonment in default of payment of fine if can be made concurrent. — [1] A sentence of imprisonment in default is not a sentence of imprisonment. (Vol 13) 1926 Bom 62 (62) : 27 Cri L Jour 111 (DB). (Not imprisonment under S. 35.) \* (Vol 27) 1940 Lah 388 (388) : 1 L R (1940) Lah 143 : 42 Cri L Jour 33 (DB). (No imprisonment under this section.)

[2] It is illegal to make various sentences of imprisonment in default of payment of fine awarded in separate trials concurrent with each other. (Vol 27) 1940 Lah 388 (389) : 1 L R (1940) Lah 143 : 42 Cri L Jour 33 (DB).

[3] A Court has no power to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials. (Vol 28) 1941 Lah 209 (210) : 42 Cri L Jour 642.

[See however (Vol 26) 1939 Bom 174 (176, 177) : 40 Cri L Jour 602 : ILR (1939) Bom 160 (DB). ‘Imprisonment’ includes imprisonment in default of payment of fine.]]

4. “Already undergoing a sentence of imprisonment,” etc. — [1] Person sentenced to two separate terms of imprisonment on the same day—He should be deemed to be undergoing imprisonment in respect of the first sentence from the moment sentence is passed—This section will apply to such a case. (Vol 11) 1924 Rang 307 (308) : 25 Cri L Jour 1310. (Case under the amended section — Sentences could be directed to run concurrently.) \* (Vol 13) 1926 Nag 426 (429) : 27 Cri L Jour 807. (Do.)

[See however (Vol 5) 1918 All 303 (303) : 19 Cri L Jour 207. (Case decided before amendment of 1923.) \* ('11) 12 Cri L Jour 241 (241) (DB) (Bom). (Do.)]

[2] Person furnishing security under S. 108 convicted under S. 500, Penal Code—Person cannot be said to be suffering imprisonment at the time of conviction. (Vol 10) 1923 Oudh 56 (57) : 25 Oudh Cas 249 : 24 Cri L Jour 577.

[3] Person suffering imprisonment in a foreign territory — Magistrate passing sentence can direct that it should commence after the expiry of the imprisonment in the foreign territory. ('97) 20 Mad 444 (444) (DB).

5. Order for imprisonment under section 123—Subsequent sentence for offence — Second proviso. — [1] The words “sentence of imprisonment” include an order for commitment to prison under S. 123. (Vol 18) 1931 Rang 127 (129) : 9 Rang 110 : 32 Cri L Jour 714 (FB).

[2] Where the subsequent sentence is for an offence committed prior to the order under S. 123, such sentence should commence immediately. ('42) 43 Cri L Jour 303 (303) (Mad) \* (Vol 20) 1933 Oudh 381 (381) : 34 Cri L Jour 1152.

**398.** (1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences.

[1882—S. 398; 1872—S. 317, Proviso; 1861—S. 48, Proviso.]

**Section 397—Note 5 (contd.)**

[3] Where the subsequent sentence is for an offence committed after the order under S. 123, this proviso has no application and the subsequent sentence will run after the expiry of the sentence under S. 123 unless the Court directs that they shall run concurrently. (Vol 18) 1931 Rang 127 (128, 129) : 9 Rang 110 : 32 Cri L Jour 714 (FB).

[4] X sentenced to imprisonment for an offence, after the date of an order for security and before the date fixed for furnishing security—Failure to furnish security on the latter date—Order under S. 123 not passed but suspended until expiry of sentence for the offence—Held firstly, that the order under S. 123 could not be suspended and secondly, the imprisonment under S. 123 would run concurrently with the previous imprisonment. (Vol 18) 1926 Sind 273 (275) : 20 Sind L R 163 : 27 Cri L Jour 865 (FB).

[But see (Vol 14) 1927 Bom 657 (657) : 28 Cri L Jour 652 (DB).]

[5] Order for security passed while accused was undergoing a sentence—Subsequently accused sentenced to another term in respect of another offence—*Held*, the proviso did not apply—The sentence for default should run concurrently with the sentence for the second offence. (Vol 28) 1941 Sind 190 (190, 191) : I L R (1941) Kar 63 : 43 Cri L Jour 105 (DB).

[6] Even though the offence in question for which a sentence of fine is imposed may have been committed prior to the passing of the order under S. 123, the effect of S. 64 of the Penal Code, would be to postpone the imprisonment in default of fine till the expiration of the imprisonment in default of security. (Vol 19) 1932 Rang 50 (51) : 9 Rang 612 : 33 Cri L Jour 174.

[7] This proviso applies to cases where imprisonment has been imposed under Ss. 21 and 24 of the Sind Frontier Regulations. (Vol 28) 1941 Sind 29 (29, 30) : I L R (1941) Kar 161 : 42 Cri L Jour 342 (DB).

**6. Detention in civil prison, if "sentence of imprisonment."**—[1] The detention in civil prison is not a sentence of imprisonment within the meaning of this section. (Vol 4) 1917 Low Bur 159 (159) : 17 Cri L Jour 480 \* (Vol 12) 1925 Rang 202 (203) : 3 Rang 93 : 26 Cri L Jour 821.

**7. Detention under Madras Borstal Schools Act, if can be made consecutive.**—[1] This section does not apply to sentences of detention under S. 8 of the Madras Borstal Schools Act. (Vol 25) 1938 Mad 613 (614) : 39 Cri L Jour 795.

**8. Effect of reversal of one of two sentences in appeal.**—[1] The following are the views on the effect of reversal of one of two sentences in appeal :

(a) Two sentences of imprisonment of which one passed subsequent to the other—First reversed in appeal—Second commences from the date of reversal. ('79) 1879 Rat 139 (139) (DB) \* ('90) 1890 Rat 523 (523) (DB). [But see (Vol 29) 1942 Bom 342 (343) : I L R (1943) Bom 82 : 44 Cri L Jour 130 (DB). (1879 Rat 139 and 1890 Rat 523, not followed—Rule 392 of Bombay Jail Manual held to be invalid.)

(b) Sentence already undergone in respect of the conviction set aside should be reckoned as imprisonment in the second conviction. ('79) 2 Weir 450 (450) \* (Vol 34) 1947 Sind 63 (63) : I L R (1946) Kar 95 (D B).

(c) Second sentence commences only as on the date of acquittal in the first but may under S. 439 be reduced by the period already suffered. (Vol 19) 1932 Sind 159 (160) : 34 Cri L Jour 24 (D B).

**9. Transportation—First proviso.**—[1] Accused already undergoing a sentence of imprisonment—Court can direct sentence of transportation to commence immediately or after the expiration of the sentence of imprisonment. ('02) 2 Weir 453 (453) (D B) \* ('09) 10 Cri L Jour 236 (237) : 2 Sind L R 23 (D B).

[2] If no order is made directing it to commence immediately, the sentence of transportation will commence only after the expiry of the sentence of imprisonment. ('88) 1888 Rat 391 (391) (D B).

[3] Magistrate ignorant of the previous sentence of imprisonment—An order directing the sentence of transportation to commence immediately can be made later on. ('88) 1888 Rat 391 (391) (D B).

[4] Transportation cannot be ordered in default of payment of fine. ('80) 1880 Pun Re No. 17 Cr, p. 29 (30) (DB).

**10. Sentence cannot be ante-dated.**—[1] A sentence cannot be made to operate from a date prior to the date on which the sentence was passed. (Vol 20) 1933 Rang 28 (28) : 34 Cri L Jour 447.

**11. Order as to commencement of sentence is not a judgment.**—[1] An order made by a Court under this section as to the commencement of sentences is not a part of its judgment and may be made after the judgment is signed. ('88) 1888 Rat 391 (391) (D B).

**12. Power of High Court to pass concurrent sentences.**—[1] The High Court has power, under this section to pass concurrent sentences in the same manner as the Court which originally passes the sentences. (Vol 16) 1929 All 585 (585) : 51 All 888 : 30 Cri L Jour 904 \* (Vol 18) 1931 Bom 529 (529) : 33 Cri L Jour 77 (D B).

**13. Appeal.**—[1] Where an accused is sentenced to concurrent terms of imprisonment, no one of which alone is appealable, he is not entitled to appeal against them collectively. ('13) 14 Cri L Jour 254 (254, 255) : 40 Cal 631 (D B) \* ('12) 13 Cri L Jour 787 (788) (D B) (Cal).

[But see ('12) 13 Cri L Jour 877 (877) (DB) (Cal).]

[2] When an Assistant Sessions Judge sentences an accused to imprisonment for a period not exceeding four years, under each of two sections of the Penal Code, directing the sentences to run concurrently, an appeal lies to the Sessions Court and not to the High Court. (Vol 3) 1916 Cal 464 (464) : 17 Cri L Jour 266 (D B).

**Section 398—Note 1.**

[1] This section provides that no person will be excused from undergoing any part of the punishment to which he is liable under former or subsequent convictions. ('03) 2 Weir 453 (453) (D B) (Mad) \* ('94) 1894 Pun Re No. 12 Cr, p. 38 (39).

**399.** (1) When any person under the age of fifteen years is sentenced by any Criminal Court *Confinement of youthful offenders in reformatories.* to imprisonment for any offence, the Court may direct that such person instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the <sup>a</sup>[Provincial Government] as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the <sup>a</sup>[Provincial Government] prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

[1882—S. 399 : 1872—S. 318 : 1861—S. 433.]

[a] *Substituted by A. O. for "Local Government".*

#### Section 398—Note 1 (*contd.*)

[2] Accused convicted under S. 447, Penal Code, and sentenced to undergo rigorous imprisonment for three months and a fine—In default of payment of fine accused sentenced to imprisonment for twenty days—Substantive sentence by mistake overlooked—Accused serving only sentence of imprisonment in default of payment of fine, and released—*Held* that accused could be re-arrested and sent to jail to serve substantive sentence and substantive sentence could be directed to begin from the date of his re-arrest. ('97-01) 1 Upp Bur Rul 89 (89, 90).

[3] Person already undergoing sentence of imprisonment in default of payment of fine—Substantive sentence of imprisonment passed against him subsequently—Order directing that subsequent sentence should take effect immediately and that unexpired portion of prior sentence should begin to run on the expiry of the subsequent sentence, is not justified under this sub-section. (Vol 26) 1939 Bom 174 (176, 177) : 40 Cri L Jour 602 : 1 L R (1939) Bom 160 (D B).

#### SECTION 399—SYNOPSIS.

1. "Under the age of fifteen years."
2. "Is sentenced to imprisonment."
3. "May direct."
4. "Instead of being imprisoned."
5. Sub-section (3).
6. "Imprisonment."

1. "Under the age of fifteen years".—[1] Accused not under fifteen years—He cannot be ordered to be detained in a reformatory. ('98) 25 Cal 333 (337) (D B) \* (Vol 11) 1924 Rang 16 (16) : 24 Cri L Jour 918 \* ('98) 1 Weir 879 (879, 880) (D B) \* ('31) 1931 Mad W N 401 (401).

[2] The Magistrate should determine precisely the age of the accused by enquiry before action is taken under this section. ('93) 15 All 208 (209) (D B) \* ('89) 14 Bom 381 (383) (D B) \* (1900) 4 Cal W N 225 (226) (D B) \* (1900-02) 1 Low Bur Rul 126 (127) \* ('01) 24 Mad 13 (15) (DB) \* (Vol 12) 1925 Rang 302 (303) : 3 Rang 218 : 26 Cri L Jour 852.

2. "Is sentenced to imprisonment".—[1] The offender must have been sentenced to imprisonment in order that this section may apply. ('82) 1882 Rat 180 (180) (D B).

[2] Where it is deemed necessary to have a convicted person sent to a reformatory, the proper procedure is to impose a substantive sentence and then direct that, in lieu thereof, the accused be detained in a reformatory. ('99) 1 Bom L R 162 (163) (D B) \* ('96) 1896 All W N 27 (27).

[3] Liability to be sent to reformatory school or non-existence of a reformatory is not to be considered in estimating sentence to be passed on a juvenile offender. (Vol 9) 1922 Bom 169 (170) : 46 Bom 429 : 23 Cri L

[4] A person who is ordered to execute a bond to keep the peace or for good behaviour and in default to undergo imprisonment for that period cannot be sent to reformatory. (1900-02) 1 Low Bur Rul 42 (42) \* ('97-01) 1 Upp Bur Rul 875 (876).

[But see (Vol 21) 1934 Mad 457 (457) : 57 Mad 928 : 35 Cri L Jour 1153.]

[5] Person sentenced to pay fine or in default to undergo imprisonment is not "sentenced to imprisonment". ('93-1900) 1893-1900 Low Bur Rul 491 (492) \* ('11) 12 Cri L Jour 244 (244) (Low Bur).

[6] Sentence of whipping is not a "sentence of imprisonment" for the purpose of sending the accused to a reformatory. ('93-1900) 1893-1900 Low Bur Rul 493 (493).

3. "May direct."—[1] As a rule, no boy should be sent to a reformatory on first conviction unless there is a reasonable cause for supposing that he is being trained up to or is likely again to lapse into crime, being without parental or other control. ('95) 1 Weir 878 (879) (Mad) \* (Vol 8) 1921 Oudh 190 (191) : 24 Oudh Cas 305 : 23 Cri L Jour 145 \* (Vol 18) 1931 Mad 771 (771) : 54 Mad 764 : 32 Cri L Jour 1044 (D B) \* (Vol 21) 1934 Rang 125 (127) : 12 Rang 344 : 35 Cri L Jour 959 (DB) \* (Vol 21) 1934 Rang 123 (124) : 12 Rang 349 : 35 Cri L Jour 903 (DB).

[2] Order for detention in a reformatory school is not a sentence and the suspension of the sentence by the Sessions Judge will not prevent the carrying out of the detention. (Vol 2) 1915 Mad 1067 (1068) : 16 Cri L Jour 134 (DB).

4. "Instead of being imprisoned".—[1] Court which sentences an accused person for any particular period of imprisonment cannot direct detention in a reformatory for a longer period. ('76) 1876 Rat 109 (109) (DB) \* ('89) 1889 All W N 131 (131) (DB).

[2] The period of detention should be defined. ('13) 14 Cri L Jour 256 (256) (DB) (Bom) \* ('01) 24 Mad 13 (16) (DB) \* ('01) 1 Low Bur Rul 63 (64).

5. Sub-section (3).—[1] This section does not apply where the Reformatory Schools Act, 1897, is in force. ('96) 1896 Rat 864 (864) (DB) \* (Vol 5) 1918 Lah 27 (28) : 1918 Pun Re No. 17 Cr : 19 Cri L Jour 917 \* ('89) 12 Mad 94 (95, 97) (FB) \* ('82) 1882 Pun Re No. 6 Cr. p. 6.

[2] Under S. 8, Reformatory Schools Act, only the Magistrate specified therein can make an order under this section. ('97) 1897 Rat 947 (948) (DB) \* ('72-92) 1872-92 Low Bur Rul 330 (331) \* ('89) 12 Mad 94 (95, 97) (FB) \* (Vol 2) 1915 Mad 841 (841) : 16 Cri L Jour 32. (A second class Magistrate not empowered to act under S. 8 of the Act must refer the case to the District Magistrate under S. 9.)

6. "Imprisonment".—[1] This section will apply to cases when an offender under the age of 15 years is sentenced to transportation. ('08) 9 Cri L Jour 99 (102) :

**400.** When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

[1882—S. 400; 1872 S. 305; 1861—S. 385.]

## CHAPTER XXIX.

### (OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.)

**"401.** (1) When any person has been sentenced to punishment for an offence, the [Provincial Government] may at any time without conditions, upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the [Provincial Government] for the suspension or remission of a sentence, the [Provincial Government] may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion [and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists].

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the [Provincial Government], not fulfilled, the [Provincial Government] may cancel the suspension or remission, and thereupon the person

#### Section 400 Note 1

[1] Person convicted under an Ordinance issued by Governor-General — His sentence does not become fully executed till expiry of the period of the sentence— Though term of the Ordinance has expired, detention after the period of Ordinance is not illegal. (Vol 20) 1933 Cal 280 (282) : 60 Cal 742 : 34 Cri L Jour 291 (DB) \* (Vol 20) 1933 Cal 516 (519) : 60 Cal 545 : 34 Cri L Jour 879 (DB).

#### Section 401 --- Note 1

[1] Provincial Government may act of its own accord or may be moved by application. See (Vol 19) 1932 All 232 (232) : 33 Cri L Jour 830 (DB).

[2] Provincial Government can suspend execution of death sentence to enable accused to appeal to Privy Council. (Vol 18) 1931 Lah 359 (360) : 33 Cri L Jour 126.

[See also (Vol 2) 1915 P C 29 (30) : 42 Cal 739 : 42 Ind App 133 : 16 Cri L Jour 494 (1C).]

[3] Though order passed under this section by Provincial Government is in name of the Governor, it is in reality order of Provincial Government. (Vol 25) 1938 Nag 513 (516) : 40 Cri L Jour 397 : I L R (1940) Nag 1 (FB).

[4] Special authority conferred by this section does not touch cases under S. 337. ('89) 11 All 79 (89).

[5] Effect of order of remission is to wipe out remitted portion of sentence altogether and not merely to suspend its operation. (Vol 25) 1938 Nag 513 (520) : 40 Cri L Jour 397 : I L R (1940) Nag 1 (FB).

[6] Provincial Government remitting sentence unconditionally — It cannot cancel order and restore sentence subsequently, except in cases of fraud or mistake and general power of cancellation of orders under S. 21 of General Clauses Act, 1897, cannot be invoked in such case. (Vol 25) 1938 Nag 513 (518, 520) : 40 Cri L Jour 397 : I L R (1940) Nag 1 (FB).

[7] Object of calling for statement under sub-s. (2) is to avoid misapprehension about legality of sentence passed or mistake as to propriety of punishment inflicted. See (Vol 21) 1934 Rang 125 (126, 127) : 12 Rang 344 : 35 Cri L Jour 959 (DB).

[8] In following cases Court recommended accused to mercy of Government :

(a) Discovery of facts after final judgment is pronounced and signed, showing accused committing offence. (Vol 10) 1923 All 473 (474) : 45 All 143 : 27 Cri L Jour 766 \* (28) 27 Cri L Jour 1254 (1256) (D) (Cal) \* (Vol 6) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265 (DB).

[See ('85) 7 All 672 (673) (DB).]

(b) Oversight on part of counsel or omission on part of Court to notice a relevant fact in proceedings resulting in error of fact or law. ('85) 10 Bom 176 (180, 18 (FB)) \* ('09) 9 Cri L Jour 226 (245) : 33 Bom 221 (D) \* ('66) 5 Suth W R 61 (64) (FB).

(c) Unsoundness of mind not strictly covered by S. 84 of Penal Code. (Vol 19) 1932 All 233 (236) : 33 Cri L Jour 714 (DB) \* (Vol 11) 1924 All 413 (413, 414) 46 All 243 : 25 Cri L Jour 683 (DB) \* ('86) 10 Bom 51 (518, 519) (DB) \* (Vol 10) 1923 Cal 460 (463) (DB) (Vol 18) 1931 Lah 276 (278) : 32 Cri L Jour 1230 (D) \* (Vol 14) 1927 Lah 674 (677) : 8 Lah 684 : 28 Cri Jour 598 (DB) \* ('31) 1931 Mad W N 719 (723) (DB) (Vol 6) 1919 Mad 128 (129) : 20 Cri L Jour 828 (DB) ('13) 14 Cri L Jour 81 (91) : 15 Oudh Cas 321 (SB) (Vol 7) 1920 Cal 39 (40) : 21 Cri L Jour 317 (DB).

(d) Punishment prescribed by law being more rigorous than circumstances of case deserve. (Vol 24) 1937 Ja 689 (691) : 39 Cri L Jour 16 (DB) \* (Vol 10) 1923 A 355 (356) : 24 Cri L Jour 753 (DB) \* (Vol 7) 1920 All 19 (200) : 21 Cri L Jour 607 (DB) \* ('95) 1895 Rat 79 (792).

(e) Other mitigating circumstances. (Vol 20) 1923 Lah 1021 (1022) : 35 Cri L Jour 430 (DB) \* (Vol 2) 1934 Lah 31 (32) : 35 Cri L Jour 652 (DB) \* (Vol 1) 1926 Mad 1165 (1166) : 50 Mad 474 : 27 Cri L Jour 1357 (DB). (Sentence for third conviction under Criminal Tribes Act, being transportation for life being harsh \* (Vol 18) 1931 Rang 285 (244) : 9 Rang 404 : 38 C L Jour 205 (SB). (Political offence.) \* (Vol 3) 1916 Sin 65 (66) : 9 Sind L R 205 : 17 Cri L Jour 281 (DB) (Right of appeal and revision barred — Erroneous conviction — Recommendation to Government.) \* ('90) 1 Mad 36 (37, 38) (DB).

[See (1900-04) 1 Low Bur Rul 359 (361) (DB).]

[9] Court ought not to express opinion in case where stay of execution of sentence is prayed for until petition to His Majesty in Council is dismissed or. 189

in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

°[(4.1) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.]

(5) Nothing herein contained shall be deemed to interfere with the right of °[His Majesty or of the °[Central Government] when such right is delegated to °[it] to grant pardons, reprieves, respites or remissions of punishment.

°[(5.1) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to °[it], by the °[Central Government], any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.]

(6) The °[\* \* \*] °[Provincial Government] may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

[1882 — S. 401 ; 1872 — S. 322 ; 1861 — S. 54.]

- [a] See the N.-W. F. P. (Adolescent) Prisoners' Release on Probation Act 1940 (N.-W. F. P. Act 2 [II] of 1940), S. 2; the Good Conduct Prisoners' Probational Release Act, (Punjab Act 10 [X] of 1926) and (Assam Act 2 [II] of 1938); the U. P. Prisoners' Release on Probation Act 1938, (U. P. Act 8 [VIII] of 1938), S. 2. [b] The words "the Governor-General in Council or" were repealed by A. O. [c] Substituted by A. O. for "Local Government". [d] The words "as the case may be" were repealed by A. O. [e] Inserted by the Code of Criminal Procedure (Amendment) Act 1923 (18 [XVIII] of 1923), S. 107. [f] Superfluous word. [g] Substituted by Act 18 [XVIII] of 1923, S. 107 for "Her Majesty". [h] Substituted by A. O. for "Governor-General." [i] Substituted by A. O. for "him". [j] The words "Governor-General in Council and the" were repealed by A. O.

#### OBJECTS AND REASONS.

Amendment of 1923.—"We have substituted the word 'law' for the word 'Act' so as to enable the provi-

sions of section 401 to be applied in the case of persons sentenced by tribunals constituted by Regulations or Ordinances."—S. C. R., [XVIII of 1923].

°[402. (1)] The °[\* \* \* \*] °[Provincial Government] may, without the consent of the *Power to commute punishment.* person sentenced, commute any one of the following sentences for any other mentioned after it :—

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

°[(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.]

[1882 — S. 402 ; 1872 — S. 322.]

- [a] Renumbered by the Code of Criminal Procedure (Amendment) Act 1923 (18 [XVIII] of 1923), S. 108. [b] The words "Governor-General in Council or the" were repealed by A. O. [c] Substituted by A. O. for "Local Government." [d] Added by Act 18 [XVIII] of 1923, S. 108.

#### Section 401—Note 1 (contd.)

matter which lies entirely with Government. (Vol 2) 1915 P C 29 (30) : 42 Cal 739 : 42 Ind App 133 : 16 Cri L Jour 494 (PC).

[10] Accused proved to be guilty of greivous offence of waging war against King — Court refused to recommend accused to mercy on ground that matter was entirely in the hands of Government. (Vol 18) 1931 Rang 235 (244) : 33 Cri L Jour 205 : 9 Rang 404 (SB).

[11] Remission under S. 227, Penal Code — Court is to decide whether conditions are violated. (Vol 20) 1933 Rang 28 (29) : 34 Cri L Jour 447.

[12] Power of pardon rests in sovereign ; and provisions contained in this section in no way interfere with prerogative of Crown in that respect. ('89) 11 All 79 (89).

[13] Tendering of advice to His Majesty as to exercise of his prerogative of pardon is matter for Executive Government and is outside the province of Judicial Committee of Privy Council. (Vol 2) 1915 P C 29 (30) : 42 Cal 739 : 42 I A 133 : 16 Cri L Jour 494 (PC).

#### Section 402 — Note 1

[1] Accused sentenced to death by Special Tribunal — Appeal to Privy Council — Tribunal ceased to exist before disposal of appeal — Provincial Government held could commute sentence under this section. (Vol 18) 1931 Lah 359 (360) : 33 Cri L Jour 126.

[2] Co-offenders tried separately receiving lesser sentence on some facts—Case may be brought to notice of Government to remove inequalities in sentences. (Vol 6) 1919 All 445 (447) : 20 Cri L Jour 767 (DB).



[402A. The powers conferred by sections 401 and 402 upon the Provincial Government *Sentences of death* may, in the case of sentences of death, also be exercised by the Governor General in his discretion.]

[a] Inserted by A. O., Cf. the Government of India Act 1935, S. 295.

## CHAPTER XXX.

### OF PREVIOUS ACQUITTALS OR CONVICTIONS.

**403.** (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other

#### SECTION 403 — SYNOPSIS.

1. Scope.
2. In what cases fresh trial is barred.
3. "Same offence."
4. Any other offence for which a different charge might have been made under section 236.
5. "Any distinct offence."
6. Consequences of act happening after previous conviction—Sub-section (3).
7. "Tried."
8. "Acquittal"—Meaning of.
9. "Conviction"—Meaning of.
10. "While such conviction or acquittal remains in force."
11. Court of competent jurisdiction.
12. Identity of accused necessary for application of section.
13. Dismissal of complaint or discharge of accused.
14. "Discharge"—Meaning of.
15. General Clauses Act, Section 26.
16. Practice.

1. Scope.—[1] This section embodies the ancient maxim *nemo debet bis vexari pro eadem causa* (no person should be twice disturbed for the same cause). (Vol 22) 1935 Mad 56 (57) : 58 Mad 513 : 36 Cri L Jour 311. (Overruled on another point by (Vol 25) 1938 Mad 847 : I L R (1938) Mad 902 : 39 Cri L Jour 712 (DB).)

[2] Section incorporates the common law principle of the well-known pleas of *autre fois acquit* (formerly acquitted) and *autre fois convict* (formerly convicted), namely that no one shall be punished or put in peril twice for the same matter. (Vol 26) 1939 Cal 65 (71) : 40 Cri L Jour 199 : ILR (1939) 1 Cal 1 (FB) & (Vol 34) 1947 Pat 290 (293) & (13) 14 Cri L Jour 185 (187) : 9 Nag L R 26 & (Vol 15) 1928 Rang 252 (253) : 6 Rang 386 : 29 Cri L Jour 930 & (Vol 5) 1918 Nag 126 (128) : 19 Cri L Jour 796 & (Vol 19) 1932 Cal 871 (874) : 60 Cal 149 : 34 Cri L Jour 181 & (Vol 21) 1934 Mad 311 (313) : 57 Mad 554 : 35 Cri L Jour 783 (DB) & (Vol 17) 1930 Pat 26 (27) : 9 Pat 585 : 30 Cri L Jour 806 (DB).

[3] There is nothing like *res judicata* in a criminal trial so long as it does not terminate in either acquittal

or conviction so as to attract the provisions of this section. (Vol 23) 1936 Nag 55 (58) : 37 Cri L Jour 474 (DB).

[4] The provisions of this section are complete by themselves on the effect of previous acquittals or convictions. (Vol 26) 1939 Cal 65 (71) : 40 Cri L Jour 199 : I L R (1939) 1 Cal 1 (FB) & (Vol 24) 1937 Cal 99 (113, 114) : 38 Cri L Jour 818 (813).

[But see (Vol 34) 1947 Pat 290 (293).]

[5] Even in cases in which a trial is not barred under this section, a judgment of acquittal fully establishes the innocence of the accused and such innocence cannot be disputed in any subsequent proceedings. (11) 12 Cri L Jour 396 (397) (SB) (Cal) & (Vol 21) 1934 All 61 (65) : 35 Cri L Jour 1349 & (13) 14 Cri L Jour 5 (18, 26) (SB) (Cal) & (11) 12 Cri L Jour 94 (96) (Lah) & (Vol 20) 1933 Oudh 470 (472) : 35 Cri L Jour 36 & (23) 1935 Mad W N 1342 (1343).

[But see (67) 7 Suth W R Cr 15 (21) & (74) 14 Beng L R 54 (58).]

[6] A was acquitted of an offence and later on B was prosecuted under Ss. 213 and 414, Penal Code, (concealing offence and screening offender) with reference to the same offence. Held that the fact established by the acquittal of A, viz., that no offence was committed by him, could not be disputed in the prosecution of B. (13) 14 Cri L Jour 453 (455) : 37 Bom 658 (DB).

[7] Where, in a trial for murder and robbery, the accused is convicted of murder but acquitted of robbery, the High Court, in appeal from the conviction is entitled to accept the evidence which has been disbelieved by the trial Court on the charge of robbery as corroborative evidence of murder. (Vol 33) 1946 P C 16 (19) : 72 Ind App 305 : I L R (1946) Lah 1 : 47 Cri L Jour 489 (PC).

2. In what cases fresh trial is barred.—[1] Where an accused is tried for a certain offence and is convicted or acquitted he cannot again be tried for the same offence on the same facts. (Vol 33) 1946 P C 16 (19) : 72 Ind App 305 : I L R (1946) Lah 1 : 47 Cri L Jour 489 (PC).

[2] First charge of being member of unlawful assembly with common object of assaulting complainant



offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

*Explanation.* — The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section.

*Illustrations.*

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for, robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

[1882—S. 403; 1872—Ss. 460, 147; para. 2; 195, Explanation 2 and 215. Explanation 2; 1861—Ss. 55, 60.]

**Section 403—Note 2 (contd.)**

and also assault on complainant — Acquittal — Subsequent proceedings for offence under S. 323, Penal Code, held, could not be reopened until order of acquittal was set aside. (01) 5 Cal W N 72 (73) (DB).

[3] Charge under S. 302, Penal Code — Acquittal — Further trial for offence under S. 326, Penal Code held barred as a conviction for such offence might have been recorded under S. 237 at previous trial. (Vol 30) 1943 Mad 737 (738); 45 Cri L Jour 518.

[4] A is tried for offence X. He is again sought to be tried for offence Y. X and Y form part of the same transaction but are not distinct offences and do not fall within Ss. 236 and 237 of the Code — Trial for offence Y is barred. (Vol 16) 1929 All 899 (900): 51 All 977: 30 Cri L Jour 1089 (Vol 15) 1928 Bom 177 (178): 29 Cri L Jour 522 (DB) \* (13) 14 Cri L Jour 135 (137): 9 Nag L R 26.

[5] Acquittal of an offence arising out of certain facts under a wrong section will prevent a further enquiry into any offence based on the same facts until that acquittal is set aside. (Vol 11) 1924 Oudh 64 (64): 26 Oudh Cas 282: 25 Cri L Jour 794.

[6] Accused acquitted of major offence — New trial on minor offence included in major offence is barred. (Vol 33) 1946 Bom 38 (44): 47 Cri L Jour 378 (FB).

[7] Accused convicted under Ss. 147 and 148, Penal Code—Sessions Judge acquitting accused cannot remand case for trial on same facts under Ss. 323 and 324, Penal Code — Such trial would be barred under sub-s. (1). (Vol 32) 1945 Mad 472 (472).

[8] Where the offence subsequently charged is one of which the accused might have been convicted under S. 238 at the previous trial the subsequent trial will be barred. (Vol 33) 1946 Bom 38 (44): 47 Cri L Jour 378 (FB).

[But see (Vol 30) 1943 Mad 737 (738): 45 Cri L Jour 518.]

[9] Charge of attempting to murder A—Acquittal—Trial for murder of B not barred — Evidence as to assailant of A is not inadmissible when the attack on A forms part of the *res geste* at the second trial. (Vol 31)

1944 Pat 247 (250): 23 Pat 95: 45 Cri L Jour 801 (DB).

[10] The true test of whether a second trial is barred is not so much whether the facts are the same in both trials as whether the acquittal or conviction from the first charge necessarily involves an acquittal or conviction on the second charge. (Vol 24) 1937 Cal 99 (113): 38 Cri L Jour 818 (SB) \* (Vol 26) 1939 Cal 65 (70): 41 Cri L Jour 199: I L R (1939) 1 Cal 1 (FB) \* (Vol 23) 1936 Rang 174 (175): 14 Rang 24: 37 Cri L Jour 492

[11] Even in cases in which a fresh trial may not be barred under this section, the Court may refuse to proceed against a person on the ground that it is no desirable or proper in the circumstances of a particular case to prosecute a person for a second time on the same facts. (Vol 32) 1945 Bom 413 (416, 417): 47 Cri L Jour 138 (DB) \* (Vol 29) 1942 Lah 122 (123): 4 Cri L Jour 632 \* (1900) 2 Weir 549 (550) (DB) \* (Vol 25) 1938 Lah 625 (627): 39 Cri L Jour 960: I L R (1938) Lah 373 (DB) \* (Vol 19) 1932 Cal 291 (292): 33 Cri L Jour 439 (DB) \* (Vol 17) 1930 Cal 60 (60): 31 Cri L Jour 613 (DB) \* (05) 2 Cri L Jour 790 (793) (DB) \* (Vol 17) 1930 Cal 457 (459): 57 Cal 268 (DB).

3. "Same offence."—[1] Where an act or omission is punishable under different provisions of law, the person committing it cannot be said to "commit the same offence" within the meaning of the sub-section (Vol 17) 1930 Pat 26 (27): 9 Pat 585: 30 Cri L Jour 806 (DB).

[2] In trial under S. 397, Penal Code, jury need not address themselves to alternative charge under S. 307 Penal Code—*Held*, that this fact cannot justify another trial under S. 307 on the same facts, as offence under S. 397 includes one under S. 307. (Vol 21) 1934 Ma 311 (313): 57 Mad 554: 35 Cri L Jour 783 (DB).

[3] The words "same offence" in sub-section (1) refer to the same transaction. (03) 6 Oudh Cas 153 (15) (DB).

4. Any other offence for which a different charge might have been made under section 236.—[1] The expression "might have been made" means "might have

Section 403 — Note 4 (*contd.*)

been lawfully made." (Vol 17) 1930 Pat 26 (27) : 9 Pat 585 : 30 Cri L Jour 806 (DB).

[2] Accused acquitted of cheating subsequently put on trial for criminal breach of trust—Facts identical in both—Subsequent trial barred—Held [Per Cornish and Mockett J.J., (Lakshmana Rao J. *contra*)] that the offences were distinct and that the subsequent trial was not barred. (Vol 23) 1936 Mad 353 (360, 372) : 37 Cri L Jour 637 (FB).

[3] Trial under certain sections expressly reserved—Charges cannot have been framed for such offences. (Vol 21) 1934 Cal 240 (241) : 35 Cri L Jour 1270 (DB).

[4] Trial and acquittal for mischief on certain facts—Subsequent trial on same facts for rioting, held barred as alternate charges under mischief and rioting could have been framed in previous trial. (Vol 11) 1924 Mad 178 (179) : 25 Cri L Jour 244.

[5] Conviction for lesser offence—Discovery of fresh evidence showing that graver offence was committed—Fresh trial for graver offence barred. (Vol 2) 1915 Low Bur 60 (61) : 16 Cri L Jour 267.

5. "Any distinct offence." — [1] The test to determine whether the offences charged at two trials are distinct for purposes of this section is whether, if the offences were charged at the same trial, separate sentences could be passed in respect thereof under S. 71 of the Penal Code. (Vol 21) 1934 Mad 311 (313) : 57 Mad 554 : 35 Cri L Jour 783 (DB).

[2] Where the offences are constituted by the same acts or omissions they are not distinct. (Vol 21) 1934 Mad 311 (313) : 57 Mad 554 : 35 Cri L Jour 783 (DB) \* (06) 3 Cri L Jour 388 (389, 390) (DB). (Offences under Ss. 202 and 178, Penal Code.) \* (Vol 22) 1935 Rang 436 (438) : 37 Cri L Jour 189. (Offences under S. 41 (16), Rangoon Police Act and Penal Code.) \* (13) 14 Cri L Jour 214 (216) : 36 Mad 308 (DB). (Offences under Ss. 182 and 211, Penal Code.) \* (Vol 16) 1929 All 940 (940) : 30 Cri L Jour 1153. (Offence under Ss. 353 and 186, Penal Code.) \* (Vol 31) 1944 Pat 328 (330). (Bihar and Orissa Municipal by-law No. 59 and S. 341, Penal Code.) \* (Vol 28) 1941 Pat 442 (444) : 42 Cri L Jour 774. (Acquittal of offence under S. 405, Penal Code, and under S. 52, Income-tax Act, bars trial for offence under S. 196, Penal Code, in respect of same facts.) \* (Vol 25) 1938 Lah 614 (614, 615) : 39 Cri L Jour 870 : 1 L R (1938) Lah 127. (Sections 323 and 324, Penal Code.) \* (Vol 24) 1937 All 117 (118, 119) : 38 Cri L Jour 368. (Sections 408 and 477A, Penal Code.) \* (Vol 23) 1936 Cal 686 (687) : 38 Cri L Jour 1 (DB) \* (Vol 13) 1926 Lah 629 (639) : 8 Lah 52 : 27 Cri L Jour 1019. (Sections 297 and 379, Penal Code.)

[But see (Vol 19) 1932 Mad 362 (363) : 55 Mad 788 : 33 Cri L Jour 522. (Offences under S. 323, Penal Code, and S. 3 (12), Madras Towns Nuisances Act.) \* (Vol 15) 1928 Bom 231 (232) : 29 Cri L Jour 981 (DB). (Conviction for driving car while drunk no bar to trial for rash and negligent driving.) \* (Vol 13) 1926 All 405 (406) : 48 All 486 : 27 Cri L Jour 767. (Section 379, Penal Code and S. 9, Opium Act.) \* (Vol 12) 1925 All 299 (300) : 47 All 284 : 26 Cri L Jour 688. (Conviction for affray does not bar trial for hurt caused in course of affray.) \* (Vol 20) 1933 Oudh 470 (472) : 35 Cri L Jour 36. (Sections 411 and 414, Penal Code and S. 19 (f), Arms Act.)]

[3] Where anything which is an offence consists of parts, any of which parts is itself an offence, the offences are not distinct. (Vol 12) 1925 Pat 20 (24, 25) : 3 Pat 503 : 25 Cri L Jour 738 (DB). (Receiving different items of stolen property at same time.) \* (Vol 12) 1925 Oudh 298 (299) : 28 Cri L Jour 1. (Do.) \* (Vol 10) 1923 Cal 557 (558) : 50 Cal 594 : 24 Cri L Jour 707 (DB). (Do.)

\* (Vol 14) 1927 Mad 441 (445) : 28 Cri L Jour 235 (Cheating in respect of two facts at one time.)

[But see (Vol 16) 1929 Pat 710 (711) : 31 Cri L Jour 472. (Unlawful assembly and rioting resulting in damage to several holdings—Charge of separate offence legal.)]

[4] Where several acts, of which one or more than one, would, by itself, or by themselves, constitute an offence, constitute, when combined, a different offence the offences are not distinct. (13) 14 Cri L Jour 13 (137, 138) : 9 Nag L R 26 \* (Vol 16) 1929 All 89 (900) : 51 All 977 : 30 Cri L Jour 1089 \* (1906) 5 Ca W N 72 (73) (DB).

[5] Previous acquittal for offence of being in possession of illicit liquor—Accused can be charged on same facts for loitering on road under Bombay City Police Act, S. 112 (d). (Vol 32) 1945 Bom 65 (66) : 46 Cri L Jour 258 (DB).

[6] Offence of working factory under S. 390, Bombay City Municipal Act, without permission—Previous acquittal cannot under S. 403, Cr. P. C., bar subsequent charge of working factory without permission a later date. (Vol 29) 1942 Bom 326 (328) : 44 Cri L Jour 120 (DB).

[7] Conviction for offence under S. 420, Penal Code for cheating certain person and obtaining from him Government Promissory Notes on false representation—Subsequent trial for offence under S. 409, Penal Code for embezzlement of amount is not barred as offences are distinct. (Vol 29) 1942 Oudh 173 (477) : 18 Luck 408 : 43 Cri L Jour 830.

[8] Conviction of a person under S. 75 of the Madras City Police Act is no bar to his trial for an offence under Ss. 323 and 352, Penal Code. (Vol 27) 1940 Mad 22 (224) : 41 Cri L Jour 401.

[9] Conspiracy—Person once tried on charge of conspiracy—Section 403 is no bar to trial of entry into fresh conspiracy. (Vol 26) 1939 Cal 65 (69, 70) : 40 Cri L Jour 199 : 1 L R (1939) 1 Cal 1 (FB) \* (Vol 23) 1936 Pat 503 (504) : 37 Cri L Jour 785. (Accused acquitted on a charge of affray—Subsequent trial and conviction for causing hurt during the affray is not barred. (Vol 17) 1930 Pat 26 : 9 Pat 585 : 30 Cri L Jour 806 (DB) and (Vol 8) 1921 Pat 22 : 22 Cri L Jour 63, explained.

[10] Charges under S. 120B, Penal Code—Subsequent charge under S. 121A—Facts in the two not same—Offences held distinct and S. 403 (2) applied. (Vol 24) 1937 Cal 99 (114) : 38 Cri L Jour 818 (SB).

[11] Criminal breach of trust or criminal misappropriation committed of different items at various times between certain dates—Charge under S. 222 for an aggregate sum omitting some of the items—Trial on such charge no bar to trial in respect of an omitted item. (Vol 28) 1941 Pat 606 (607) : 43 Cri L Jour 286 \* (Vol 17) 1930 Mad 978 (980) : 32 Cri L Jour 22 \* (10) 11 Cri L Jour 337 (337, 338) (DB) (Bom) \* (Vol 16) 1929 Cal 457 (458, 459) : 57 Cal 17 : 31 Cri L Jour 747 (DB) \* (Vol 10) 1923 Cal 654 (658) : 50 Ca 632 : 25 Cri L Jour 156 (SB) \* (Vol 18) 1931 All 20 (209) : 32 Cri L Jour 376 : 53 All 411.

[But see (Vol 4) 1917 Mad 524 (525) : 17 Cr L J 30.]

[12] Conspiracy to commit an offence is distinct from the offence the commission of which is the object of the conspiracy. (Vol 29) 1942 Pat 58 (59, 60) : 43 Cri L Jour 44 (DB) \* (Vol 21) 1934 All 61 (65) : 35 Cri L Jour 1349 \* (Vol 20) 1933 Bom 447 (448, 449) : 58 Bom 23 : 35 Cri L Jour 112 (DB) \* (Vol 11) 1924 Ca 809 (811) : 25 Cri L Jour 1048 (DB).

[But see (Vol 13) 1926 Cal 450 (450) : 26 Cri L Jour 1023 (DB).]

[13] Previous trial for abetment of forgery is no bar to trial for offences under S. 82, Registration Act. (Vol 2) 1915 All 114 (115) : 37 All 107 : 16 Cri L Jour 144.

Section 403—Note 5 (*contd.*)

[But see (Vol 11) 1924 Rang 213 (213): 1 Rang 299: 25 Cri L Jour 191.]

[14] Non-compliance with notice under S. 159 (1), Madras Local Boards Act, for removal of encroachment—Prosecution for—Fresh prosecution for disobedience of fresh notice regarding same encroachment is not barred. (Vol 25) 1938 Mad 847 (848, 849): 39 Cri L Jour 712: I L R (1938) Mad 902 (DB). (Overruling (Vol 22) 1935 Mad 56: 58 Mad 513: 36 Cri L Jour 311.)

[15] The test for determining whether an offence is distinct from one previously tried, is to see whether the evidence necessary to prove the two offences is the same or different. (Vol 15) 1928 Pat 577 (578): 29 Cri L Jour 760 ✕ (Vol 14) 1927 Bom 629 (630): 28 Cri L Jour 1032 (DB) ✕ (Vol 17) 1930 All 92 (95): 30 Cri L Jour 1149 ✕ (Vol 17) 1930 Pat 26 (27): 30 Cri L Jour 806: 9 Pat 585 (DB).

[But see (Vol 19) 1932 Mad 362 (363): 55 Mad 788: 33 Cri L Jour 522.]

[16] In order to constitute distinct offences, the offences must be totally unconnected. (Vol 15) 1928 Rang 252 (253): 6 Rang 386: 29 Cri L Jour 930.

6. Consequences of act happening after previous conviction—Sub-section (3).—[1] A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide. (Vol 1) 1914 All 191 (192): 15 Cri L Jour 64: 36 All 4 (DB) ✕ ('01) 1901 Pnn Re No. 3 Cr, p. 6 (8) ✕ (Vol 22) 1935 Pesh 18 (19): 36 Cri L Jour 813. (Fresh trial competent even if accused undergoing previous sentence.)

[2] Conviction for grievous hurt—Person injured afterwards dies—Fact of death known to Court at time of previous conviction—Subsequent trial for culpable homicide is not competent. ('80) 2 All 349 (350) ✕ ('13) 14 Cri L Jour 135 (137, 138): 9 Nag L R 26.

7. "Tried".—[1] This section does not apply unless the accused has been tried. (Vol 30) 1943 Mad 6 (7): 44 Cri L Jour 176 ✕ (Vol 21) 1934 Mad 716 (717): 36 Cri L Jour 550: 58 Mad 256.

[2] For applicability of this section, previous trial need not be on merits. ('11) 12 Cri L Jour 41 (42): 34 Mad 253 ✕ (Vol 16) 1929 Cal 189 (189, 190): 30 Cri L Jour 585 (DB) ✕ (Vol 14) 1927 Nag 388 (388): 28 Cri L Jour 183 ✕ (Vol 5) 1918 Mad 231 (233): 40 Mad 976: 19 Cri L Jour 501 (DB) ✕ (Vol 22) 1935 Cal 491 (493): 36 Cri L Jour 1238: 62 Cal 1119 (DB) ✕ (Vol 16) 1929 Bom 408 (409, 410): 53 Bom 693: 31 Cri L Jour 1000 (DB).

[3] An acquittal under S. 247, in a summons case on the ground of the complainant's absence will be a valid bar under this section, although the summons had not been served on the accused. (Vol 11) 1924 Pat 140 (141): 24 Cri L Jour 815 ✕ (Vol 22) 1935 Cal 491 (493): 62 Cal 1119: 36 Cri L Jour 1238 (DB) ✕ (Vol 16) 1929 Cal 189 (190): 30 Cri L Jour 585 (DB) ✕ (Vol 30) 1943 Mad 6 (7): 44 Cri L Jour 176 ✕ (Vol 8) 1921 Pat 311 (312): 22 Cri L Jour 331 ✕ (Vol 14) 1927 Nag 388 (388): 28 Cri L Jour 183 ✕ (Vol 10) 1923 All 360 (360): 45 All 58: 24 Cri L Jour 862 ✕ (Vol 5) 1918

Mad 628 (630) (DB) ✕ (Vol 16) 1929 Bom 408 (409): 53 Bom 693: 31 Cri L Jour 1000 (DB).

[But see (Vol 5) 1918 Mad 212 (212, 213): 40 Mad 977: 19 Cri L Jour 497 (DB).]

[4] Security proceedings do not constitute a trial within this section. (Vol 29) 1942 Lah 84 (84): I L R (1943) Lah 365: 43 Cri L Jour 564 (D B) ✕ (Vol 29) 1942 Oudh 416 (416): 43 Cri L Jour 729 ✕ ('13) 14 Cri L Jour 559 (561): 36 Mad 315 (DB).

[See however (Vol 15) 1928 Rang 135 (136): 30 Cri L Jour 630.]

[5] Proceeding under S. 145 is not a trial within this section. (Vol 5) 1918 Upp Bur S (9): 3 Upp Bur Rul 33: 19 Cri L Jour 389.

[6] Disciplinary proceedings under the Legal Practitioners Act are not trials. (Vol 18) 1931 Pat 369 (376): 11 Pat 353: 32 Cri L Jour 1256 (FB).

[See however (Vol 12) 1925 Rang 110 (110): 2 Rang 491: 26 Cri L Jour 1111.]

[7] Where in a sessions trial in a High Court the jury is discharged on a difference of opinion between the Judge and the jury and the case is re-tried with a new jury, there is no fresh trial, for the purpose of this section. (Vol 33) 1946 Bom 38 (42, 44): 47 Cri L Jour 378 (F B). ((Vol 18) 1931 Bom 309: 55 Bom 520: 33 Cri L Jour 62 overruled and (Vol 32) 1945 Bom 110 reversed.) ✕ (Vol 1) 1914 Cal 901 (904): 41 Cal 1072: 15 Cri L Jour 460.

[But see (Vol 30) 1943 Mad 737 (738, 739): 45 Cri L Jour 518.]

[8] The re-trial of an accused on remand owing to misdirection to the jury is part of the same trial which is not concluded till the appeal is heard and determined. ('36) 37 Cri L Jour 707 (707): 62 Cal 928 (DB).

[9] An appeal is not a fresh trial but only a continuation of the trial in the lower Court. (Vol 1) 1914 Mad 258 (259): 37 Mad 119: 15 Cri L Jour 180 (DB) ✕ ('96) 23 Cal 975 (977) (DB) ✕ (Vol 19) 1932 Nag 121 (123): 28 Nag L R 233: 33 Cri L Jour 849 (FB).

[See ('95) 22 Cal 377 (381, 382, 383) (DB).]

[10] This section does not say that a person who has been tried and convicted or acquitted shall be acquitted if an attempt is made to prosecute him again for the same offence. It says that he shall not be tried at all. (Vol 25) 1938 Mad 847 (848): 39 Cri L Jour 712: I L R (1938) Mad 902 (DB).

[11] The acquittal of a person on the ground of his trial being barred under this section is illegal. ('08) 8 Cri L Jour 139 (140) (DB) ✕ ('09) 9 Cri L Jour 578 (580, 581): 5 Low Bur Rul 12.

8. "Acquittal"—Meaning of.—[1] An acquittal under S. 247 on ground of complainant's absence is within the section. (Vol 30) 1943 Mad 6 (7): 44 Cri L Jour 176 ✕ (Vol 27) 1940 Nag 357 (359, 360): 41 Cri L Jour 919 ✕ (Vol 16) 1929 Bom 408 (409, 410): 53 Bom 693: 31 Cri L Jour 1000 (D B) ✕ (Vol 22) 1935 Cal 491 (493): 62 Cal 1119: 36 Cri L Jour 1238 (D B) ✕ (Vol 16) 1929 Cal 189 (189, 190): 30 Cr L Jour 585 (D B)

Section 403—Note 8 (*contd.*)

\* (Vol 21) 1934 Lah 211 (212) : 36 Cri L Jour 29 \* (Vol 8) 1921 Pat 311 (312) : 22 Cri L Jour 331 (D B) \* (Vol 14) 1927 Nag 388 (388) : 28 Cri L Jour 183 \* (Vol 1) 1914 Mad 628 (630) : 38 Mad 1028 : 15 Cri L Jour 236 (D B) \* (Vol 11) 1924 Pat 140 (141) : 24 Cri L Jour 815 \* (Vol 10) 1923 All 360 (360) : 45 All 58 : 24 Cri L Jour 862.

[But see (Vol 5) 1918 Mad 212 (212, 213) : 49 Mad 977 : 19 Cri L Jour 497 (D B).]

[2] An acquittal on withdrawal of prosecution under S. 494 is within this section. ('43) 9 Out L T 95 (97) \* (Vol 28) 1941 Pat 412 (444) : 42 Cri L Jour 774 \* ('13) 14 Cri L Jour 135 (138) : 9 Nag L R 26 \* (Vol 5) 1918 Mad 231 (233, 235) : 40 Mad 976 : 19 Cri L Jour 501 (D B) \* ('89) 12 Mad 35 (36) (DB).

[3] Case lawfully compounded—Acquittal of accused is within this section. (Vol 28) 1936 Mad 353 (360, 372) : 37 Cri L Jour 687 (FB) \* ('13) 14 Cri L Jour 458 (459) (D B) (Cal).

[See (Vol 25) 1938 Lah 739 (740, 741) : 40 Cri L Jour 131.]

[4] The following are not orders of acquittal within the meaning of this section :

(a) Dismissal of complaint. (Vol 31) 1944 Nag 318 (319) : ILR (1945) Nag 486 : 46 Cri L Jour 195 \* (Vol 24) 1937 Rang 35 (37) \* (Vol 21) 1934 All 877 (879) : 35 Cri L Jour 1177.

(b) Discharge of accused. (Vol 16) 1929 Mad 260 (261) : 30 Cri L Jour 403 \* ('07) 5 Cri L Jour 309 (318) : 31 Bom 335 (DB) \* (Vol 19) 1932 Mad 505 (506, 507) : 55 Mad 795 : 33 Cri L Jour 653 \* (Vol 21) 1934 All 340 (341) : 56 All 750 : 36 Cri L Jour 65.

(c) Order stopping proceedings under S. 249. ('12) 13 Cri L Jour 860 (861) : 1913 Pun Re No. 9 Cr.

(d) Order refusing to take cognizance of an offence. (Vol 19) 1932 Cal 871 (874, 875) : 60 Cal 149 : 34 Cri L Jour 181 \* (1900) 24 Mad 337 (339) (DB) \* (Vol 20) 1933 Pat 242 (243) : 12 Pat 234 : 34 Cri L Jour 1198 (D B).

[But see ('08) 7 Cal W N 711 (713) (DB) \* ('08) 7 Cal W N 493 (494) (DB).]

[5] Where an appellate Court sets aside a conviction without doing anything further, the order amounts to an acquittal. ('33) 1933 Mad W N 224 (224) \* (Vol 5) 1918 Nag 126 (127) : 19 Cri L Jour 796.

[But see ('06) 3 Cri L Jour 15 (17) : 3 Low Bur Rul 87 (FB).]

[6] Where the appellate Court sets aside a conviction and orders a re-trial, its order does not amount to an acquittal. ('35) 36 Cri L Jour 1333 (1334) (All) \* (Vol 19) 1932 All 409 (411) : 54 All 756 : 33 Cri L Jour 669 (DB) \* (Vol 38) 1946 Mad 496 (496) : 47 Cri L Jour 991 : ILR (1946) Mad 736. (Conviction under S. 409, Penal Code—Appellate Court acquitting accused under S. 409 and ordering retrial under S. 420, Penal Code—S. 408 is no bar as there is no fresh prosecution.)

[See (Vol 13) 1926 Cal 585 (586) : 53 Cal 192 : 27 Cri L Jour 788 (DB) \* (Vol 6) 1919 Cal 115 (116) : 20 Cri L Jour 225 : 46 Cal 212n (DB).]

[7] An order setting aside a conviction on the ground of the lower Court having had no jurisdiction, does not amount to an acquittal but only to a discharge. ('02) 29 Cal 412 (414) (D B) \* (Vol 13) 1926 Pat 302 (304) : 5 Pat 452 : 27 Cri L Jour 849 (DB) \* (Vol 21) 1934 Mad 716 (717, 718) : 58 Mad 256 : 36 Cri L Jour 550 \* (Vol 19) 1932 Cal 683 (684) : 33 Cri L Jour 770 (DB) \* (Vol 1) 1917 All 110 (112) : 18 Cri L Jour 546 : 39 All 293 (296, 297) \* (Vol 5) 1918 Nag 126 (128) : 19 Cri L Jour 796.

[8] *De novo* trial under S. 350—Charge already framed—Discharge in *de novo* trial amounts to acquittal—When that order is in force, accused cannot be tried again. ('40) 1910 Mad W N 962 (963).

[9] Appeal from acquittal—High Court setting aside order of acquittal on ground of trial having been illegal, but not ordering retrial—Fresh trial not barred. (Vol 24) 1937 Bom 152 (152) : 38 Cri L Jour 571.

[10] Acquittal of accused brought about by fraud established against third person in proceedings to which the accused were not parties is valid unless set aside by independent proceedings. (Vol 11) 1924 All 778 (779) : 26 Cri L Jour 98.

[11] Dismissal for default of application under S. 1 of Workman's Breach of Contract Act—No acquittal. ('13) 14 Cri L Jour 404 (404) : 9 Low Bur Rul 35.

[12] Dismissal of application for sanction to prosecute does not attract the operation of S. 403. (Vol 8) 1921 Cal 1 (15) : 48 Cal 388 : 22 Cri L Jour 371 (SB).

[13] Doctrine of *autre fois acquit* does not apply to a refusal by a Magistrate under S. 476 to file complaint against the accused. (Vol 17) 1930 Sind 315 (315) : 24 Sind L R 446 : 32 Cri L Jour 521 (DB).

9. "Conviction"—Meaning of.—[1] A finding of guilty by a Magistrate, proceeding under S. 349, is not a conviction. (Vol 15) 1928 Bom 240 (240) : 5 Bom 456 : 29 Cri L Jour 901.

[2] Finding of guilty by a Magistrate who commit a case under S. 348 would bar the trial of the accused for the offence to which the finding relates. (Vol 1) 191 Mad 149 (149) : 38 Mad 552 : 15 Cri L Jour 188.

[3] Departmental punishment is not a conviction for the purposes of this section. ('87) 1887 Rat 318 (319) : (Vol 2) 1915 Lah 350 (351) : 1915 Pun Re No. 26 Cr 16 Cri L Jour 788 (DB) \* ('94) 17 Mad 278 (279, 280) (DB) \* ('10) 12 Cri L Jour 143 (144) (Lah).

[4] Section does not apply to proceedings for taking security either under S. 107 or S. 110 as there is no conviction of any offence. (Vol 29) 1942 Lah 84 (84) ILR (1943) Lah 365 : 43 Cri L Jour 564 (DB).

10 "While such conviction or acquittal remains in force."—[1] The bar of a fresh trial under this section applies only where the previous conviction or acquittal is in force. ('40) 1940 Mad W N 962 (962)

[2] Two accused convicted under S. 420, Penal Code—On appeal conviction against one set aside—Revisiting petition by the other—Conviction under S. 420 set aside and committal to sessions for trial under S. 477 ordered—Former accused also cannot be tried again upon the same record. (Vol 6) 1919 Pat 384 (385) : 4

Section 403 — Note 10 (*contd.*)

Cri L Jour 667 \* (Vol 16) 1929 All 710 (719) : 31 Cri L Jour 230 (DB) \* (Vol 4) 1917 All 410 (412) : 39 All 293 : 18 Cri L Jour 546.

[3] Conviction of some accused and acquittal of others—Appeal by former—Appellate Court holding whole trial void as without jurisdiction—Acquittal also void and does not operate as a bar to fresh trial of persons acquitted. (Vol 16) 1929 Nag 161 (162) : 30 Cri L Jour 763.

11. Court of competent jurisdiction.—[1] The bar of a fresh trial under this section will apply only where the previous conviction or acquittal has been by a Court of competent jurisdiction. (Vol 4) 1917 All 410 (412) : 39 All 293 : 18 Cri L Jour 546 \* ('84) 8 Bom 307 (308) (DB) \* ('81) 3 Mad 48 (51) (DB) \* ('84) 1884 Pun Re No. 38 Cr, p. 73 (75) (DB) \* (1865) 4 Suth W R Cr L 2 (2).

[2] For the application of this section the Court by which the accused was first tried should have been competent to try the offence subsequently charged. (Vol 34) 1947 Pat 67 (70) : 25 Pat 378 (DB) \* (Vol 30) 1943 Pesh 89 (90) : 45 Cri L Jour 167 (DB) \* (Vol 26) 1939 Cal 65 (70) : ILR (1939) 1 Cal 1 : 40 Cri L Jour 199 (FB) \* (Vol 25) 1938 Lah 614 (615) : 39 Cri L Jour 870 : ILR (1938) Lah 127 \* (Vol 24) 1937 All 117 (118, 119) : 38 Cri L Jour 368 \* (Vol 24) 1937 Cal 99 (113) : 38 Cri L Jour 813 (S B) \* (1900-02) 1 Low Bur Rul 340 (343) (F B) \* (Vol 15) 1928 Bom 530 (531, 532) : 30 Cri L Jour 54 : 53 Bom 69 (DB) \* (Vol 15) 1928 Pat 577 (579) : 29 Cri L Jour 760 \* (Vol 12) 1925 Mad 711 (711) : 26 Cri L Jour 1087 \* (Vol 6) 1919 Upp Bur 32 (33) : 3 Upp Bur Rul 135 : 20 Cri L Jour 533 \* (Vol 5) 1918 Mad 481 (482) : 18 Cri L Jour 643 (DB) \* (Vol 16) 1929 Nag 161 (162) : 30 Cri L Jour 763 \* (Vol 15) 1928 Lah 844 (844) : 29 Cri L Jour 701 \* (Vol 21) 1934 All 141 (142) : 56 All 529 : 35 Cri L Jour 865 \* (Vol 10) 1923 Pat 228 (229) : 2 Pat 333 : 25 Cri L Jour 1385 (DB) \* (Vol 2) 1915 Bom 203 (204) : 40 Bom 97 : 16 Cri L Jour 761 (DB).

[3] Complaint or sanction of a particular person or authority necessary for trial of accused—Trial in absence of such complaint or sanction is not one by a Court of competent jurisdiction. (Vol 31) 1944 Pat 328 (330) \* (Vol 25) 1938 Lah 625 (626) : 39 Cri L Jour 960 : I L R (1939) Lah 373 (D B) \* (Vol 16) 1929 All 940 (940) : 30 Cri L Jour 1153 \* (Vol 13) 1926 All 231 (232) : 27 Cri L Jour 705 \* (Vol 15) 1928 Bom 143 (144) : 52 Bom 257 : 29 Cri L Jour 545 (D B) \* (Vol 15) 1928 Bom 530 (531, 532) : 30 Cri L Jour 54 : 53 Bom 69 (D B) \* (Vol 5) 1918 Nag 126 (127, 128) : 19 Cri L Jour 796 \* (Vol 21) 1934 Pat 411 (411) : 35 Cri L Jour 686 \* (1900-02) 1 Low Bur Rul 340 (343) (F B) \* (Vol 14) 1927 Sind 10 (12, 16) : 21 Sind L R 1 : 27 Cri L Jour 1105 (D B) \* ('05) 4 Cri L Jour 422 (423) : 2 Nag L R 149 \* (Vol 17) 1930 Lah 1055 (1055) : 32 Cri L Jour 253 \* ('04) 27 Mad 61 (62) (D B).

[But see (Vol 9) 1922 All 502 (502) : 45 All 11 : 23 Cri L Jour 496 (D B) \* (Vol 8) 1921 Sind 137 (139, 140, 142) : 16 Sind L R 1 (D B) \* ('13) 14 Cri L Jour 214 (217, 218) : 36 Mad 308.]

[4] Trial without proper complaint is void under S. 530—Judgment of acquittal also becomes void—Court cannot recognize a plea of *autrefois acquit* in such a case. (Vol 24) 1937 Mad 301 (302, 303) : 38 Cri L Jour 457 : I L R (1937) Mad 664 (F B).

[5] Trial in the absence of necessary sanction or complaint is no trial at all within this section. (Vol 13) 1926 Cal 691 (692) : 27 Cri L Jour 751 (D B).

[6] An accused person can plead *autrefois acquit* if the only defect in the jurisdiction of the Court which passed the order is want of territorial jurisdiction—S. 531 applies to such cases. (Vol 20) 1933 Mad 765 (766) : 34 Cri L Jour 1080 : 56 Mad 996 (F B) \* (Vol 24) 1937 Sind 179 (180, 181) : 33 Cri L Jour 959 (DB). ((Vol 20) 1933 Mad 765 : 34 Cri L Jour 1080 : 56 Mad 996 (F B), Followed ; (Vol 15) 1928 Bom 530 : 53 Bom 69 : 30 Cr L J 54, Dissented from.)

[But see (Vol 15) 1928 Bom 530 (531, 532) : 53 Bom 69 : 30 Cri L Jour 54 (D B).]

[7] Previous trial by Court of Session with aid of assessors—Offence subsequently charged triable by jury—Court of Session held not incompetent to try offence subsequently charged. ('01) 24 Mad 641 (644) (D B).

[8] The word "Court" in this section does not include the jury and therefore, where a trial takes place before a jury in excess of the legal number, the Court does not cease to be a Court of competent jurisdiction. (Vol 32) 1945 Bom 183 (186, 187) : I L R (1945) Bom 196 : 46 Cri L Jour 520 (D B).

[9] A conviction or acquittal by a Court established under a local or special law is a conviction or acquittal by a Court of competent jurisdiction. (Vol 11) 1924 Rang 23 (23) : 1 Rang 449 : 25 Cri L Jour 233 \* ('84) 1884 Pun Re No. 30 Cr, p. 52 (53, 54) (D B).

[10] A conviction by a Court in a Native State can be pleaded as a bar under this section. (Vol 11) 1924 Lah 238 (239) : 24 Cri L Jour 715.

[11] An illegal conviction is not the same thing as a conviction by a Court having no jurisdiction. (Vol 18) 1931 Lah 199 (199, 200) : 32 Cri L Jour 731.

[12] Order of acquittal passed by Special Court constituted under Ordinance II of 1942—Ordinance subsequently declared to be *ultra vires* as regards constitution of Special Courts—Order is still one passed by Court of competent jurisdiction in view of Ordinance 19 of 1943, S. 4—S. 403 is bar to fresh trial. (Vol 32) 1945 Sind 33 (37, 38) : I L R (1944) Kar 430 : 46 Cri L Jour 422 (D B).

[See also (Vol 32) 1945 Mad 355 (356) : 47 Cri L Jour 126 (D B).]

12. Identity of accused necessary for application of section.—[1] Section bars fresh trial only if accused in both trials is the same person—Conviction or acquittal of one person is no bar to trial of another person implicated in same offence. (Vol 23) 1936 Pesh 152 (153) : 37 Cri L Jour 889 (D B) \* (Vol 1) 1914 All 85 (86) : 26 All 168 : 15 Cri L Jour 200 (DB) \* (Vol 1) 1914 Cal 886 (887) : 41 Cal 754 : 15 Cri L Jour 402 (D B) \* ('10) 11 Cri L Jour 541 (541) : 37 Cal 680 (D B).

[2] In determining whether there is sufficient ground for proceeding against a person, the fact that another person accused of the same offence and on the same facts has been acquitted may be taken into consideration. (Vol 13) 1926 Cal 795 (798) : 53 Cal 606 : 27 Cri

Section 403 — Note 12 (*contd.*)

L. Jour 788 (D B) \* (133) 1933 Mad W N 246 (247, 248) \* (1900) 4 Cal W N 346 (347) (D B).

[See however (Vol 23) 1936 Pesh 152 (153) : 27 Cri L Jour 889 (DB).]

13. Dismissal of complaint or discharge of accused. — [1] Dismissal of complaint — Order not set aside by availing special remedy under S. 436 — Fresh prosecution is not barred. (Vol 29) 1942 Pesh 24 (25) : 43 Cri L Jour 611 \* (Vol 26) 1939 Sind 193 (195, 196) : 40 Cri L Jour 745 : 1 L R (1940) Kar 74 (F B) \* (Vol 21) 1934 Lah 435 (436) : 36 Cri L Jour 62 \* (Vol 3) 1916 Mad 887 (887) : 16 Cri L Jour 814 \* (05) 2 Cri L Jour 651 (652) : 1 Nag L R 18 \* (Vol 22) 1935 All 60 (63) : 35 Cri L Jour 1485 \* (1900) 28 Cal 211 (215) \* (Vol 21) 1934 All 87 (87) : 56 All 425 : 35 Cri L Jour 1062 \* (Vol 1) 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174 \* (08) 8 Cri L Jour 249 (249) (Lah) \* (04) 1 Cri L Jour 167 (173, 179) : 2 Low Bur Rul 27 (F B) \* (Vol 19) 1932 Mad 269 (371) : 55 Mad 622 : 33 Cri L Jour 454 (F B).

[See however (Vol 12) 1925 Rang 114 (114, 115) : 26 Cri L Jour 284.]

[2] Discharge of accused — Order not set aside by availing special remedy under S. 436 or S. 437 — Fresh prosecution not barred. (Vol 30) 1943 Mad 178 (179) : 44 Cri L Jour 331 \* (09) 9 Cri L Jour 80 (82) : 31 Mad 543 (D B) \* (Vol 1) 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174 \* (Vol 1) 1914 Oudh 406 (407) : 17 Oudh Cas 273 : 15 Cri L Jour 638 \* (Vol 17) 1930 Cal 369 (370) : 31 Cri L Jour 1153 (D B) \* (Vol 16) 1929 Bom 134 (134) : 30 Cri L Jour 594 (D B) \* (Vol 12) 1925 Nag 432 (432) : 26 Cri L Jour 1040 \* (Vol 21) 1934 Nag 215 (216) : 31 Nag L R 93 : 36 Cri L Jour 57 \* (Vol 11) 1924 Pat 797 (798) : 26 Cri L Jour 129. (Discharge under S. 494A.) \* (Vol 21) 1934 All 87 (87) : 56 All 425 : 35 Cri L Jour 1062 \* (Vol 17) 1930 All 92 (95) : 30 Cri L Jour 1149 \* (Vol 3) 1916 Pat 109 (110) : 18 Cri L Jour 296 : 2 Pat L Jour 34 (D B) \* (Vol 21) 1934 Lah 169 (170) : 36 Cri L Jour 473. (Discharge on withdrawal by Public Prosecutor — Fresh complaint by private party not barred.) \* (Vol 9) 1922 Pat 372 (375) : 23 Cri L Jour 236 \* (11) 12 Cri L Jour 364 (368, 369) : 1911 Pun Re No. 10 Or (F B) \* (Vol 17) 1930 Rang 156 (157) : 8 Rang 1 : 31 Cri L Jour 824.

[3] Order dismissing complaint or discharging accused confirmed by superior Court — Fresh prosecution not barred. (Vol 17) 1930 Lah 879 (880) : 12 Lah 9 : 31 Cri L Jour 1180 \* (09) 9 Cri L Jour 563 (564) : 36 Cal 415 (DB).

[But see (Vol 15) 1928 Sind 49 (50) : 21 Sind L R 127 : 28 Cri L Jour 57 (D B) \* (10) 11 Cri L Jour 347 (348) (Lah) \* (05) 2 Cri L Jour 752 (753) : 23 Mad 255 (D B).]

[4] Order dismissing complaint or discharging accused passed by one Magistrate — Another Magistrate of co-ordinate or inferior jurisdiction can start fresh prosecution for same offence. (Vol 12) 1925 Bom 258 (259) : 26 Cri L Jour 991 (DB) \* (92) 16 Bom 414 (427) (DB) \* (Vol 19) 1932 Mad 869 (371) : 55 Mad 622 : 33 Cri L Jour 454 (FB) \* (Vol 3) 1916 Mad 887 (887) : 16 Cri L Jour 814 \* (Vol 13) 1926 All 298 (298) : 27 Cri L Jour 888 \* (Vol 21) 1934 Rang 40 (41) : 35 Cri L Jour 802 \*

(11) 12 Cri L Jour 364 (369) : 1911 Pun Re No. 10 Cr (FB).

[See however (Vol 22) 1935 All 60 (63) : 56 All 990 : 35 Cri L Jour 1485 \* (Vol 13) 1926 Lah 445 (445) : 27 Cri L Jour 719.]

[But see (1900) 22 All 106 (108) (DB) \* (Vol 21) 1934 All 87 (87, 88) : 56 All 425 : 35 Cri L Jour 1062 \* (Vol 14) 1927 All 815 (816) : 28 Cri L Jour 536 \* (97) 24 Cal 528 (531, 532) (DB) \* (Vol 27) 1940 Sind 15 (16) : 41 Cri L Jour 248 \* (Vol 26) 1939 Sind 38 (39) : 40 Cri L Jour 287 : ILR (1939) Kar 228 (DB).]

[5] Dismissal of a complaint for default is no bar to the entertainment of a fresh complaint by the same Magistrate or by his successor in office or by some other Magistrate of co-ordinate jurisdiction. (Vol 26) 1939 Sind 193 (195, 196) : 40 Cri L Jour 745 : 1 L R (1940) Kar 74 (FB) ((Vol 16) 1929 Sind 61 : 23 Sind L R 43 : 29 Cri L Jour 1037 (DB) overruled so far as cases of dismissal of complaint for default are concerned.)

[6] The successor of the Magistrate by whom a complaint was dismissed or an accused was discharged can start proceedings against the accused afresh. (Vol 12) 1925 Nag 432 (433) : 26 Cri L Jour 1040 \* (Vol 1) 1914 All 79 (80) : 36 All 129 : 15 Cri L Jour 158 \* (Vol 7) 1920 Pat 523 (524) : 21 Cri L Jour 660 \* (Vol 21) 1934 All 514 (515) : 35 Cri L Jour 1059 (DB).

[7] Where an accused has been discharged a Magistrate ought not to start a fresh prosecution in the absence of exceptional circumstances. (Vol 23) 1936 Lah 47 (48) : 37 Cri L Jour 427 \* (Vol 17) 1930 Lah 879 (880) : 12 Lah 9 : 31 Cri L Jour 1180 \* (Vol 5) 1918 Mad 494 (495) : 18 Cri L Jour 329 \* (Vol 9) 1922 Pat 372 (375) : 23 Cri L Jour 236 \* (Vol 12) 1925 Rang 114 (115) : 26 Cri L Jour 284 \* (04) 1 Cri L Jour 867 (869) : 1904 Upp Bur Rul Cr Pro Code 19 \* (05) 2 Cri L Jour 651 (653) : 1 Nag L R 18 \* (06) 1 Cri L Jour 59 (60) : 29 All 7 \* (29) 30 Cri L Jour 444 (444) (DB) (Sind) \* (Vol 16) 1929 Sind 242 (243) : 31 Cri L Jour 687 (DB) \* (Vol 12) 1925 Bom 258 (259) : 26 Cri L Jour 991 (DB). (A previous similar complaint was dismissed so that Magistrate may exercise greater care in dealing with the case.) \* (Vol 12) 1925 Cal 104 (104) : 25 Cri L Jour 811 (DB)

14. "Discharge"—Meaning of. — [1] Complaint of major offence—Magistrate framing charge for minor offence — Action amounts to discharge of accused on major offence. (Vol 30) 1943 Pesh 89 (90) : 45 Cri L Jour 167 (DB) \* (01) 24 Mad 136 (139, 140, 146) (SB) \* (Vol 16) 1929 All 940 (940) : 30 Cri L Jour 1153 \* (Vol 7) 1920 Mad 94 (95) : 43 Mad 330 : 21 Cri L Jour 91 (DB) \* (Vol 19) 1932 Nag 85 (85) : 33 Cri L Jour 558 \* (Vol 12) 1925 Sind 190 (191) : 19 Sind L R 353 : 25 Cri L Jour 1368 (DB).

[But see (03) 5 Bom L R 125 (126) (DB).]

[2] Warrant case tried as summons case—Acquittal — Order only amounts to discharge. (88) 1888 All W N 96 (97) \* (86) 1886 All W N 260 (260).

[But see (81) 3 All 129 (131).]

[3] Case under S. 102, Presidency-Towns Insolvency Act (summons-case) and S. 420, Penal Code (warrant-case) — Complainant absent — Accused discharged — Discharge does not operate as acquittal with reference

PART VII.  
OF APPEAL, REFERENCE AND REVISION.  
CHAPTER XXXI.

OF APPEALS.

*Unless otherwise provided, no appeal to lie.*

**404.** No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

[1882—S. 404 ; 1872—Ss. 282 para 2, 286 Illustrations ; 1861—S. 414.]

Section 403 — Note 14 (*contd.*)  
to offence under S. 102. (Vol 27) 1940 Bom 413 (413) : 42 Cri L Jour 153 (DB).

[4] For the purposes of this section there is no distinction between discharge after taking prosecution evidence and discharge before. (Vol 21) 1934 All 944 (945) : 36 Cri L Jour 202.

[5] Accused tried for offence triable as warrant case on complaint by police—Before charge framed case withdrawn but order of acquittal passed — Order of acquittal was virtually one of discharge and did not bar subsequent trial for same offence. (Vol 20) 1933 Mad 98 (99) : 34 Cri L Jour 12.

15. General Clauses Act, Section 26. — [1] Under S. 26, General Clauses Act, if the same act constitutes an offence under two enactments, the accused cannot be awarded two separate punishments for such act. (Vol 3) 1916 Pat 86 (86) : 1 Pat L Jour 373 : 18 Cri L Jour 321 (DB).

[2] The section only applies where the offences under the two enactments are constituted by the same act or omission and not where the offences are distinct. (Vol 20) 1933 All 461 (462) : 34 Cri L Jour 1018 \* (Vol 19) 1932 Mad 537 (537).

[3] Trial of accused for offence under one enactment — Acquittal — Second trial for same act under different enactment is not barred under S. 403 (5) as it is authorised by S. 26, General Clauses Act. (Vol 31) 1944 Mad 369 (370) : 46 Cri L Jour 194. (Managing director of company — Prosecution for criminal breach of trust and under Companies Act.)

[But see ('03) 6 Ordh Cas 153 (157) (DB).]

[4] Sentence for attempt to murder — Victim dying subsequently — Trial again of accused and conviction and sentence of death for murder—Section 26, General Clauses Act, is no bar to such sentence being passed. (Vol 22) 1935 Pesh 18 (19) : 36 Cri L Jour 813 (DB).

16. Practice. — [1] A plea of bar under this section can be raised at any stage of the case. (Vol 23) 1936 Mad 353 (357, 363) : 37 Cri L Jour 637 (FB). (Though proper time to take it is when accused is called upon his defence.) \* (Vol 1) 1914 Cal 901 (904) : 41 Cal 1072 : 15 Cri L Jour 460. (Before verdict in any form is given.) \* (Vol 15) 1928 Pat 577 (579) : 29 Cri L Jour 760 \* (Vol 21) 1934 All 877 (878) : 35 Cri L Jour 1177. (Can be taken in revision.) \* (Vol 8) 1921 Sind 137 (138) : 16 Sind L R 1 (DB). (Objection to trial can be taken notice of by High Court in revision of its own motion.) \* (Vol 22) 1935 Nag 23 (25). (Do.)

[See (Vol 32) 1945 Bom 413 (416) : 47 Cri L Jour 138 (DB).]

[2] The burden of proving the facts necessary to establish the plea is on the accused. (Vol 15) 1928 Pat 577 (579) : 29 Cri L Jour 760 \* (Vol 2) 1915 Mad 315 (315) : 15 Cri L Jour 672 (DB).

[3] A plea of bar raised under this section must be determined after hearing the evidence and ascertaining what the facts are in the two cases. (Vol 6) 1919 Cal 57 (57) : 20 Cri L Jour 572 (DB) \* (Vol 7) 1920 Cal 972 (973) : 22 Cri L Jour 67 (DB).

[4] A plea under this section cannot be constructively decided. (Vol 23) 1936 Mad 353 (364) : 37 Cri L Jour 637 (FB). (Per Mockett J.)

#### SECTION 404 — SYNOPSIS.

1. Right of appeal.
2. Forum of appeal.
3. Appeal to Privy Council.
4. Appeal to Federal Court.
5. "By any other law."

1. Right of appeal. — [1] Right of appeal is not a natural or inherent right but must be expressly given by statute. (Vol 30) 1943 All 26 (26) : 1 L R (1943) All 238 : 44 Cri L Jour 216 (F B) \* (Vol 28) 1941 Lah 414 (415) : 43 Cri L Jour 170 \* (Vol 26) 1939 F C 43 (45) : 40 Cri L Jour 468 : 1 L R (1939) Kar (F C) 132 : 1939 F C R 159 : 1 L R (1940) Lah 400 (F C) \* (Vol 24) 1937 Cal 413 (413) : 1 L R (1937) 1 Cal 123 : 38 Cri L Jour 876 (D B) \* ('13) 40 Cal 21 (27) : 6 Low Bur Rul 150 : 39 Ind App 197 (P C).

[2] Right of appeal cannot arise by implication. (Vol 19) 1932 Sind 88 (89) : 26 Sind L R 200 : 33 Cri L Jour 898 (D B) \* (Vol 2) 1915 Mad 831 (832) : 39 Mad 539 : 16 Cri L Jour 303 (D B).

[3] Existence of power in superior Court to cancel or vary an order of subordinate Court under S. 125, or under S. 123, sub-s. (12) cannot be construed as giving a right of appeal. (Vol 1) 1914 Mad 613 (619) : 14 Cri L Jour 546 : 37 Mad 125 (F B). (S. 125.) \* ('13) 14 Cri L Jour 63 (63) : 35 All 103 (Do.) \* (Vol 4) 1917 All 428 (428) : 39 All 466 : 18 Cri L Jour 630 (DB). (Do.) \* (Vol 19) 1932 Sind 88 (89) : 26 Sind L R 200 : 33 Cri L Jour 898 (D B). (S. 123 (2).)

[But see ('78) 3 Cal 379 (381). (S. 125.)]



Section 404 — Note 1 (*contd.*)

[4] Right of appeal given by statute subject to conditions and limitations — Right cannot be enlarged to nullify such conditions or limitations. (Vol 24) 1937 Bom 336 (336) : 38 Cri L Jour 985 (D B) \* (Vol 24) 1937 Cal 413 (414) : I L R (1937) 1 Cal 123 : 38 Cri L Jour 876 (D B) \* ('84) 7 Mad 213 (214).

[5] Right of appeal duly conferred on a person cannot be taken away by transfer. ('79) 1 Cal 667 (669).

[6] Procedure to be adopted in appeals provided for in the Code is that prescribed by this chapter unless any of the provisions specifically restrict the application of such provisions to appeals under this chapter. (Vol 8) 1921 Mad 281 (282) : 22 Cri L Jour 583 \* (Vol 15) 1928 Mad 391 (392) : 51 Mad 603 : 29 Cri L Jour 445.

[See ('10) 11 Cri L Jour 280 (281) : 33 Mad 90 (D B).]

[7] The words judgment, order, conviction and sentence are not used in a consistent sense in this chapter so that a clear and consistent scheme as to appeals cannot be evolved. ('04) 1 Cri L Jour 543 (545) : 1904 Upp Bur Rul Cr P C 7 \* (Vol 12) 1925 Cal 329 (330) : 52 Cal 463 : 26 Cri L Jour 455 (D B).

[8] Term "order" in this section means a final order hence an interlocutory order is not open to appeal. (Vol 13) 1926 Oudh 280 (280, 281) : 1 Luck 48 : 27 Cri L Jour 191.

[9] Appeal is a continuation of the trial. (Vol 1) 1914 Mad 258 (259) : 37 Mad 119 : 15 Cri L Jour 180 (D B) \* ('96) 23 Cal 975 (977) (D B) \* (Vol 19) 1932 Nag 121 (123) : 28 Nag L R 233 : 33 Cri L Jour 849 (F B).

[10] Appellate Court, unless otherwise provided, can do only what the lower Court could do and should have done and not to pass any order under any circumstances. ('11) 12 Cri L Jour 444 (445, 446) : 7 Nag L R 109 \* ('06) 3 Cri L Jour 461 (462) : 29 Mad 190 (D B) \* ('08) 7 Cri L Jour 224 (226) (D B) (Cal) \* ('89) 12 Mad 451 (453) (D B).

2. Forum of appeal. — [1] Judge's status at the time of the hearing and not at the time of the judgment determines the forum of appeal. (Vol 25) 1938 All 102 (106) : I L R (1938) All 157 : 39 Cri L Jour 345 (D B) \* (Vol 19) 1932 Cal 460 (461) : 33 Cri L Jour 516.

[But see (Vol 24) 1937 Sind 22 (22, 23) : 38 Cri L Jour 350 : 30 Sind L R 456 (D B).]

[2] This section only indicates that an appeal is to lie from a judgment or order and has nothing to do with the forum of an appeal. (Vol 25) 1938 All 102 (105, 106) : I L R (1938) All 157 : 39 Cri L Jour 345 (D B).

3. Appeal to Privy Council. — [1] Privy Council may grant special leave in special cases. (Vol 26) 1939 F C 43 (45) : 40 Cri L Jour 468 : I L R (1939) Kar (F C) 132 : 1939 F C R 159 : I L R (1940) Lah 400 (F C) \* (Vol 23) 1936 P C 160 (165) : 37 Cri L Jour 679 (P C) \* (Vol 23) 1936 P C 169 (170) : 37 Cri L Jour 628 (P C) \* (Vol 23) 1936 P C 253 (253) : 38 Cri L Jour 415 (P C).

[2] Privy Council will not interfere with the course of criminal proceedings in British India unless by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. (Vol 33) 1946 P C 187 (189) : I L R (1946) Lah 667 : 73 Ind App 195 (P C) \* (Vol 33) 1946 P C 38 (41) : 73 Ind App 1 : 21 Luck 176 : 47 Cri L Jour 336 (P C) \* (Vol 33) 1946 P C 16 (16) : 72 Ind App 305 : I L R (1946) Lah 1 : 47 Cri L Jour 489 (P C) \* (Vol 33) 1946 P C 12 (12) : 47 Cri L Jour 171 (P C) \* (Vol 33) 1946 P C 1 (3) : 72 Ind App 270 : I L R (1945) Lah 451 : I L R (1945) Kar (P C) 366 (P C) \* (Vol 32) 1945 P C 140 (143) (P C).

4. Appeal to Federal Court. — [1] Word "judgment" in S. 205 of the Government of India Act, 1935, includes a judgment in a criminal case. (Vol 26) 1939 F C 43 (54) : 40 Cri L Jour 468 : I L R (1939) Kar (F C) 132 : 1939 F C R 159 : I L R (1940) Lah 400 (F C).

[2] Federal Court has jurisdiction in criminal as well as in civil cases. (Vol 26) 1939 F C 43 (44, 45) : 40 Cri L Jour 468 : I L R (1939) Kar (F C) 132 : 1939 F C R 159 : I L R (1940) Lah 400 (F C).

5. "By any other law." — [1] If the right of appeal is created by a rule of the Government such a rule must not be *ultra vires* of the statute conferring the rule-making power. ('91) 15 Bom 505 (509, 511) (D B).

[2] An order may be that of a criminal Court; yet there will be no appeal unless one is provided for by the statute. (Vol 1) 1914 Sind 79 (80) : 15 Cri L Jour 372 : 7 Sind L R 80 \* ('95) 1 Weir 835 (835).

[See ('10) 11 Cri L Jour 390 (391) : 1910 Pun Re No. 14 Cr (D B).]

[But see (Vol 12) 1925 Rang 12 (13) : 2 Rang 321 : 26 Cri L Jour 289.]

[3] No right of appeal exists when a special or local Act lays down that sentences passed thereunder in criminal cases are final. (Vol 30) 1913 Mad 464 (466) : 44 Cri L Jour 741 \* ('86) 12 Cal 536 (538) (D B) \* ('84) 1884 Pun Re No. 40 Cr. p. 77 (84).

[See ('10) 11 Cri L Jour 426 (427) : 1910 Pun Re No. 19 Cr.]

[See however ('93) 1893 Rat 672 (673).]

[4] Special or local law provides special procedure in regard to appeals — Such procedure will prevail over that of Code. (Vol 15) 1928 Pat 370 (372) : 7 Pat 421 : 29 Cri L Jour 420 (D B) \* (Vol 20) 1933 Bom 1 (3, 4) : 57 Bom 93 : 34 Cri L Jour 199 (SB) \* ('84) 1884 Pun Re No. 40 Cr. p. 77 (84) \* (Vol 19) 1932 Cal 867 (868) : 59 Cal 1248 : 34 Cri L Jour 107.

[5] Special or local law does not provide special procedure in regard to appeals — Code will apply. (Vol 3) 1916 Lah 207 (208) : 1916 Pun Re No. 10 Cr. : 17 Cri L Jour 225 \* ('72) 9 Bom H C R Cr 166 (168) \* ('86) 5 Suth W R Cr. 22 (23).

] Section 205 of Government of India Act, 1935,



*Appeal from order rejecting application for restoration of attached property.*

[1882—S. 405.]

**405.** Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

*Appeal from order requiring security for keeping the peace or for good behaviour.*

<sup>a</sup>[**406.** Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—

(a) if made by a Presidency Magistrate, to the High Court ;

(b) if made by any other Magistrate, to the Court of Session :

Provided that the <sup>b</sup>[Provincial Government] may, by notification in the <sup>c</sup>[Official Gazette], direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session :

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.]

[1882—S. 406 ; 1872—S. 267 ; 1861—S. 409.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 109. [b] *Substituted* by A. O. for "Local Government". [c] *Substituted* by A. O. for "Local Official Gazette".

#### Section 404—Note 5 (*contd.*)

provides one of the exceptions referred to in S. 404 of the Cr. P. C. and hence though an appeal from an order of discharge under S. 491 of the Cr. P. C. does not lie under the Cr. P. C., such appeal is competent under S. 205 of the Government of India Act, 1935. (Vol 32) 1945 P C 156 (158, 159) : 72 Ind App 241 (PC).

#### Section 405 — Note 1

[1] Court to which appeals ordinarily lie is the Court to which appeals are normally and in the majority of cases provided for by the statute. ('87) 11 Bom 438 (440) (DB) & ('95) 22 Cal 487 (489, 490) (DB) & (Vol 6) 1919 Lah 57 (59) : 1919 Pun Re No. 32 Cr : 21 Cri L Jour 210 (DB).

[2] Subordinate Court getting only delegated jurisdiction to hear appeals is not a Court within the meaning of this section. ('03) 26 Mad 656 (658, 659) (FB) & ('02) 30 Cal 394 (395, 396) (DB).

[See however (Vol 3) 1916 Mad 1105 (1106) : 16 Cri L Jour 489 (DB).]

#### Section 406 — Note 1

[1] An order under S. 106, as it is not covered by the terms of S. 118 read with S. 112 is non-appealable. (Vol 22) 1935 Rang 363 (363) : 13 Rang 287 : 36 Cri L Jour 1510\* ('89) 2 Weir 460 (460).

[2] When a special or local Act empowers a Magistrate to proceed under the security sections of Chapter VIII of the Code in respect of persons specified in the Act, an order by the Magistrate for furnishing security is one under S. 118 of the Code and S. 406 applies to such an order. ('05) 2 Cri L Jour 317 (319) : 3 Low Bur Rul 21\* (Vol 6) 1919 Upp Bur 27 (27) : 3 Upp Bur Rul 117 : 20 Cri L Jour 321.

[3] The Code does not confer a right of appeal from an order of imprisonment in default of furnishing security passed under S. 123. (Vol 22) 1935 Rang 363 (363) : 13 Rang 287 : 36 Cri L Jour 1510.

[4] Appeal from order requiring person to furnish security—Appeal should not be disposed of in summary manner—Judge must apply his mind to consideration of evidence and of pleas raised. (Vol 3) 1916 All 197 (197) : 38 All 393 : 17 Cri L Jour 309\* (Vol 13) 1926 All 614 (614, 615) : 27 Cri L Jour 370\* ('13) 14 Cri L Jour 419 (420) : 40 Cal 376 (DB) & (Vol 16) 1929 Nag 328 (330, 331) : 31 Cri L Jour 20.

[5] Appellate Court can modify or alter the bond in appeal under cl. (c) to S. 423. (Vol 25) 1938 Nag 303 (305) : 1 L R (1938) Nag 595 : 39 Cri L Jour 747\* (Vol 9) 1922 Nag 180 (180) : 23 Cri L Jour 394.

[6] Appellate Court cannot enhance amount of security demanded by trial Court. (Vol 10) 1923 Oudh 44 (45) : 24 Oudh Cas 286.

[7] Appellate Court can extend period of security and thereby extend period of imprisonment to be suffered in default—Power should be exercised in exceptional circumstances. (Vol 23) 1936 Sind 125 (125) : 29 Sind L R 353 : 37 Cri L Jour 1003 (DB).

[8] Proceedings laid before Sessions Judge under S. 123 (2)—In view of second proviso there is no right of appeal in such cases. (Vol 22) 1935 Pesh 55 (55) : 36 Cri L Jour 936.

[9] Right of appeal is revived if, pending disposal of reference, under S. 123 (2), security is offered and accepted. (Vol 15) 1928 Lah 64 (65) : 29 Cri L Jour 236.

[10] Order by Sessions Judge on reference under S. 123 continues to be non-appealable under S. 406.

*Appeal from order refusing to accept or rejecting a surety.*

"[406A. Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order :

(a) if made by a Presidency Magistrate, to the High Court :

(b) if made by the District Magistrate, to the Court of Session ; or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 110.*

*Appeal from sentence of Magistrate of the second or third class.*

407. (1. Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 "or in respect of whom an order has been made or a sentence has been passed under section 350] by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of

*Transfer of appeals to first class Magistrate.*

such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the "Provincial Government] to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

[1882 — S. 407 ; 1872 — Ss. 266, 47 ; 1861 — S. 412.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 111.*

[b] *Substituted by A. O. for "Local Government."*

#### Section 406 — Note 1 (contd.)

(11) 12 Cri L Jour 257 (258) : 35 Bom 271 (DB) \* (1900) 1900 Pun Re No. 15 Cr, p. 31 (35) (DB) \* (83) 9 Cal 878 (879) (DB) \* (86) 1886 Pun Re No. 23 Cr, p. 55 (55) (DB) \* (93-1900) 1893 1900 Low Bur Rul 381 (382) \* (91) 1891 All W N 219 (219) (DB) \* (93) 1893 All W N 183 (184).

[11] Where the bond required is for one year the order requires no confirmation but is, subject to appeal under S. 406, final. (Vol 17) 1930 Pat 274 (276) : 9 Pat 131 : 31 Cri L Jour 958 (DB).

#### Section 406-A — Note 1

[1] An appeal lies to the Sessions Judge from an order of a District Magistrate rejecting sureties. (Vol 21) 1934 Cal 482 (487) : 61 Cal 588 : 35 Cri L Jour 952 (D B).

#### SECTION 407 — SYNOPSIS.

1. "Convicted on a trial."
2. Trial held by a second class Magistrate.
3. Appeals from the Bench of Magistrates of the second class.
4. Transfer of appeals by the District Magistrate — Sub-section (2).

1. "Convicted on trial." — [1] A "trial" under the Code would imply the proceedings in which a person stands before a Court empowered to convict him of some 'offences' alleged against him. (Vol 7) 1920 Mad 337 (341) : 21 Cri L Jour 402 : 43 Mad 511 (F B) \* (78) 2 Mad 169 (170) (D B).

[2] The expression "convicted on trial" has sole reference to cases in which an accused has been held guilty of an offence. (68) 4 Mad H C R Cr 146 (148). (Proceeding under S. 480, a case of conviction on trial.)

[3] An order under the Cattle Trespass Act, 1871, for compensation for illegal seizure amounts to a "conviction on a trial" and is appealable. (Vol 9) 1922 Bom 191 (191, 192) : 46 Bom 58 : 22 Cri L Jour 624 (D B) \* (97) 5 Cri L Jour 86 (86, 87) : 29 Mad 517 (DB) \* (97) 6 Cri L Jour 121 (121, 122) : 4 Low Bur Rul 10.

[4] An order under S. 488 of this Code directing payment of a monthly allowance in default of maintenance is not a "conviction on a trial." (67) 7 South W R Cr 10 (11). (The person ordered against is not a person convicted of an offence — Per Peacock, C. J.) \* (68) 5 Bom H C R Cr 81 (82).

[5] An order under the Workman's Breach of Contract Act imposing a penalty and indicating a sentence of imprisonment or to perform a contract under that Act is an order of conviction on trial. (Vol 1) 1914 Sind 79 (80) : 7 Sind L R 80 : 15 Cri L Jour 372 \* (Vol 1) 1914 Cal 909 (909) : 15 Cri L Jour 697 (D B).

[6] Order forfeiting security furnished under Chapter VIII is not order of conviction on trial. (78) 2 Mad 169 (170) (D B).

[7] Person sentenced to fine under S. 480 is not convicted on trial—Appeal lies only under S. 486. (Vol 29) 1942 Mad 181 (181) : 1 L R (1942) Mad 587 : 43 Cri L Jour 397.

[8] Appeal being from conviction, absence of sentence, as in cases falling under S. 562, is no bar to appeal. (Vol 12) 1925 Cal 329 (330, 331) : 52 Cal 463 : 26 Cri L Jour 455 (DB). (Marginal note to the section ignores distinction between order and sentence.) \* (94) 1 Cri L Jour 543 (545) : 1904 Upp Bur Rul 7 \* (94) 1 Cri L Jour 1098 (1099) : 1904 Pun Re No. 24 Cr \* (10) 11 Cri L Jour 152 (153) : 5 Low Bur Rul 129 \* (Vol 4) 1917 Lah 413 (413) : 1917 Pun Re No 20 Cr : 18 Cri L Jour 401.

**408.** Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under section 349<sup>a</sup> [or in respect of whom an order has been made or a sentence has been passed under section 380] by a Magistrate of the first class, may appeal to the Court of Session :

*Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class.*

Provided as follows :

b[ \* \* \* \* \*

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal<sup>a</sup> [of all or any of the accused convicted at such trial] shall lie to the High Court ;

(c) when any person is convicted by a Magistrate of an offence under section 124A of the Indian Penal Code, the appeal shall lie to the High Court.

[1882 — Ss. 380, 408, 31; 1872 — Ss. 79, 269, 270, 18; 1861 — Ss. 409, 22.]

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 112.  
[b] Cl. (a) was *repealed* by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 23.

#### Section 407 — Note 1 (*contd.*)

[9] No appeal lies against sentence alone except under S. 412. (Vol 18) 1931 Pat 351 (351); 32 Cri L Jour 1017.

#### 2. Trial held by a second class Magistrate. —

[1] It is not the conviction by a second class Magistrate but holding of a trial by such Magistrate that determines the forum of the appeal. (Vol 12) 1925 Pat 472 (472) : 26 Cri L Jour 914 (DB) (Vol 19) 1932 Cal 460 (461) : 33 Cri L Jour 516.

[2] Second class Magistrate invested with first class powers only at time of judgment — Appeal lies to district Magistrate. (Vol 29) 1942 Pat 107 (108) : 43 Cri L Jour 7. (Judgment is no part of trial) (Vol 19) 1932 Cal 460 (461) : 33 Cri L Jour 516 (1938) 8 Cri L Jour 48 (49) : 4 How Bur Rul 239.

[3] Most part of trial held by Magistrate as first class Magistrate—Appeal lies to Sessions Court. (Vol 30) 1943 Bom 94 (95) : 44 Cri L Jour 481 (DB) (Vol 14) 1927 Lah 138 (139) : 28 Cri L Jour 50 (1914) (Vol 14) 1927 Bom 366 (366) : 28 Cri L Jour 474 (DB).

[4] Small part of trial held by Magistrate as First Class Magistrate—Appeal lies to Sessions Court. (Vol 12) 1925 Pat 472 (472) : 26 Cri L Jour 914 (DB) (Vol 14) 1927 Lah 398 (399) : 8 Lah 203 : 28 Cri L Jour 781.

[5] Conviction by first class Magistrate and not trial is determining factor. (Vol 15) 1928 Mad 55 (55) : 51 Mad 257 : 29 Cri L Jour 71 (DB) (Vol 30) 1943 Bom 94 (95) : 44 Cri L Jour 481 (DB).

[6] Where a second class Magistrate submits a case under S. 349 to a first class Magistrate, an appeal from the sentence of the first class Magistrate falls under S. 408 and not under this section, although the first class Magistrate passes his sentence without taking further evidence. (Vol 24) 1937 Cal 394 (396) : 38 Cri L Jour 990 : ILR (1937) 2 Cal 469 (DB).

**3. Appeals from Bench of the Magistrates of the second class.**—[1] Where a trial Bench is composed of Magistrates of the second class but is invested, as a Bench, with first class powers, appeals from the decisions of the Bench lies to the Sessions Judge and not to the

District Magistrate. (Vol 21) 1934 Bom 176 (177) : 36 Cri L Jour 592 (DB).

**4. Transfer of appeals by the District Magistrate** — Sub-section (2) — [1] District Magistrate can transfer only appeals. (1900) 2 Bom L R 536 (539).

[2] District Magistrate cannot transfer appeals other than those from convictions. (Vol 30) 1943 Mad 50 (51) : I L R (1943) Mad 303 : 44 Cri L Jour 177 (1929) 1942 Mad 181 (182) : I L R (1942) Mad 587 : 43 Cri L Jour 397 (12) 13 Cri L Jour 273 (274) : 34 All 244.

[3] The power to hear appeals on transfer will not render the Court of the first class Magistrate, the Court to which appeals "ordinarily lie" within the meaning of S. 195 (3). The Court of the District Magistrate will continue to be such Court notwithstanding that appeals under S. 407 may be presented to a subordinate Magistrate's Court under the sub-section. (1908) 26 Mad 656 (659) (1913) (1913) (Vol 7) 1920 Lah 479 (479) (1907) 5 Cri L Jour 432 (433) : 3 Nag L R 50 (1911) 1924 Oudh 239 (239) : 26 Oudh Cas 358 : 26 Cri L Jour 423 (1908) 30 Cal 394 (396) (DB) (1904) 1 Cri L Jour 422 (424) : 27 Mad 124 (1916) 1929 Cal 172 (173) : 56 Cal 824 : 30 Cri L Jour 658 (DB).

[But see (195) 18 Mad 487 (490).]

[4] The power of withdrawal of appeals vested in the District Magistrate can be exercised at any time even though an appeal may be part-heard before the Subordinate Magistrate. (1908) 7 Cri L Jour 329 (330) : 31 Mad 277 (DB).

[5] Once an appeal is withdrawn the District Magistrate becomes solely responsible for the disposal of the appeal and he is not bound by any opinion formed or recorded by the Subordinate Magistrate prior to the withdrawal as to the necessity of examining further evidence in the case. (1908) 7 Cri L Jour 329 (330) : 31 Mad 277 (DB).

#### SECTION 408 — SYNOPSIS.

1. Scope.
2. "Convicted on a trial."
3. "Trial held by."

SECTION 408 — SYNOPSIS (*contd.*)

4. Sentence under section 349.
5. Court of Session.
6. Proviso (b).
7. Concurrent sentences.
8. Proviso (c).

1. Scope.—[1] The section must be read subject to the exceptions and modifications embodied in subsequent sections, viz., sections 412, 413 and 414. (Vol 24) 1937 Cal 394 (395, 396) : 38 Cri L Jour 990 : I L R (1937) 2 Cal 469 (DB) \* ('11) 12 Cri L Jour 389 (389) : 33 All 510 \* (Vol 18) 1931 Cal 642 (643) : 59 Cal 19 : 33 Cri L Jour 90 \* (Vol 6) 1919 Pat 556 (557, 559) : 20 Cri L Jour 545 : 4 Pat L Jour 435 (DB) \* ('13) 14 Cri L Jour 170 (171) : 15 Oudh Cas 386 (DB) \* ('10) 11 Cri L Jour 152 (152) : 5 Low Bur Rul 129.

2. "Convicted on a trial."—[1] The section confers a right of appeal on a person convicted on a trial and hence the absence of a sentence as in cases where he is dealt with under S. 562 does not affect his right of appeal. (Vol 27) 1940 Rang 223 (224) : 1940 Rang L R 381 : 41 Cri L Jour 877 \* (Vol 13) 1926 Bom 382 (383) : 27 Cri L Jour 873 (D B) \* (Vol 1) 1914 All 543 (544) : 37 All 31 : 16 Cri L Jour 43 \* (Vol 22) 1935 Mad 157 (158) : 58 Mad 517 : 36 Cri L Jour 589 (DB) \* (Vol 11) 1924 All 765 (766) : 46 All 828 : 25 Cri L Jour 1244.

3. "Trial held by."—[1] The word "trial" is not confined to a trial with the aid of assessors only. It applies to a trial either with the assessors or with the aid of a jury. (Vol 30) 1943 Oudh 322 (324) : 41 Cri L Jour 604.

4. Sentence under section 349. — [1] Case submitted under S. 349 — Magistrate to whom it is submitted cannot pass sentence higher than he is empowered to inflict under Ss. 32 and 33. ('73) 1873 Pun Re No. 2 Cr, p. 3 (3).

[2] Magistrate to whom proceedings are submitted under S. 349 empowered under S. 30 — Magistrate cannot pass sentence severer than he is empowered to inflict under Ss. 32 and 33. ('07) 6 Cri L Jour 289 (290) : 4 Low Bur Rul 53.

5. Court of Session. — [1] Where in the district there are two sessions divisions, an appeal from a conviction by a Magistrate having jurisdiction over the whole district lies to the Sessions Judge of the division within which the headquarters of the Magistrate are situate, irrespective of the place of offence. ('06) 4 Cri L Jour 443 (444) (D B) (Mad).

[2] Where a sessions division covers two districts, an appeal to the Sessions Court can be heard in any one of the places. It is a matter of discretion for the Sessions Judge, when the matter comes before him on appeal, to decide in which district it shall be heard. (Vol 21) 1934 Pat 643 (648) : 36 Cri L Jour 371.

[3] In Agency Tracts of which the Code of Criminal Procedure is extended, an appeal from the Agency Magistrate of the first class lies to the Sessions Judge of the Agency Tracts and not to the non-agency Sessions Judge. ('12) 13 Cri L Jour 850 (852) (Mad).

[4] Sub-divisional Magistrate exercising powers as Assistant Agent in Agency Tract — District Magistrate acting as Government Agent — District Magistrate

transferring cases to former — Cases decided by him in capacity of Sub-divisional Magistrate — Appeal lies to Sessions Judge and not to Government Agent. (Vol 24) 1937 Mad 17 (19) : 38 Cri L Jour 81.

[5] The Code being extended to British Baluchistan, a Court of Sessions in the said territory has all the powers in respect of appeals as are conferred by the Code. (Vol 16) 1929 Lah 187 (189) : 30 Cri L Jour 918 (DB).

[6] A sentence of the Justice of the Peace under the Merchant Seamen's Act (11) of 1859) is appealable to a Court of Session. (1865) 2 Mad 11 C R 473 (473).

6. Proviso (b). — [1] An appeal by an accused person sentenced for a term not exceeding four years will lie to the High Court even though no appeal has been preferred by another accused who has been sentenced in the same case for a term exceeding four years. (Vol 2) 1915 All 20 (20) : 16 Cri L Jour 353 \* ('31) 1931 Mad W N 1068 (1068) \* ('07) 5 Cri L Jour 496 (496) (D B) (Mad) \* ('11) 12 Cri L Jour 236 (238) (DB) (Lah) \* (Vol 13) 1926 All 160 (160) : 27 Cri L Jour 175 \* (Vol 2) 1915 All 356 (357) : 37 All 471 : 16 Cri L Jour 606 \* (Vol 3) 1916 Lah 441 (441) : 1916 Pun Re No. 5. Cr : 17 Cri L Jour 299.

[2] The "sentence" in proviso (b) has reference only to the substantive sentence of imprisonment apart from any sentence of whipping or fine or imprisonment in default of fine. (Vol 21) 1934 Oudh 433 (433) : 35 Cri L Jour 1288 \* (Vol 5) 1918 Lah 384 (384) : 1918 Pun Re No. 19 Cr : 19 Cri L Jour 742.

[3] When a Magistrate empowered under S. 30 of the Code passes a sentence referred to in this proviso, the appeal lies only to the High Court. (Vol 12) 1925 Rang 39 (39) : 2 Rang 386 : 26 Cri L Jour 293.

[4] Where the Magistrate is not empowered under S. 30 or has not acted in exercise of such powers, the appeal will lie only to the Court of Session. ('07) 6 Cri L Jour 289 (290) : 4 Low Bur Rul 53 \* ('75) 1875 Pun Re No. 10 Cr, p. 14 (14) \* ('77) 1877 Pun Re No. 8 Cr, p. 19 (21) (FJ) \* ('79) 1879 Pun No. 33 Cr, p. 94 (95) (DB) \* ('81) 1881 Pun Re No. 23 Cr, p. 51 (52, 53) (DB).

[5] Where an Assistant Sessions Judge convicts and sentences an accused for a term less than four years, an appeal lies only to the Court of Session and the fact that at the time of the appeal the Assistant Sessions Judge himself becomes the Sessions Judge will not give a right of appeal to the High Court. (Vol 5) 1918 Pat 240 (240) : 3 Pat L Jour 192 : 19 Cri L J 442 (DB).

[6] Where a District Magistrate, appointed as a special officer to try a criminal case in a Native State, convicts and sentences the accused for the term mentioned in proviso (b), no appeal will lie to the High Court as he did not act as a Magistrate of the first class under the Code. ('10) 11 Cri L Jour 390 (391) : 1910 Pun Re No. 14 Cr (DB).

[7] An order of detention in Borstal School is not a sentence of imprisonment within the meaning of this proviso. (Vol 23) 1936 Rang 229 (229, 230) : 37 Cri L Jour 793 : 14 Rang 143.

7. Concurrent sentences. — [1] In a trial for more offences than one the aggregate of sentences if

*Appeals to Court of Session how heard.*

**409.** An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge :

<sup>a</sup>[Provided that an Additional Sessions Judge shall hear only such appeals as the <sup>b</sup>[Provincial Government] may, by general or special order, direct or as the Sessions Judge of the division may make over to him.]

[1882 — S. 409.]

[a] *Added* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 113. [b] *Substituted* by A. O. for "Local Government."

*Appeal from sentence of Court of Session.*

**410.** Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

[1882 — S. 410 : 1872 — Ss. 80, 270, 271 ; 1861 — S. 406.]

*411.* Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

[1882 — S. 411.]

#### Section 408—Note 7 (contd.)

they are consecutive must be deemed as one sentence for purposes of an appeal. (1931) 32 Cri L Jour 469 (469) (All) \* ('13) 14 Cri L Jour 119 (119) : 35 All 154 \* (Vol 20) 1933 Pesh 90 (94) : 35 Cr L J 399 (DB).

8. Proviso (c). — [1] The Sessions Judge entertaining appeal against conviction under S. 124A, Penal Code, acts without jurisdiction. (Vol 24) 1937 All 466 (467) : 38 Cri L Jour 972 (DB).

[2] Single trial—Conviction under Ss. 124A and 153A, Penal Code — Agreement of sentences must be deemed as one sentence for appeal under S. 35 (3) — Appeal lies to High Court. ('11) 12 Cri L Jour 348 (351) : 38 Cal 214 (DB).

#### Section 409 — Note 1

[1] The Sessions Judge cannot, make over an appeal under the proviso to an Assistant Sessions Judge for hearing. Nor can he do so under sub-s. (2) of S. 193 of the Code, as an appeal is not a "case" within the meaning of that section. (Vol 2) 1915 All 101 (102) : 37 All 286 : 16 Cri L Jour 316.

[2] The power of the Sessions Judge to make over an appeal to an additional Sessions Judge is not confined to appeals arising within his territorial jurisdiction but extends also to appeals which might have been transferred to the Sessions Judge by the High Court. (Vol 21) 1934 Pat 114 (115, 116) : 35 Cri L Jour 1167 (DB).

[3] The Sessions Judge has power to transfer any appeal he likes to the Court of the Additional Sessions Judge including an appeal from an order under S. 195. (Vol 29) 1942 Oudh 50 (54) : 43 Cri L Jour 50.

#### Section 410 -- Note 1

[1] Conviction by Sessions Judge for intentional insult to him in Court — Appeal lies to High Court. ('68-69) 4 Mad H C R Cr 146 (147, 148).

[2] Order by Sessions Judge in case referred to him

under S. 123—No appeal lies to High Court. ('83) 9 Cal 878 (879) (DB).

[3] Where a Sessions Judge, acting under S. 428, causes additional evidence to be taken in an appeal and then convicts the accused, the latter is not convicted on a trial held by a Sessions Judge and no appeal lies to the High Court. (1900) 27 Cal 372 (375, 376) (DB) \* ('71) 15 Suth W R Cr 33 (34).

[4] A Judge of the Court of the Judicial Commissioner of Sind sitting in a Sessions trial is a Sessions Judge for the purposes of this section. (Vol 26) 1939 Sind 209 (211) : 41 Cri L Jour 28 : I L R (1940) Kar 249 (DB) \* (Vol 12) 1925 Sind 249 (250, 251, 253) : 19 Sind L R 309 : 26 Cri L Jour 562 (FB).

[5] The High Court of Bombay has power to hear appeals from a conviction by the Agent of Mewar, under the special jurisdiction conferred on the said High Court by rule 44 of the Bombay Act, 2 (II) of 1846. (Vol 4) 1917 Bom 224 (226) : 41 Bom 657 : 18 Cri L Jour 817 (FB).

[6] The High Court of Calcutta has no jurisdiction to hear appeals from Chittagong Hill Tracts. (1900) 27 Cal 654 (654) (DB).

[7] Where a case has been submitted to the High Court under S. 374 for confirmation and the High Court has pronounced a decision thereon, no appeal is open to the accused subsequently from the order of the Sessions Judge. ('67) 1867 Pun Re No. 33 Cr, p. 55 (55) (DB).

#### Section 411—Note 1

1. Appeal from the Presidency Magistrate. —

[1] This section has reference only to the substantive term of imprisonment, and does not include the imprisonment in default of payment of fine. ('06) 4 Cri L Jour 368 (369) : 33 Cal 1036 (DB). (Sentence of eight months in default of giving security — No appeal.) \* ('78) 2 Mad 30 (31, 32) (DB). (Substantive sentence of imprisonment of six months cannot be combined with imprisonment in default of fine to claim right of appeal.) \* ('96) 20 Bom 145 (145) (DB). (Do.)

<sup>a</sup>[411A. (1) Without prejudice to the provisions of section 449 any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court —

- (a) against the conviction on any ground of appeal which involves a matter of law only;
- (b) with the leave of the appellate Court, or upon the certificate of the judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be a sufficient ground of appeal; and
- (c) with the leave of the appellate Court against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction lie on a matter of fact as well as a matter of law.

(3) Notwithstanding anything elsewhere contained in any Act or Regulation, an appeal under this section shall be heard by a Division Court of the High Court composed of not less than two judges, being judges other than the judge or judges by whom the original trial was held; and if the constitution of such a Division Court is impracticable, the High Court shall report the

#### Section 411—Note 1 (contd.)

[2] Where the sentence does not contain any one of the punishments specified in the section no appeal lies. (Vol 24) 1937 Bom 336 (336) : 38 Cri L Jour 985 (DB). (Sentence of whipping — No appeal.) \* (Vol 24) 1937 Cal 413 (413) : 38 Cri L Jour 876 : I.L.R. (1937) 1 Cal 123 (DB). (Sentence of six months' imprisonment—No appeal.) \* (Vol 2) 1915 Bom 61 (61) : 39 Bom 558 : 16 Cri L Jour 585 (DB). (Simple imprisonment for a day and forfeiture of pay of two days—No appeal.) \* (1905) 2 Cal L Jour 45n. (Imprisonment for one day and Rs. 200 fine.)

[3] Concurrent sentences against the accused in the same trial cannot be aggregated to bring the case under the section. (12) 13 Cri L Jour 787 (788) (DB) (Cal). (Two concurrent sentences of six months each amount to a single sentence of six months.)

[4] Where a Presidency Magistrate proceeds under S. 562 and passes an order for release of the accused on furnishing security for good behaviour no appeal lies from such an order. (Vol 24) 1937 Cal 413 (414) : 38 Cri L Jour 876 : I.L.R. (1937) 1 Cal 123 (DB) \* (Vol 19) 1932 Cal 488 (488) : 33 Cri L Jour 639 (DB).

[5] Where the sentence of imprisonment, is within the appealable limit, an appeal lies although the offender is ordered to be confined in a juvenile jail. (Vol 12) 1925 Bom 147 (147) : 26 Cri L Jour 454 (DB).

#### Section 411A—Note 1

[1] The section has no retrospective operation. (Vol 31) 1944 Bom 252 (252, 253) : I.L.R. (1945) Bom 17 : 48 Cri L Jour 328 (DB).

[2] Leave or certificate should be granted only when it is thought that had the verdict been given by a *motusil* jury, it would have been a fit case for a successful reference to the High Court under S. 307 and not merely because on the evidence it is possible to take a view different from that taken by the jury. (Vol 32) 1945 Bom 277 (282) : 46 Cri L Jour 635 (FB).

[3] Verdict of jury wrong in Judge's opinion but accepted as being unanimous — Judge may give certificate — Verdict of jury not unanimous — Judge accepting verdict cannot grant certificate — Whether there should be appeal in such a case should be kept to appellate Court. (Vol 33) 1946 Bom 465 (468) : 47 Cri L Jour 884 (SB).

[4] Conviction for contempt of Court passed by a single Judge of High Court in summary proceedings — No appeal lies. (Vol 31) 1947 Bom 184 (185) (DB).

[5] High Court can, in appeal under sub-s. (1) (b) of this section, on a matter involving a question of fact, set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case it is convinced that the verdict is unreasonable. (Vol 33) 1946 Mad 271 (272, 273) : 47 Cri L Jour 785 : I.L.R. (1946) Mad 389 (DB). (The omission in the Code of Criminal Procedure of a provision corresponding to sub-s (1) of S. 4 of the English Criminal Appeal Act (1907) does not affect the powers of an Indian High Court when hearing an appeal under S. 411A (1) (b) either by way of extending or limiting them.) \* (45) I.L.R. (1945) Bom 724 (727) (FB).

[6] Although the powers of interference under this section are very wide, the High Court is not bound to exercise them indiscriminately in every case. (Vol 32) 1945 Bom 277 (278) : 46 Cri L Jour 635 (FB).

circumstances to the Provincial Government which shall take action with a view to the transfer of the appeal under section 527 to another High Court.

(4) Subject to such rules as may from time to time be made by His Majesty in Council in this behalf, and to such conditions as the High Court may establish or require, an appeal shall lie to His Majesty in Council from any order made on appeal under sub-section (1) by a Division Court of the High Court in respect of which order the High Court declares that the matter is a fit one for such appeal.]

[a] *Inserted* by the Code of Criminal Procedure (Amendment) Act, 1943 (26 [XXVI] of 1943), S. 2.

[27-11-1943.]

### OBJECTS AND REASONS.

Sub-section (2) makes the provision for appeals against acquittals and has the effect of exactly equating the right of appeal against acquittals with the right given under clauses (b) and (c) of sub-section (1) of this section of appeal against a conviction. The words 'which shall take action' inserted by the Select Committee in sub-section (3) after the words 'Provincial

Government' have the effect of imposing on the Provincial Government a definite duty to arrange for a transfer to another High Court in the circumstances there dealt with. The provision in sub-section (4) has the effect of confining appeals to the Privy Council to appeals against orders made on appeal against conviction only.—*See* S. C. R., Gazette of India, 1943, Part V page 219.

**412.** Notwithstanding anything hereinbefore contained, where an accused person has pleaded *No appeal in certain cases when accused pleads guilty.* guilty and has been convicted by <sup>a</sup>[a High Court,] a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

[1882 — S. 412 ; 1872 — S. 273.]

[a] *Inserted* by the Criminal Procedure Amendment Act, 1943 (26 [XXVI] of 1943), S. 3. [27-11-1943.]

#### Section 411A—Note 1 (*contd.*)

[7] Even after the introduction of this section the jury remains the sole arbiter of facts and the Judge is still bound by the unanimous verdict of the jury, the appellate Court ought to give due weight to its verdict. (Vol 32) 1945 Bom 277 (279, 280) : 46 Cri L Jour 635 (FB). (Verdict mostly on appreciation of oral evidence—Jury unanimously disbelieving witnesses—Appellate Court should be slow to interfere.) \* (Vol 33) 1946 Bom 38 (41) : 47 Cri L Jour 378 (FB).

[8] Where the presiding Judge gives a certificate of fitness for appeal, due regard must of course be given to this implied opinion that the verdict is wrong. But even then the test for interference remains the same as in a case under S.307. (Vol 32) 1945 Bom 277 (280, 281) : 46 Cri L Jour 635 (FB).

#### Section 412—Note 1

[1] A plea of guilty by the accused person operates as a waiver of his right to question the legality of the conviction based on such a plea. But the plea of guilty must be really such a plea. (Vol 7) 1920 Cal 522 (522) : 21 Cri L Jour 547 (SB) \* (80) 5 Bom 85 (87) (DB) \* (Vol 15) 1928 Rang 49 (49) : 5 Rang 710 : 29 Cri L Jour 115.

[2] The following is not really a plea of guilty, for instance :—

(a) A plea only amounting to an admission of facts alleged and not the offence. (Vol 6) 1919 Bom 160 (160) : 43 Bom 842 : 20 Cri L Jour 684 (DB).

(b) A plea of guilty based on misconception of the law of criminal liability. (Vol 7) 1920 Cal 522 (523) : 21 Cri L Jour 547 (SB). (Following (1869) 11 Suth W R (Cr) 53.)

(c) A plea based on misconception of one's rights in property. (Vol 18) 1931 All 265 (266) : 53 All 437 : 32 Cri L Jour 576 (DB). (Case under S. 380, Penal Code.)

(d) An answer to a charge defectively framed and not properly explained to the accused. (193-1900) 1893-1900 Low Bur Rul 328 (328).

(e) A plea of guilty obtained by trickery. (Vol 31) 1944 Cal 120 (121) : 1 L R (1943) 1 Cal 540 : 45 Cri L Jour 517.

[3] It is only in cases where the Court has accepted the plea of guilty and has convicted the accused person on such plea that the right of an appeal from the conviction is taken away. (Vol 30) 1943 Pat 313 (314) : 44 Cri L Jour 801 \* (09) 10 Cri L Jour 325 (340) (DB) (Cal) \* (Vol 18) 1931 Bom 195 (196, 198) : 32 Cri L Jour 719 (FB).

[4] Once the Court has in its discretion accepted the plea, such discretion cannot afterwards be attacked as improperly exercised so as to affect the provisions of this section. (Vol 21) 1934 Pat 333 (334) : 35 Cri L Jour 1322 (DB).

[5] A plea of guilty with regard to previous convictions equally precludes the appellate Court from re-opening the question of the previous convictions in appeal. (1909) 9 Cri L Jour 56 (59) : 4 Nag L R 163.

[6] This section creates an exception to the rule that an appeal cannot be admitted on the question of sentence only in cases where the conviction has taken place on an admission of guilt by the accused person. (Vol 18) 1931 Pat 351 (351) : 32 Cri L Jour 1017. (A restriction order for admission of a criminal appeal on the ground of sentence only is *ultra vires*.) \* (Vol 1

**413.** Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which "a High Court passes a sentence of imprisonment not exceeding six months only or of fine not exceeding two hundred rupees only or in which a Court of Session <sup>b</sup> passes a sentence of imprisonment not exceeding one month only, or <sup>c</sup> [in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence] of fine not exceeding fifty rupees only <sup>d</sup>."

*Explanation.*—There is no appeal from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

[1882 — S. 413; 1872 — S. 273; 1861 — S. 411.]

[a] Inserted by the Criminal Procedure Amendment Act, 1943 (26 [XXVI] of 1943), S. 4. [27-11-1943.]  
[b] The words "or the District Magistrate or other Magistrate of the first class" were *repealed* by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 24. [c] Inserted, *ibid.* [d] The words "or of whipping only" were *repealed, ibid.*

### OBJECTS AND REASONS.

*Amendment made in 1943.* — "The alteration here made is to make applicable to appeals from a High Court exercising original criminal jurisdiction the same

restriction as is imposed by S. 411 of the Code on appeals from a Presidency Magistrate." — S. C. R., Gazette of India, 1943, Part V, page 219.

#### Section 412—Note 1 (*contd.*)

1914 Cal 276 (277): 41 Cal 406: 14 Cri L Jour 485 (DB) \* ('98) 22 Bom 759 (760) (DB). (Corresponding section of the Code of 1882 did not include a conviction by a Magistrate of the first class.)

[7] The accused is entitled to question in appeal the sentence only of the lower Court either on the ground that the extent of the sentence is beyond what the circumstances of the case required or that the sentence is illegal as not authorised by law. ('80) 5 Bom 85 (87) (DB). (Case under Presidency Magistrates' Act 4 [IV] of 1877)\*('98) 22 Bom 759 (760) (DB).

[8] Where on the plea of guilty of the accused the Court, proceeding under Section 562 of the Code, releases him on recognizance and passes no sentence at all, the right of appeal is absolutely barred. (Vol 4) 1917 Lah 413 (413): 1917 Pun Re No. 20 Cr: 18 Cri L Jour 401 \* (Vol 18) 1931 Sind 151 (151, 152): 25 Sind L R 337: 32 Cri L Jour 1142.

[9] The section does not apply to conviction by a Magistrate of the second class. (Vol 30) 1943 Pat 380 (381): 45 Cri L Jour 166. (Overruled on another point in (Vol 31) 1944 Pat 1: 22 Pat 602: 45 Cri L Jour 288 (DB).)

[10] The principle of this section would seem to apply to criminal revision also. (Vol 7) 1920 Cal 522 (522): 21 Cri L Jour 547 \* ('07) 6 Cri L Jour 153 (154) (All).

[11] Notwithstanding the conviction being based on a plea of guilty, the legality of the conviction can be questioned in an application for revision. (Vol 30) 1943 Bom 209 (210): 44 Cri L Jour 668 (D B) \* (Vol 30) 1943 Pat 313 (314): 44 Cri L Jour 801. (Powers of High Court in revision are not restricted by S. 412.) \* (Vol 17) 1930 Rang 349 (350): 32 Cri L Jour 206.

[12] Accused convicted on his plea of guilty—Notice to show cause why sentence should not be enhanced — Accused held entitled to appeal both against his con-

viction and sentence. (Vol 22) 1935 Rang 40 (50): 36 Cri L Jour 336: 12 Rang 616 (DB). (Accused convicted on his plea of guilty — Notice to show cause why sentence should not be enhanced—Accused held entitled to appeal both against his conviction and sentence).

### SECTION 413 --SYNOPSIS.

1. Scope.
2. Order under section 562.
3. "Passes a sentence."
4. "Sentence of fine."
5. "By a convicted person."

1. Scope.—[1] Explanations to Ss. 413 and 415 are intended to remove possible doubts in the construction of those sections. ('11) 12 Cri L Jour 389 (389, 390): 33 All 510. (This case is confined to S. 415.)

[2] If the two conditions as regards limit of sentence and the Court given in the section are satisfied the section would apply although the sentence is passed under S. 349 or S. 380 of the Code. (Vol 24) 1937 Cal 394 (396): 38 Cri L Jour 990: 1 L R (1937) 2 Cal 469 (D B).

[3] The restrictions on appeal laid down in S. 413 apply to European British subjects by the repeal of section 416.

2. Order under section 562.—[1] The restrictive provisions of S. 413 are not applicable to the case, where order under S. 562 is passed. (Vol 13) 1926 Bom 382 (383): 27 Cri L Jour 873 (DB) \* ('04) 1 Cri L Jour 1098 (1099): 1904 Pun Re No. 24 Cr.

[2] Any restrictive provision on the right of appeal must be strictly construed and in favour of the subject. (Vol 18) 1931 Cal 642 (643): 59 Cal 19: 33 Cri L Jour 90.



**414.** Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence <sup>a</sup>[\* \* \*] of fine not exceeding two hundred rupees only <sup>b</sup>[\* \* \*].

[1882 — S. 414 ; 1872 — S. 274, para. 1.]

[a] The words "of imprisonment not exceeding three months only, or" were *repealed* by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 25. [b] The words "or of whipping only" were *repealed*, *ibid*.

**415.** An appeal may be brought against any sentence referred to in section 413 or section 414 *Proviso to sections 413 and 414.* <sup>a</sup>[by which any punishment therein mentioned is combined with any other punishment] but no sentence which would not otherwise be liable to appeal

#### Section 413—Note 2 (*contd.*)

[3] The section cannot bar the right of appeal existing in respect of cases not falling within its specific terms. *See* (Vol 11) 1924 All 765 (765); 46 All 828 : 25 Cri L Jour 1244.

3. "Passes a sentence."—[1] Where a Magistrate passes a non-appealable sentence at first and subsequently adds to it so as to make it appealable, an appeal lies from such a sentence. ('11) 12 Cri L Jour 431 (431) (D B) (Bom) \* ('11) 12 Cri L Jour 402 (402); 35 Bom 418 (D B).

[2] Where during a trial commenced before a second class Magistrate, he is invested with first class powers, a sentence of fine not exceeding fifty rupees passed by him is one "passed" by a first class Magistrate and is not appealable under this section. (Vol 30) 1943 Bom 94 (95); 44 Cri L Jour 481 (D B) \* (Vol 29) 1942 Pat 107 (108); 43 Cri L Jour 7 \* (Vol 27) 1940 Cal 540 (542) : 1 I L R (1940) 1 Cal 519 : 42 Cri L Jour 87 (D B).

4. "Sentence of fine."—[1] An award of compensation under S. 22 of the Cattle-trespass Act, 1871, is not a sentence of fine within the meaning of this section. (Vol 9) 1922 Bom 191 (191); 46 Bom 58 : 22 Cri L Jour 624.

[*See* (1900) 27 Cal 992 (992) (D B).]

[2] An order directing payment to the complainant of the court-fee paid by him on his complaint is not a sentence of fine. ('37) 42 Cal W N 760 (760).

[3] Where a sentence of fine of Rs. 10 has been imposed by a first class Magistrate under S. 480, Cr. P. C., no appeal lies against the sentence. (Vol 31) 1944 Cal 382 (383); 1 I L R (1944) 1 Cal 31 : 46 Cri L Jour 17 (D B).

5. "By a convicted person."—[1] As to the right of appeal by a co-accused who has been awarded only a non-appealable sentence, see notes on section 415A.

#### Section 414—Note 1

[1] This section takes away the right of appeal in cases tried summarily under S. 260 of the Code where the sentence is one of fine not exceeding Rs. 200 only.

(Vol 27) 1940 All 517 (518); 1 I L R (1940) All 643 : 42 Cri L Jour 243 (D B).

[2] The restriction in this section applies only to convictions by a Magistrate or a Bench of Magistrates of the first class to whom alone S. 260 has reference. ('86) 9 Mad 36 (37). (Conviction by bench of second or third class Magistrates not affected by the section.)

*See* ('83) 9 Cal 96 (97) (D B).]

[3] A Magistrate cannot deprive an accused person of his right of appeal by trying a case summarily without having the power to do so. ('79) 4 Cal 18 (19) (D B) \* (Vol 19) 1932 Lah 188 (189); 33 Cri L Jour 108.

[4] By the amendment in 1923 of S. 414, cases in which a sentence of imprisonment or whipping has been passed have been made appealable. (Vol 16) 1929 Pat 716 (716); 30 Cri L Jour 869.

[5] Where an order under S. 562 is passed, this section has no application and an appeal lies from the conviction. (Vol 27) 1940 Rang 223 (223, 224) : 1940 Rang L R 381; 41 Cri L Jour 877 \* (Vol 11) 1924 All 765 (766); 46 All 828 : 25 Cri L Jour 1244 \* ('04) 1 Cri L Jour 543 (545); 1904 Upp Bur Rul (Cr. P. C.) 7.

[6] A sentence of fine of Rs. 60 coupled with suspension of licence under the Motor Vehicles Act is not a sentence of fine only within the meaning of this section and an appeal is not barred. (Vol 20) 1933 Rang 329 (330); 35 Cri L Jour 116.

[7] Where, in addition to a non-appealable sentence a further order to furnish security for good behaviour is passed, this section does not apply. ('09) 9 Cri L Jour 368 (370); 4 Low Bur Rul 359.

[8] An order of confiscation under the Excise Act in addition to non-appealable sentence does not make the case appealable. (1900-02) 1 Low Bur Rul 3 (4).

[*See* ('77) 3 Cal 366 (369) (F B).]

[*See also* ('66) 3 Bom H C R Cr 12 (14).]

#### Section 415—Note 1

[1] The amendment of this section by Act 6 [VI] of 1945 has set a conflict of view regarding the applica-

shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

*Explanation.*—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

[1882 — S. 115 : 1872 — S. 274.]

[a] *Substituted by the Repealing and Amending Act, 1915 (6 [VI] of 1915), S. 3 and Sch. II, for "by which any two or more of the punishments therein mentioned are combined."*

\*[415A. Notwithstanding anything contained in this Chapter, when more persons than one *Special right of appeal* are convicted in one trial, and an appealable judgment or order has been *in certain cases.* passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.]

[a] *Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 114.*

416. [Saving of sentences on European British subjects.] *Repealed by the Criminal Law Amendment Act, 1923 (12 [XXII] of 1923), S. 26.*

[1882 — S. 416 ; 1872 — S. 274, para. 3.]

#### Section 415—Note 1 (*contd.*)

bility of this section at rest by making it clear that the section only applies where any other punishment than one mentioned in S. 413 or S. 414 is combined with such punishment.

[2] A combination of sentences will give a right of appeal only if the sentences are in the same trial and not in separate cases. (66) 6 South W R Cr 51 (51, 52) & (68) 10 South W R Cr 3 (4).

[3] Concurrent sentences of imprisonment cannot be aggregated under S. 415 for escaping the bar of Ss. 413 and 414. (13) 14 Cri L Jour 251 (254); 40 Cal 631 (D B) & (Vol 8) 1921 Cal 152 (152); 23 Cri L Jour 225 (D B).

[But see (12) 13 Cri L Jour 877 (877) (Cal) & (11) 12 Cri L Jour 391 (392) (D B) (Cal).]

[4] Where the sentence is of a fine of Rs. 45 and disqualification to hold licence under the Motor Vehicles Act, the sentence is not appealable. (Vol 32) 1945 Mad 27 (28); 1 L R (1945) Mad 315; 46 Cri L Jour 300.

[But see (Vol 20) 1933 Rang 329 (330); 35 Cri L Jour 116.]

[5] The fact of a convicted person being ordered to furnish security to keep the peace will not alter the non-appealable nature of the sentences mentioned in Ss. 413 and 414. (04) 1 Cri L Jour 1054 (1055); 7 Oudh Cas 338 & (Vol 22) 1935 Rang 363 (363); 36 Cri L Jour 1610; 13 Rang 287.

[6] Where in a summary trial an accused person was convicted and sentenced to three months imprisonment and was also ordered to give security for good behaviour under S. 31A of the Rangoon Police Act, it was held that an appeal lay under S. 408 and that the right thereto was not taken away by S. 414 (as it stood before the amendment). (1909) 9 Cri L Jour 368 (369, 370); 4 Low Bur Bul 359.

#### Section 415A—Note 1

[1] The enactment of this section in 1923 recognizes

the right of appeal on behalf of an accused person against whom a non-appealable sentence is passed in a trial in which an appealable judgment is passed against any of the accused persons. (Vol 18) 1931 Cal 642 (643); 59 Cal 19 : 33 Cri L Jour 90 & (Vol 12) 1925 Cal 329 (332) : 52 Cal 463; 26 Cri L Jour 455 (D B) & (Vol 32) 1935 Mad 157 (158); 58 Mad 517; 36 Cri L Jour 589 (D B).

[See also (Vol 13) 1926 Bom 382 (382) : 27 Cri L Jour 873 (D B).]

[2] The section confers a general right of appeal and that although the co-accused (by virtue of whose right of appeal the other accused gets his right of appeal) can only appeal as to his conviction and not as to his sentence, the other accused can appeal as to both. (Vol 27) 1940 Rang 223 (224); 1940 Rang L R 381 : 41 Cri L Jour 877.

[But see (Vol 18) 1931 Sind 151 (152) : 25 Sind L R 337 : 32 Cri L Jour 1142. (Extent of right of appeal is same in case of all accused)]

[3] A and B are jointly tried and convicted by a Presidency Magistrate. A is sentenced to six months' imprisonment and B is dealt with under S. 562 without any sentence being passed against him. A is not entitled to appeal under this section because under the terms of S. 411, there being no sentence against B, there is no appealable judgment against B. (A himself cannot appeal because the sentence against him is not of the appealable level.) (Vol 24) 1937 Cal 413 (414); 38 Cri L Jour 876 : 1 L R (1937) 1 Cal 123 (D B).

[4] A and B are jointly tried and both are convicted on their plea of guilty. But no sentence is passed on A and he is dealt with under S. 562. But an appealable sentence is passed against B. A cannot appeal. (Vol 18) 1931 Sind 151 (152); 25 Sind L R 337 : 32 Cri L Jour 1142.

[5] Where leave to appeal is granted under S. 449 to one of the two accused persons jointly tried by the High Court sessions, leave to appeal should be granted to the other accused also. (Vol 14) 1927 Cal 307 (308); 54 Cal 52 : 28 Cri L Jour 481 (D B).

417. The <sup>a</sup>[Provincial Government] may direct the Public Prosecutor to present an *Appeal on behalf of Government in case of acquittal.* appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

[1892 — S. 417 ; 1872 — S. 272 paras. 1, 2.]

[a] *Substituted by A. O. for "Local Government".*

#### SECTION 417 — SYNOPSIS.

1. Scope.
2. "The Provincial Government."
3. "May direct."
4. "Public Prosecutor."
5. "High Court."
6. Order of acquittal.
7. Interlocutory orders.

1. Scope. — [1] The extraordinary remedy of an appeal against an acquittal received a statutory recognition for the first time in 1872 in the interests of public safety, peace and order. (Vol 18) 1931 All 439 (441) (DB)\* (1904) 1 Cri L Jour 781 (788); 1904 Pun Re No. 7 Cr. (DB)\* (1904) 1 Cri L Jour 674 (677, 678) : 17 C P L R 75 \* ('10) 11 Cri L Jour 66 (66) : 1909 Pun Re No. 15 Cr.

[2] Before a person acquitted can undergo any further trial for the offence of which he has been acquitted, the highest executive authority must hold that it is desirable, the highest legal authority must advise that it is legal and proper and the highest judicial authority must find that it is just that the order should be set aside. (1904) 1 Cri L Jour 674 (684, 685); 17 C P L R 75.

[3] The object of the section is only to enable the Provincial Government to have a wrongful acquittal converted into a conviction and not to enable it to obtain from the High Court opinions on abstract questions. ('10) 11 Cri L Jour 65 (65) : 1909 Pun Re No. 14 Cr \* ('11) 12 Cri L Jour 364 (371) : 1911 Pun Re No. 10 Cr (SB).

[4] An appeal lies against an order of acquittal in a case tried summarily under S. 260. (Vol 21) 1934 All 842 (844) : 35 Cri L Jour 1229 (DB).

[5] This section does not control the powers of the High Court under S. 439. (Vol 17) 1930 Lah 159 (160) : 31 Cri L Jour 584.

[6] This section is inapplicable to cases of orders of acquittal passed by special Magistrates under Bengal Act 12 of 1932 under which there is no right of appeal to the High Court. (Vol 20) 1933 Cal 776 (776) : 60 Cal 1482 : 34 Cri L Jour 1070 (DB).

[7] In an appeal against an order of acquittal, it is for the Government to show that the judgment appealed against is wrong. (Vol 31) 1944 Sind 33 (33) : 1 L R (1944) Kar 123 : 45 Cri L Jour 650 (DB) \* ('32) 33 Cri L Jour 929 (930) (DB) (Oudh) \* (Vol 21) 1934 Pesh 129 (132) : 36 Cri L Jour 443 (DB) \* ('35) 36 Cri L Jour 1243 (1245) (DB) (Lah).

[See (Vol 22) 1935 Nag 69 (75) (DB).]

[8] An order of acquittal made without jurisdiction may be set aside in appeal under this section. (Vol 15) 1928 Rang 49 (49) : 5 Rang 710 : 29 Cri L Jour 115.

[See ('07) 6 Cri L Jour 287 (288, 289) : 4 Low Bur Rul 49 (DB).]

2. "The Provincial Government." — [1] It is only the Provincial Government that can prefer an appeal under this section. The object of limiting the right of appeal to the Provincial Government is to prevent personal vindictiveness to ensure that such interference shall take place only in cases where there has been a grave miscarriage of justice. (Vol 31) 1944 Nag 136 (137) : 1 L R (1944) Nag 176 : 45 Cri L Jour 766 \* (Vol 2) 1915 Cal 388 (388) : 42 Cal 612 : 16 Cri L Jour 122 (DB) \* ('94) 22 Cal 164 (170) (DB) \* (Vol 3) 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91 (DB) \* (Vol 1)

1914 Mad 628 (631) : 38 Mad 1028 : 15 Cri L Jour 236 (DB).

[2] A private person has no right of appeal under this section. (Vol 14) 1927 Nag 170 (173) : 23 Nag L R 40 : 28 Cr L Jour 523 \* (Vol 18) 1931 Rang 86 (86) : 8 Rang 671 : 32 Cri L Jour 929.

[3] It is a matter of practice that the Provincial Government is and can be moved by private individuals or by the Police through the District Magistrate or by the latter himself as the head of the criminal administration in his district. (Vol 24) 1937 Sind 100 (101) : 38 Cri L Jour 665 (DB) \* (Vol 10) 1923 Lah 163 (166) : 24 Cri L Jour 433 \* (Vol 9) 1922 Mad 502 (503) : 45 Mad 913 : 23 Cri L Jour 533 (F B) \* (Vol 12) 1925 Pat 321 (322) : 26 Cri L Jour 516 (DB) \* (Vol 15) 1928 Sind 176 (176) : 30 Cri L Jour 251 (DB) \* ('92-95) 1 Upp Bur Rul 47 (47).

3. "May direct." — [1] The power given to the Provincial Government by this section should be sparingly used and with circumspection, care and caution. (Vol 31) 1944 Sind 124 (130) : 46 Cri L Jour 759 (DB) \* (Vol 30) 1943 Mad 33 (33, 34) : 44 Cri L Jour 183 \* (Vol 25) 1938 Sind 80 (81) : 39 Cri L Jour 504 : 32 Sind L R 689 (DB) \* (Vol 18) 1931 All 712 (716) : 32 Cri L Jour 1073 (DB) \* (Vol 7) 1920 Bom 217 (219) : 21 Cri L Jour 17 (DB) \* (Vol 11) 1924 Bom 335 (337) : 25 Cri L Jour 786 (DB) \* (Vol 20) 1933 Mad 230 (230) : 34 Cri L Jour 948 \* ('98) 21 All 122 (126) (DB) \* ('04) 1 Cri L Jour 781 (790) : 1904 Pun Re No. 7 Cr (DB).

[2] The power under this section is to be used only after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved. (Vol 13) 1926 Pat 176 (179) : 5 Pat 25 : 27 Cri L Jour 235 (DB) \* (Vol 16) 1929 Pat 139 (140) : 7 Pat 579 : 30 Cri L Jour 673 (DB) \* ('98) 1898 Pun Re No. 15 Cr, p. 34 (35) \* ('11) 12 Cri L Jour 364 (370) : 1911 Pun Re No. 10 Cr (F B).

[But see (Vol 26) 1939 Lah 406 (409) : 40 Cri L Jour 942 (DB).]

[3] The making of a direction under this section should be limited to those instances in which there is a grave miscarriage of justice or where it is required in the interests of justice and of the public. (Vol 29) 1942 Pat 58 (59) : 43 Cri L Jour 44 (DB) \* ('94) 22 Cal 164 (170) (DB) \* (Vol 18) 1931 All 712 (716) : 32 Cri L Jour 1073 (DB) \* ('94) 16 All 212 (214) (DB) \* (Vol 18) 1931 All 439 (442) (DB) \* (Vol 3) 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91.

[See ('04) 1 Cri L Jour 674 (684) : 17 C P L R 75.]

[See also (Vol 28) 1941 Bom 410 (411) : 43 Cri L Jour 174 (DB) \* (Vol 10) 1923 Lah 601 (603) : 26 Cri L Jour 337].

[4] The exercise of the discretion is not subject to control by the High Court and cannot be questioned in dealing with such appeals. ('04) 1 Cri L Jour 674 (686) : 17 C P L R 75. (Apart from the merits of the appeal itself.) \* (Vol 7) 1920 Bom 217 (219) : 21 Cri L Jour 17 (DB) \* (Vol 11) 1924 Bom 335 (337) : 25 Cri L Jour 786 (DB) \* (Vol 5) 1918 Lah 41 (45) : 1917 Pun Re No. 43 Cr : 19 Cri L Jour 85 (DB) \* (Vol 2) 1915 Sind 8 (9) : 9 Sind L R 17 : 16 Cri L Jour 604 (DB).

[5] An appeal against an acquittal for a major offence can be preferred by the Provincial Government although an appeal preferred by the accused against his conviction for a minor offence has been heard and decided by the High Court. But, where the appeal by the accused



419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

[1882—S. 418: 1872—S. 273, 1861—S. 416.]

Section 418 (*contd.*).

our 394 : 63 Cal 929 (DB) (Do.) \* (Vol 8) 1921 Sind 4 (86, 87) : 15 Sind L R 108 : 23 Cri L Jour 53 (FB).

[4] The section does not confer a right of appeal from the verdict and judgment in a trial held at the sessions of the High Court. (Vol 22) 1935 Rang 87 (69) : 8 Rang 104 : 38 Cri L Jour 595 (FB).

[5] Judge of the Sind Chief Court sitting in his sessions Court jurisdiction is a *Sessions Judge* and an appeal lies to the Chief Court against a conviction recorded on a trial with a jury. (Vol 31) 1944 Sind 65 (84) : 1 L R (1944) Kar 238 : 45 Cri L Jour 506 (DB) \* (Vol 28) 1936 Sind 209 (211, 212) : 41 Cri L Jour 28 : L R (1940) Kar 242 (DB).

[6] The section jealously guards the right of the accused to the finality of the verdict of the jury so that an appellate Court cannot, by going into a question of fact, substitute its own opinion for the verdict of the jury. (Vol 31) 1944 Cal 89 (40) : 45 Cri L Jour 465 (DB) \* (Vol 30) 1948 Mad 527 (529) : 44 Cri L Jour 760 \* (Vol 30) 1948 Bom 74 (75) : 44 Cri L Jour 411 (DB) \* (Vol 26) 1939 Bom 457 (458, 460) : 1 L R (1939) Bom 643 : 1 Cri L Jour 176 (DB) \* (Vol 24) 1937 All 195 (196) : L R (1937) All 419 : 38 Cri L Jour 465 (DB) \* (Vol 19) 1917 All 173 (175, 176) : 39 All 348 : 18 Cri L Jour 31 \* (Vol 6) 1919 Cal 514 (513) : 46 Cal 895 : 20 Cri L Jour 524 (DB) \* (Vol 18) 1931 Oudh 171 (171) : Luck 705 : 32 Cri L Jour 858 \* (Vol 21) 1934 Oudh 22 (122) : 35 Cri L Jour 566 \* (Vol 18) 1931 Pat 379 (81) : 11 Pat 143 : 32 Cri L Jour 1197 (DB) \* (Vol 15) 1928 Mad 1186 (1189) : 51 Mad 956 : 30 Cri L Jour 317 (B).

[7] Where the accused is tried by a jury in a case which ought to have been tried with the aid of assessors, it will be treated as one by a jury and no appeal lies except on a matter of law. (Vol 25) 1938 Cal 51 (57, 65) : 1 L R (1938) 1 Cal 290 : 39 Cri L Jour 161 (DB) \* (Vol 24) 1937 Cal 756 (759, 760) : 1 L R (1937) 2 Cal 5 : 39 Cri L Jour 182 (DB) \* ('01) 25 Bom 680 (688, 694) (FB) \* (Vol 20) 1933 All 128 (129, 130) : 55 All 68 : 1 Cri L Jour 441 \* (Vol 13) 1926 Bom 134 (135) : 27 Cri L Jour 650 (DB) \* ('03) 26 Mad 243 (246, 248) (B). (Per Bhashyam Ayyangar J.; Benson, J. *contra*.) ('30) 1930 Mad W N 776 (776).

[But see ('75) 24 Suth W R Cr 30 (30) \* ('78) 3 Cal 5 (766) (DB) \* ('96) 26 Mad 343n (343n) \* ('88) 1888 m Re No. 18 Cr, p 33 (33) (DB).]

[8] Where an accused person is tried on one charge by a jury and on another charge by the Judge, with the aid of the same jury as assessors, an appeal will lie against conviction on the latter charge on a question of fact as well as on a question of law. (Vol 5) 1918 Mad 11 (822) : 18 Cri L Jour 346 (DB).

[See also (Vol 28) 1941 Nag 94 (95) : 1 L R (1941) 157 : 42 Cri L Jour 154 (DB).]

[9] Every petition of appeal should state distinctly in what respect the law has been contravened. It is not for the Court to hunt through the records and find out any equality that may arise. (Vol 32) 1945 All 182 (184) : L R (1945) All 127 : 46 Cri L Jour 687 \* (1864) 1 Sth W R Cr 21 (21)

[10] If the verdict has been influenced by evidence, which was inadmissible or proceeds on no evidence at all, this is a matter of law. (Vol 17) 1930 All 24 (26) : 31 Cri L Jour 33 (DB) \* ('03) 27 Bom 626 (632) (DB) \*

('90) 17 Cal 642 (667) (F B). (Statements not admitted in evidence.) \* (Vol 19) 1922 Cal 295 (296) : 33 Cri L Jour 477 (DB) \* (Vol 2) 1916 Mad 851 (854) : 39 Mad 443 : 16 Cri L Jour 294 (DB). (Admission of inadmissible evidence without warning jury.)

[See also (Vol 1) 1914 P C 155 (164) : 15 Cri L Jour 328 (B C). (Reception of inadmissible evidence not influencing verdict—Trial is not vitiated.)

[11] The sufficiency or otherwise of evidence is not a matter of law; whether the jury believes the evidence to be sufficient or not is a pure question of fact. (1865) 2 Suth W R Cr 3 (3)

[12] Alleged severity of a sentence is matter of law. (Vol 18) 1931 Oudh 171 (171) : 6 Luck 705 : 32 Cri L Jour 858 \* (Vol 12) 1925 Rang 239 (239) : 3 Rang 220 : 26 Cri L Jour 1871 (DB). (Overruled in (Vol 22) 1935 Rang 67 : 13 Rang 104 : 38 Cri L Jour 595 (FB), on another point.)

[13] Burden of proving innocence put on accused—It is error of law. (Vol 26) 1939 Sind 209 (212) : 41 Cri L Jour 28 : 1 L R (1940) Kar 249.

[14] Judge supposing that he had no jurisdiction to disagree with verdict of jury—It is a matter of law. (Vol 24) 1937 All 195 (195) : 1 L R (1937) All 419 : 38 Cri L Jour 465 (DB).

[15] Jury practically abdicating their functions in favour of the Judge—Retrial ordered. (Vol 15) 1928 Cal 827 (828) : 30 Cri L Jour 54 (DB).

[16] It is a question of fact whether a statement made to a police officer in the course of an investigation comes under S. 162 or is made by way of complaint to commence an investigation under S. 154. (Vol 17) 1930 Cal 130 (131) : 31 Cri L Jour 771 (DB).

[17] This sub-section provides that when in the case of a trial by jury, one person is sentenced to death, and another to lesser punishment, the second accused may appeal on a matter of fact as well as on a matter of law. (Vol 24) 1937 Sind 162 (164) : 31 Sind L R 82 : 38 Cri L Jour 808 (DB) \* (Vol 20) 1933 Cal 426 (429) : 34 Cri L Jour 533 (SB) \* (Vol 19) 1932 Pat 302 (302, 303) : 34 Cri L Jour 83 (DB).

[18] Reference under S. 374, Cr. P. C., for confirmation of sentence of death—Appeal by accused—Reference and appeal heard together—Appeal succeeding on ground of there having been misdirection to jury—High Court cannot convict on its own appreciation of facts under S. 373. (Vol 29) 1942 Cal 524 (526, 527) : 43 Cri L Jour 860 (DB).

#### SECTION 419—SYNOPSIS.

1. Scope.
2. Copy of judgment.
3. Who can present appeal.
4. How and to whom to be presented.
5. Contents of petition.
6. Form of petition.
7. Stamp.
8. Territorial jurisdiction.

1. Scope.—[1] This section is general and prescribes the form in which a petition of appeal, whether from jail or otherwise, is to be presented. ('91) 13 All 171 (179) (FB).

[2] Where an appeal presented from jail is dismissed summarily under S. 421, no further appeal can be brought under this section. (Vol 27) 1940 Oudh 371

**120.** If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward it in jail. such petition and copies to the proper Appellate Court.

52 — S. 420; 1872 — S. 277; 1881 — S. 418.]

on 419 : *con. d.*

13 Luck 703; 41 Cri L J 632 (DB); (Vol 27) 1940 363 (271); 41 Cri L Jour 711 : 15 Luck 662 (DB). An appeal does not lie from the order of the Court, dismissing the previous appeal under (Vol 22) 1935 Pat 426 (427, 430); 37 Cri L Jour 4 Pat 392 (DB).

**Copy of judgment.** — [1] Where a petition is not accompanied by a copy of the judgment, appeal may be rejected. (Vol 21) 1934 All 206 (207); 1999 : 35 Cri L Jour 441.

*also* (74) 1874 Rat 82 (82, 83). (Copy in prisoner's own language is sufficient.) \* (79) 2 Weir 438 (Absence of complete judgment is not ground for on of appeal.)

The Court may in its discretion, in proper cases, use with the copy of the judgment. (Vol 16) 1929 114 (614, 615) : 30 Cri L Jour 235. (Full order had with one of the connected appeals.) \* (08) 5 LR 704 (704) (DB). (Joint appeal by three accused single copy furnishing stamps necessary for three separate copies—Separate copies dispensed with).

**Who can present appeal.** — [1] Under this it is only the appellant or his pleader who can present an appeal.

"Pleader" includes a *mukhtar* appointed with permission of the Court. (11) 12 Cri L Jour 118 : 4 Sind L R 195 (DB).

Presentation by a pleader's clerk is considered tant to a presentation by the pleader and is (96) 20 Mad 87 (87) (DB) \* (94) 2 Weir 469 \* (97) 21 Mad 114 (115) (DB). (Person not a pleader — No power to present.)

Where a petition of appeal on behalf of three was signed under a vakalat by their pleader, presentation was made by another pleader, who vakalat only from one of the accused, it was held the appeal should be treated as properly presented. Weir 470 (471).

Where two accused have conflicting interests, should not appeal through the same pleader. 3) 1936 Lah 859 (860, 861) : 17 Lah 771 : 38 Jour 115 \* (90) 1890 Pun Re No. 13 Cr, p. 25 (DB).

A memorandum of appearance is sufficient to present a presentation. (Vol 11) 1924 Mad 192 (192) : L Jour 78 \* (Vol 13) 1926 Pat 296 (297, 298) : L Jour 666 (DB). (No appointment in writing is try.)

(Vol 31) 1944 Oudh 84 (84) : 45 Cri L Jour 286 : ck 563 \* (Vol 28) 1941 All 336 (336) : I L R All 633 : 43 Cri L Jour 173.]

**How and to whom to be presented.** — [1] A put into a petition box kept for the convenience parties cannot be recognized. (96) 19 Mad 354 (DB).

A petition cannot be sent by post. (91) 15 Mad 37, 188 (DB) \* (84) 2 Weir 467 (468). however (89) 1889 Rat 464 (465). (District rate treating petition sent by post as duly presented—Petitioner should be given opportunity to be before its dismissal.)

A presentation to an officer of the Court, such as a clerk, or to one of the Judges, is not invalid. 1) 1939 Mad 669 (669, 670) : 40 Cri L Jour 960. 2) presented to the second clerk. \* (Vol 9) 1916 10 (111) : 32 Mad 527 : 14 Cr L Jour 522 (DB).

**5. Contents of petition.** — [1] A petition of appeal should not contain irrelevant, defamatory and scandalous expressions concerning the trying Magistrate. If it does, it will be returned for expunging the objectionable matter. (89) 15 Bom 488 (489, 490, 491) (DB) \* (06) 3 Cri L Jour 376 (379) : 29 Mad 100 (DB).

[2] In cases of trial by jury, the appeal petition should state clearly what points of law have been contravened. (1864) 1 Suth W R Cr 21 (21). Also see Notes on S. 418.

[3] Where an appellant, who has not got all necessary copies when presenting an appeal, reserves to himself liberty to bring forward additional points of appeal afterwards, it is perfectly regular, to raise such additional points by a supplemental petition. (71) 8 Bom H C R Cr 126 (135, 136).

[4] A false statement made in a petition of appeal will not render the appellant liable for prosecution for making such false statement. (79) 1879 Pun Re No. 17 Cr, p. 45 (46) (DB) \* (81) 1881 Pun Re No. 41 Cr, p. 102 (103) (DB) \* (99) 12 Mad 451 (453) (DB) \* (Vol 15) 1928 Pat 574 (577) : 29 Cri L Jour 613.

[5] A plea that an alleged illegality or error vitiates the whole trial, though not taken in the memorandum of appeal, will be allowed to be raised at the hearing of the appeal. (Vol 18) 1931 Oudh 113 (113) : 6 Luck 386 : 32 Cri L Jour 91 (DB).

**6. Form of petition.** — [1] Even if the prisoners wish to state no grounds for their appeal, still their appeal must be in the form of a petition. (70) 13 Suth W R Cr 69 (69).

[2] The petitioner is not required to verify the petition of appeal. (79) 1879 Pun Re No. 17 Cr, p. 45 (46) (DB) \* (89) 12 Mad 451 (453) (DB).

[3] A joint appeal is legal where the interests of the accused are common. (Vol 23) 1936 Lah 859 (860) : 17 Lah 771 : 38 Cri L Jour 115.

[See however (Vol 4) 1917 Oudh 329 (330) : 18 Cri L Jour 512 \* (Vol 14) 1927 Nag 48 (48) : 27 Cri L Jour 1062.]

[4] Where it is alleged that one of the jurors was hard of hearing, another ignorant of English and unable to follow the arguments in Court, such facts should be supported by an affidavit before the appeal comes on for hearing. (Vol 19) 1932 Pat 302 (303) : 34 Cri L Jour 83 (DB).

[5] A petition filed as an appeal where appeal does not lie can be dealt with as a revision petition. (05) 2 Cri L Jour 105 (106) (All).

**7. Stamp.** — [1] The appeal petition presented by a pleader on behalf of an appellant in *duress* need not bear a court-fee stamp. (Vol 5) 1918 Nag 125 (126) : 14 Nag L R 77 : 19 Cri L Jour 494. (10 Cal 61, Followed.) \* (Vol 11) 1924 Rang 160 (160) : 1 Rang 510 : 25 Cri L Jour 277 \* (Vol 9) 1922 Upp Bur 14 (15) : 23 Cri L Jour 121 : 4 Upp Bur Rul 72.

[2] Those appellants, who were not in custody, must affix the necessary stamp. (82) 2 Weir 467 (467).

**8. Territorial jurisdiction.** — [1] Appellate jurisdiction existing at the time of presentation of an appeal is not lost by the subsequent transfer of territory. (12) 13 Cri L Jour 169 (170) : 34 All 118 (DB) \* (11) 12 Cri L Jour 401 (401) : 33 All 578 (DB).

#### Section 420—Note 1

[1] Appeals presented to jail officers and not accompanied by such copies should not be forwarded to the appellate Court, but should be returned to the appellant. (67) 8

1882 — S. 421 : 1872 — S. 217 : 1864 — S. 217.

[5] The appellate Court cannot admit an appeal with

3. "May dismiss the appeal summarily." — [1]  
The powers conferred by this section, on the appellate Court, should be exercised sparingly and with great caution and with judicial discretion. ('98) 8 All 514 (515). (With caution.) \* (Vol 9) 1922 Pat 552 (552); 24 Cri L Jour 477 (Do). \* (Vol 20) 1933 Pat 160 (160); 34 Cri L Jour 1017 (Do). \* (Vol 5) 1918 Cal 106 (106); 19 Cri L Jour 228. (With judicial discretion). \* ('10) 11 Cri L Jour 631 (832); 13 Oudh Cas 509. (Do).

ion 421 (*contd.*)

[ ] Complicated questions involved in appeal — it should not summarily dismiss it but should send record and hear the appeal. (Vol 7) 1920 Cal 391 : 22 Cri L Jour 349 (DB) \* ('06) 4 Cri L Jour 57 : 29 Mad 236 \* (Vol 11) 1924 Mad 395 (395) : 26 L Jour 411 : 49 Mad 385 \* (Vol 5) 1918 Pat 553 : 19 Cri L Jour 209 : 3 Pat L Jour 359 (DB) \* 9) 1922 Pat 552 (552) : 24 Cri L Jour 477 \* (Vol 1933 Cal 515 (515) : 34 Cri L Jour 812.

See however (Vol 18) 1931 Cal 264 (264) : 32 Cri ur 568.]

[ ] Appeal of one co-accused admitted — The Court dispose of the appeal of another co-accused summarily. ('05) 5 Cal W N 332 (334) (DB).

"No sufficient ground for interfering" — [1] If the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in appeal, the appeal cannot be dismissed summarily under this section. (Vol 22) 1935 P C 89 (92) : 62 Cal : 36 Cri L Jour 838 : 62 Ind App 129 (PC).

5. Right of appellant to be heard—Proviso.—[1] Appellant or his pleader has, in cases of appeals under S. 419, the right to a reasonable opportunity being heard in support of the appeal. (Vol 12) 1925 355 (356) : 26 Cri L Jour 1169 (DB) \* (Vol 16) Nag 150 (151) : 30 Cri L Jour 791 \* (1881) 6 : 14 (15) (DB) \* (1908) 9 Cri L Jour 189 (189, 190) (Cal) \* (Vol 11) 1924 Rang 294 (295) : 25 Cri L Jour 933 \* (1906) 4 Cri L Jour 57 (57) : 29 Mad 236.

[ ] In the cases of jail appeals, the Court can summarily dismiss the appeal on perusal of the papers sent calling upon the appellant to appear. 25) 1933 Bom 279 (281) : 39 Cri L Jour 578 : I L R 3 Bom 357 (DB) \* ('91) 13 All 171 (130, 137) (FB) : 14) 1927 Sind 223 (223) : 30 Sind L R 189 : 27 : Jour 933 (DB) \* (Vol 10) 1923 Mad 426 (432) : ad 382 : 24 Cri L Jour 439 (DB).

The appellate Court can direct the production of prisoner before it for disposing of the appeal. (Vol 25) Bom 279 (280, 281) : 39 Cri L Jour 578 : I L R 3 Bom 357 (DB).

Where the appellant from jail has preferred an appeal through a pleader, the appellate Court cannot dismiss the appeal without hearing such pleader. ('06) 4 Jour 373 (373) (All) \* (Vol 13) 1926 All 178 (179) : 11 208 : 26 Cri L Jour 1621.

Reasonable opportunity cannot be said to have been given to the appellant or his pleader in the following cases:

Where the appellate Court calls upon the pleader to file the appeal on the same day that it is presented. 8) 1941 Mad 802 (802) \* ('05) 2 Cri L Jour 58 (DB) (Bom) \* (1909) 9 Cri L Jour 401 (402) : 36 15 (DB).

Where on the presentation of a petition by a prisoner, time is wanted, for some other pleader to argue the case but the Court calls on him to argue it himself and there. ('09) 10 Cri L Jour 491 (492) (Mad) \* 9) 1915 Upp Bur 11 (13) : 2 Upp Bur Rul 52 : 1 L Jour 538.

Where an appeal signed by a pleader is presented to the Court by the appellant and the Court forthwith calls the appellant himself to argue. ('06) 4 Cri L Jour 7 : 29 Mad 236.

Pleader desiring to be heard at the presentation of appeal—Court without giving further opportunity can dismiss. (Vol 14) 1927 Bom 361 (361) : 28 Cri L Jour 305 (DB) \* (Vol 17) 1930 Mad 863 (864) : 53 Mad 865 : 1 L Jour 40.

A week's time given to the appellant's pleader—

395 (395) : 48 Mad 835 : 26 Cri L Jour 411 \* ('09) 9 Cri L Jour 401 (402) : 36 Cal 885 (DB).

[8] Appeal filed in one place—Hearing fixed two days afterwards in a place far away — Held, this does not mean giving reasonable opportunity. ('75) 24 Suth W R Cr 60 (60) (DB).

[9] A time should be fixed for each appeal for admission and notices should be given to the appellant or his pleader, in such case. (1882) 5 Mad 11 (12) (DB).

[10] No notice to appellant or his pleader of the date to which appeal is posted — Held, no opportunity given to be heard. (Vol 6) 1919 Pat 54 (55, 56) : 20 Cri L Jour 271.

[11] Having heard the pleader for appellant, the Court need not hear him again when it sends for the record, though it may do so, if the Court or the pleader desires it. (Vol 26) 1939 Cal 541 (541, 542) : 40 Cri L Jour 839 : I L R (1939) 1 Cal 814 \* (Vol 25) 1938 Pat 12 (12) : 39 Cri L Jour 254 \* ('36) 37 Cri L Jour 904 (904, 905) (DB) (Cal) \* (Vol 17) 1930 Pat 499 (500, 501) : 9 Pat 768 : 31 Cri L Jour 1131 (DB) \* (Vol 14) 1927 Bom 361 (361) : 28 Cri L Jour 467 (DB) \* ('08) 10 Cri L Jour 204 (204, 205) : 2 Sind L R 39 (DB).

[But see (Vol 23) 1936 Cal 294 (295) : 37 Cri L Jour 831 (DB) \* (Vol 19) 1932 Cal 397 (398) : 33 Cri L Jour 602 (DB) \* (Vol 4) 1917 Pat 331 (332) : 18 Cri L Jour 639 (DB).]

[12] The right of being heard in support will include the right of reply and the right to refer to certified copies of the evidence. ('11) 12 Cri L Jour 9 (9, 10) : 38 Cal 307 (DB). (Right of reply.) \* ('08) 9 Cri L Jour 55 (56) : 11 Oudh Cas 360. (Reference to certified copies.)

6. "May call for the record of the case"—Sub-section (2). — [1] Rejecting an appeal without calling for the records is very inconvenient and should not be adopted. ('83) 1883 All W N 145 (145).

[2] An appeal should not be rejected summarily when a point of law is raised or when the judgment is a long and intricate one requiring careful consideration. (Vol 5) 1918 Pat 653 (654) : 19 Cri L Jour 209 : 3 Pat L Jour 389 (DB) \* ('82) 1882 Pun Re No. 35 Cr. p. 42 (46) (SB).

[3] The Court should note in the order-sheet the points for which it is sending for the record. (Vol 25) 1938 Pat 12 (12, 13) : 38 Cri L Jour 254.

7. Judgment and record of reasons. — [1] A Court, when dismissing an appeal summarily under this section need not write a judgment in conformity with the provisions of S. 367. (Vol 27) 1940 Oudh 369 (371) : 41 Cri L Jour 711 : 15 Luck 662 (DB) \* (Vol 3) 1916 All 197 (197) : 38 All 393 : 17 Cri L Jour 809 (F B) \* ('95) 17 All 241 (242, 243) (DB) \* (1895) 20 Bom 540 (541) (DB) \* ('93) 21 Cal 92 (96) (DB) \* (Vol 13) 1926 Lah 196 (197) : 27 Cri L Jour 23 \* ('02) 25 Mad 534 (534) (DB) \* (Vol 4) 1917 Nag 203 (204) : 13 Nag L R 169 : 18 Cri L Jour 993 \* ('10) 11 Cri L Jour 631 (632) : 13 Oudh Cas 309 \* (Vol 12) 1925 Pat 183 (184) : 25 Cri L Jour 1237 \* (Vol 17) 1930 Pat 331 (331) : 31 Cri L Jour 760 \* ('06) 4 Cri L Jour 284 (284) : 1906 Upp Bur Rul 49 \* (Vol 6) 1919 Low Bur 154 (156) : 19 Cri L Jour 316.

[But see ('21) 22 Cri L Jour 321 (321) (Pat).]

[2] Appellate Court can dismiss appeals summarily without recording any reasons for it. (Vol 18) 1931 All 555 (556) : 53 All 797 : 33 Cri L Jour 259 \* (Vol 16) 1929 Cal 773 (773) : 31 Cri L Jour 474 \* (1900-02) I Low Bur Rul 270 (271) \* (Vol 13) 1926 Lah 196 (197) : 27 Cri L Jour 23.

[3] It is advisable for the appellate Court to record its reasons for summary dismissal so that in an application for revision, the High Court can see that the Court





in all types, from an order of magnitude, such as 10 and 100, to a third into a category  
smaller, or that the animal is not a member of the class, or that the animal is a member  
of the class, or that the animal is a member of the class, or that the animal is a member of the class.

10. In an appeal from any other order, alter or reverse such or part:

9. Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or reason depending on the part of the jury of the law as laid down by him.

<sup>1</sup>Substituted by the Criminal Procedure Amendment Act 1941 (28 "XVI" of 1941), S. 3 for "Section 177," (27-11-1941). [b] As to the powers of an Appellate Court or High Court in respect of adolescent offenders in the United Provinces, see the U. P. Berhal Act, 1945 (U. P. Act 7 (VIII) of 1945), S. 9 (2).

Vol 101 1923 Exam 74 (74) : 24 Crt L Jour 700  
 Vol 111 1924 Lab 675 (675) : 15 Crt L Jour 208  
 Vol 121 1921 Mad 281 (281) : 22 Crt L Jour 753.

District Magistrate is officer to receive notice —  
 all filed before him and transferred to Joint Magis-  
 —Latter must serve notice on the former. No. 12,  
 Mad 375 (276) ; 25 Cal L Jour 1889.

No notice to Crown — Acquittal supported by a — Complainant cannot ask for interference with appellate order in revision. (Vol 30-1943 LIND 588 587) : 44 Cri L Jour 794.

An order of acquittal passed without notice to the accused can be challenged in an appeal under S. 417. 29, 1942 Mad 356 (358); 48 CrLJ 786.

Time and place of hearing. — [1] Appeal directed to be heard "in January" — No date fixed — Appeal set up and dismissed on a particular day without notice to appellant — *Held*, dismissal was improper.

A notice to an appellant's pleader that his appeal  
be heard next day wherever the Court happened  
encamped is not sufficient. (Vol 7; 1920 Bcm 318  
: 21 Cri L Jour 373 (DB)).

An appeal posted for hearing at one place cannot  
ard and dismissed at another place, without giving  
to the appellant or his pleader of the change of  
'91), 1891 Pun Re No. 7 Cr. p. 16 (17) \* ('05) 2  
Jour 66 166 : 1905 Pun Re No. 11 Cr.

An appeal posted for hearing on a particular date  
it be heard on a date previous to that fixed. ('82)  
is 475 (475) (DB).

Criminal Appeal fixed for hearing — Counsel  
ring at 10 A. M. was informed that appeal was  
led of on merits at 7-30 A. M. — *Held*, appeal to  
be heard by another Magistrate. ('87) 1937 Mad  
51 (91, 92).

Appeal by some accused fixed for hearing —  
notation of appeal by other accused on date of  
it — Magistrate insisting on advocate to argue but  
accused pleading inability — Case adjourned — Order

of acquittal on advanced date passed without hearing arguments cannot be sustained. (Vol. 28) 1941 Mad 502 (SC).

1. Scope.
2. "Shall then send for the record."
3. "After perusing the record."
4. Refusal to entertain appeal on ground that conviction ought to have been under non-appealable section.
5. Appeal admitted — Objection as to its admissibility
6. Appeal cannot be admitted merely for reviewing sentence.
7. Withdrawal of appeal.
8. Parties must be given an opportunity of being heard.
9. Connected appeals—Hearing of.
10. Appointment of assessors in appeal.
11. New plea.
12. Appreciation of evidence by the appellate Court.
13. Appeal from acquittal—Clause (a).
14. Appeal from acquittal — Order for further enquiry.
15. Appeal against acquittal — Power to order re-trial.
16. Re-trial of appeals.
17. "Find him guilty and pass sentence."
18. Appeal from conviction—General.
19. "Reverse the finding and sentence."
20. "Acquit or discharge the accused."
21. "Order him to be re-tried."
22. "By a Court of competent jurisdiction."
23. Discharge and re-trial—If both can be ordered.
24. Effect of re-trial on offences of which accused had been acquitted in trial Court.
25. Ordering re-trial for enhancing sentence.

Section 423 (*contd.*)

26. Remand for passing sentence or for writing proper judgment.
27. Effect of order for re-trial in appeal.
28. "Or committed for trial."
- 29 "Alter the finding."
30. Reduction of sentence.
31. "Alter the nature of the sentence, but, . . . . . not so as to enhance the same."
32. "Appeal from any other order"—Clause (c).
33. Subsequent events—Power to take notice of.
34. Power to direct sentences to run concurrently.
35. Appellate Court cannot canvass previous convictions.
36. Appellate Court, when to report to the High Court.
37. "Any amendment or any consequential or incidental order"—Clause (d).
38. Verdict of jury—Sub-section (2).

1. Scope. — [1] By a combination of Ss. 423 and 439, the High Court, in appeal, can convict the accused of an offence of which he had been acquitted and also enhance the sentence. (Vol 23) 1941 Lah 465 (468, 470) : 1 L R (1942) Lah 129 : 43 Cri L Jour 235 (F B) \* (Vol 22) 1935 P C 35 (36) : 36 Cri L Jour 482 : 57 All 156 : 62 Ind App 36 (P C).

[2] Where an appeal is before the High Court, the accused may be warned that, at the hearing of the petition, he may be called on to show cause why the sentence should not be enhanced. But the revisional powers cannot be exercised until the peremptory provisions of Ss. 422 and 423 have been complied with. (Vol 22) 1935 P C 89 (92) : 36 Cri L Jour 338 : 62 Ind App 129 : 62 Cal 983 (P C).

[3] The powers of the Court under this section are subject to other provisions limiting the right of interference to the extent specified by such provisions. ('07) 6 Cri L Jour 129 (130) : 1907 Pun Re No. 18 Cr. p. 58. (Reformatory Schools Act, S. 16 — No interference.) \* ('93-1900) 1893-1900 Low Bur Rul 441 (442) (Do.) \* ('12) 13 Cri L Jour 44 (44) : 5 Sind L R 173 (Do.) \* ('97) 20 All 158 (159) (D B). (Do.) \* ('01) 28 Cal 423 (424) (D B). (Do.) \* (Vol 18) 1931 Nag 179 (179) : 27 Nag L R 242 : 32 Cri L Jour 1268. (Do.) \* ('01) 1 Low Bur Rul 68 (68). (Can interfere when order is against rules framed by Local Government under Reformatory Schools Act.) \* ('99) 21 All 391 (401, 404) (F B). (Reformatory Schools Act — Court can interfere where the order is without jurisdiction.) \* ('84) 1884 Pun Re No. 40 Cr. p. 77 (84, 87) (DB). (Section 28 of the Cantonments Act.) \* (Vol 19) 1932 Lah 436 (437) : 13 Lah 585 : 33 Cri L Jour 333. (Sections 48 and 49, Frontier Crimes Regulation, apply only to orders passed by special tribunal — They do not affect High Courts' powers.) \* (Vol 19) 1932 Sind 175 (177) : 26 Sind L R 295 : 34 Cri L Jour 11. (Borstal Schools Act.) \* (Vol 23) 1936 Cal 529 (532) : 37 Cri L Jour 1092 : 1 L R (1937) 1 Cal 169 (DB). (Appeals from convictions under Bengal Suppression of Terrorists Outrages Supplementary Act — High Court retains its ordinary powers as provided in Ch. 31, Criminal P. C., in dealing with appeals.)

2. "Shall then send for the record." — [1] Where the appeal is not dismissed summarily under S. 421, the appellate Court is bound to send for the record if such record is not already in Court. (Vol 22) 1935 P C 89 (92) : 36 Cri L Jour 338 : 62 Ind App 129 : 62 Cal 983 (P C).

[2] Entire record lost — Court set aside conviction and ordered fresh trial. (Vol 30) 1943 Mad 391 (392) : 44 Cri L Jour 611.

[3] In the absence of any appeal by the person convicted, the conviction cannot in revision be quashed merely on the ground that some of the material records were lost at the time of the lower Court's judgment. (Vol 2) 1915 Mad 198 : 1905 : 2 : Mad 198 : 14 Cri L Jour 497.

3. "After perusing the record." — [1] It is the duty of the appellate Court to go through the record and dispose of the appeal on the merits. ('02) 9 Cri L Jour 559 (554-555) : 5 Nag L R 70 \* (Vol 15) 1929 Lah 816 (849) : 30 Cri L Jour 362 \* (Vol 17) 1930 Lah 579 (589) : 11 Lah 242 : 31 Cri L Jour 979 \* (Vol 21) 1934 Pat 21 (21) : 35 Cri L Jour 963 \* (Vol 10) 1928 All 173 (173) : 24 Cri L Jour 802 \* (Vol 13) 1926 Bom 548 (548) : 5 : Bom 573 : 27 Cri L Jour 1167 (D B) \* (Vol 11) 1924 Cal 95 (95) : 30 Cal 972 : 25 Cri L Jour 1150 (D B) \* (Vol 32) 1945 Oudh 52 (58) : 48 Cri L Jour 684. (Whether appellant appears or not.) \* (Vol 6) 1912 Pat 54 (56) : 20 Cri L Jour 271. (Do.) \* (Vol 14) 1927 Pat 176 (176) : 6 Pat 16 : 2 : Cri L Jour 351 (D B). (Do.)

[See also (Vol 28) 1941 Mad 604 (605) : 42 Cri L Jour 551. (Where a criminal appeal is presented and the advocate for the appellant requests for time to obtain the necessary records, it should not be disposed of on the same day of presentation.)]

[2] The whole record and not the mere judgment must be perused. ('13) 14 Cri L Jour 132 (133) (DB) (Cal).

[3] Documents not forming part of the record of the proceedings of the lower Court cannot be considered in appeal. ('10) 11 Cri L Jour 221 (221) : (Mad) \* ('10) 11 Cri L Jour 734 (734) (Mad).

[4] Magistrate first passed a non-appealable sentence and then illegally corrected it into an appealable sentence — Held that appeal against the latter could not be dismissed on the ground that the original sentence was non-appealable. ('11) 12 Cri L Jour 431 (431) (D B) (Bom) \* ('11) 12 Cri L Jour 402 (402, 403) : 35 Bom 418 (DB).

4. Refusal to entertain appeal on ground that conviction ought to have been under non-appealable section. — [1] Where a conviction is given under an appealable section, the appeal cannot be refused to be entertained because the conviction, in the appellate Court's opinion, ought to have been under a non-appealable section. ('88) 1888 Rat 363 (364).

5. Appeal admitted — Objection as to its admissibility. — [1] Appeal admitted — Objection that there was no sufficient cause under S. 5 of the Limitation Act for excusing the delay in filing the appeal is maintainable. (Vol 1) 1914 Bom 111 (111) : 38 Bom 613 (D B).

[2] Objection that no appeal lies against the particular sentence is maintainable though the appeal is admitted. ('13) 14 Cri L Jour 254 (254) : 40 Cal 631 (D B).

6. Appeal cannot be admitted merely for reviewing sentence. — [1] Appeal admitted — Appellant not heard on the merits of the whole case — Re-hearing of the appeal should be ordered. (Vol 26) 1939 Lah 295 (296) : 1 L R (1939) Lah 148 : 40 Cri L Jour 760 (DB) \* (Vol 18) 1931 Pat 351 (351) : 32 Cri L Jour 1017 \* (Vol 1) 1914 Cal 276 (277) : 41 Cal 406 : 14 Cri L Jour 485 (DB) \* (Vol 12) 1925 Pat 453 (455) : 4 Pat 254 : 26 Cri L Jour 862 (DB) \* (Vol 20) 1933 Cal 124 (125) : 60 Cal 571 : 34 Cri L Jour 633 (DB).

[See also (Vol 29) 1942 Pat 46 (47) : 43 Cri L Jour 27. (Appeal cannot be admitted only on a limited ground of sentence only.)]

7. Withdrawal of appeal. — [1] A petition of appeal presented for admission may be withdrawn by the appellant. ('79) 5 Cal L Rep 372 (373) (DB).

[2] A party can withdraw his appeal at any time before judgment. ('04) 1 Cri L Jour 751 (752, 753) : 17 C P L R 97 (DB).

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[See however, ('80) 6 Cal L Rep 427 (428), (DB). (Whether appeal can be withdrawn after perusal of evidence by Court is doubtful.)]

[But see (Vol 29) 1942 Lah 236 (298) : 1 L R (1942) Lah 241 : 44 Cri L Jour 14 (FB). (No withdrawal after admission of appeal.)]

8. Parties must be given an opportunity of being heard.—[1] An appeal cannot be dismissed summarily under this section. ('99) 1 Bom L R 225 (225) \* ('01) 2 Weir 474 (475) (DB).

[See also (Vol 28) 1941 Mad 802 (803). (Appeal by accused—Appellant's advocate refused adjournment and appeal closed and disposed of on same day and accused acquitted—Order set aside in revision.)]

[2] The appellate Court must give the appellant or his pleader an opportunity of being heard. ('70) 1370 Pun Re No. 31 Or, p. 48 (49) (SB). (Time so fixed for appearance that it was physically impossible for the appellant to be present.) \* ('97) 1897 Rat 914 (914) (DB). (Appeal disposed of in chambers without being aware of the fact that accused was represented by pleader—Judgment was set aside.) \* (Vol 6) 1919 Pat 54 (56) : 20 Cri L Jour 271. (When appeal is adjourned, notice of it should be given to appellant.) \* (Vol 11) 1924 Rang 294 (295) : 25 Cri L Jour 933. (Appellant's advocate not given notice of date fixed for hearing appeal.) \* ('98) 1898 Rat 978 (978) (D B). (Dismissal on ground that matter is trifling is wrong.)

[See also (Vol 31) 1944 P C 93 (95, 96): 46 Cri L Jour 105 (P C).]

[See however (Vol 10) 1923 Pat 297 (298) : 26 Cri L Jour 419. (Appeal transferred — Appellant not aware of transfer—Transferee Court disposing of appeal on merits does not commit any mistake.)]

[3] Opportunity given but the appellant or his pleader absent or not prepared to argue — Court is competent to dispose of the appeal on the merits after perusing the record. ('91) 13 All 171 (187) (F B). (Overruled on another point in (Vol 15) 1928 All 84 : 50 All 543 : 29 Cri L Jour 334 (FB).) \* (Vol 22) 1935 Pat 515 (518) : 36 Cri L Jour 1354 : 15 Pat 69 (DB).

[4] Where a pleader appears for the appellant but files no *vakalatnama*, the refusal of Court to grant time for production of the *vakalatnama*, though not proper, is not wrong. (Vol 7) 1920 Cal 175 (175) : 21 Cri L Jour 413 (DB).

[5] If the appellant is in jail and is unrepresented by a pleader, he is entitled to appear and be heard in person. (Vol 15) 1928 All 84 (86) : 50 All 543 : 29 Cri L Jour 334 (FB). (Overruling 13 All 171 (FB) and dissenting from (Vol 14) 1927 Oudh 312 : 28 Cri L Jour 679.) \* ('83) 2 Weir 473, (473). (Court can direct him to be brought before it.)

[But see (Vol 14) 1927 Oudh 312 (313): 28 Cri L Jour 679 (DB).]

[6] A mukhtear is a pleader, and if he represents the appellant, he must be heard. ('81) 6 Bom 14 (15) (DB).

[7] A complainant or a private prosecutor cannot claim, as of right, to be heard in appeal. (Vol 29) 1942 Sind 5 (6) : 1 L R (1941) Kar 451 : 43 Cri L Jour 345 \* (Vol 19) 1932 Cal 61 (61, 62) : 33 Cri L Jour 305 (D B). (No right to be heard but can be heard.) \* (Vol 27) 1940 Bom 14 (15) : 41 Cri L Jour 245 (D B). (Court may allow.) \* (Vol 24) 1937 Nag 394 (396) : 39 Cri L Jour 75 : 1 L R (1938) Nag 157.

[8] The parties to be heard must be heard in each other's presence. (Vol 19) 1932 Cal 856 (857, 858) : 33 Cri L Jour 775.

[9] If the respondent is heard, the appellant has a right of reply. (Vol 19) 1932 Cal 856 (857) : 33 Cri L Jour 775 \* (Vol 3) 1916 Lah 74 (74, 75) : 1917 Pun Re No. 21 Cr : 18 Cri L Jour 3 (DB).

[But see (Vol 12) 1925 Oudh 65 (66) : 25 Cri L Jour 1169. (It is a privilege not ordinarily refused.) \* (Vol 12) 1925 Oudh 50 (50) : 25 Cri L Jour 1173. (Do.)]

9. Connected appeals — Hearing of. — [1] An appellate Court should not hear two appeals together. (Vol 15) 1928 Cal 230 (230, 231) : 29 Cri L Jour 512 (D B).

[2] It is irregular for the Court, while dealing with connected criminal appeals, to make cross-references to the evidence and judgments in the several cases. (Vol 3) 1916 Cal 912 (913) : 17 Cri L Jour 439 (D B) \* (Vol 3) 1916 Mad 1021 (1022) : 16 Cri L Jour 542.

[3] Two parties charged for their attacks against each other in the same occurrence. High Court, though trying the two charges separately, gave single judgment — Held that their irregularity, in the absence of prejudice, would not affect the validity of the convictions. (Vol 14) 1927 P C 26 (26, 27) : 8 Lah 193 : 28 Cri L Jour 254 (P C).

[4] Sessions Court reversed the finding of the lower Court on a question of fact, without discussing the evidence in the case but referring to his finding in the appeal in a counter-case — Held that the procedure raised difficulties when the case came before the High Court in revision for want of material for High Court and hence the case should be remanded. (Vol 22) 1935 Pat 494 (494) : 36 Cri L Jour 1349 (D B).

10. Appointment of assessors in appeal. — [1] The appointment of assessors in appeal is not authorized by law. ('68) 1868 Pun Re No. 17 Cr, p. 42 (42) (D B).

11. New plea. — [1] The appellate Court should examine the plea of self-defence, though raised for the first time in appeal if the facts on the record justify such plea. (Vol 12) 1925 All 664 (666) : 28 Cri L Jour 997 (D B) \* (Vol 13) 1926 Nag 202 (202) : 26 Cri L Jour 1552 \* (Vol 19) 1932 Lah 606 (607) : 34 Cri L Jour 462 (D B) \* (Vol 21) 1934 Oudh 251 (254) : 35 Cri L Jour 943 (D B).

[2] A question of law may be raised for the first time in appeal. ('03) 7 Cal W N 883 (888) (DB). (Limitation.) \* (Vol 26) 1939 Bom 457 (459) : 41 Cri L Jour 176 : 1 L R (1939) Bom 648 (DB). (Plea of illegality of trial—Sessions Judge omitted to explain law to jury.) \* (Vol 18) 1931 Oudh 113 (113) : 32 Cri L Jour 91 : 6 Luck 386 (DB). (Plea of illegality.) \* ('02) 26 Mad 125 (126, 127) (D B). (Plea of illegality due to misjoinder of charges.) \* (Vol 16) 1929 Cal 92 (93) : 30 Cri L Jour 484 (D B). (Plea that Court was wrongly constituted and hence trial illegal.)

[But see (Vol 17) 1930 Cal 291 (291, 294) : 57 Cal 1062 (D B). (Not entertained as there was no prejudice.)]

[3] The admissibility of evidence cannot be questioned for the first time in appeal. (Vol 23) 1936 Cal 101 (103) : 37 Cri L Jour 445 (D B) \* (Vol 20) 1933 Cal 190 (192) : 34 Cri L Jour 430 (D B).

[4] An objection that the trial ought to have been with the aid of assessors and not by jury will not be entertained for the first time in appeal. ('30) 1930 Mad W N 776 (776)

[5] An alternative case cannot be raised by the prosecution for the first time in appeal from an acquittal. (Vol 30) 1943 Sind 130 (131) : 1 L R (1943) Kar 3 : 44 Cri L Jour 607 (DB).

12. Appreciation of evidence by the appellate Court. — [1] The appellate Court must form its own conclusions on the evidence. (Vol 25) 1938 Rang 46 (47) : 39 Cri L Jour 248 (D B) \* (Vol 32) 1945 Nag 116 (116) : 1 L R (1945) Nag 441 : 46 Cri L Jour 595 \* (Vol 30) 1933 Pat 100 (102) : 11 Pat 807 : 34 Cri L Jour 427 (DB). (Admission of counsel.) \* ('13) 14 Cri L Jour 439 (420) : 40 Cal 376 (D B). (Counsel did not refer to evi-

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7 (7, 8) : 38 Cri L Jour 295 (DB) \* (Vol 23) 1936 Pat 350 (353) : 15 Pat 108 : 37 Cri L Jour 577 (DB).

[8] Where the lower Court, thinking whole trial illegal because of wrong joinder of charges, acquits the accused, the order of acquittal should be set aside. (Vol 24) 1937 Bom 152 (152) : 38 Cri L Jour 571 (DB).

[9] In deciding upon acquittals, the High Court should confine itself to the particular acquittal complained of by the Government. (Vol 25) 1938 Sing 108 (113) : 39 Cri L Jour 630 : 1 L R (1939) Kar 41 (DB) \* ('94) 19 Bom 51 (68) (DB).

[10] Accused charged with a major offence but convicted of a minor offence, should be held to be acquitted of the major offence. (Vol 15) 1928 P C 254 (257) : 50 All 722 : 55 Ind App 390 : 29 Cri L Jour 828 (PC) \* (Vol 25) 1938 Mad 723 (723) : 39 Cri L Jour 871. (Accused can ask High Court to consider evidence and it can acquit him of minor offence also.)

14. Appeal from acquittal — Order for further inquiry. — [1] Further inquiry may be directed in appeals from only acquittals. (1900) 27 Cal 126 (129) (DB) \* (Vol 8) 1921 All 158 (158) : 23 Cri L Jour 402. (Appeal from conviction — No further inquiry but further evidence may be taken.) \* (Vol 24) 1937 All 305 (313) : 38 Cri L Jour 561 : 1 L R (1937) All 517 (FB). (No power of remand under S. 476B.)

[2] Additional evidence may be taken under Section 428. (Vol 24) 1937 Nag 285 (286) : 38 Cri L Jour 1058 : 1 L R (1937) Nag 541.

15. Appeal against acquittal — Power to order re-trial. — [1] The power to order a re-trial is discretionary. (Vol 24) 1937 Bom 152 (152) : 38 Cri L Jour 571 (DB) \* (Vol 19) 1932 All 191 (192) : 54 All 413 : 33 Cri L Jour 885.

[2] A retrial should be ordered only where the trial is incurably defective. ('93) 6 C P L R Cr 15 (16).

[3] Where the lower Court had acquitted the accused under a misconception of the law and did not examine defence witnesses re-trial was ordered. ('33) 1933 Mad WN 242 (243) (DB).

[4] Evidence disclosed other offence — Re-trial ordered. ('74) 7 N W P H C R 196 (199).

[5] Evidence found on record not placed there by prosecution in a proper manner — Re-trial ordered. (Vol 29) 1942 Sind 33 (36) : 1 L R (1941) Kar 532 : 43 Cri L Jour 458 (DB).

[6] Re-trial should not be ordered where the case is not of sufficient consequence. ('71-74) 7 Mad H C R Cr 339 (341) (DB).

[See [Vol 19] 1932 All 188 (190) : 54 All 416 : 34 Cri L Jour 18. (Re-trial can be ordered where case is of public importance.)]

[7] No evidence on the record sufficient for conviction — Re-trial should not be ordered. (Vol 11) 1924 Cal 975 (976) : 51 Cal 924 : 26 Cri L Jour 15 (DB) \* (Vol 12) 1925 Lah 85 (85, 86) : 26 Cri L Jour 320 : 5 Lah 404 (DB).

[8] No action taken against accused for a long time after offence and ordering of re-trial would result in accused labouring under great difficulties in conduct of his case — Re-trial not to be ordered. (Vol 3) 1916 Mad 110 (113, 115) : 39 Mad. 527 : 16 Cri L Jour 593 (FB).

[9] Full inquiry into facts already made and no further evidence likely to be forthcoming — No re-trial. (Vol 4) 1917 Upp Bur 7 (7) : 3 Upp Bur Bul 19 : 18 Cr. L. J. 970.

[10] Subsequent discovery of evidence is no ground for re-trial. ('02-03) 1902-1903 Upp Bur Bul 9 (12) \* ('06) 3 Cri L Jour 234 (236) (DB) (Low Bur).

[See however (Vol 10) 1923 Rang 65 (65) : 24 Cr. L. J. 744. (Re-trial not ordered as there was no reason to suppose that fresh evidence would be forthcoming.)]

[11] An order for re-trial can be passed even subsequent to the order setting aside the conviction sentence. ('81) 3 Mad 48 (51) (DB).

[12] Appeal against acquittal — Court set acquittal but declined to order re-trial — Prosecution has power to prosecute the accused for the same. (Vol 24) 1937 Bom 152 (152) : 38 Cri L Jour :

16. Re-trial of appeals. — [1] The word 'includes re-trial of an appeal.' ('70) 1870 Pun 1 Cr, p. 48 (49) (DB) \* ('89) 13 Bom 506 (51) (Vol 1) 1914 Mad 50 (51) : 15 Cri L Jour 4 (*Quare*—Can do so under S. 439 read with c and (d) of S. 423.)

[See also (Vol 24) 1937 Nag 394 (395) : 39 C 75 : 1 L R (1938) Nag 157.]

[But see (Vol 23) 1936 Rang 369 (370) L Jour 1008.]

17. "Find him guilty and pass sentence The appellate Court may find the accused guilty of offences of which the trial Court could have found him guilty and not merely of offences of which the accused was acquitted in lower Court, provided the accused was prejudiced by such course. (Vol 15) 1928 Bom 1 52 Bom 385 : 29 Cri L Jour 408 (DB). (Ev trial was with the aid of assessors.) \* (Vol 12) 1 105 (107) : 19 Sind L R 183 : 25 Cri L Jour 10

[2] Trial not legal — Accused cannot be convicted by the appellate Court — Re-trial may be ordered 1916 Mad 110 (113, 115) : 39 Mad 527 : 16 Cr 593 (FB) \* (Vol 24) 1937 Bom 152 (152) : 38 C 571 (DB).

[3] The High Court, setting aside acquittal a severer sentence than that awarded by the trial Court though it must be within the powers of the Magistrate. (Vol 22) 1935 Nag 139 (140, 141) L R 312 : 36 Cri L Jour 867.

[4] In an appeal against an acquittal the trial Court will not ordinarily pass a capital sentence. (Vol 17) 1930 Lah 409 (414) : 32 Cri L Jour 51

18. Appeal from conviction — General rule. — The appellate Court cannot simply remand the case directing that the lower Court should examine witnesses afresh and re-submit the record to the trial Court for decision of the appeal. (Vol 12) 1 172 (172) : 26 Cri L Jour 313 (DB).

[See also (Vol 23) 1936 Pat 438 (439) : 37 Cr 906.]

[2] Clause (b) does not imply that, unless accompanied by a sentence, a conviction is not appealable. (Vol 22) 1935 Mad 157 (157) : 58 Mad Cri L Jour 589 (DB).

19. "Reverse the finding and sentence"

[1] A mere reversal of the conviction amounts to an acquittal. ('33) 1933 Mad WN 224 (224).

[2] Reversal accompanied by order of retrial commitment does not amount to an acquittal with meaning of S. 403. ('35) 36 Cri L Jour 133 : (All) \* (Vol 33) 1946 Mad 496 (496).

20. "Acquit or discharge the accused." — A and B convicted by trial Court — B appeals and is acquitted on the merits — Grounds of acquittal of B comm also — High Court can, as a Court of revision, set aside the conviction of A also. (Vol 5) 1918 Mad 918 40 Mad 591 : 18 Cri L Jour 454. (Where there is an order of A's acquittal, his acquittal does not follow acquittal.) \* (Vol 31) 1944 Pat 232 (233, 234) : 108 : 45 Cri L Jour 725 (D B) \* (Vol 21) 1934 1 (348) : 35 Cri L Jour 1046 (D B) \* (Vol 33) 1946 (458, 459) (D B) \* (Vol 18) 1931 Cal 618 (619) : 902 : 32 Cri L Jour 1003 (D B). (Even without notice on prosecution.) \* (Vol 3) 1916 Lah 380 (384) L Jour 97 (D B) \* (Vol 21) 1934 Oudh 151 : (Luek 546) 35 Cri L Jour 915 (DB) \* (Vol 7) 1920

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(481, 482): 21 Cri L Jour 705; 5 Pat L Jour 430 & ('10) 11 Cri L Jour 99 (105) (D B) (Lah).

[2] A acquitted and B convicted by trial Court — B appealed—Appellate Court cannot interfere so as to affect the acquittal of A. ('11) 12 Cri L Jour 575 (576) (All).

21. "Order him to be re-tried." — [1] A re-trial is a matter of judicial discretion of the Court. ('08) 8 Cri L Jour 121 (125) (D B) (Cal).

[2] An order for re-trial would be proper where the trial in the lower Court has been illegal irregular or otherwise defective. (Vol 28) 1941 Cal 707 (713): 1 L R (1941) 2 Cal 319: 43 Cri L Jour 389 (D B). (Where on an appeal from a conviction at a trial by jury, the High Court holds that there has been misjoinder of charges and as such there has not been a legal trial, it is not entitled to order that there shall not be a fresh trial unless it is prepared to quash the commitment under S. 215, Cr. P. C.) & (Vol 26) 1939 Sind 209 (216, 217): 41 Cri L Jour 28: 1 L R (1940) Kar 249 (DB) & (Vol 24) 1937 Pesh 71 (72): 38 Cri L Jour 741 (D B) & (Vol 23) 1936 All 758 (759): 38 Cri L Jour 71 & ('11) 12 Cri L Jour 585 (590): 36 Mad 457 (S B). (Power to direct re-trial is not confined to cases where trial was held by Court having no jurisdiction.)

[See (Vol 10) 1923 Mad 32 (34): 46 Mad 117: 23 Cri L Jour 748 (D B). (Trial *de novo* — Witnesses not examined *de novo* — Depositions at previous trial filed — Procedure held illegal and re-trial ordered.)]

[3] In all serious cases where the first trial, owing to a defect of jurisdiction or other similar cause, is rendered abortive, a new trial should be ordered. ('08) 8 Cri L Jour 121 (124, 126) (D B) (Cal).

[4] Sentence was a small one, the offence not being a serious one, and the accused had sufficiently suffered in pocket — Defect in trial — No retrial ordered. (Vol 12) 1925 All 301 (303): 26 Cri L Jour 734 & (Vol 21) 1934 Lah 648 (648): 36 Cri L Jour 468. (Technical offence.)

[5] Evidence unsatisfactory and not supporting conviction — No retrial ordered. (Vol 30) 1943 Cal 521 (525): 1 L R (1943) 1 Cal 543: 45 Cri L Jour 99 (D B) & (Vol 13) 1926 Nag 53 (54, 55): 26 Cri L Jour 1090 & (Vol 3) 1916 Mad 1108 (1108): 17 Cri L Jour 193 & (Vol 19) 1932 Oudh 23 (25): 38 Cri L Jour 167: 7 Luck 390 & (Vol 25) 1938 Cal 51 (59): 1 L R (1938) 1 Cal 290: 39 Cri L Jour 161 (D B) & ('90) 14 Bom 115 (147) (S B).

[6] No probability of a conviction even if a re-trial is ordered — Retrial should not be ordered. (Vol 24) 1937 Bom 152 (152): 38 Cri L Jour 571 (D B). (Case of appeal against acquittal.) & (Vol 13) 1926 Mad 638 (641): 50 Mad 274: 27 Cri L Jour 394 & (Vol 14) 1927 Mad 442 (443): 28 Cri L Jour 295.

[7] Retrial may not be ordered where the accused has already been subjected to prosecution for a long time. (Vol 27) 1940 All 19 (21): 41 Cri L Jour 281 & (Vol 25) 1938 Cal 51 (59): 39 Cri L Jour 161: 1 L R (1938) 1 Cal 290 (D B) & (Vol 21) 1934 Bom 303 (305): 35 Cri L Jour 1477 (D B). ((Vol 21) 1934 Bom 48: 35 Cri L Jour 644, followed.)

[See also (Vol 30) 1943 Cal 521 (524, 525): 1 L R (1943) 1 Cal 543: 45 Cri L Jour 99 (D B). (But the fact that the accused has already been re-tried twice is no reason for refusing to order a third trial in a proper case.)]

[8] Re-trial is not proper where the accused has already undergone a considerable portion of the sentence. ('99) 8 Cal W N 332 (333) (D B) & ('11) 12 Cri L Jour 82 (82) (D B) (Cal). (Conviction under S. 323, Penal Code.) & (Vol 17) 1930 Nag 255 (259): 31 Cri L Jour 705 & (Vol 14) 1927 Lah 671 (672): 8 Lah 496: 29 Cri L Jour 6 & (Vol 7) 1920 Pat 590 (591): 21 Cri L Jour 496 & ('11) 12 Cri L Jour 19 (19) (D B) (Mad).

[See however (Vol 24) 1937 All 240 (243): 38 Cri L Jour 521 (D B). (That the accused has undergone a part

of the sentence is not in itself a sufficient ground for not ordering a re-trial.)]

[9] Irrelevant evidence admitted — Other evidence sufficient to reach same conclusion — No re-trial. (Vol 10) 1923 Rang 65 (65): 24 Cri L Jour 744.

[See also (Vol 27) 1940 Mad 685 (686): 41 Cri L Jour 897.]

[10] Certain evidence not brought on the record — Appellate Court may itself take evidence and decide the case. (Vol 5) 1918 All 133 (134): 19 Cri L Jour 435.

[See however ('84) 1884 Pun Re No. 23 Cr, p. 43 (50) (D B). (Where the appellate Court does not want to act under S. 428 and the conviction cannot be sustained owing to the defect, the Court should order a re-trial and not dismiss the appeal.)]

[11] Re-trial ought not to be ordered on the ground that there is a chance that the prosecution may be able to produce better evidence. (Vol 25) 1938 Cal 361 (362): 39 Cri L Jour 604 (D B) & (Vol 25) 1938 Pat 32 (40): 39 Cri L Jour 278 & ('31) 1931 Mad W N 517 (520). (A Judge who takes this action constitutes himself as a sort of Public Prosecutor.) & (Vol 18) 1931 Mad 227 (227, 228): 32 Cri L Jour 749. (It is rather for supplying formal defects that appellate Court orders re-trial.) & (Vol 17) 1930 Mad 189 (190): 31 Cri L Jour 422 (Do.).

[12] That the appellate Court disagrees with the finding of the lower Court is not a ground for re-trial. (Vol 23) 1936 All 758 (759): 38 Cri L Jour 71 & (Vol 23) 1936 Pesh 172 (175): 37 Cri L Jour 1039 (D B).

[13] Verdict of jury vitiated by inadmissible evidence — Remaining evidence sufficient to support conviction if believed by jury — Re-trial ordered. (Vol 33) 1946 Cal 452 (458) (D B).

[14] Misjoinder of charges — Re-trial ordered. (Vol 28) 1941 Cal 707 (713): 43 Cri L Jour 389: 1 L R (1941) 2 Cal 319 (D B).

[15] Accused admitting offence under misapprehension — Prayer for re-trial must be granted. (Vol 23) 1941 Mad 679 (680): 43 Cri L Jour 58.

[16] Perfunctory cross-examination of prosecution witness is a good ground for re-trial. (Vol 11) 1924 Cal 257 (283): 25 Cri L Jour 817 (F B).

[17] Special procedure — Omission of Judge to follow — Re-trial ordered. (Vol 20) 1933 Cal 364 (366): 60 Cal 814: 34 Cri L Jour 320 (D B).

[18] It would be dangerous to order a re-hearing in a case in which there is enmity between the parties and the Court is doubtful as to the value of any evidence that may be adduced upon a re-hearing. (Vol 27) 1940 Pat 295 (303): 41 Cri L Jour 267 (D B).

[19] Likelihood of witnesses confusing what they saw at time of occurrence of murder before two years — Re-trial not ordered. (Vol 24) 1937 Cal 269 (273): 38 Cri L Jour 1018 (D B).

[20] Appellate Court can order a re-trial from the point at which the error in the trial has been committed. (Vol 28) 1941 Sind 144 (145): 1 L R (1941) Kar 167: 42 Cri L Jour 837 (D B).

[21] Accused admitting that he was member of criminal tribe but denying previous convictions — After evidence as to identity and fact of previous convictions is given, jury's verdict must be taken on point of previous convictions — Re-trial in respect of further charge held cannot be ordered. (Vol 34) 1947 Cal 158 (159): 47 Cri L Jour 685 (DB).

[22] The appellate Court can direct a re-trial on a fresh charge framed on the evidence already recorded. ('13) 14 Cri L Jour 230 (231): 9 Nag L R 42. (Court may at the same time direct that new trial should commence with the framing of a proper charge.)

[But see ('22) 1932 Mad W N 114 (116). (Appellate Court cannot direct that a particular charge be framed or that trial be resumed from a particular point.)]

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[23] The appellate Court cannot direct that the evidence already on the record should be treated as evidence in the case. (Vol 5) 1918 Pat 582 (588) : 19 Cri L Jour 77 (D B) & (Vol 22) 1935 Nag 125 (127) : 36 Cri L Jour 740 : 31 Nag L R 246.

[See also (Vol 24) 1937 Pat 246 (247) : 38 Cri L Jour 657.]

[24] Where a re-trial is ordered the prosecution may or may not proceed as it may be advised. (Vol 8) 1921 Cal 257 (258) : 22 Cri L Jour 475 (D B).

[25] Where the circumstances of the case warrant an order for re-trial, the appellate Court should not simply dismiss the appeal or report the case to the High Court. ('93-1900) 1893-1900 Low Bur Rul 128 (128) & ('02) 2 Weir 484 (484, 485). (In this case the matter was referred by the appellate Court to the District Magistrate.)

[26] Trial by Court incompetent to try is no trial. Re-trial cannot, therefore, be ordered in such case. ('02) 29 Cal 412 (414) (D B).

## 22. "By a Court of competent jurisdiction."—

[1] The words "order him to be re-tried by a Court of competent jurisdiction" do not imply that it is necessary before ordering a re-trial, that the original Court should have had no jurisdiction to try the case. ('11) 12 Cri L Jour 585 (590) : 36 Mad 457 (SB) & ('91) 2 Weir 481 (482)(DB)&('95) 1895 Pun Re No. 16 Cr, p. 50 (51) (DB). (8 All 14 dissented from; 16 Bom 580 and 15 All 205 followed.)&(1900) 27 Cal 172 (174) (DB).

[2] Re-trial may be ordered to be held by the original Court or by another Court of competent jurisdiction even where the original Court was itself a Court of competent jurisdiction. ('93-1900) 1893-1900 Low Bur Rul 238 (240). (Dissenting from 8 All 14.)

[3] Court convicting accused competent to try the case, but not to adequately punish for the offence — The appellate Court may order a re-trial by a Court which can adequately punish the accused. ('95) 1895 Pun Re No. 16 Cr, p. 50 (51) (DB) & ('04) 1 Cri L Jour 751 (754, 755) : 17 C P L R 97.

[4] The appellate Court can specify the subordinate Court which should hold the re-trial. ('88) 1888 Rat 367 (367) & (Vol 22) 1935 P C 122 (124) : 62 Ind App 174 : 59 Bom 496 : 36 Cri L Jour 978 (P C).

[5] The appellate Court cannot order the re-trial to proceed before itself. ('98) 1898 Rat 982 (982).

[But see ('07) 5 Cri L Jour 104 (105) : 30 Mad 228 &('90) 2 Weir 481 (481).]

[6] Case tried by jury in Court X—Appellate Court ordered a re-trial by Court Y competent to try the case with the aid of assessors—Order held valid but ought not to be made, unless justified by exceptional circumstances. (Vol 12) 1925 P C 122 (124) (P C).

[7] Conviction by a jury set aside on the ground of defective charge to the jury — Appellate Court should order a re-trial by jury. ('06) 4 Cri L Jour 412 (414) (DB) (Cal) & ('12) 13 Cri L Jour 715 (716) (DB) (Cal). (Whole case should go to jury for re-trial.)

[8] Appeal against an acquittal in a case tried by jury—Held that the High Court had jurisdiction to decide the case itself instead of ordering a new trial. (Vol 14) 1927 Sind 104 (108) : 21 Sind L R 356 : 28 Cri L Jour 66 (DB).

23. Discharge and re-trial — If both can be ordered. — [1] Where the appellate Court discharges an accused it can add a direction that the accused should be re-tried. ('01) 28 Cal 104 (107, 108) (DB).

[2] It is not ordinarily the duty of the appellate Court to order the re-trial of a person whose conviction is set aside — Prosecution may be given an option. ('08) 8 Cri L Jour 11 (17) : 4 Nag L R 71 & ('08) 7 Cri L Jour 103 (105) (DB) (Cal).

24. Effect of re-trial on offences accused had been acquitted in trial Court — A charged with offences X and Y but convicted only — On appeal conviction reversed & ordered — If the whole case is re-opened & be re-tried on both charges X and Y if on case the offences X and Y fall within S. Code. ('38) 1 L R (1938) 1 Cal 98 (117-119) tion 408 (1), Cr. P. C., has no application. Cri L Jour 497 (498) : 40 Cal 163 (DB).

[2] Accused charged at one trial with distinct acts and convicted of the other — Order for appeal against the conviction will not re-open case. ('36) 63 Cal 1112 (1114, 1115) (DB) Cal 377 (382, 383) (DB) & (Vol 14) 1927 Pat 208 : 27 Cri L Jour 1100 (DB).

[See also (Vol 22) 1935 Lah 945 (946) Jour 303 & (Vol 20) 1933 All 941 (948, 9 L Jour 668 : 56 All 210 (DB).]

[3] A charged with offences under Ss. 30 of the Penal Code and convicted under S. 30 under S. 201 withdrawn by prosecution—He from the conviction that the appellate Court order a re-trial even in respect of the of S. 201, since there was no acquittal on it ('05) 2 Cal L Jour 18n (18n) (DB).

## 25. Ordering re-trial for enhancing

[1] The power of ordering a new trial for purpose of enhancing the punishment ought sparingly used. (Vol 2) 1915 All 185 (186) Jour 433 (DB)&('93-1900) 1893-1900 Low 1 (111, 112). (Trial Court competent to inflict punishment — No re-trial.)

26. Remand for passing sentence or proper judgment.—[1] An appellate Court mand the case to the lower Court for the passing a legal sentence. ('07) 11 Cal W N coliv

[2] An appellate Court has no power to case for "re-hearing the parties and writing per judgment;" it must go into the facts it pose of the case. ('06) 3 Cri L Jour 119 (1 1069 (DB).

27. Effect of order for re-trial in appeal — Order of retrial by Sessions Judge as a Court in an appeal against the conviction of Magistrate — District Magistrate cannot d same and release the prisoner. ('09) 10 Cr (77, 78) : 5 Low Bur Rul 49.

28. "Or committed for trial." — [1] late Court, while ordering a commitment, can way fetter the discretion of the trial Court in of procedure or evidence. (Vol 32) 1945 Sind I L R (1945) Kar 109 : 47 Cri L Jour 37 (D).

[2] Where a Magistrate convicts the accused on an offence which is exclusively triable by a Court and the appellate Court reverses the finding a commitment, it is not necessary that the should commence a fresh inquiry and take *novus*. The enquiry and the evidence at trial sufficient for the purposes of commitment. (All 579 (583) : 36 Cri L Jour 1013 : 58 & ('78) 2 Weir 479 (479).

[3] The appellate Court can either make ment itself or direct a Magistrate to do so. (All 579 (583) : 36 Cri L Jour 1013 : 58 All

[See also (Vol 28) 1941 Sind 36 (38) : 42 460. (Power to commit under S. 423 (1) (b).

[4] Offence exclusively triable by a Court — Proper course is to direct a commitment simply alter the charge into one for which ought to have been committed and after that try the case itself on such charge. (Vol 31) 1



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(346) : 23 Cri L Jour 456 \* (Vol 12) 1925 Rang 230 (251) : 3 Rang 68 : 26 Cri L Jour 1119.

[5] It is not necessary that, in order that the appellate Court may direct a committal, the offence should be one exclusively triable by a Court of Session. ('96) 23 Cal 350 (351) (DB) \* (Vol 20) 1933 Lah 126 (129) : 34 Cri L Jour 640 \* ('92) 16 Bom 580 (583) (DB).

[But see ('85) 8 All 14 (17).]

[6] In the following case the High Court refused to make an order for commitment in view, *inter alia*, of the considerable expense which the accused had been put to in the conduct of the case. (Vol 19) 1932 Cal 390 (394) : 59 Cal 1233 : 33 Cri L Jour 685 (DB).

[7] The Appellate Court will not, while committing the case, order that no proceedings should be taken against one of the accused merely because he has already suffered a part of the sentence, where this cannot be done without prejudicing the whole trial. (Vol 28) 1941 Sind 36 (38) : 42 Cri L Jour 460.

29. "Alter the finding." — [1] The appellate Court is, under this section, given the power to correct any mistakes of finding which the first Court may have committed. (Vol 27) 1940 Rang 118 (119, 120) : 41 Cri L Jour 621 : 1940 Rang L R 215 \* (Vol 26) 1939 All 710 (712) : 41 Cri L Jour 111 \* (Vol 25) 1938 Mad 315 (315) : 39 Cri L Jour 465 \* (Vol 25) 1938 Nag 303 (305) : 39 Cri L Jour 747 : I L R (1938) Nag 595 \* (Vol 4) 1917 Lah 233 (234) : 18 Cri L Jour 511 : 1917 Pun Re No. 4 Cr. (Dissenting from 25 All 534.) \* ('06) 4 Cri L Jour 490 (491) : 3 Low Bur Rul 232 \* (Vol 10) 1923 Lah 260 (261) : 3 Lah 440 : 23 Cri L Jour 709.

[2] The appellate Court cannot, in a case not falling within S. 237, convict the accused of a graver offence than that charged. (Vol 23) 1936 All 758 (759) : 38 Cri L Jour 158 \* (Vol 8) 1921 Low Bur 36 (37) : 23 Cri L Jour 740 : 11 Low Bur Rul 45 \* (1899) 26 Cal 863 (866, 867) (DB).

[See however (Vol 12) 1925 Sind 105 (107) : 25 Cri L Jour 1057 : 19 Sind L R 183 (DB). (Case was one falling within Ss. 236 and 237.)]

[3] A charged with offences X and Y and acquitted of offence X—Appellate Court may, in an appeal against the conviction for offence Y, alter the conviction to one for offence X. (Vol 31) 1944 All 137 (146, 148, 167) : I L R (1944) All 403 : 46 Cri L Jour 38 (FB). ((Vol 24) 1937 All 240 : 38 Cri L Jour 521, Overruled.) \* (Vol 21) 1934 Oudh 200 (205, 206) : 9 Luck 607 : 35 Cri L Jour 973 \* (Vol 19) 1932 Cal 723 (726) : 60 Cal 179 : 34 Cri L Jour 177 (DB) \* (Vol 4) 1917 Pat 625 (626) : 18 Cri L Jour 982 \* (Vol 5) 1918 Pat 257 (258) : 19 Cri L Jour 735 : 3 Pat L Jour 565 (DB) \* ('10) 11 Cri L Jour 534 (535) : 34 Mad 547 (DB) \* (Vol 1) 1914 Cal 456 (459) : 41 Cal 350 : 15 Cri L Jour 385 \* ('04) 1 Cri L Jour 942 (943) : 1904 Pun Re No. 12 Cr (DB) \* ('11) 12 Cri L Jour 269 (271) : 35 Mad 243 (DB) \* (Vol 11) 1924 Rang 93 (97) : 1 Rang 436 : 25 Cri L Jour 247 (DB).

[But see (Vol 29) 1942 Pesh 51 (53) : 43 Cri L Jour 766 (DB) \* (Vol 25) 1938 Sind 202 (206) : 40 Cri L Jour 93 : I L R (1939) Kar 75 (DB) \* (Vol 16) 1929 Nag 325 (327) : 30 Cri L Jour 944 (DB).]

[4] The above principle applies with greater force where A had not been expressly acquitted or convicted of offence X, but had simply been convicted of offence Y. (Vol 28) 1941 Rang 340 (341) : 1941 Rang L R 582 : 43 Cri L Jour 426 \* (Vol 24) 1937 All 853 (858) : 38 Cri L Jour 621 (DB) \* (Vol 20) 1933 All 565 (567, 568) : 55 All 834 : 34 Cri L Jour 1064 (DB) \* (Vol 18) 1931 Sind 9 (12) : 25 Sind L R 1 : 32 Cri L Jour 517 (DB) \* ('12) 13 Cri L Jour 457 (459) : 1 Upp Bur Rul 100.

[5] A was charged with offence X only, but the lower Court could have convicted the accused without a charge of offence Y also—Held, that the appellate Court can, in

an appeal against the conviction for offence X, alter the conviction to one for offence Y. (Vol 29) 1942 Pat 272 (275) : 43 Cri L Jour 296 (DB) \* (Vol 28) 1941 Lah 463 (468) : I L R (1942) Lah 129 : 43 Cri L Jour 235 (FB) \* (Vol 28) 1941 Rang 295 (298) : 1541 Rang L R 395 : 43 Cri L Jour 57 \* (Vol 25) 1936 Rang 261 (282) \* : 39 Cri L Jour 761 : 1938 Rang L R 139 \* (Vol 23) 1936 Nag 132 (133, 134) : 38 Cri L Jour 390 : I L R (1936) Nag 99 (DB) \* (Vol 25) 1936 Oudh 44 (47) : 37 Cri L Jour 12 (DB) \* ('86) 1886 Rat 293 (294) \* (Vol 19) 1932 Nag 172 (173) : 28 Nag L R 216 : 24 Cri L Jour 66 \* (Vol 14) 1927 Cal 520 (521, 522) : 54 Cal 476 : 28 Cri L Jour 404 (DB).

[But see (Vol 18) 1926 All 33 (34) : 26 Cri L Jour 1494.]

[6] An appellate Court cannot alter the finding in such a way that the altered offence was neither charged in the trial Court nor was one for which the accused could have been convicted under the provisions of Ss. 237 and 238. (Vol 26) 1939 All 710 (712) : 41 Cri L Jour 111 \* (Vol 24) 1937 Nag 123 (124) : 38 Cri L Jour 483 \* (Vol 23) 1936 Pat 530 (537) : 37 Cri L Jour 1150 \* (Vol 33) 1946 Cal 305 (305) \* (Vol 22) 1935 Cal 561 (570) : 62 Cal 433 : 36 Cri L Jour 1275 (SB) \* (Vol 12) 1925 Mad 706 (706) : 26 Cri L Jour 1036 \* (Vol 11) 1924 All 766 (767) : 25 Cri L Jour 1292 \* (Vol 11) 1924 Mad 375 (376) : 47 Mad 61 : 25 Cri L Jour 554 \* (Vol 14) 1927 Rang 32 (32) : 4 Rang 355 : 27 Cri L Jour 1360 \* (Vol 12) 1925 Nag 294 (294) : 26 Cri L Jour 1358 \* (Vol 10) 1923 Lah 260 (261) : 3 Lah 440 : 26 Cri L Jour 709 \* (Vol 21) 1934 Lah 178 (179) : 35 Cri L Jour 519 \* ('06) 3 Cri L Jour 240 (242) (DB) (Bom). (Alteration of conviction under S. 376, Penal Code, into one under S. 366 is illegal.)

[See (Vol 28) 1941 Pat 623 (623) : 42 Cri L Jour 790 \* (Vol 32) 1945 Pat 376 (379).]

[7] The appellate Court can, where the facts are the same, alter the conviction from one under a wrong section to one under the proper section, if it does not prejudice the accused. (Vol 33) 1946 All 7 (8) \* (Vol 31) 1944 Cal 92 (105, 106) : I L R (1943) 1 Cal 493 : 45 Cri L Jour 43 (DB) \* (Vol 31) 1944 Pat 67 (74) : 22 Pat 681 : 45 Cri L Jour 624 (DB) \* (Vol 25) 1938 Oudh 263 (263) : 39 Cri L Jour 937 \* (Vol 20) 1933 Pat 26 (27) : 34 Cri L Jour 419 \* (Vol 9) 1922 All 143 (143) : 23 Cri L Jour 198 \* (Vol 19) 1932 Cal 865 (866) : 33 Cri L Jour 828 (DB) \* ('08) 1 Upp Bur Rul Penal Code 9 (13) \* (1900) 13 C P L R 125 (126) \* ('75) 12 Bom H C R Cr 1 (7).

[8] Where the accused is not prejudiced by the alteration of the charge, the appellate Court can alter the finding, even though the case does not fall within S. 237 or S. 238. (Vol 4) 1917 Mad 687 (688) : 17 Cri L Jour 384 \* (Vol 20) 1933 Pesh 9 (12) : 34 Cri L Jour 266 \* (Vol 6) 1919 Mad 188 (189) : 20 Cri L Jour 780 \* ('99) 26 Cal 863 (867, 868) (DB).

[9] Section 238 of the Code provides that every distinct offence must be separately charged, though where a trial does take place without a charge, it is a curable irregularity under S. 535. This principle applies equally to the appellate Court as well as to the trial Court. ('05) 2 Cri L Jour 694 (695) : 1905 Pun Re No. 38 Cr. [See however (Vol 2) 1915 Mad 302 (303) : 15 Cri L Jour 680.]

[10] The words "may alter the finding" must be construed in harmony with other provisions of the Code and not as overriding them. ('10) 11 Cri L Jour 49 (49) : 38 Mad 264.

[11] The word "finding" is not limited to a finding upon a point of law as distinct from a finding upon a point of fact. (Vol 5) 1918 Pat 257 (258) : 19 Cri L Jour 735 : 3 Pat L Jour 565. (Distinguishing (Vol 4) 1917 Pat 626 and (Vol 1) 1914 Cal 456 : 41 Cal 350.)

[12] X charged under S. 143 and also under S. 379 of the Penal Code, but convicted only under S. 143 and ac-



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guilted of offence under S. 379—Appellate Court confirmed conviction under S. 143 but set aside the acquittal under S. 379 — *Held* that the appellate Court had no jurisdiction to do so. (Vol 10) 1923 Cal 658 (658) : 24 Cri L Jour 938.

[13] The abetment of an offence may come under S. 237, if there is no element in it which is not included in the charge for the substantive offence. In such a case, the accused may be convicted in appeal for abetment of the offence. (Vol 13) 1926 Rang 207 (207, 208) : 27 Cri L Jour 1285 (Vol 14) 1927 All 35 (36) : 49 All 120 : 27 Cri L Jour 1118 (Vol 15) 1931 Oudh 274 (276, 277) : 7 Luck 102 : 32 Cri L Jour 905 (Vol 22) 1935 Pesh 67 (68) : 36 Cri L Jour 1438.

30. Reduction of sentence. — [1] Where the appellate Court rejects the appeal summarily under S. 421, it cannot reduce the sentence. ('86) 1886 Rat 304 (305).

[2] The appellate Court cannot, while affirming the conviction, reverse the sentence absolutely. If it thinks the sentence severe it must pass at least a nominal sentence. ('91) 1891 Rat 545 (546).

[3] An appellate Court has power to reduce the sentence. (Vol 24) 1937 Mad 231 (232) : 59 Mad 995 : 37 Cri L Jour 1150.

[4] Appellate Court cannot remit a sentence—Government can alone do it. ('69) 1869 Pun Re No. 11 Cr, p. 20 (21).

[5] Only some accused appealing—Appellate Court can reduce the sentence passed on non-appellants. (Vol 19) 1932 Lah 615 (615) : 34 Cri L Jour 458.

31. "Alter the nature of the sentence, but, . . . not so as to enhance the same."—[1] A sentence of fine and in default X months' imprisonment is a lighter sentence than a sentence merely of X months' imprisonment. ('99) 23 Bom 439 (441) (Vol 7) 5 Cri L Jour 36 (38) : 30 Mad 103 (FB) (Vol 18) 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217.

[But see (Vol 29) 1942 Oudh 399 (399) : 18 Luck 252 : 43 Cri L Jour 719 (Vol 21) 23 All 497 (499) (Vol 7) 6 Cri L Jour 100 (101) : 3 Nag L R 90 (Vol 11) 1924 Pat 563 (564) : 3 Pat 638 : 25 Cri L Jour 1186 (DB) (Vol 24) 1937 Oudh 462 (463) : 38 Cri L Jour 935 (Imposition of substantial fine in place of sentence of imprisonment.)]

[2] A sentence of six months' imprisonment and a fine of Rs. 1000 and in default three months' imprisonment, in substitution of a sentence of less than nine months' imprisonment is an enhancement. ('98) 23 Bom 439 (441) (Vol 17) 17 All 67 (68, 69).

[See ('07) 5 Cri L Jour 36 (38) : 30 Mad 103 (FB) (Vol 18) 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217.]

[3] The alteration of an offence to a less grave offence, but maintaining the sentence, is not an enhancement when the act committed is held to be the same, but the alteration is due to a different interpretation of the law. (Vol 14) 1927 Mad 789 (789, 790) : 28 Cri L Jour 824.

[4] Where the appellate Court passes a sentence which the lower Court has no power to pass, there is an enhancement of the sentence. (Vol 11) 1924 All 130 (130) : 45 All 594 : 25 Cri L Jour 312 (DB) (Vol 11) 12 Cri L Jour 444 (445, 446) : 7 Nag L R 109 (Vol 17) 1930 Lah 318 (318) : 31 Cri L Jour 166.

[5] Accused, convicted of two offences, acquitted as regards one — The maintenance of the whole punishment awarded for the two offences, amounts to an enhancement. (Vol 20) 1933 Lah 938 (938) : 35 Cri L Jour 108 (Vol 3) 1916 Mad 622 (622) : 16 Cri L Jour 271 (Vol 4) 1917 Lah 358 (360) : 1916 Pun Re No. 21 Cr : 18 Cri L Jour 372 (Vol 14) 1927 All 375

(376) : 49 All 484 : 28 Cri L Jour 495 (Vol 17) 24 Cal (317) (Vol 15) 1928 Bom 346 (347) : 28 Cri L Jour 1082 (DB) (Vol 14) 1927 Mad 789 (789) : 28 Cri L Jour 824.

[But see ('08) 8 Cri L Jour 75 (88) (SB) (Lah) (Vol 11) 11 Cri L Jour 243 (244) (Mad) (Vol 17) 1930 79 (80) : 31 Cri L Jour 173.

[6] Acts constituting a single offence, but split into two offences and the accused sentenced separately for the two offences—Appellate Court can alter conviction to the proper one for the single offence maintain the aggregate of the two sentences; there is enhancement in such a case. ('07) 6 Cri L Jour 43 (3 Nag L R 67.

[7] Where a charge has several counts, the appellate Court setting aside the conviction on some of the counts but maintaining the entire sentence, does not give enhanced sentence. (Vol 15) 1928 Mad 651 (652) Cri L Jour 847.

[8] A fine in lieu of simple imprisonment is no enhancement. ('11) 12 Cri L Jour 444 (446) : 7 L R 109.

[9] Rigorous imprisonment in lieu of simple imprisonment for the same term is enhancement. (Vol 11) All 130 (130) : 45 All 594 : 25 Cri L Jour 312 (DB)

[10] Solitary confinement, even if the imprisonment awarded is reduced, is enhancement. ('90) 1890 W N 170 (170).

[11] A sentence of imprisonment in lieu of fine enhancement. ('93) 18 Bom 751 (751) (Vol 19) 1900 Low Bur Rul 423 (425) (Vol 18) 18 All 301 (

[12] An increase of fine or a sentence of whipping in lieu of decrease in imprisonment is an enhancement (Vol 15) 1928 Rang 265 (265) : 30 Cri L Jour 3 ('97) 2 Weir 487 (487) (Vol 27) 1940 Rang 81 (41 Cri L Jour 455 : 1939 Rang L R 744 (DB), (D tion in Borstal School.)

[But see ('84) 1884 Pun Re No. 3 Cr, p. 4 (4).]

[13] Whipping only in default of fine is not enhancement of the punishment of whipping only. (Vol 29) Sind 162 (163) : I L R (1942) Kar 288 : 44 Cri L Jour 127.

[14] Whether a sentence has been enhanced question of fact to be determined in each particular case with reference to the facts of that case. (Vol 19) 1942 Oudh 399 (399) : 18 Luck 252 : 43 Cri L Jour 719 (Vol 21) 23 All 497 (499) (Vol 20) 27 Cal (177).

[15] The test of enhancement is whether the accused considers the substituted sentence heavier than awarded. (Vol 17) 1930 Mad 193 (194) : 31 Cri L Jour 203 (DB) (Vol 21) 1934 All 1031 (1032) : 36 Cri L Jour 335 (Vol 1) 1914 Lah 539 (539) : 1915 Pun No. 7 Cr : 16 Cri L Jour 603 (DB) (Vol 13) 1921 543 (543) : 27 Cri L Jour 812 (Vol 1) 1914 A (531) : 36 All 485 : 15 Cri L Jour 519. (Fine, payable, accused, for imprisonment.)

[16] Accused convicted by the Magistrate Ss. 363 and 498, Penal Code, but sentenced under S. 498 only—Held that the appellate Court could appropriate sentence under S. 498 provided such sentence did not exceed that passed by the trial Court. (Vol 25) 1938 Cal 439 (440) : 39 Cri L Jour 684 (Vol 33) 1946 Pat 235 (238, 239) : 24 Pat 708 (DB)

[17] High Court of Rangoon has laid down principles on which a whipping may be substituted for imprisonment. See the following cases. (Vol 16) Rang 177 (179) : 7 Rang 319 : 30 Cri L Jour 986 (Substitution of 30 stripes for three months' imprisonment is enhancement.) (Vol 19) 1932 Rang 151, 152) : 10 Rang 317 : 33 Cri L Jour 758 (Period of imprisonment already undergone should

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considered by appellate Court in inflicting sentence of whipping.

[18] An additional order for security passed under S. 106, sub-s. (3), is not an enhancement of the sentence. (Vol 5) 1918 Nag 61 (65) : 20 Cri L Jour 760 & (Vol 6) 1919 All 375 (376) : 20 Cri L Jour 302.

[19] The provision against enhancement of sentence applies only to a convicted person. It does not preclude the award of rigorous instead of simple imprisonment to a person who has been bound over under Chapter VIII but who has failed to give the required security. (Vol 23) 1936 Sind 188 (189) : 30 Sind L R 322 : 38 Cri L Jour 168 (DB).

32. "Appeal from any other order"—Clause (c). —[1] Clause (c) applies to an appeal from any order other than an order of acquittal or of conviction. (98)21 Mad 124 (126) (F B) & (Vol 30) 1943 Pesh 6 (3) : 44 Cri L Jour 381. (Order under S. 514.) & (05) 2 Cri L Jour 131 (132) : 1905 Pun Re No. 15 Cr (D B). (Do.) & (12) 13 Cri L Jour 31 (31) : 5 Sind L R 179 (SE.) (Do.) & (85) 1885 Pun Re No. 42 Cr, p. 89 (89). (Order under S. 185.)

[2] Appeal under sub-s. (3) of S. 250—Appellate Court can, under this clause, set aside the order for compensation though it cannot set aside the acquittal. (Vol 19) 1932 Cal 120 (121) : 58 Cal 1436 : 33 Cri L Jour 269.

[3] In an appeal from an order under S. 118, an order for further inquiry or re-trial cannot be ordered. (Vol 29) 1942 Oudh 416 (416) : 45 Cri L Jour 729 & (06) 3 Cri L Jour 243 (243) : 33 Cal 8 (D B) & (Vol 21) 1934 Mad 202 (202) : 34 Cri L Jour 947.

[But see (Vol 29) 1942 Lah 84 (84) : I L R (1943) Lah 365 : 43 Cri L Jour 564 (D B). ((Vol 16) 1929 Lah 28 : 30 Cri L Jour 491, overruled.) & (Vol 13) 1926 All 403 (403, 404) : 48 All 501 : 27 Cri L Jour 945 (DB) & (Vol 7) 1920 Upp Bur 28 (29) : 3 Upp Bur Rul 270 : 22 Cri L Jour 309.]

[4] The Court has no power, by alteration, to increase the severity of the penalty imposed by the trial Court. (Vol 10) 1923 Oudh 44 (45) : 24 Oudh Cas 286 : 22 Cri L Jour 766.

[See however (Vol 30) 1943 Pesh 6 (8) : 44 Cri L Jour 381. (The word "alter" in S. 423 does not imply the power only to reduce the amount of security forfeited. The Appellate Court can raise the amount of the security forfeited.) & (Vol 23) 1936 Sind 188 (189) : 30 Sind L R 322 : 38 Cri L Jour 168. (Person ordered to give security under Ch. VIII failing to do so — Trial Magistrate ordering that he should be detained in simple imprisonment — High Court in revision can direct that the imprisonment should be rigorous.)]

33. Subsequent events — Power to take notice of.—[1] The conviction should not be disturbed because the appellate Court thinks that, owing to subsequent events, the parties may have committed another offence. (68) 9 Suth W R Cr 65 (65, 66).

[2] Facts which happened subsequent to the conviction cannot be utilised for altering the verdict. (Vol 16) 1929 Cal 92 (93) : 30 Cri L Jour 484 (DB).

[3] Where, after the verdict of the jury, it was discovered that the foreman of the jury had taken bribe, the verdict was set aside. (Vol 20) 1933 Cal 639 (640) : 60 Cal 751 : 34 Cri L Jour 1072 (DB).

34. Power to direct sentences to run concurrently. — [1] The High Court can, under this section, and S. 501A of the Code, act under S. 397 and direct separate sentences in separate trials to run concurrently. (Vol 18) 1931 Bom 529 (529) : 33 Cri L Jour 77 (DB).

[See (Vol 16) 1929 All 585 (585) : 51 All 888 : 30 Cri L Jour 904.]

35. Appellate Court cannot canvass previous convictions. — [1] An appellate Court cannot go into

the legality of previous convictions or of orders passed against the accused. (Vol 11) 1924 Rang 295 (297) : 25 Cri L Jour 1303.

36. Appellate Court, when to report to the High Court.—[1] Where the appellate Court comes to the conclusion that the sentences ought to be enhanced, and wishes to report to the High Court, it should do so in separate proceedings and not keep the appeal undisposed of till the report is made and orders passed thereon. (84) 1884 All W N 130 (130).

[2] An appellate Court should not refer the matter of the appeal to the High Court; it should decide the appeal itself. (Vol 2) 1915 All 185 (186) : 16 Cri L Jour 433 & (69) 11 Suth W R Cr 24 (24) (DB) & (Vol 1) 1914 Low Bur 226 (226) : 15 Cri L Jour 667.

37. "Any amendment or any consequential or incidental order" — Clause (d). — [1] The wide power of making amendment must be used so as not to prejudice the accused. (Vol 30) 1943 P C 192 (195) : I L R (1944) Kar P C 1 : 70 Ind App 196 : 23 Pat 88 : 45 Cri L Jour 126 (PC).

[2] Clause (d) cannot apply to matters that may arise pending appeal. (Vol 21) 1934 All 845 (845) : 36 Cri L Jour 177. (Release of appellant on bail.) & (Vol 10) 1923 Mad 95 (96) : 24 Cri L Jour 89 (DB). (Order exonerating delay in filing appeal is illegal.)

[But see (Vol 19) 1932 All 680 (681) : 54 All 861 : 33 Cri L Jour 731. (Order dispensing with security by a person convicted under S. 107, pending appeal.)]

[3] An amendment of charge can properly be done under this clause. (Vol 30) 1943 P C 192 (195) : I L R (1944) Kar (P C) 1 : 23 Pat 88 : 70 Ind App 196 : 45 Cri L Jour 126 (PC).

[4] Whether a particular order is "consequential or incidental" depends on the terms of the order under consideration and the circumstances in which it is made. (Vol 20) 1933 Rang 288 (290, 291) : 11 Rang 361 : 35 Cri L Jour 1 (FB).

[5] 'Consequential or incidental' orders fall under one or other of the two heads : First, there are orders which follow as a matter of course, being the necessary complements to the main order passed without which the latter would be incomplete or ineffective and for them no separate authority is needed. Secondly, there are orders which, though ancillary in character, require more than the support of a criminal Court's inherent jurisdiction, and could not be passed without express authority. (11) 12 Cri L Jour 529 (531) : 39 Cal 157 (F B) & (Vol 9) 1922 All 107 (109) : 44 All 401 : 23 Cri L Jour 349 (DB).

[But see (Vol 27) 1940 Rang 278 (279) : 1940 Rang L R 502 : 42 Cri L Jour 218.]

[6] The following have all been held to be "consequential" or "incidental" orders within the meaning of clause (d) :

(a) An order for costs under S. 148, sub-s. (3) is incidental to an order for possession under S. 145. (Vol 20) 1933 Rang 288 (291) : 11 Rang 361 : 35 Cri L Jour 1 (F B).

(b) An order under S. 517 for restoration of property to the person entitled may be passed as a consequential or incidental order. (Vol 15) 1928 Lah 567 (567, 568, 571) : 10 Lah 187 : 29 Cri L Jour 810 (D B) & (06) 4 Cri L Jour 370 (371) (All) & (Vol 1) 1914 Cal 658 (660) : 15 Cri L Jour 184 (DB).

(c) Where a member of a Bench of Magistrates has not signed the judgment, the appellate Court can, as an incidental order, send the case back to him for such signature. (Vol 6) 1919 All 308 (308) : 41 All 217 : 20 Cri L Jour 214.

(d) An order under S. 31 of the Court-fees Act (now S. 546A, Criminal Procedure Code) can be passed as an

Section 423—Note 37 (*contd.*)

incidental order. (Vol 12) 1925 Mad 136 (137): 47 Mad 914 : 25 Cri L Jour 1213.

(e) An order under S. 471 is incidental to an order of acquittal on the ground of insanity. (Vol 28) 1941 Rang 352 (352): 1941 Rang L R 544 : 43 Cri L Jour 228 \* (Vol 9) 1922 Mad 54 (55): 23 Cri L Jour 71 \* (Vol 2) 1915 Low Bur 34 (35): 8 Low Bur Rul 290 : 16 Cri L Jour 670.

(f) An order sending a case back for re-hearing can be passed under this clause. (Vol 1) 1914 Mad 50 (51): 15 Cri L Jour 409 (D B).

(g) An order directing refund of compensation on the setting aside of an order for compensation is a consequential or incidental order within clause (d). ('03) 25 All 315 (315).

[7] An order under S. 250 is not 'consequential' or 'incidental' to an order of discharge or acquittal. ('11) 12 Cri L Jour 529 (531, 532): 39 Cal 157 (F B). (Overruling 11 Cri L Jour 46.) \* (Vol 27) 1940 Rang 278 (279): 1940 Rang L R 502 \* (Vol 26) 1939 Sind 321 (322): 41 Cri L Jour 53 : I L R (1940) Kar 119 (DB) \* (Vol 13) 1926 Lah 427 (427): 7 Lah 152 : 27 Cri L Jour 570 \* (Vol 11) 1924 All 224 (224): 46 All 80 : 25 Cri L Jour 967 \* ('06) 3 Cri L Jour 441 (442): 28 All 625 \* ('01) 3 Bom L R 841 (842) (DB). (No reference to clause (d) was made.)

[8] The following orders have been held not to be within clause (d):

(a) Order as to costs of the appeal itself. (Vol 20) 1933 All 264 (269): 55 All 301 : 34 Cri L Jour 414 (F B) \* (Vol 12) 1925 Mad 438 (440): 48 Mad 262: 26 Cri L Jour 707 (F B).

[But see (Vol 1) 1914 Bom 128 (128): 15 Cri L Jour 522 (DB).]

(b) Order of adjournment of the appeal. ('02) 1902 All W N 59 (59, 60).

(c) Order setting aside an order under S. 31 of the Court-fees Act, now S. 546A, Criminal Procedure Code. ('09) 9 Cri L Jour 83 (83, 84): 31 Mad 547.

(d) Order reviewing the order of the predecessor. (Vol 16) 1929 Bom 309 (311): 53 Bom 578: 31 Cri L Jour 309 (D B).

(e) Order staying criminal proceedings pending decision of civil Court. (Vol 18) 1931 Pat 411 (413, 414): 33 Cri L Jour 147.

(f) Where an order under S. 476, sub-s. (1), is set aside, proceedings under S. 476, sub-s. (2), which had been begun may be stayed under clause (d). ('12) 13 Cri L Jour 492 (492): 6 Low Bur Rul 49.

38. Verdict of jury—Sub-section (2).—[1] Where the trial is illegal in fact, it may be set aside for that reason only and no question of misdirection by the Judge or misunderstanding by the jury of the law arises at all. (Vol 30) 1943 Bom 74 (75): 44 Cri L Jour 411 (DB) \* (Vol 14) 1927 Cal 949 (950, 951): 28 Cri L Jour 449 (DB) \* (Vol 13) 1926 Lah 193 (194): 27 Cri L Jour 793.

[2] Where there is an error of law or a misdirection, etc., and there has been, as a consequence of the same, an erroneous verdict and failure of justice, the appellate Court is entitled to interfere with the verdict. (Vol 30) 1943 Bom 74 (75): 44 Cri L Jour 411 (DB) \* (Vol 28) 1941 Oudh 567 (572): 17 Luck 128: 42 Cri L Jour 728 \* (Vol 24) 1937 Pat 440 (442): 38 Cri L Jour 919 : 16 Pat 413 (DB) \* (Vol 33) 1946 Cal 286 (287) (DB) \* (Vol 8) 1921 Cal 257 (257, 258): 22 Cri L Jour 475 (DB).

[3] Where there is no misdirection and the verdict is a reasonable and honest one, the appellate Court cannot interfere. (Vol 33) 1946 Bom 38 (41) (F B) \* (Vol 29) 1942 Nag 127 (132): I L R (1942) Nag 749: 44 Cri L Jour 13 (DB) \* (Vol 28) 1941 Mad 708 (708): 42 Cri L

Jour 824 \* (Vol 28) 1941 Pat 362 (366) (DB) \* (Vol 14) 1927 Oudh 549 (549): 28 Cri L Jour 937 \* (Vol 21) 1934 All 1032 (1033): 36 Cri L Jour 322 (DB) \* (Vol 17) 1930 Cal 712 (713): 32 Cri L Jour 236 (DB). [See also (Vol 29) 1942 Nag 126 (127): 44 Cri L Jour 113 : I L R (1942) Nag 775 (DB).]

[4] Misdirection which does not result in erroneous verdict is no ground for interference by appellate Court. (Vol 27) 1940 Lah 87 (88): 41 Cri L Jour 482, ('Erroneous' explained.) \* (Vol 19) 1932 Cal 474 (478): 59 Cal 1361 : 33 Cri L Jour 854 (DB) \* (Vol 16) 1929 All 364 (364): 30 Cri L Jour 622 (DB) \* (Vol 22) 1935 All 103 (105): 36 Cri L Jour 612 (DB) \* ('03) 27 Bom 626 (632) \* (Vol 16) 1929 Pat 313 (315): 8 Pat 344 : 30 Cri L Jour 721 (DB).

[See (Vol 30) 1943 Oudh 322 (324): 44 Cri L Jour 604.]

[5] Misdirection not occasioning failure of justice.—No interference by appellate Court. (Vol 33) 1946 Bom 446 (451) (DB) \* (Vol 30) 1943 Pat 163 (164): 21 Pat 865 : 44 Cri L Jour 507 (DB) \* (Vol 28) 1941 Nag 324 (326, 327): 43 Cri L Jour 129 : I L R (1942) Nag 510 \* (Vol 27) 1940 Lah 87 (89): 41 Cri L Jour 482 \* (Vol 24) 1937 Pat 263 (271, 274): 15 Pat 817 : 38 Cri L Jour 673 (DB) \* (Vol 13) 1926 All 429 (431): 27 Cri L Jour 785. (Misdirection must have affected jury's verdict.) \* (Vol 14) 1927 Cal 680 (682): 54 Cal 539 : 23 Cri L Jour 689 (DB) \* ('33) 1933 Mad W N 320 (323) \* ('24) 21 Cri L Jour 294 (295) (F B) (Cal) \* (Vol 21) 1934 Pat 301 (310): 13 Pat 529 : 35 Cri L Jour 1104 (DB) \* (Vol 22) 1935 All 103 (105): 36 Cri L Jour 612 (DB).

[See also (Vol 1) 1914 P C 155 (164): 15 Cri L Jour 326 (PC). (Objectionable evidence not affecting verdict of jury—No miscarriage of justice.)]

[6] Where the Judge in his charge to the jury put inadmissible evidence before the jury or fails to warn them against considering such evidence, there will be misdirection which will, subject to the provisions of S. 537, form a ground of interference in appeal. (Vol 31) 1944 Bom 338 (340, 343) (DB).

[7] Where a verdict is set aside on the ground of misdirection or error of law, the appellate Court should ordinarily direct a re-trial. (Vol 32) 1945 Bom 26 (268): 46 Cri L Jour 714 (F B) \* (Vol 33) 1946 Bom 26 (287) (DB) \* (Vol 31) 1944 Cal 234 (238): I L R (1944) 1 Cal 181 : 46 Cri L Jour 31 (DB) \* (Vol 13) 1926 All 429 (431, 432). (Insufficient evidence—Accused harassed—No re-trial.) \* ('02) 29 Cal 782 (791). (Do.) \* (Vol 13) 1926 Bom 53 (54, 55): 26 Cri L Jour 109 (Do.) \* (Vol 15) 1928 Pat 326 (335): 29 Cri L Jour 31 (DB). (Do.) \* (Vol 19) 1932 Oudh 23 (25): 33 Cri Jour 167 : 7 Luck 390. (Do.) \* (Vol 30) 1943 Oudh 31 (324): 44 Cri L Jour 604.

[8] A recent decision of the Privy Council has set rest a conflict of decisions, by holding that the appellate Court can go into the evidence and decide upon the facts whether, upon the merits, the decision is right and, if so, confirm the conviction notwithstanding misdirection or an error of law. A re-trial need not be ordered in such cases. (Vol 33) 1946 P C 82 (86, 87) 73 I A 77 : I L R (1946) Lah 119 : 47 Cri L Jour 6 (P O).

[See also (Vol 33) 1946 Sind 132 (135) (DB).]

[9] The powers under S. 423 are large enough to invoke the application of the English law rule that repugnancy in the verdict of the jury is by itself sufficient for quashing a conviction. (Vol 12) 1925 Cal 5 (506, 507): 26 Cri L Jour 662 (DB).

[10] Setting aside the conviction and sentence will not affect the verdict of the jury is not prohibited under sub-s. (2). (Vol 24) 1937 All 195 (196): 38 Cri Jour 465 : I L R (1937) All 419 (DB).

**424.** The rules contained in chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court :

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

[1882—S. 424.]

#### SECTION 424 — SYNOPSIS.

1. Scope and object.
2. What the appellate judgment should contain.
3. Who can pronounce judgment.
4. "Other than a High Court."

1. Scope and object.—[1] The object of the section is that uniformity should be produced and it should be ensured that judgments of subordinate criminal Courts are written in such a way as to promote public confidence in their decisions and to safeguard them against the possible suggestion that cases are disposed of without proper consideration. (Vol 32) 1945 Oudh 52 (53) : 46 Cri L Jour 684 \* ('12) 18 Cri L Jour 559 (560) : 8 Nag L R 84 \* ('97) 19 All 506 (507) (FB).

[2] The High Court should be enabled in revision to grasp the nature of the case without reference to the records. (Vol 32) 1945 Oudh 52 (53) : 46 Cri L Jour 684 \* ('97) 1897 Pun Re No. 18 Cr, p. 49 (50) \* (Vol 4) 1917 Pat 336 (337) : 18 Cri L Jour 750 (751) \* (Vol 14) 1927 Nag 88 (89) : 27 Cri L Jour 1404.

[3] The judgments of the lower appellate Courts should be self-contained and give a full analysis of the evidence. (Vol 30) 1943 Mad 66 (66, 67) : 44 Cri L Jour 287 \* (Vol 17) 1930 Lah 1051 (1051, 1052) : 32 Cri L Jour 271.

[4] A judgment which does not discuss evidence or give reasons will not inspire confidence in the trial of appeals in Courts below. (Vol 17) 1930 Lah 1051 (1052) : 32 Cri L Jour 271.

[5] This section applies only when an appeal is admitted and heard under S. 423, but not where it is summarily rejected under S. 421 of the Code. (1900-02) 1 Low Bur Rul 270 (271) \* ('93-1900) 1893-1900 Low Bur Rul 606 (607) \* ('99) 1 Bom L R 225 (225) (DB) \* ('95) 20 Bom 540 (541) (DB) \* ('94) 21 Cal 92 (96) (DB).

[But see (Vol 4) 1917 Pat 336 (337) : 18 Cri L Jour 750.]

[6] The provisions of this section apply to appeals against orders passed under Ss. 110, 250 and 476. ('22) 23 Cri L Jour 378 (378) (All). (Section 110.) \* ('13) 14 Cri L Jour 419 (420) : 40 Cal 376 (DB). (Do.) \* (Vol 3) 1916 All 197 (197) : 17 Cri L Jour 309 : 38 All 393 (394). (Do.) \* (Vol 9) 1922 Pat 157 (158) : 23 Cri L Jour 261. (Section 250.) \* (Vol 14) 1927 Cal 284 (284) : 54 Cal 355 (DB). (Section 476.—Per Chotzner J.)

2. What the appellate judgment should contain. — [1] The appellate judgment should comply so far as may be practicable with the provisions of S. 367. (Vol 27) 1940 Sind 113 (114) : 41 Cri L Jour 724 (DB) \* (Vol 24) 1937 Pesh 88 (89) : 39 Cri L Jour 337 \* (Vol 12) 1925 Cal 266 (266) : 25 Cri L Jour 901 (DB) \* (Vol 7) 1920 Lah 355 (355) : 21 Cri L Jour 223 \* ('10) 11 Cri L Jour 348 (349) : 37 Cal 194 (DB).

[2] The appellate judgment should contain the point or points for determination, the decision thereon and the reasons for the decision. (Vol 32) 1945 Oudh 52 (53) : 46 Cri L Jour 684 \* (Vol 30) 1943 Cal 465 (466, 467) : 1 I L R (1943) 1 Cal 423 : 45 Cri L Jour 71 (DB) \* (Vol 27) 1940 All 18 (19) : 1 I L R (1939) All 865 : 41 Cri L Jour 220 \* (Vol 27) 1940 Sind 113 (114) : 41 Cri L Jour 724 (DB) \* (Vol 25) 1938 Cal 522 (523) : 39 Cri L Jour 791 \* (Vol 24) 1937 Pesh. 88 (89) : 39 Cri L Jour 337 \* (Vol 23) 1936 Nag 160 (160) : 1 I L R (1937)

Nag 38 : 39 Cri L Jour 349 \* (Vol 20) 1933 Nag 328 (328) : 35 Cri L Jour 120 \* ('13) 14 Cri L Jour 370 (570) : 1 Upp Bur Rul 169 \* (Vol 9) 1922 Pat 157 (158) : 23 Cri L Jour 261 \* (Vol 5) 1921 Lah 102 (102) : 2 Lah 308 : 23 Cri L Jour 9.

[3] "I have considered the evidence and I agree with the Magistrate in his conclusions and in his reasons" — Held, this is sufficient in the appellate judgment where the appeal is dismissed. ('97) 19 All 506 (509) (FB) \* (Vol 13) 1926 Bom 512 (512) : 27 Cri L Jour 1153 (DB) \* (Vol 16) 1929 Pat 231 (232) : 36 Cri L Jour 1070 \* (1864) 1861 Suth V R Gap Cr 6 (8) (DB).

[4] It is sufficient for the appellate Court to say that it agrees with the conclusions and reasons of the lower Court where the case is simple, and not so in complicated cases. (Vol 13) 1926 All 218 (318, 319) : 27 Cri L Jour 449 \* (Vol 18) 1931 Pat 379 (381) : 11 Pat 143 : 32 Cri L Jour 1197 (DB).

[5] The true test is really to see whether the judgment indicates that the appellate Court has really and not nominally considered the case and arrived at an independent judgment. (Vol 10) 1923 Rang 188 (188) : 1 Rang 301 : 24 Cri L Jour 920 \* (Vol 27) 1940 All 18 (19) : 1 I L R (1939) All 865 : 41 Cri L Jour 220 \* (Vol 25) 1938 Cal 522 (522, 523) : 39 Cri L Jour 791 \* (Vol 8) 1921 Lah 102 (103) : 2 Lah 308 : 23 Cri L Jour 9 \* (Vol 6) 1919 Cal 668 (669) : 20 Cri L Jour 238 (DB) \* (Vol 15) 1928 Lah 863 (863) : 29 Cri L Jour 705 \* (Vol 3) 1916 All 180 (181) : 17 Cri L Jour 167 \* ('10) 11 Cri L Jour 331 (331, 332) (Mad) \* (Vol 14) 1927 Nag 88 (89) : 27 Cri L Jour 1404 (DB) \* (Vol 7) 1920 Pat 121 (122) : 21 Cri L Jour 648 \* ('84) 1884 Pun R No. 31 Cr, p. 56 (56) \* (31) 1931 Mad W N 119 (120).

[6] The appellate Court need not write a long and elaborate judgment. (Vol 24) 1937 Pesh 88 (89) : 39 Cri L Jour 337 \* (Vol 15) 1928 Lah 863 (863) : 29 Cri L Jour 705 \* (Vol 8) 1921 Lah 102 (102, 103) : 2 Lah 308 : 23 Cri L Jour 9 \* ('09) 9 Cri L Jour 528 (529) (All) \* ('05) 2 Cri L Jour 170 (171) : 32 Cal 178 (DB).

[7] The appellate Court need not repeat *in extenso* all that has been stated by the trial Court. ('31) 193 Mad W N 119 (119, 120) \* (Vol 4) 1917 Cal 285 (286) 18 Cri L Jour 294 (DB) \* (Vol 6) 1919 Cal 668 (669) 20 Cri L Jour 238 (239) (DB) \* (Vol 3) 1916 All 4 (49) : 17 Cri L Jour 461 (461).

[8] The judgment should be independent and self-contained so that the High Court in revision may be able to follow it without reference to the trial Court judgment. (Vol 27) 1940 All 18 (19) : 1 I L R (1939) All 865 : 41 Cri L Jour 220 \* (Vol 25) 1938 Cal 522 (522) 39 Cri L Jour 791 \* (Vol 24) 1937 Pesh 88 (89) : 39 Cri L Jour 337 \* (Vol 24) 1937 Sind 28 (27) : 30 Sind L R 332 : 38 Cri L Jour 363 (DB) \* (Vol 22) 1935 C 316 (321, 322) : 62 Cal 749 : 36 Cri L Jour 982 (DB) (Vol 11) 1924 Lah 660 (661) : 25 Cri L Jour 113 \* (Vol 10) 1923 Lah 344 (344) : 25 Cri L Jour 246.

[See however ('10) 11 Cri L Jour 331 (331, 332) (Mad.)]

[9] "I am satisfied that the judgment of the trial Court is substantially right." — *Held*, sufficient. (Vol. 1924 Cal 537 (537) : 24 Cri L Jour 311 (DB).

[10] "I agree with lower Court that the opposite is in cultivating possession of the same." — *Held*, sufficient. (Vol 8) 1921 Pat 504 (504) : 22 Cri L Jour 651

*Suspension of sentence pending appeal. Release of appellant on bail.*

**426. (1)** Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

<sup>a</sup>**(2A)** When any person other than a person accused of a non-bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub-section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.]

<sup>b</sup>**(2B)** Where a High Court is satisfied that a convicted person has been granted special leave to appeal to His Majesty in Council against any sentence which it has imposed or maintained, or has been granted leave to appeal to His Majesty in Council against an order of the Federal Court on an appeal from the High Court involving the imposition or maintenance of a sentence it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail.]

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

[1882—S. 426 ; 1872—S. 281 ; 1861—S. 421.]

[a] Added by the Code of Criminal Procedure (Amendment) Act, 1945 (2) [II] of 1945, S. 2. [29-3-1945.]

[b] Added *ibid* (Second Amendment) 1946 (4) [IV] of 1946, S. 2. [28-2-1946.]

#### Objects and Reasons.

*Sub-section (2B)*—In a case before the Privy Council it was held that a High Court possesses no power to grant bail to a person who has been sentenced to imprisonment and who has been granted special leave to appeal to His Majesty in Council against such sentence. At the same time their Lordships observed, 'It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court

..... But this desirable object can only be achieved by legislation.' [See (Vol 32) 1945 P. C. 94 (97, 98).] Sub-section (2B) inserted in 1946 makes a provision conferring on High Courts the power to suspend sentence and grant bail where special leave to appeal to His Majesty in Council has been granted—See S. O. R., Gazette of India, 1946, Part V, page 41.

#### SECTION 426 — SYNOPSIS.

1. Scope.
2. "Pending an appeal."
3. "A convicted person."
4. "Appellate Court."
5. "Sentence."
6. Suspension of sentence.
7. High Court—Sub-section (2).
8. Exclusion of time—Sub-section (3).

1. Scope.—[1] The special provision of this section is provided for special circumstances only and is not generally applicable to all cases. ('91) 13 All 171 (188) (F B).

2. "Pending an appeal." — [1] The *pendency* of an appeal by a convicted person is a condition precedent to the exercise of jurisdiction under sub-ss. (1) and (2) of this section. (Vol 17) 1930 Pat 274 (275) : 31 Cri L Jour 958 : 9 Pat 131 (DB) \* (Vol 19) 1932 Mad 720 (721) : 56 Mad 149 : 33 Cri L Jour 826.

3. "A convicted person." — [1] "Convicted person" means a person convicted of an offence and does not include persons who are bound over. (Vol 23) 1936 All 107 (108) : 58 All 589 : 36 Cri L Jour 155 (DB) \* (Vol 21) 1934 All 845 (845) : 57 All 264 : 36 Cri L Jour 177 \* (Vol 17) 1930 Pat 274 (275) : 9 Pat 131 : 31 Cri L Jour 958 (DB). (Order under S. 118.) [See however (Vol 19) 1932 All 680 (681) : 54 All 861 : 33 Cri L Jour 731.]

4. "Appellate Court." — [1] The only Courts which can suspend the execution of a sentence or order

under this section are the appellate Court and the High Court. ('91) 2 Weir 536 (536) \* ('69) 12 Suth W R Cr 47 (47, 48).

[2] The Court passing the sentence cannot suspend it. Such Court can only release the accused on bail which will, however, have the effect of the sentence being deemed to be suspended. ('68) 4 Mad H C R App i(ii) \* ('69) 12 Suth W R Cr 47 (47).

[See however ('81) 7 Cal L Rep 393 (395) (DB).]

[3] A Court to which the appeal does not lie cannot suspend the sentence. ('91) 2 Weir 536 (536).

[4] The Privy Council, in an application for leave to appeal to itself is not a Court of criminal appeal, and cannot stay execution of the sentence. (Vol 2) 1915 P C 29 (30) : 42 Cal 739 : 16 Cri L Jour 494 : 42 Ind App 133 (PC).

5. "Sentence." — [1] An appellate Court has no power to suspend operation of an order of detention in the Reformatory School. (Vol 2) 1915 Mad 1067 (1068) : 16 Cri L Jour 134 (DB).

6. Suspension of sentence. — [1] An order of suspension of sentence should only be passed when very special cause is shown. (Vol 13) 1926 Nag 279 (280) : 27 Cri L Jour 319.

7. High Court—Sub-section (2).—[1] The High Court has unfettered powers to grant bail, yet in exercising these powers it ought to have regard to the limitations imposed on lower appellate Courts. (Vol 13) 1926 Nag 279 (280) : 27 Cri L Jour 319.

[2] It was held before the addition of sub-section (2b) that High Court has no inherent powers to suspend

427. When an appeal is presented under <sup>a</sup>[section 411-A, sub-section (2), or section 417], the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

[1882—S. 427.]

[a] Substituted by the Criminal Procedure (Amendment) Act, 1943 (26 [XXVI] of 1943), S. 5 for "S. 417," [27-11-1943.]

428. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

[1882—S. 428; 1872—S. 282, paras. 1, 3, 4; 1861—S. 422.]

Section 426—Note 7 (*contd.*)

the execution of sentence or grant bail, pending the hearing of an appeal to the Privy Council, against its own sentence. (Vol 32) 1945 P C 94 (97, 98); 72 Ind App 120; 1 L R (1945) Lah 57; 46 Cri L Jour 662 (P.C.).

8. Exclusion of time—Sub-section (3).—[1] Time during which the sentence of appellant was suspended is not excluded when ultimately he is sentenced. ('91) 2 Weir 536 (537).

[2] The period during which a person is released on bail cannot reduce the term of sentence. (Vol 23) 1936 All 12 (13); 36 Cri L Jour 1479; (Vol 21) 1934 All 845 (845, 846); 57 All 264; 36 Cri L Jour 177.

#### SECTION 428 — SYNOPSIS.

1. Scope and object.
2. "Appeal under this Chapter."
3. "If it thinks additional evidence to be necessary."
4. "Shall record its reasons."
5. "Direct it to be taken by a Magistrate."
6. "Shall certify such evidence to the Appellate Court," etc.—Sub-section (2).
7. Presence of accused while additional evidence is taken—Sub-section (3).
8. Procedure in taking additional evidence—Sub-section (4).
9. Appeal or revision.

1. Scope and object.—[1] This section is analogous to O. 41, B. 27 of the Civil P. C. (Vol 20) 1933 Cal 364 (365); 60 Cal 814; 34 Cri L Jour 320 (DB) & (Vol 15) 1928 Bom 241 (242); 52 Bom 686; 29 Cri L Jour 990 (DB).

[2] The decisions passed under the Civil Procedure Code are not a trustworthy guide in interpreting this section. (Vol 15) 1928 Mad. 1174 (1175); 30 Cri L Jour 133.

[3] Justice should be done between the prosecutor and the person prosecuted. (Vol 13) 1926 Lah 309 (310); 7 Lah 148; 27 Cri L Jour 463 & (Vol 12) 1925 Pat 450 (452); 4 Pat 204; 27 Cri L Jour 524 (DB).

[4] The object is the prevention of a guilty person's escape or the vindication of a wrongfully accused person's innocence by recording circumstances essential to

the elucidation of truth. ('72) 18 Suth W R Cr 31 (32) & (Vol 12) 1925 Pat 526 (528); 26 Cri L Jour 1171.

[5] It is not creditable to the administration of justice or in accordance with modern ideas on the subject that a conviction or a charge, if otherwise sustainable, should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite. (Vol 7) 1920 Mad 928 (929); 42 Mad 885; 20 Cri L Jour 455 (SB).

[6] Public time should be saved by taking only the additional evidence necessary instead of remanding the whole case. (Vol 5) 1918 All 133 (134); 19 Cri L Jour 485.

[7] The additional evidence can be taken in appeals against conviction or appeals against acquittal. (Vol 1) 1914 Mad 628 (631); 38 Mad 1028; 15 Cri L Jour 236 (DB).

[8] Additional evidence can be taken for the prosecution or for the defence. (Vol 12) 1925 Mad 106 (109, 111); 25 Cri L Jour 401 (DB) & (Vol 15) 1928 Mad 1174 (1175); 30 Cri L Jour 133.

[9] The High Court can, on a reference under S. 307, call for further evidence under this section. (Vol 16) 1929 Cal 244 (246); 56 Cal 566; 30 Cri L Jour 1031 (DB) & ('73) 20 Suth W R Cr 1 (5).

[10] The High Court in revision may exercise the powers under this section. (Vol 22) 1935 Pat 208 (209); 14 Pat 455; 36 Cri L Jour 1048 (DB).

[11] Appellate Magistrate passing order that before giving decision evidence of certain witnesses is to be recorded — Decision given without recording such evidence — Procedure held irregular. (Vol 27) 1940 Oudh 396 (397); 41 Cri L Jour 725.

2. "Appeal under this Chapter." — [1] A proceeding under S. 125 of the Code is not an appellate proceeding and consequently this section does not apply. (Vol 6) 1919 Pat 171 (172); 20 Cri L Jour 221.

[2] A proceeding under S. 437 of the Code is one in revision and this section has no application to such a proceeding. ('07) 6 Cri L Jour 357 (358) (DB) (Cal) & ('82) 1882 All W N 146 (147) (DB).

[3] An appeal under S. 476B of the Code is not under this Chapter and consequently this section does not apply. (Vol 15) 1928 Mad 391 (392); 51-Mad 603; 29 Cri L Jour 445 & ('10) 11 Cri L Jour 280 (281); 33 Mad 90 (DB) & ('07) 5 Cri L Jour 288 (289); 30 Mad 311 (DB).



428 — Note 2 (*contd.*)

the appellate Court may record additional evidence on appeal under S. 250, sub-s. (3). (Vol 17) d 483 (484) : 53 Mad 688 : 31 Cri L Jour 602

the Sessions Court, in an appeal from the judgment of an Assistant Sessions Judge, cannot record additional evidence. (Vol 22) 1935 Oudh 402 (403) : 36 J 844 : 11 Luck 231.

appeal to High Court from order under S. 19, Offenders Act, 1881 — High Court can direct additional evidence. (Vol 21) 1934 Mad 55 (59) : 57 : 35 Cri L Jour 511 (DB).

If it thinks additional evidence to be necessary—[1] The power to take additional evidence should be exercised for the purpose of filling a gap in the prosecution when the necessary evidence was available at the hearing and ought to have been produced then. (Vol 24) 1937 Mad 181 (181, 182) : 1 Jour 257 (DB) (Vol 22) 1935 Oudh 402 (404) : 1 Jour 844 : 11 Luck 231 (Vol 22) 1935 Mad 1 : 37 Cri L Jour 99 (DB) (Vol 12) 1925 Lah 5 : 5 Lah 404 : 26 Cri L Jour 320 (DB) (Vol 12) 5 (221).

Additional evidence can be taken under this section to supply the defect in formal proof but before additional evidence is allowed the Court should be satisfied that the evidence is of formal proof only. (Vol 7) 1920 Mad 928 : 12 Mad 885 : 20 Cri L Jour 455 (SB).

The provisions of this section are not to be invoked for supplying formal proof. (Vol 33) 1946 Nag 99 L R (1945) Nag 809 (DB) (Vol 31) 1944 Oudh 4 : 45 Cri L Jour 730 (Vol 12) 1925 Mad 106 : 1 : 25 Cri L Jour 401 (DB) (Vol 15) 1928 Mad 175 : 30 Cri L Jour 133.

The provisions of this section are directed to the interest of justice even at a late stage in the proceedings—the introduction of further materials which the judges think to be essential to a just decision. (Vol 12) at 526 (528, 529) : 26 Cri L Jour 1171.

The word "necessary" does not import that it is not possible to pronounce judgment without the additional evidence. (Vol 12) 1925 Mad 106 (108) : 25 Cri L Jour 401 (DB).

The necessity for taking additional evidence under this section must be determined on the particular facts of the case. ('11) 12 Cri L Jour 585 (590, 591) : 36 57 (SB).

The necessity for additional evidence must be determined from the record in the case. ('06) 3 Cri L Jour 36 (DB) (Low Bur.)

The discretion vested in the Court of appeal should not be exercised arbitrarily. ('10) 11 Cri L Jour 74 (Mad) (Vol 7) 1920 Mad 928 (930, 933) : 42 385 : 20 Cri L Jour 455 (SB) (Vol 82) 5 All 217 (221).

The discretion to call for additional evidence should only be used when justice demands it. (Vol 22) 1935 : 1 (64) : 36 Cri L Jour 117 (Vol 31) 1931 Mad W N 132 (DB) (Vol 15) 1928 Bom 241 (242) : 52 Bom 29 Cri L Jour 990 (DB) (Vol 10) 1923 Mad 600 : 24 Cri L Jour 403 (DB) (Vol 8) 1921 All 215 : 27 Cri L Jour 513 (DB).

If there is some *prima facie* evidence bearing on the guilt or innocence of the accused, the appellate Court may act under this section. (Vol 31) 1944 Oudh 244 : 45 Cri L Jour 730 (Vol 72) 18 Suth W R Cr 31

1) Important witnesses not cited by parties — Trial Court fails to call them — Additional evidence may be taken. (Vol 31) 1944 Pat 373 (376) : 23 Pat 278 : 46 Cri L Jour 546 (DB) (Vol 29) 1942 Pat 143 (144) : 43 Cri L Jour 546 (DB) (Vol 25) 1938 Mad 900 (902) : 40 Cri L Jour 35.

[12] Trial Court refuses to take evidence offered for some reason — Additional evidence may be taken. ('86) 19 Mad 375 (381) (DB) (Vol 11) 12 Cri L Jour 585 (591) : 36 Mad 457 (SB) (Vol 11) 12 Cri L Jour 412 (420) (DB) (Lah) (Vol 7) 5 Cri L Jour 164 (167, 168) : 31 Bom 218 (DB).

[13] Documents admitted not proved—Examination of accused not satisfactory—Additional evidence may be taken. (Vol 23) 1936 Pat 438 (439) : 37 Cri L Jour 900.

[14] Prosecution witnesses not cross-examined and not recalled after charge — Accused desiring their evidence—Additional evidence may be taken. (Vol 25) 1938 Cal 781 (782) : 1 L R (1938) 1 Cal 205 : 40 Cri L Jour 47 (DB).

[15] Accused alleging that confession was obtained from him by force—Trial Court failing to inquire—Additional evidence may be taken. ('71) 8 Bom H C R Cr 126 (149) (FB) (Vol 6) 2 Bom H C R Cr 398 (399) (SB).

[16] Accused insane—Medical evidence not taken — Additional evidence may be taken. ('10) 11 Cri L Jour 105 (105) (DB) (Lah).

[17] Whether a remand under S. 423 or taking additional evidence under this section is the proper procedure will depend upon the facts of each case. ('65) 2 Bom H C R Cr 395 (396, 397) (DB) (Vol 6) 1919 Cal 882 (872) : 19 Cri L Jour 753 (DB).

[18] Where an illegality in the conduct of the case has been committed, the case should be remanded. (Vol 16) 1929 Bom 309 (310, 311, 313) : 53 Bom 575 : 31 Cri L Jour 309 (DB) (Vol 12) 1925 Cal 172 (172) : 26 Cri L Jour 313 (DB) (Vol 1900) 2 Bom L R 342 (544) (DB).

[19] An order setting aside the conviction and sending the case back for further evidence but not for complete trial is illegal. (Vol 23) 1936 Pat 438 (439) : 37 Cri L Jour 906.

[20] Allegations in grounds of appeal regarding same happening in the trial Court at the pronouncing of judgment—Appellate Court, examining Magistrate, held evidence so taken was not under S. 428 — Appellate Court can inquire by report. (Vol 29) 1942 Mad 668 (669) : 44 Cri L Jour 5.

4. "Shall record its reasons."—[1] Whenever additional evidence is taken under this section, reasons for the same should be given. (Vol 11) 1924 All 193 (194) : 26 Cri L Jour 200 (Vol 13) 1926 Lah 303 (309) : 7 Lah 148 : 27 Cri L Jour 463 (Vol 10) 11 Cri L Jour 571 (574) (Mad) (Vol 10) 11 Cri L Jour 734 (734) (Mad).

[2] This provision is a guarantee against the appellate Court exercising its powers arbitrarily. (Vol 7) 1920 Mad 928 (933) : 42 Mad 885 : 20 Cri L Jour 455 (SB).

[3] Additional evidence should not be perused in appeal unless the provisions of this section were complied with. (Vol 11) 1924 All 193 (194) : 26 Cri L Jour 200.

[4] Reasons for taking additional evidence not recorded—Irregularity is curable under S. 537 if there is no failure of justice. (Vol 17) 1930 Mad 483 (484) : 53 Mad 688 : 31 Cri L Jour 602 (D B) (Vol 11) 12 Cri L Jour 240 (341) (D B) (Mad).

5. "Direct it to be taken by a Magistrate." — [1] The appellate Court cannot call for a report from the Magistrate. (Vol 12) 1925 Pat 450 (452) : 4 Pat 204 : 27 Cri L Jour 524 (D B).

[2] The Court cannot call for a finding on the additional evidence taken by the Magistrate. (Vol 2) 1915 Mad 756 (756) : 16 Cri L Jour 79 (Vol 11) 12 Cri L Jour 240 (241) (D B) (Mad) (Vol 21) 1934 Lah 316 (316) : 35 Cri L Jour 1166 (Vol 69) 3 Bom L R App Cr 62 (64) (Vol 3) 1916 Pat 219 (221) : 17 Cri L Jour 332 : 1 Pat L Jour 99 (D B).

**429.** When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

*Procedure where Judges of Court of Appeal are equally divided.*

[1382—S. 429; 1872—S. 271 Para. 8.]

*Finality of orders on appeal.*

**430.** Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII.

[1882—S. 430; 1872—S. 285; 1861—S. 428.]

**Section 428 — Note 5 (contd.)**

[3] The Court cannot act on the finding or report in respect of additional evidence of the Magistrate. (Vol 3) 1916 Mad 775 (775, etc.): 16 Cri L Jour 767 (D B).

[4] Appellate Court cannot send the case to the police for further investigation. (1900) 1900 All W N 130 (130) (D B).

6. "Shall certify such evidence to the Appellate Court," etc.—Sub-section (2).—[1] The appellate Court after perusing the additional evidence should itself dispose of the appeal. (Vol 3) 1916 Mad 775 (776, 778): 16 Cri L Jour 767 (D B) \* (Vol 2) 1915 Mad 756 (756): 16 Cri L Jour 79.

7. Presence of accused while additional evidence is taken—Sub-section (3).—[1] The evidence should ordinarily be taken in the presence of the accused, though the Court has power to dispense with such presence. (Vol 15) 1928 Bom 200 (200): 52 Bom 699: 29 Cri L Jour 972 (D B) \* ('06) 3 All L Jour 112n (112n) \* ('91) 13 All 171 (188) (F B) \* ('06) 3 Cri L Jour 376 (378): 29 Mad 100 (D B).

[2] If the original trial had been with a jury or assessors, additional evidence need not be taken in the presence of the jury or the assessors. (Vol 25) 1938 Cal 781 (781): 1 L R (1938) 1 Cal 205: 40 Cri L Jour 47 (D B) \* ('07) 6 Cri L Jour 154 (159) (D B) (Cal) \* ('93) 15 All 136 (137) (D B).

8. Procedure in taking additional evidence—Sub-section (4).—[1] In taking additional evidence under this section the provisions contained in Chapter XXV should be followed. ('10) 11 Cri L Jour 784 (784) (Mad) \* (Vol 8) 1921 All 215 (216): 27 Cri L Jour 813 (D B).

[2] Additional evidence being taken by a Magistrate—Offence against public justice under S. 195 committed—Magistrate can prefer a complaint with respect to that offence. ('71) 15 Suth W R Cr 64 (66).

9. Appeal or revision.—[1] A judgment passed by the appellate Court after taking the additional evidence is appellate judgment from which there is no appeal. ('71) 15 Suth W R Cr 33 (34) \* (1900) 27 Cal 372 (375) (D B) \* ('69) 6 Bom H C R Cr 64 (66).

[2] A Court of revision will not interfere with an order under this section made by a Court of appeal unless the appellate Court committed an error of law prejudicial to the accused. (Vol 12) 1925 Pat 526 (530): 26 Cri L Jour 1171 \* (Vol 5) 1918 Pat 272 (272, 273): 19 Cri L Jour 902: 3 Pat L Jour 632 (D B).

[3] Appeal before a First Class Magistrate—He ordered additional evidence—Additional District Magistrate withdrew the case to his file and disposed of it without additional evidence—*Held*, he was not bound by the opinion of the Magistrate. ('08) 7 Cri L Jour 329 (330): 31 Mad 277 (D B).

**Section 429 — Note 1.**

[1] The section applies not only to appeals but also to revision petitions by virtue of S. 439, sub-s. (1). ('32) 1932 Mad W N 873 (888) (DB).

[2] The principle of this section applies to a reference under S. 307. ('31) 15 Bom 452 (474, 476) (SB).

[3] Where the Judges of appellate Court are equally divided over the question of bail, this section does not apply. ('09) 9 Cri L Jour 409 (418): 36 Cal 174 (DB).

[4] A third Judge to whom reference is made cannot make a reference to a Full Bench. (Vol 12) 1925 Cal 1040 (1045, 1046): 26 Cri L Jour 915 (SB).

[5] The third Judge to whom case is referred on difference between two Judges should consider all the points involved before he gives his opinion. (Vol 34) 1947 Lah 244 (244, 245): 48 Cri L Jour 126 \* ('10) 11 Cri L Jour 515 (517, 518): 38 Cal 202 (DB) \* ('32) 1932 Mad W N 873 (888, 889) (DB) \* (Vol 14) 1927 Bom 177 (182): 51 Bom 310: 28 Cri L Jour 373 (DB).

[6] Judges agreed that accused cannot be acquitted, but differed whether he should be convicted or new trial should be held—The third Judge on reference can disagree on the point on which the Judges agreed. (Vol 6) 1919 Cal 862 (870): 19 Cri L Jour 753 (DB).

[7] Judges agreed that accused is guilty, but disagreed on a subsidiary point—The third Judge to whom the case is referred can disagree on the question of guilt of accused. ('32) 1932 Mad W N 873 (891) (DB).

[8] Two or more accused in a case—Judges agreed with regard to one of them but divided as regards others—The case of latter accused alone placed before the third Judge. (Vol 30) 1943 All 272 (272): 1 LR (1943) All 82: 44 Cri L Jour 765 (DB) \* ('10) 11 Cri L Jour 515 (517, 518): 38 Cal 202 (DB) \* (Vol 18) 1931 Lah 513 (520): 32 Cri L Jour 868 (DB).

[9] Case referred to third Judge—Judgment will be according to his opinion. ('10) 11 Cri L Jour 515 (517, 518): 38 Cal 202 (DB).

[10] Murder case—Judges agreed regarding guilt of accused but differed on question of sentence—Difference sufficient not to award death penalty though the third Judge, on reference, may consider whether or not death penalty should be given. (Vol 17) 1930 Cal 193 (198): 31 Cri L Jour 817 (DB).

**Section 430 — Note 1**

[1] A sentence is final when it cannot be set aside or interfered with in any manner by any Court. ('86) 12 Cal 536 (538) (DB).

[2] Jail appeal dismissed under S. 421—Judgment cannot be altered or reviewed by the same Court. (Vol 27) 1940 Oudh 371 (375): 41 Cri L Jour 682: 15 Luck 703 (DB) \* (Vol 27) 1940 Oudh 369 (371): 41 Cri L Jour 711: 15 Luck 662 (DB) \* (Vol 26) 1939 Rang 392 (393): 41 Cri L Jour 108: 1940 Rang L R 145 \* (Vol 6) 1919 Cal 409 (410): 46 Cal 60: 20 Cri L Jour 265 (DB) \* (Vol 10) 1923 Mad 426 (427): 46 Mad 382: 24 Cri L Jour 439 (DB) \* (Vol 13) 1926 All 178 (179): 48 All 208: 26 Cri L Jour 1621 \* (Vol 9) 1922 All 480 (481): 44 All 759: 23 Cri L Jour 505 (DB) \* (Vol 22) 1935 Pat 426 (427): 37 Cri L Jour 58: 14 Pat 392 (DB) \* (Vol 13) 1926 Mad 420 (420): 27 Cri L Jour 184.

[See however (Vol 21) 1934 All 988 (988): 36 Cri L Jour 300.]

[3] In Jail appeals it is not essential that the appellant should be heard before the appeal is dismissed. (Vol 10) 1923 Mad 426 (432): 24 Cri L Jour 439: 46



**431.** Every appeal under "section 411-A, sub-section (2) or section 417, shall finally abate on *Abatement of appeals.* the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

[1882—S. 431.]

[a] *Substituted by the Criminal Procedure (Amendment) Act, 1948 (26 [XXVI] of 1948), S. 5 for "section 417."*  
[27-11-1943.]

#### OBJECTS AND REASONS.

"*Clause 431.* — We think that an appeal against a sentence of fine should not abate by reason of the death of the accused, because it is a matter which affects his estate. We have accordingly excepted this case." — S. C. R., 1898.

### CHAPTER XXXII.

#### OF REFERENCE AND REVISION.

**432.** A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court *Reference by Presidency* any question of law which arises in the hearing of any case pending *Magistrate to High Court.* before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

[1882 — S. 432.]

#### Section 430 — Note 1 (contd.)

Mad 382 (DB) \* (Vol 22) 1935 Pat 426 (427) : 37 Cri L Jour 58 : 14 Pat 392 (DB).

[4] Non-jail appeal dismissed under S. 421 — Dismissal is final and cannot be reconsidered. (Vol 22) 1935 Sind 84 (85) : 29 Sind L R 203 : 36 Cri L Jour 831 (FB) \* ('95) 19 Bom 732 (734) (DB) \* ('04) 1 Cri L Jour 329 (330) (DB) (Bom).

[5] Appellant or pleader not appearing, in spite of opportunity given at the hearing — Appeal dismissed — Dismissal, held, cannot be reconsidered. (Vol 13) 1926 Lah 196 (197) : 27 Cri L Jour 23 \* (Vol 22) 1935 Sind 84 (86) : 29 Sind L R 203 : 36 Cri L Jour 831 (FB) \* ('79) 4 Bom 101 (103) (DB) \* ('87) 1887 Pun Re No. 24 Cr, p. 48 (48) (DB).

[6] Non-jail appeal — Opportunity not given to appellant or his pleader to be heard — Dismissal of appeal is without jurisdiction and can be reconsidered. ('12) 13 Cri L Jour 710 (711) (DB) (Mad) \* (Vol 12) 1925 Lah 355 (356) : 26 Cri L Jour 1169 (DB).

[7] Parties or their pleaders not present in spite of opportunity given and consequently not heard — Finality of appellate judgment is not affected. (Vol 10) 1923 Pat 297 (298) : 26 Cri L Jour 419.

[8] Appeal dismissed merely for default of parties — Order can be reconsidered. ('09) 9 Cri L Jour 553 (554) : 5 Nag L R 76 \* (Vol 10) 1923 Mad 426 (432, 433) : 46 Mad 382 : 24 Cri L Jour 439 (DB) \* ('09) 10 Cri L Jour 287 (289) (DB) (Cal).

[9] No notice to parties regarding date and place of hearing — Order passed is open to reconsideration. (Vol 6) 1919 Cal 409 (410) : 46 Cal 60 : 20 Cri L Jour 265 (DB) \* ('09) 9 Cri L Jour 553 (554, 555) : 5 Nag L R 76.

[10] Convicted person preferring jail appeal and an appeal through pleader — Former appeal dismissed in ignorance of the latter — Order of dismissal cannot be set aside. (Vol 13) 1926 All 178 (179) : 48 All 208 : 28 Cri L Jour 1621. (High Court can set aside such order in revision.) \* ('06) 4 Cri L Jour 373 (373) (All) (Do.)

[11] The dismissal of an appeal under S. 421 on the ground that the appeal is barred by limitation is a valid judgment and is final. (Vol 10) 1923 Mad 426 (427) : 46 Mad 382 : 24 Cri L Jour 439 (DB) \* ('95) 19 Bom 732 (734) (DB).

[But see (Vol 21) 1934 All 206 (207) : 56 All 299 : 35 Cri L Jour 441.]

[12] A charged under Ss. 302 and 304, Penal Code — A acquitted of charge under S. 302 but convicted under

S. 304 — A's appeal against conviction dismissed — Provincial Government appealing against acquittal — *Held*, High Court could hear that appeal. (Vol 19) 1932 Nag 121 (123, 124) : 28 Nag L R 233 : 33 Cri L Jour 849 (FB) (Overruling AIR (Vol 19) 1932 Nag 73 : 33 Cri L Jour 728 (DB).)

[13] Appellate Court in course of hearing of appeal ordering that evidence of certain witnesses should be recorded by trial Court — Appellate Court then disposing of appeal though such evidence not recorded — Procedure, held, was irregular. (Vol 27) 1940 Oudh 396 (397) : 41 Cri L Jour 725.

[14] An appellate Court cannot dismiss an appeal till the decision of a civil suit between the parties. (Vol 5) 1918 All 247 (248) : 19 Cri L Jour 358 (359). (Appellate Court can postpone decision of appeal).

#### Section 431 — Note 1

[1] The object of introducing the exceptions to an appeal against a sentence of fine was to prevent the estate of the deceased appellant from being damaged. ('09) 9 Cri L Jour 103 (104) : 1908 Pun Re No. 24 Cr. \* (Vol 6) 1919 Lah 347 (348) : 1919 Pun Re No. 8 Cr : 20 Cri L Jour 214.

[2] Where the conviction of a deceased person is allowed to stand in appeal, the fine imposed upon him can be realised from his legal representatives. (Vol 28) 1941 Pat 526 (527) : 42 Cri L Jour 653.

#### SECTION 432 — SYNOPSIS.

1. Scope.
2. Reference by Presidency Magistrate.
3. "Any question of law."
4. "May give judgment . . . on such reference."
5. "Arises in the hearing of any case."

1. Scope.—[1] This section enables a Presidency Magistrate to refer for the opinion of the High Court any question of law which arises in respect of any proceedings pending before him. ('91) 15 Bom 530 (532) (DB). (Police Act, Act 48 [XLVIII] of 1860.) \* (Vol 5) 1918 Bom 70 (71) : 43 Bom 310 : 20 Cri L Jour 34 (DB). (Extradition Act.) \* ('85) 11 Cal 267 (270, 271) (DB). (Stamp Act.) \* ('06) 8 Bom L R 601 (606) (DB). (Bombay Abkari Act.) \* ('09) 10 Cri L Jour 543 (545) : 34 Bom 252 (DB). (Bombay Municipal Act.) \* (Vol 2) 1915 Cal 728 (728, 729) : 16 Cri L Jour 317 (DB). (Calcutta Municipal Act.) \* ('04) 1 Cri L Jour 69 (70) : 8 Cal W N 142 (DB). (Do.) \* ('13) 14 Cri L Jour 47 (48) (Mad). (Madras City Municipal Act.)

2. Reference by Presidency Magistrate. — [1] No Magistrate except a Presidency Magistrate has power

**433.** (1) When a question has been so referred, the High Court shall pass such order then as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

*Direction as to costs.* (2) The High Court may direct by whom the cost of such reference shall be paid.

[1882 — S. 433.]

**434.** [Power to reserve questions arising in original jurisdiction of High Court. Procedure when question reserved] — *Omitted by the Criminal Procedure Amendment Act, 1926 [XXVI] of 1943, S. 6.* [27-11-1943].

[1882 — S. 434.]

*Power to call for records of inferior Courts.*

**435.** (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the <sup>a</sup>[Provincial Government] in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying himself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court <sup>b</sup>[and may, while calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Section 432—Note 2 (*contd.*)

to make a reference to High Court under this section. ('08) 9 Cri L Jour 248 (248) : 1 Sind L R 4 (DB). (District Magistrate.) × ('80) 2 All 771 (772). (Sessions Judge.) × ('85) 1885 Rat 214 (214). (Do.) × ('08) 7 Cri L Jour 400 (401) (DB) (Cal). (Sub-divisional Magistrate.) × ('84) Oudh S C No. 71, p. 32. (Do.)

[2] Presidency Magistrate not making a reference under this section — High Court cannot direct him to state a case especially when he has acquitted the accused. (Vol 31) 1944 Bom 107 (108) : 1 L R (1944) Bom 302 : 45 Cri L Jour 612 (FB).

3. "Any question of law." — [1] Question of law includes questions relating to procedure, jurisdiction, construction and interpretation of provisions of law. ('92) 16 Bom 159 (161) (DB) × (1900) 4 Cal W N 26 (27) (DB) × (Vol 12) 1925 Cal 579 (580) : 26 Cr. L. J. 302 (DB).

[2] Reference on questions of fact is incompetent — Opinion of High Court on such question has not the force of a ruling. ('09) 9 Cri L Jour 248 (248) : 1 Sind L R 4 (DB).

[3] The Magistrate cannot refer questions of law if such questions have already been settled by judicial precedents binding on him even though he may doubt the soundness or correctness of such precedents. (Vol 17) 1930 Bom 49 (54) : 54 Bom 146 : 31 Cr. L. J. 633 (DB).

[4] Magistrate should state the question on which he requires the opinion of the High Court distinctly and in the form of a definite question of law. ('96) 1896 Rat 838 (839) × (Vol 3) 1916 Mad 655 (656) : 39 Mad 686 : 16 Cri L Jour 620 (DB).

4. "May give judgment . . . on such reference." — [1] In cases where it is undesirable for Magistrate to make reference in the form which involves giving a decision on law divorced from the facts, Magistrate should use second part of the section. By adopting this course duplicity of hearing in both Courts would probably be avoided and all the facts would be before the High Court once for all. (Vol 26) 1939 Cal 529 (530) : 40 Cri L Jour 782 : 1 L R (1939) 2 Cal 411 (S B). (Overruled on another point in (Vol 32) 1945 P C 156 : 72 Ind App 241 (P C).)

5. "Arises in the hearing of any case." — [1] No reference can be made when hearing of case has not commenced. ('99) 1 Bom LR 521 (522) (D B).

[2] The power of reference conferred upon Presidency Magistrate is confined only to such questions of law

which it is the Magistrate's duty to decide. He or not to refer any other question of law which is necessary for the determination of the case. (Vol 1929 Cal 756 (757) : 57 Cal 1042 : 31 Cr. L. J. 506 (C)

Section 433—Note 1

[1] Reference under S. 432 — High Court is strictly confined to the terms of the reference. It has power to deal with facts or to consider any other contentions that may have been raised in the case before the Magistrate. ('06) 3 Cri L Jour 365 (366) : 33 193 (DB).

[2] Where the High Court passes an order under this section and the Magistrate gives a decision in conformity with such order, it has no power to reconsider or reverse that order in case the matter comes up before appeal. ('93) 1893 Rat 638 (638).

[3] The decision of High Court on a reference under S. 432 is an opinion and not a "judgment, decree or order" within S. 205 (1) of the Government of India Act of 1935. (Vol 26) 1939 Cal 529 (530) : 40 Cri L 782 : 1 L R (1939) 2 Cal 411 (SB).

SECTION 435 — SYNOPSIS.

1. Scope.
2. What Courts cannot revise proceedings under this section.
3. "High Court," meaning of.
4. "May call for."
  5. High Court will not entertain application unless the lower Court has first been approached.
6. The proceedings must be that of a criminal Court.
7. Explanation.
8. Inferior Court must be within the local limits of the revising Court's jurisdiction.
9. "Any proceedings" may be called for.
10. Correctness, legality or propriety of any finding, sentence or order and regularity of any proceeding.
11. Extent of power of Sessions Judge or District Magistrate.
12. Extent of power of Sub-divisional Magistrate — Sub-section (2).
13. Revision not to be entertained by both Sessions Judge and the District Magistrate — Sub-section (4).
14. Bar of revision.

*Explanation.*—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.

(2) If any Sub-divisional Magistrate acting under sub-section 1 considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

[1882—S. 435; 1872—Ss. 294, 295, 320; 1861—Ss. 405, 434.]

[a] Substituted by A. O. for "Local Government".

[b] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 18 [XVIII] of 1923, S. 110.

[c] Sub-s. (3) was repealed, *ibid.*

#### Section 435 (contd.)

15. Order under the Code for execution of extradition warrant—Revision, if barred.

16. Second application for revision.

17. Dismissal for default—Restoration.

18. Duty of Court whose records are called for.

1. Scope.—[1] This section empowers the Courts specified therein to call for the records of inferior criminal Courts and examine them for the purpose of satisfying themselves as to whether a sentence, finding or order of such inferior Court is legal, correct or proper, or whether the proceedings of such inferior Courts are regular. (Vol 27) 1940 Sind 65 (65, 66) : 1 L R (1940) Kar 157 : 41 Cri L Jour 568 (DB) \* ('78) 2 Bom 564 (370) (SB) \* ('09) 10 Cri L Jour 385 (388) : 36 Cal 994 (DB) \* ('10) 11 Cri L Jour 476 (477) (All).

[2] The object of the section is to give superior criminal Courts a supervisory jurisdiction in order to correct miscarriage of justice. (Vol 25) 1938 Nag 394 (398) : 1 L R (1938) Nag 442 : 39 Cri L Jour 917 (DB) \* (Vol 15) 1928 All 287 (288) : 29 Cri L Jour 446 (DB).

[3] The aim of the Legislature is to secure the setting right of a patent error or defect, and not to give the Court a roving commission either in the direction of stamping with approval the proceedings of a lower Court, or in the direction of questioning about and looking to see if, possibly under a fair record, there lies some traces of a possible error. ('99) 1899 All W N 135 (136).

[4] Where a revision petition by a prisoner addressed to the High Court is handed over to the Jail Superintendent and the latter deliberately withholds it from the High Court and declines to forward it, the Jail Superintendent interferes with the administration of justice and is guilty of a criminal contempt. (Vol 32) 1945 Nag 33 (49) : 1 L R (1945) Nag 74 (DB).

[5] The records of a proceeding can be called for under this section even when the proceeding is pending before the inferior Criminal Court. (Vol 28) 1941 Rang 114 (115, 116) : 1941 Rang L R 82 : 42 Cri L Jour 573.

2. What Courts cannot revise proceedings under this section.—[1] An Additional Sessions Judge cannot exercise the powers of a Sessions Judge and act under this section. (1900-1902) 1 Low Bur Rul 119 (120) \* ('06) 3 Cri L Jour 88 (88) (DB) (Bom) \* ('76) 25 Suth W R Cr 21 (22) (DB) (Joint Sessions Judge under the Code of 1872.) \* ('85) 9 Bom 164 (168) (DB). (A joint Sessions Judge cannot exercise the powers of a Sessions Judge under Chap. XXXII.)

[2] A Special Judge cannot exercise the powers of a Sessions Judge and act under this section. ('05) 2 Cri L Jour 534 (538) (DB) (Cal).

[3] An order signed by another person "for" the District Magistrate, calling for a proceeding is an order without authority. (Vol 28) 1941 Rang 114 (115, 116) : 1941 Rang L R 82 : 42 Cri L Jour 573.

3. "High Court," meaning of.—[1] The "High Court" for the purposes of revision against an acquittal

in proceedings from the Santal Parganas is the Commissioner of Bhagalpur and not the High Court of Patna. (Vol 13, 1923 Pat 448 (450) : 3 Pat 83 : 24 Cri L Jour 59 (DB).

4. "May call for."—[1] Words "may call for record" show that superior Court may in its discretion call for and examine record of inferior Court. (Vol 51) 1944 Cal 17 (20) : 11 L R (1944) 2 Cal 1 : 45 Cri L Jour 309 (FB).

[2] The section does not indicate any method by which such superior Court should be apprised of the irregularities in the proceedings of the inferior Court. It cannot be limited to cases in which the Judge of such Court happens to have personal knowledge leading him to suspect an irregularity or to cases where an application is made by interested parties; it can act *suo motu* on any information and can call for the records irrespective of the source of the information. (Vol 18) 1931 Lah 107 (108) : 12 Lah 471 : 32 Cri L Jour 653 \* (Vol 17) 1930 Nag 61 (63) : 26 Nag L R 50 : 31 Cri L Jour 284. (High Court can interfere when a certain order, though legal, is improper.) \* ('78) 2 Weir 538 (538). (Information got outside Court—Powers under this section may be put in force on matters coming to the Court's knowledge on reliable information.) \* (1865) 3 Suth W R Cr 70 (70) (DB) \* ('81) 3 All 563 (564) (FD). (Official information.) \* (Vol 4) 1917 Lah 277 (278) : 18 Cri L Jour 121 : 1916 Pun Re No. 23 Cr.

[3] The application referred to in sub-s. (4) of the section is an application by a party to the proceeding, e.g., the accused, the Crown or the complainant. (Vol 20) 1933 All 678 (680) : 56 All 158 : 34 Cri L Jour 1115 (FB).

[See (Vol 23) 1936 All 852 (853) : 38 Cri L Jour 301.]

[4] An application by third person will be treated as supplying information to the Court on which it may act. (Vol 20) 1933 All 678 (680) : 56 All 158 : 34 Cri L Jour 1115 (FB) \* (Vol 18) 1931 Lah 145 (150) : 32 Cri L Jour 700 \* (Vol 14) 1927 All 38 (38) : 49 All 230 : 27 Cri L Jour 1130. (A Sessions Judge can take up at the instance of a private person any revision of Magistrate's order under S. 476.) \* ('09) 10 Cri L Jour 237 (238) : 2 Sind L R 25 (DB).

[5] The Court will act on information supplied by third person only if there are *a priori* grounds for apprehending that a miscarriage of justice has taken place. (Vol 10) 1923 All 85 (86) : 45 All 128 : 24 Cri L Jour 115 \* (Vol 18) 1931 Bom 140 (140) : 55 Bom 353 : 32 Cri L Jour 471 (DB). (Application for revision made by a third party to the High Court should not be entertained unless there is a very strong case.) \* (Vol 10) 1923 All 85 (86) : 45 All 128 : 24 Cri L Jour 115 \* (Vol 17) 1930 Oudh 497 (498) : 32 Cri L Jour 104 (DB).

[See however (Vol 20) 1933 All 678 (685) : 34 Cri L Jour 1115 (FB).]

[6] Held, that the procedure of a Magistrate applying to the District Magistrate for advice in regard to a

## Section 435—Note 4 (contd.)

question of jurisdiction in a case pending before him was erroneous and that he ought to have completed the inquiry himself and passed such order as to him seemed legal and proper. (12) 13 Cri L Jour 786 (786) : 37 Bom 144 (DB).

[7] Applicants in revision to High Court must be prepared with their cases and with the documents in support. The High Court will not send for the record unless there is sufficient material to justify that course and will not adjourn the case merely to enable a party to do what he should have done before prosecuting the application. (Vol 27) 1940 Bom 283 (283) : 42 Cri L Jour 52 (DB).

5. High Court will not entertain application unless the lower Court has first been approached. —[1] The established practice is that the High Court will not entertain an application for revision where the applicant could have applied to the Sessions Judge or the District Magistrate and has not done so. (Vol 29) 1942 Bom 148 (149) : I L R (1942) Bom 249 : 43 Cri L Jour 708 (DB) (Vol 29) 1942 Oudh 438 (439) : 43 Cri L Jour 739 (Vol 28) 1941 Oudh 268 (269) : 42 Cri L Jour 349 (41) 1941 Nag L Jour 619 (619) (Vol 27) 1940 Pat 299 (299) : 41 Cri L Jour 257 (DB) (Vol 20) 1933 All 283 (283, 284) : 55 All 261 : 34 Cri L Jour 1048 (Vol 6) 1919 All 258 (260) : 41 All 587 : 20 Cri L Jour 347 (Vol 11) 1924 Mad 228 (229) : 25 Cri L Jour 310. (Fact that order for compensation passed along with order of discharge is revisable by the High Court only does not alter the procedure.) (Vol 18) 1931 Mad 778 (779) : 55 Mad 178 : 33 Cri L Jour 48 (Vol 16) 1929 Nag 13 (14) : 29 Cri L Jour 618 (Vol 5) 1918 Pat 588 (589) : 19 Cri L Jour 559 : 3 Pat L Jour 302 (DB) (Vol 19) 1932 Sind 28 (29) : 25 Sind L R 395 : 33 Cri L Jour 298 (DB) (Vol 15) 1928 Sind 69 (70) : 28 Cri L Jour 978 : 22 Sind L R 201 (DB) (Vol 8) 1921 Cal 76 (76) : 48 Cal 534 : 22 Cri L Jour 650 (DB). (Case under S. 183.) (Vol 10) 1923 Cal 674 (674) : 50 Cal 423 : 25 Cri L Jour 526 (DB) (Vol 14) 1927 Lah 689 (690) : 28 Cri L Jour 815 : 8 Lah 514.

[2] The object of the practice is, firstly, to prevent the time of the High Court from being wasted and, secondly, to have the advantage of the opinion of the Sessions Judge or the District Magistrate in case the matter should eventually come before the High Court. (Vol 28) 1941 Oudh 268 (269) : 42 Cri L Jour 349 (Vol 20) 1933 All 283 (283, 284) : 55 All 261 : 34 Cri L Jour 1048.

[3] The object of the practice is not attained by the mere fact that an appeal was preferred to the District Magistrate. (Vol 20) 1933 All 283 (284) : 55 All 261 : 34 Cri L Jour 1048. (Dissenting from (Vol 6) 1919 All 258 : 41 All 587 : 20 Cri L Jour 347.)

[See however (Vol 14) 1927 Lah 689 (690) : 8 Lah 514 : 28 Cri L Jour 815. (Appeal to District Magistrate—High Court entertained revision though Sessions Judge was not moved.)]

[4] The practice does not oust the jurisdiction of the High Court to entertain a revision in contravention of the practice and the discretion of the High Court is not fettered by any hard and fast rule. (Vol 19) 1932 All 125 (126) : 33 Cri L Jour 528 : 54 All 331 (Vol 20) 1933 All 612 (613) : 55 All 857 : 34 Cri L Jour 1053 (Vol 3) 1916 Mad 713 (713) : 16 Cri L Jour 794 (Vol 19) 1932 Sind 28 (29, 31) : 25 Sind L R 395 : 33 Cri L Jour 298 (DB). (When the application is connected with another application which has been made and which can be entertained only by the High Court it may be entertained.) (Vol 21) 1934 Cal 139 (140) : 35 Cri L Jour 641 (DB). (Where the lower Court of concurrent jurisdiction, postponed the case and the matter was urgent.)

[See (Vol 31) 1944 Oudh 310 (311) : 46 Cri L Jour 756. (Order under S. 517, passed by Magistrate—High Court alone can set aside order on reference or revision—No revision before Sessions Judge—Revision direct to High Court held maintainable.)]

[5] Order under S. 117—Party concerned not proceeding under S. 125 but directly applying to High Court in revision—Revision held could be entertained. (Vol 11) 1924 Oudh 241 (241) : 24 Cri L Jour 616 (Vol 1) 1914 Oudh 305 (306) : 15 Cri L Jour 721 (Vol 4) 1917 All 428 (428) : 18 Cri L Jour 630 : 39 All 466.

[But see (05) 2 Cri L Jour 335 (335) (All). (Dissenting from in (Vol 11) 1924 Oudh 241 : 24 Cri L Jour 616.) (Vol 5) 1918 Nag 173 (173) : 19 Cri L Jour 900.]

[6] Application to High Court made directly—Application, if admitted must be disposed of on merits. (Vol 29) 1942 Oudh 438 (439) : 43 Cri L Jour 739 (Vol 20) 1933 All 678 : 56 All 158 : 34 Cri L Jour 1115 (FB) (Vol 28) 1941 Pat 548 (548) : 43 Cri L Jour 110 (Vol 28) 1941 Pat 444 (447) : 42 Cri L Jour 347 (Vol 27) 1940 Pat 299 (299) : 41 Cri L Jour 257 (Vol 10) 1923 Cal 674 (674) : 50 Cal 423 : 25 Cri L Jour 526 (DB).

[See also (Vol 29) 1942 Pat 150 (152) : 43 Cri L Jour 537.]

[7] According to R. 15 of Chap. IV of the Nagpur High Court Rules, an application for revision of an order passed by a criminal Court of appeal may be made directly to the High Court and the applicant need not first apply to the Sessions Court. (Vol 28) 1941 Nag 316 (317) : I L R (1941) Nag 606 : 43 Cri L Jour 24 (DB).

6. The proceedings must be that of a criminal Court. —[1] A Judge acting as a *persona designata* under special powers conferred on him as such is not a Court and his action cannot be revised. (Vol 17) 1930 Bom 486 (486) : 54 Bom 664 : 32 Cri L Jour 397 (DB). (The special power of the Chief Presidency Magistrate under S. 45, Bombay City Police Act, 1902, is not as criminal Court but as a *persona designata*.)

[2] A Judge or Magistrate who acts in his executive or administrative capacity cannot be considered to be acting as a Court. (Vol 30) 1943 Mad 470 (471) : 44 Cri L Jour 662 (Vol 28) 1941 Lah 71 (73) : I L R (1940) Lah 577 : 42 Cri L Jour 448 (D B) (Vol 27) 1940 Cal 30 (31) : I L R (1939) 2 Cal 532 : 41 Cri L Jour 442 (DB) (Vol 27) 1940 Oudh 416 (416) : 41 Cri L Jour 781 (Vol 26) 1939 All 124 (126, 127) : I L R (1939) All 178 : 40 Cri L Jour 305 (Vol 26) 1939 Sind 340 (341) : I L R (1940) Kar 102 : 41 Cri L Jour 179 (D B) (Vol 21) 1934 All 148 (149, 150) : 56 All 409 : 35 Cri L Jour 1296 (D B) (Vol 21) 1934 Cal 487 (488) : 36 Cri L Jour 68 (D B) (Vol 17) 1930 Lah 539 (543) : 32 Cri L Jour 296 (D B). (Order under S. 25 of the Police Act, 1861, passed by a first class Magistrate is passed in his executive capacity.) (Vol 17) 1930 Sind 162 (163, 164) : 31 Cri L Jour 952 : 24 Sind L R 389 (D B) (Vol 6) 1919 Mad 610 (610, 611) : 42 Mad 64 : 20 Cri L Jour 78 (DB). (Administrative orders passed by a District Magistrate cannot be revised by High Court.) (Vol 5) 1918 Lah 302 (302) : 19 Cri L Jour 621 : 1918 Pun Re No. 21 Cr (D B). (District Magistrate acting under S. 6 of Act 25 [XXV] of 1867 is not exercising jurisdiction as a Court, civil or criminal, but his proceedings are administrative.) (Vol 19) 1932 Pat 155 (155) : 34 Cri L Jour 346. (Order refusing to direct the removal of names from a register under the Criminal Tribes Act is passed in executive capacity.) (Vol 4) 1917 Oudh 170 (170) : 20 Oudh Cas 229 : 18 Cri L Jour 900. (Order under S. 17 of the Police Act appointing special constable is executive.)

[See (Vol 28) 1941 Pat 395 (397) : 42 Cri L Jour 504. (Magistrate's action in taking cognizance and transferring a case for trial is a judicial matter.)]

Section 435—Note 5 (*contd.*)

[But see ('10) 11 Cri L Jour 514 (515) : 13 Oudh Cas 198. (Executive act of revenue officer was revised—It is submitted that the decision is not correct.) \* ('06) 3 Cri L Jour 112 (114) (D B) (Cal). (Where High Court interfered with order of District Registrar in departmental enquiry.)]

[3] The following are not Courts within the meaning of this section :

(a) A Collector directing a departmental inquiry into the conduct of a Magistrate. (Vol 15) 1928 Bom 390 (391, 392) : 29 Cri L Jour 1063 (D B).

(b) A Collector acting in *butwara* proceeding and fixing a *mukhtear* for making false statements in the course of such proceedings. ('82) 10 Cal L Rep 14 (14) (D B).

(c) A District Superintendent of Police as such. ('78) 1878 Rat 133 (133).

[But see ('98) 22 Bom 715 (716) (D B).]

(d) A jury appointed under S. 138. ('87) 1887 Rat 336 (336).

(e) The Secretary to the Provincial Government acting under S. 4 of the Goondas Act. (Vol 11) 1924 Cal 698 (701) : 51 Cal 460 : 26 Cri L Jour 20 (D B) \* (Vol 13) 1926 Cal 961 (963) : 53 Cal 962 : 28 Cri L Jour 10 (D B).

(f) A District Registrar. ('12) 13 Cri L Jour 845 (845) (D B) (Bom) \* ('13) 14 Cri L Jour 144 (144) : 35 All 109.

[4] A Magistrate appointed under this Code is, when acting as such Magistrate judicially, a criminal Court whose action can be revised under this section. (Vol 28) 1941 Pat 548 (549, 550) : 43 Cri L Jour 110. (Magistrate acting under S. 198, Bihar and Orissa Municipal Act, acts judicially.) \* (Vol 20) 1933 Bom 59 (61) : 34 Cri L Jour 239 (D B). (Railways Act [9 [IX] of 1890], S. 113 — Under S. 113 Magistrate functions judicially — Hence his order can be revised by High Court under Criminal Procedure Code.) \* ('91) 1891 Pun Re No. 13 Cr, p. 41 (43) (D B). (Magistrate's proceedings under S. 113, Railways Act, 1890, *held*, open to revision.) \* (Vol 15) 1928 Bom 117 (119) : 52 Bom 262 : 29 Cri L Jour 513 (D B). (Order of Chief Presidency Magistrate under S. 7, Maintenance Orders Enforcement Act, 1921.) \* (Vol 7) 1920 Cal 734 (736) : 22 Cri L Jour 25 (D B). (An order by Magistrate under S. 202, Bengal Municipal Act (1884) is a judicial proceeding.) \* (Vol 5) 1918 Cal 485 (485) : 18 Cri L Jour 886 (D B). (Granting or withholding consent to withdrawal of prosecution under S. 494.) \* ('09) 11 Cri L Jour 17 (18) : 1909 Pun Re No. 9 Cr. (Order imposing fine under S. 283, Cantonment Code.) \* (Vol 20) 1933 Bom 485 (486) : 35 Cri L Jour 311 : 58 Bom 49 (D B). (Magistrate's order declining to stay proceedings in his Court is order covered by S. 435.)

[See (Vol 29) 1942 Lah 171 (172) : I L R (1942) Lah 510 : 43 Cri L Jour 747 (F B).]

[5] The following are Criminal Courts :

(a) A Magistrate appointed under S. 531, Calcutta Municipal Act, 1923, for the trial of offences under that Act. (Vol 12) 1925 Cal 1251 (1253) : 52 Cal 962 : 26 Cri L Jour 1533 (D B).

(b) A Magistrate acting under S. 221, Madras Local Boards Act. (Vol 15) 1928 Mad 495 (496) : 29 Cri L Jour 389 \* (Vol 11) 1924 Mad 669 (670) : 47 Mad 381 : 25 Cri L Jour 352 (D B) \* (Vol 10) 1923 Mad 275 (275) : 24 Cri L Jour 464.

(c) A Court acting under S. 3, Eastern Bengal and Assam Disorderly Houses Act. ('10) 11 Cri L Jour 112-113 (D B) (Cal).

(d) A Court acting under S. 80, Frontier Crimes Regulation [3 [III] of 1901]. (Vol 19) 1932 Lah 436 (437) : 13 Lah 585.

(e) A panchayat constituted under the Bihar and Orissa Village Administration Act, 1922. (Vol 28) 1941 Pat 169 (171) : 42 Cri L Jour 434.

[6] When a Magistrate though appointed under the Code does not act as such Magistrate but under a special power conferred by a special Act, which does not itself constitute him a criminal Court, his action is not that of a criminal Court and cannot be revised under this section. (Vol 23) 1941 Bom 184 (186) : I L R (1941) Bom 427. (Appellate Magistrate under S. 96, Bombay District Municipal Act, is *persona designata*, and against his decision no appeal or revision application lies to High Court.) \* (Vol 26) 1939 All 124 (126, 127) : I L R (1939) All 178 : 40 Cri L Jour 305. (Order under S. 4, U. P. Naik Girls' Protection Act, passed by District Magistrate without following rules as to enquiry prescribed by Criminal Procedure Code and Evidence Act—No revision.) \* (Vol 26) 1939 Sind 340 (341) : I L R (1940) Kar 102 : 41 Cri L Jour 179 (D B). (District Magistrate acting as an executive officer in the exercise of powers conferred upon him under S. 39A, Bombay District Police Act.) \* (Vol 20) 1933 All 281 (281, 283) : 34 Cri L Jour 1105. (U. P. Municipalities Act, 1916, S. 160 — District Magistrate entertaining and deciding appeal purporting to act under S. 160.) \* (Vol 16) 1929 All 931 (932) : 30 Cri L Jour 1159. (District Magistrate exercising jurisdiction under Election Rules does not act as criminal Court and no revision lies from his order.) \* (Vol 10) 1923 All 149 (149) : 45 All 135 : 24 Cri L Jour 597 (D B). (District Magistrate acting under Police Act is not a Court—No revision.) \* (Vol 34) 1947 All 51 (52) (D B). (Order of Town Rationing Officer, who is also Magistrate, under R. 81, Defence of India Rules cannot be revised.) \* ('07) 6 Cri L Jour 425 (426) (D B) (Bom). (Under S. 86, Bombay District Municipal Act [3 [III] of 1901], Magistrate hearing an appeal is merely an appellate authority having jurisdiction given by the Act.) \* (Vol 2) 1915 Mad 360 (362) : 38 Mad 581 : 15 Cri L Jour 593 (D B). (Presidency Magistrate authorized to enquire into the fitness of candidate for election under S. 413, Madras City Municipal Act, 1904, is not a Court subject to the superintendence of High Court.) \* (Vol 33) 1946 Bom 533 (535) : 48 Cri L Jour 152 (F B). (District Magistrate requiring person to let part of house to specified person under R. 81 (2), Defence of India Rules — Order is not one made by Court : (Vol 32) 1945 Bom 385, Overruled.)

[7] A village panchayat constituted under the U. P. Village Panchayat Act (6 [VI] of 1920) is not a criminal Court. (Vol 26) 1939 Oudh 143 (144) : 14 Luck 592 : 40 Cri L Jour 338 (D B). \* (Vol 11) 1924 All 265 (266, 267) : 46 All 167 : 25 Cri L Jour 1390 (D B).

[But see (Vol 13) 1926 All 27 (28) : 48 All 23 : 27 Cri L Jour 19 (D B)].

[8] A Justice of the Peace appointed under S. 22 of the Code is not a criminal Court. ('70) 14 Suth W R Cr 79 (80) (D B).

[9] An order passed by a civil or revenue Court under S. 195 or S. 476 of this Code is not an order of the criminal Court. (Vol 7) 1920 Nag 146 (147) : 16 Nag L R 23 : 21 Cri L Jour 270 (D B) \* (Vol 13) 1926 All 229 (230) : 27 Cri L Jour 278 \* ('06) 3 Cri L Jour 400 (407) : 28 All 554 (F B). (Overruling I Cri L Jour 120 : 26 All 1.) \* ('95) 2 Weir 602 (603) \* (Vol 14) 1927 Oudh 14 (15) : 28 Cri L Jour 16 \* (Vol 17) 1930 Oudh 58 (60) : 5 Luck 435 : 31 Cri L Jour 679. (Order under S. 478, as a revenue Court.) \* (Vol 8) 1921 Pat 94 (95) : 22 Cri L Jour 403 : 6 Pat L Jour 178 (D B). (Revenue Court.) \* (Vol 18) 1931 Pat 411 (412) : 33 Cri L Jour 147. (*Held*, that under S. 107, Government of India Act, High Court could interfere.) \* (Vol 8) 1916 Upp Bur 13 (14) : 17 Cri L Jour 82 : 2 Upp Bur Rul 83 \* ('04) 1 Cri L Jour 73 (76, 77) : 26 All 249 (F B) \* (Vol 2)

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915 Cal 457 (455); 19 Cri L Jour 286 (D B). (Order refusing sanction to prosecute by civil Court is not order of criminal Court.) \* (C9) 10 Cri L Jour 395 (397, 405); Sind L R 36 (S B). (Order of an Income-tax Collector passed under S. 476, Cr. P. C., is not an order passed by criminal Court.) \* (18) 14 Cri L Jour 197 (204); 40 Cal 477 (F B) \* (13) 14 Cri L Jour 496 (496); 7 Low Bur Rul 76. (Order passed by Small Cause Court—Order cannot be revised under Criminal Procedure Code.) \* (Vol 1) 1914 Bom 138 (140); 38 Bom. 642; 15 Cri L Jour 581 (F B). (Income-tax Officer is a revenue Court.) \* (05) 26 Mad 139 (141, 142) \* (08) 7 Cri L Jour 416 (417); 4 Low Bur Rul 138.

[But see (08) 8 Cri L Jour 331 (354); 4 Nag L R 140 \* (08) 7 Cri L Jour 261 (288); 1908 Pun Re No. 5 Cr (F B) \* (05) 2 Cri L Jour 54 (55) (D B) \* (01) 23 All 249 (251) \* (92) 15 Mad 224 (225) (D B) \* (06) 4 Cri L Jour 460 (464); 34 Cal 42 (D B).]

[10] A civil Court taking proceedings against a suitor for contempt is not a criminal Court. (Vol 6) 1919 All 46 (47); 42 All 26; 20 Cri L Jour 615.

[11] Court of Deputy Commissioner or Commissioner is not criminal Court—Hence, High Court cannot revise order of Deputy Commissioner under S. 480, or of Commissioner passed on appeal. (Vol 34) 1947 Nag 35 (36); 1 L R (1946) Nag 780; 47 Cri L Jour 529.

7. Explanation. — [1] There may be inferiority without subordination but there cannot be subordination without inferiority. (85) 9 Bom 100 (103) (D B).

[2] A District Magistrate is "inferior" to the Court of Session, though not subordinate to it. (Vol 30) 1943 Nag 236 (238); 1 L R (1943) Nag 687; 44 Cri L Jour 643 (Vol 3) 1916 Oudh 136 (137); 19 Oudh Cas 108; 17 Cri L Jour 223 \* (04) 1 Cri L Jour 1063 (1065); 1904 Pun Re No. 15 Cr (D B). (Even though specially empowered under S. 30.) \* (Vol 9) 1922 Lah 85 (86); 3 Lah 23; 23 Cri L Jour 577. (Even in the exercise of his appellate jurisdiction.) \* (Vol 12) 1925 All 591 (592); 26 Cri L Jour 1282 \* (Vol 6) 1919 All 258 (260); 41 All 587; 20 Cri L Jour 347.

[3] A first class Magistrate is inferior to the District Magistrate. (85) 9 Bom 100 (103) (D B) \* (94) 1894 Pun Re No. 10 Cr, p. 33 (34) \* (86) 12 Cal 473 (476) (F B). (Overruling 10 Cal 551.) \* (85) 8 Mad 18 (19) (F B) \* (Vol 3) 1916 Nag 97 (98); 12 Nag L R 94; 17 Cri L Jour 245. (Specially empowered Magistrate is inferior to District Magistrate.) \* (72-92) 1872-1892 Low Bur Rul 387 (388) \* (29) 30 Cri L Jour 490 (490) (Lah.) \* (85) 7 All 853 (854) (F B). (Overruling 1884 All W N 286.)

[4] As a Special Magistrate under Ordinance 2 [II] of 1942 derives his jurisdiction from the Ordinance he cannot be properly described as an "inferior criminal Court" and the High Court cannot revise his order. (Vol 30) 1943 Pat 18 (23); 22 Pat 175; 44 Cri L Jour 273 (F B) \* (Vol 33) 1946 P C 169 (172); 47 Cr. L Jour 933; 73 Ind App 199 (F C)

[5] An Additional District Magistrate is inferior to the latter for the purposes of this section. (09) 9 Cri L Jour 104 (104); 1908 Pun Re No. 25 Cr (D B).

[But see (Vol 6) 1919 Low Bur 43 (44); 20 Cr L Jour 494. (Dissenting from 9 Cri L Jour 104; 1908 Pun Re No. 25 Cr.)]

[6] A single Judge of the High Court is not inferior to the High Court and the proceedings of the former are not open to revision under this section. (09) 9 Cri L Jour 306 (307); 1909 Pun Re No. 1 Cr (D B) \* (09) 9 Cri L Jour 378 (379); 1909 Pun Re No. 4 Cr (D B) \* (Vol 13) 1926 Nag 323 (324); 27 Cri L Jour 339 (D B). [Conviction by a Judge of Judicial Commissioner's Court cannot be revised by that Court.] \* (Vol 10) 1923 All 473 (474); 45 All 143; 24 Cri L Jour 766 \* (87)

14 Cal 42 (48, 49) (F B) \* (Vol 10) 1923 Mad 426 (427); 46 Mad 382; 24 Cri L Jour 439 (D B).

[7] A Court cannot sit in revision upon its own record. (Vol 17) 1930 Mad 1001 (1002); 53 Mad 870; 32 Cri L Jour 429 (D B) \* (Vol 22) 1935 All 466 (468); 36 Cri L Jour 1286 \* (Vol 20) 1933 Mad 247 (248); 34 Cri L Jour 278 \* (12) 13 Cri L Jour 710 (711) (Mad).

[8] A Magistrate other than a District Magistrate specially empowered under S. 30, is "inferior" to the District Magistrate. (Vol 3) 1916 Nag 97 (98); 12 Nag L R 94; 17 Cri L Jour 245.

[See (Vol 6) 1919 Low Bur 146 (147); 9 Low Bur Rul 208; 19 Cri L Jour 801. (So assumed).]

[9] A Sub-divisional Magistrate holding inquiry under S. 176 of the Code is a Court inferior to the High Court. (Vol 27) 1940 Rang 68 (70); 1940 Rang L R 188; 41 Cri L Jour 470 (D B).

8. Inferior Court must be within the local limits of the revising Court's jurisdiction. — [1] When applied to a Court, the word "situate" refers to the place where the Court ordinarily sits. (06) 4 Cri L Jour 443 (444); 30 Mad 136 (D B).

[2] The dominions of the Sultan of Muscat are not within the local limits of the jurisdiction of the High Court of Bombay and the latter has no criminal revisional jurisdiction over the proceedings of His Majesty's Consul within such dominions. (1900) 24 Bom 471 (472) (D B).

[3] Mohurbunj is a place outside British India and the High Court cannot revise proceedings taken by the Superintendent of the Tributary Mahals for offences committed in Mohurbunj. (83) 9 Cal 288 (289) (D B). (As to whether Mohurbunj is within British India or not, see 8 Cal 985 (F B) and 7 Cal 523.)

[4] The special tribunal created by the Defence of India Act is not subject to the appellate jurisdiction of the High Court and its proceedings cannot be revised by the High Court. (Vol 5) 1918 Pat 103 (112, 113); 3 Pat L Jour 581; 19 Cri L Jour 833 (F B).

[5] Sanction to prosecute granted—Sessions Judge in revision staying proceedings against accused before Magistrate outside his local limits—Order is *ultra vires*. (03) 26 Mad 137 (139).

9. "Any proceeding" may be called for. — [1] A "proceeding" within S. 435 cannot be said to have any reference, by itself, to the commission or trial of an offence. (Vol 33) 1946 Bom 533 (534); 48 Cri L Jour 152 (F B).

[2] Provided a proceeding is that of a criminal Court, it would be open to revision, irrespective of the nature of the proceeding. (Vol 31) 1944 Mad 37 (38); 45 Cri L Jour 212 \* (Vol 11) 1924 Lah 617 (619); 25 Cri L Jour 82. (Following 8 Cri L Jour 260; 1908 Pun Re N. 9 Cr) \* (08) 8 Cri L Jour 260 (262); 1908 Pun Re No. 9 Cr. (D B) \* (91) 1891 Pun Re No. 13 Cr p. 41 (43) (D B).

[But see (84) 6 All 487 (488) (D B). (Non-judicial proceedings not revisable.) \* (06) 3 Cri L Jour 256 (261, 268) (D B) (Cal). (Order not judicial, no interference.) \* (92) 1892 All W N 236 (236, 237) (D B). (Order must be in a judicial proceeding.) \* (Vol 9) 1922 Lah 146 (147); 2 Lah 305; 23 Cri L Jour 113. (Court granting sanction under S. 197 is not a judicial act and no revision lies therefrom.)]

[3] A proceeding under S. 110, S. 514, S. 545 or S. 517 of the Code or a proceeding for granting bail, or an administrative proceeding can be revised under this section. (Vol 10) 1923 All 596 (596); 24 Cri L Jour 593 \* (05) 2 Cri L Jour 131 (132); 1905 Pun Re No. 15 Cr (D B) \* (83) 2 Weir 538 (539) \* (Vol 12) 1925 Nag 228 (250, 231); 25 Cri L Jour 1363. (Section 497 (5) or S. 498 does not bar operation of this section.) \* (10) 11 Cri L Jour 112 (113); 37 Cal 287 (D B). (Court as such passing administrative order.)



Section 435.—Note 9 (*contd.*)

[See also (Vol 31) 1944 Oudh 310 (311) : 46 Cri L Jour 756. (Order under S. 517, Cr. P. C. — Application against order made to High Court under S. 520—Application held could be treated as revision application under S. 435.) \*('06) 3 Cri L Jour 466 (467) (DB) (Cal).]

[4] A proceeding dealing with a question in the nature of a civil liability is not revisable under this section. (Vol 1) 1914 Lah 399 (400) : 1914 Pun Re No. 18 Cr : 15 Cri L Jour 601 (DB). (Proceeding under S. 36, Legal Practitioners Act, neither criminal nor civil — Neither procedure applies—High Court interferes under its general powers.) \*('99) 21 All 181 (182) (DB) \*('09) 10 Cri L Jour 443 (444) : 1909 Pun Re No. 11 Cr (DB) (Do.) \*('88) 1888 Pun Re No. 41 Cr p. 105 (105, 106) (DB). (Proceeding under S. 14, Legal Practitioners Act not a criminal proceeding.) \*('Vol 14) 1927 Sind 23 (23) : 21 Sind LR 51 : 27 Cri L Jour 1127 (DB). (Proceeding under S. 86, Bombay District Municipal Act, 1901, deals with question of civil liability—Therefore not revisable.) \*('07) 6 Cri L Jour 425 (426) (DB) (Bom) (Do.) \*('Vol 15) 1928 Bom 376 (376) : 29 Cri L Jour 1081 (DB). (Further revision to High Court does not lie from revisional orders passed on an order under Bombay City Municipal Act, S. 110—Matter is one relating to civil liability.)

[See (Vol 14) 1927 Cal 509 (511) : 54 Cal 532 : 28 Cri L Jour 407 (DB). (Order by a Criminal Court under the Calcutta Municipal Act, 1923, for demolition of buildings is in the nature of a mandatory injunction of a Civil Court.)]

[See also (Vol 12) 1925 Rang 140 (140) : 4 Upp Bur Bul 169 : 25 Cri L Jour 111. (Decision seems to assume that the proceeding must be a criminal one, but holds that proceeding under S. 488 is not of a civil nature.)]

[But see ('68) 5 Bom H C R 81 (82). (An order for maintenance is a judicial proceeding.) \*('Vol 6) 1919 Bom 158 (159) : 43 Bom 607 : 20 Cri L Jour 316 (DB). (High Court can revise order under Workman's Breach of Contract Act (1859), S. 2 (1).)]

[5] The order of a District Magistrate rejecting an application for transfer of a case under S. 528 is not open to revision. (Vol 23) 1935 Rang 446 (446) : 37 Cri L Jour 220 \*('Vol 11) 1924 Rang 100 (100) : 1 Rang 632 : 25 Cri L Jour 485.

10. Correctness, legality or propriety of any finding, sentence or order and regularity of any proceeding. — [1] The power of revision extends to considering not only the legality of the orders passed, but also the correctness or propriety of the proceeding or of the orders passed. (Vol 25) 1938 Rang 161 (165) : 39 Cri L Jour 642 (DB).

[2] The words "finding, sentence or order" are three separate matters on which a revision may be heard. Thus, it is perfectly legal for the Judge to order under S. 440 that the counsel should not be heard on the question of finding but that there should be hearing only on the question of sentence. (Vol 27) 1940 All 426 (426) : ILR (1940) All 539 : 41 Cri L Jour 876.

[3] As to the meaning of the words 'finding,' 'sentence,' 'order' and 'proceeding' as used in this section, see (Vol 31) 1944 Cal 17 (20) : I L R (1944) 2 Cal 1 : 45 Cri L Jour 309 (FB).

[4] In a pending case no question as to the correctness or propriety of a finding can arise; consequently the superior Court can examine the proceedings of the inferior Court only to satisfy itself as to their regularity. (Vol 29) 1942 Nag 38 (38) : I L R (1942) Nag 494 : 43 Cri L Jour 323.

[5] An order by a Magistrate refusing an application to "recommend" to the District Magistrate that the prosecution should be withdrawn is the only order that can be passed on such an application and there can be

no ground for revising such order even if it were revisable. (Vol 30) 1943 Lah 304 (305) : 45 Cri L Jour 162.

11. Extent of power of Sessions Judge or District Magistrate. — [1] Sessions Judge or District Magistrate can only refer the matter to the High Court under S. 438. (Vol 28) 1941 Pat 105 (106) : 42 Cri L Jour 340 \*('Vol 25) 1938 Cal 416 (416) : 39 Cri L Jour 569 (DB) \*('Vol 23) 1936 All 852 (853) : 38 Cri L Jour 301 \*('33) 1933 Mad W N 1031 (1032) \*('Vol 11) 1924 Cal 634 (635) : 26 Cri L Jour 65 (DB).

[2] Neither Sessions Judge nor District Magistrate has authority to hear the case as one judicially before him, and send his findings to the High Court. ('81) 1881 All W N 76 (76) \*('01) 3 Bom L R 677 (678) (DB). (Cannot record evidence.) \*('82) 1882 All W N 146 (147). (DB) \*('75) 12 Bom H C R 234 (236, 237).

[3] Sessions Judge or District Magistrate cannot quash proceedings. (Vol 16) 1929 Cal 204 (205) : 30 Cri L Jour 401 (DB) \*('1900) 23 Mad 540 (543) (DB) \*('72) 4 N W P H C R 6 (6).

[4] An order of inferior Court cannot be set aside by Sessions Judge or District Magistrate. (Vol 31) 1944 Oudh 310 (311) : 46 Cri L Jour 756 \*('Vol 28) 1941 Pat 105 (106) : 42 Cri L Jour 340 \*('Vol 23) 1936 All 852 (853) : 38 Cri L Jour 301 \*('Vol 12) 1925 Oudh 44 (45) : 25 Cri L Jour 359 \*('08) 7 Cri L Jour 304 (305) (All) \*('03) 26 Mad 130 (132) \*('Vol 9) 1922 Pat 554 (554) : 23 Cri L Jour 562 \*('Vol 11) 1924 All 675 (676) : 46 All 623 : 25 Cri L Jour 1168.

[5] Sessions Judge or District Magistrate cannot stay proceedings of inferior Court. (Vol 28) 1941 Rang 114 (116) : 1941 Rang L R 82 : 42 Cri L Jour 573 \*('05) 2 Cri L Jour 534 (538) (SB) (Cal) \*('03) 26 Mad 137 (139).

[6] District Magistrate has no power to revise the opinion of a subordinate Magistrate in case reported to him under S. 346. (Vol 29) 1942 Bom 84 (85, 86) : I L R (1942) Bom 198 : 43 Cri L Jour 562 (DB).

[7] Accused applying to Sessions Judge claiming Sessions trial under S. 409, Penal Code—Sessions Judge cannot direct Magistrate to commit accused to Sessions. (Vol 25) 1938 Cal 416 (416) : 39 Cri L Jour 569 (DB).

[8] Sessions Judge and District Magistrate have concurrent jurisdiction under this section—Application made to former—He cannot endorse same to latter, but must deal with it himself. ('90) 1890 Rat 525 (527) \*('03) 1903 Pun L R No. 151, p. 619.

[9] Subordinate Magistrate properly seized of case—Superior Magistrate or Sessions Judge cannot, except under this section or by withdrawal, take any action in regard to case. (1900) 27 Cal 798 (800) (DB) \*('Vol 16) 1929 Cal 457 (458) : 57 Cal 17 : 31 Cri L Jour 747 (DB) \*('Vol 21) 1934 Nag 39 (41) : 25 Cri L Jour 411.

12. Extent of power of Sub-divisional Magistrate—Sub-section (2).—[1] A Sub-divisional Magistrate acting under this section has power only to forward the record to the District Magistrate with such remark thereon as he thinks fit. He has no power to set aside the order. \*('Vol 28) 1941 Pat 169 (172) : 42 Cri L Jour 434 \*('37) 1937 Mad W N 182 (183) (DB).

13. Revision not to be entertained by both the Sessions Judge and the District Magistrate—Sub-section (4).—[1] When an application has been made to either the Sessions Judge or the District Magistrate, it cannot again be entertained by the other of them. ('06) 5 Cri L Jour 132 (132) (DB) (Mad) \*('13) 14 Cri L Jour 123 (124) (DB) (Cal) \*('03) 26 Mad 477 (478) (DB).

[See also (Vol 11) 1924 Oudh 241 (242) : 24 Cri L Jour 616. (As a Court of revision, the District Magistrate is not inferior to the Sessions Judge.)]

[2] The sub-section must be construed as meaning that where either the Sessions Judge or the District Magistrate has had an application in revision in the

**Section 435.—Note 13 (contd.)**

same matter moved by either party, the other Court would have no jurisdiction to hear a further application in the same matter even though made by another party. (Vol 17) 1930 All 257 (258) : 52 All 257 : 31 Cri L Jour 995.

[3] The words "further application" in this sub-section mean any other application in respect of the order in question passed by the inferior Court. ('13) 14 Cri L Jour 134 (135) : 1912 Pun Re No. 10 Cr (DB).

[4] The intention of the Legislature in enacting this sub-section is to avoid a conflict of opinion between Courts of co-ordinate jurisdiction and to prevent them from simultaneously exercising their powers of revision in such a way as would amount, as it were, to hearing an appeal by one of them from, or reviewing an order passed by the other of them. (Vol 17) 1930 All 257 (258) : 52 All 257 : 31 Cri L Jour 995 & ('08) 26 Mad 477 (478) (DB) & ('01) 4 Oudh Cas 119 (122).

[5] Principle of sub-section applies also to action taken *suo motu* — Revision entertained by District Magistrate — Sessions Judge cannot *suo motu* again revise proceedings. (Vol 1) 1914 Low Bur 260 (261) : 8 Low Bur Rul 361 : 17 Cri L Jour 497 & ('13) 14 Cri L Jour 134 (135) : 1912 Pun Re No. 10 Cr (DB) & ('02) 26 Mad 477 (478) (DB).

[6] District Judge ordering further inquiry on revision — Sessions Judge cannot make reference under S. 438. ('13) 14 Cri L Jour 134 (135) : 1912 Pun Re No. 10 Cr (DB).

[7] Word "made" means not only made but also "entertained and decided" — Application made to District Magistrate not entertained by him — Fresh application to Sessions Judge is not barred. (Vol 18) 1931 Mad 772 (773) : 54 Mad 342 : 32 Cri L Jour 1278 (DB).

[8] Application made to Sessions Judge rejected for want of prosecution — Fresh application to District Magistrate is not barred. ('01) 4 Oudh Cas 119 (122).

14. Bar of revision.—[1] A revision always lies unless the jurisdiction to revise is taken away by express words or by necessary implication. ('12) 13 Cri L Jour 31 (32) : 5 Sind L R 179 (DB) & (Vol 12) 1925 Rang 12 (13) : 2 Rang 321 : 26 Cri L Jour 289 & (Vol 19) 1932 Lah 436 (437) : 13 Lah 585 : 33 Cri L Jour 333.

[2] Section 22 of the Press Act, 1910, S. 15 of the Extradition Act, 1903, S. 16 of the Reformatory Schools Act, 1897, expressly take away the revisional powers of the Court in regard to the orders respectively specified therein. ('04) 1 Cri L Jour 609 (610) (DB) (Bom) & ('99) 21 All 391 (398) (FB).

[See (Vol 12) 1925 Rang 12 (13) : 2 Rang 321 : 26 Cri L Jour 289.]

[3] Order of Union Bench under Bengal Village Self-Government Act, 1919—By virtue of S. 98 of that Act revision under this Code is barred. (Vol 26) 1939 Cal 259 (260) : 1 I L R (1938) 2 Cal 523 : 40 Cri L Jour 359 (DB).

[4] Order not authorised by provision under which it is purported to be passed — Revision will lie. (Vol 1) 1914 Cal 22 (25) : 14 Cri L Jour 673 (675) : 41 Cal 400 (DB). (Extradition Act.)

[See (Vol 20) 1933 Lah 1019 (1020) : 35 Cri L Jour 505.]

[5] Where a remedy by way of appeal is available, the proper course will be to file an appeal and not to apply for revision. ('84) 1884 All W N 293 (293) & ('74) Oudh S C No. 2, p. 2.

15. Order under the Code for execution of extradition warrant — Revision, if barred.—[1] When a Magistrate orders the arrest of an accused person on

an extradition warrant under S. 7 of the Extradition Act (15 [XV] of 1903), he is only acting in his executive capacity and not as a Court and, therefore, the order cannot be interfered with in revision. (Vol 21) 1931 All 148 (149) : 56 All 409 : 35 Cri L Jour 1296 (DB) & (Vol 2) 1915 Cal 426 (427) : 42 Cal 793 : 16 Cri L Jour 31 (DB).

[But see (Vol 16) 1929 Bom 81 (83) : 53 Bom 149 : 30 Cri L Jour 772 (DB).]

[2] Section 15 of the Extradition Act only ousts the jurisdiction of the High Court to enquire into the propriety of warrant issued under S. 7, but leaves open the High Court's power to interfere with the Magistrate's action if it is proved that such action was consequent upon a warrant which was plainly illegal. ('05) 2 Cri L Jour 439 (443) (DB) (Bom). (Per Russel J.) & (Vol 9) 1922 Pat 442 (444) : 1 Pat 57 : 23 Cri L Jour 293 (DB).

[See also (Vol 1) 1914 Cal 22 (25) : 14 Cri L Jour 673 (675) : 41 Cal 400 (DB) & ('11) 12 Cri L Jour 322 (322) : 38 Cal 547 (DB).] (Magistrate acting under the Extradition Act is not subject to revisional jurisdiction.) & ('11) 12 Cri L Jour 346 (346) : 38 Cal 550 (DB). (High Court cannot interfere in the conduct of an enquiry held under S. 14, Extradition Act.)

[3] Warrant issued under S. 7, Extradition Act, by Political Agent—High Court has no power in revision to go into circumstances under which Political Agent was originally moved by High Court. ('09) 9 Cri L Jour 3 (4) : 1909 Pun Re No. 3 Cr.

16. Second application for revision.—[1] A fresh application for revision on the same grounds as those on which a previous application was based is not maintainable. (Vol 14) 1927 All 724 (725, 726) : 29 Cri L Jour 88 & (Vol 10) 1923 Mad 276 (276) : 23 Cri L Jour 746 & ('11) 12 Cri L Jour 407 (408) : 38 Cal 933 (DB) & (Vol 22) 1935 All 466 (468) : 38 Cri L Jour 1286 : 57 All 867 (DB) & (Vol 13) 1926 Nag 323 (324) : 27 Cri L Jour 339 (DB) & (Vol 20) 1933 Mad 247 (248) : 34 Cri L Jour 278 & ('13) 14 Cri L Jour 213 (214) : 40 Cal 584 (DB) & ('81) 3 All 545 (547) (FB) & ('12) 13 Cri L Jour 301 (301) (Low Bur).

[2] The principle will apply to all points which the party ought to have raised in the previous application. (Vol 12) 1925 Mad 993 (994) : 26 Cri L Jour 583 (DB). (In practice a party will be required to state all his grounds for revision in a single petition.) & (Vol 9) 1922 All 502 (502) : 45 All 11 : 23 Cri L Jour 496 (DB) & (Vol 11) 1924 All 558 (559) : 46 All 146 : 25 Cri L Jour 612 (DB).

[3] District Magistrate dealing with case in revision *suo motu* — He cannot subsequently entertain application on same grounds as those which formed subject-matter of previous application. ('12) 13 Cri L Jour 301 (301) (Low Bur).

[But see (Vol 2) 1915 Low Bur 7 (8) : 8 Low Bur Rul 377 : 16 Cri L Jour 711.]

[4] Reference by Sessions Judge under S. 438—High Court refusing interference — Subsequent application must be rejected. (Vol 14) 1927 All 724 (725) : 29 Cri L Jour 88.

[5] An application by an accused person for revision against his conviction does not bar an application by the complainant for enhancement of the sentence. (Vol 12) 1925 Mad 993 (994, 998) : 26 Cri L Jour 583 (DB).

17. Dismissal for default — Restoration.—[1] An application for revision dismissed for default can be restored to file and re-heard. ('09) 10 Cri L Jour 287 (289) (DB) (Cal) & (Vol 10) 1923 Mad 426 (433) : 46 Mad 382 : 24 Cri L Jour 439 (DB) & (Vol 15) 1928 Rang 288 (288, 289) : 30 Cri L Jour 749.

[But see ('12) 13 Cri L Jour 710 (711) (DB) (Mad) & (Vol 10) 1923 Mad 276 (276) : 23 Cri L Jour 746.]



<sup>a</sup>[436]. On examining any record under section 435 or otherwise, the High Court or the Power to order inquiry. Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any "person accused of an offence" who has been discharged :

<sup>c</sup>[Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of shewing cause why such direction should not be made.]

[1882—S. 437; 1872—S. 298; 1861—S. 435.]

[a] Re-numbered for S. 437 by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 117. [b] Substituted, *ibid*, for "accused person." [c] Inserted, *ibid*.

#### Section 435 (*contd.*)

18. Duty of Court whose records are called for. — [1] As a general rule no Court is at liberty to part with its judicial records except when called for by an appellate Court or on demand by a superior Court under this section. ('77) 1877 Rat 128 (128).

[2] The calling for the record under this section suspends the jurisdiction of the inferior Court to continue the proceedings. (Vol 12) 1925 Bom 247 (247) : 49 Bom 533 : 26 Cri L Jour 996 (DB) & ('05) 2 Cri L Jour 534 (538) (SB) (Cal) & ('66) 2 Bom H C R Or 384 (385) (DE).

[3] The Court whose records are called for cannot pass *ad interim* orders in the proceedings. ('06) 4 Cri L Jour 433 (435) (DB).

[4] The Court whose record is called for must send a letter of explanation along with the record. The letter must be signed by the Magistrate himself. ('97-98) 2 Cal W N 572 (573) (DB).

[5] In sending its explanation the inferior Court is not entitled to make any suggestion or representation which is not founded on the record. (Vol 17) 1930 Cal 379 (379) : 32 Cri L Jour 18 (DB).

[6] In sending explanation it is not open to the inferior Court to submit observations with a view to supplement or add to its judgment, though it is open to it to show cause and to submit its remarks in answer to the grounds urged by the petitioner. ('03) 7 Cal W N 359 (360) (DB).

[7] It is desirable that Courts should not place difficulties in the way of persons entitled to appeal, by calling for proceedings and taking action upon them within the period allowed for appeal. (Vol 4) 1917 Upp Bur 2 (3) : 2 Upp Bur Rul 124 : 18 Cri L Jour 355.

[8] Magistrate showing cause against rule issued must ask Legal Remembrancer to appear for him and must not address the Registrar of the High Court. ('79) 4 Cal 20 (22) (DB).

#### SECTION 436 — SYNOPSIS.

1. Scope.
2. Applicability of the section to Presidency Magistrates.
3. "Or otherwise."
4. What Courts can revise under this section.
- 4a. District Magistrate can order further inquiry into case discharged or dismissed by himself.
5. "May direct."
6. "District Magistrate by himself or by any of the Magistrates subordinate to him."
7. Further inquiry can be made only by a Magistrate.
8. "Further inquiry"—Meaning of.
9. Order can be only for a further inquiry.
10. Orders that can be revised.
11. Dismissal of complaint after issue of process.

12. Dismissal of complaint under S. 203 may be one after full inquiry.

13. "Person accused of an offence."

14. Contents of order for further inquiry.

15. Proviso — Notice.

16. Notice under S. 437—Order, if can be passed under S. 436.

17. Non-compliance with proviso—Effect.

18. Who can apply under this section.

19. Burden of proof.

20. Limitation for application under the section.

21. Effect of order for further inquiry.

22. Court moved under this section not to report to High Court.

23. District Magistrate moved under S. 436 can take cognizance of offence under S. 190.

24. Further inquiry into offence requiring sanction for prosecution.

25. Further inquiry by different Magistrate — De novo inquiry, if necessary.

26. Applicability of S. 556 to proceedings under this section.

27. Revision of order passed under this section.

1. Scope. — [1] This section relates to proceedings antecedent and preliminary to trials object being to ascertain whether or not a trial shall take place. (Vol 18) 1931 Rang 225 (232) : 9 Rang 239 : 32 Cri L Jour 950 (FB).

[See ('09) 9 Cri L Jour 192 (204, 205) : 32 Mad 220 (FB).]

[2] Accused discharged after evidence of complainant is heard — Proper course for complainant is to apply under the section for further inquiry and not to prefer a fresh complaint and then ask for the transfer of the case to another Magistrate. (Vol 22) 1935 All 59 (60) : 36 Cri L Jour 128.

[3] The powers of the High Court, Sessions Judge and the District Magistrate are co-extensive under this section. ('08) 9 Cri L Jour 192 (207) : 32 Mad 220 (FB).

2. Applicability of the section to Presidency Magistrates. — [1] Order of discharge or dismissal passed by Presidency Magistrate — No further inquiry can be ordered under this section in respect thereof. ('07) 5 Cri L Jour 83 (84) : 33 Cal 1282 (DB) & ('07) 6 Cri L Jour 400 (401) (DB) (Cal).

[See however ('99) 26 Cal 746 (748) (DB).]

3. "Or otherwise." — [1] The words "or otherwise" show that even in cases where the Courts specified in the section have occasion to examine the record of a subordinate Court otherwise than under S. 435, they may act under this section. Thus, where the record is before the Court on an appeal, the appellate Court can act under this section. (Vol 7) 1920 Pat 523 (525) : 21 Cri L Jour 660 & ('84) 10 Cal 263 (272) (DB). (Overruled in 12 Cal 473 (FB) on another point.)

## Section 436 (contd.)

## 4. What Courts can revise under this section.—

[1] A Deputy Magistrate placed in charge of the duties of the District Magistrate cannot act under the section. ('85) 11 Cal 236 (237) (DB).

[2] Additional Sessions Judge to whom a case is transferred by the Sessions Judge can direct a further inquiry under this section. (Vol 7) 1920 All 55 (56) : 21 Cri L Jour 293.

[3] An application under this section will not ordinarily be entertained by the High Court direct, when the party has not in the first instance moved the Sessions Judge or District Magistrate who have concurrent jurisdiction in the matter. ('06) 3 Cri L Jour 53 (54) : 28 All 268 \* ('08) 7 Cri L Jour 48 (48) : 30 All 116 \* ('90) 1890 Rat 499 (499) \* ('04) 1 Cri L Jour 1025 (1026) : 2 Low Bur Rul 306 \* (Vol 7) 1920 Nag 198 (198) : 21 Cri L Jour 863 \* ('87) 14 Cal 887 (888) (DB).

[4] Sessions Judge cannot refuse to exercise his powers under this section and refer the petitioner to District Magistrate. ('03) 1903 Pun L R No. 151 Cr, page 619 (619).

## 4a. District Magistrate can order further inquiry into case discharged or dismissed by himself.—

[1] Section 369 must be read as controlled by this section; a District Magistrate can make or order a further inquiry into a case in which an order of dismissal or discharge has been passed by himself. ('01) 28 Cal 102 (104) (DB) \* ('02) 1902 Pun Re No. 9 Cr, p. 24 (DB).

5. "May direct." — [1] The words "may direct" give a wide discretion to the Court to order a further inquiry. (Vol 33) 1946 Pat 432 (435) : 25 Pat 174 \* (Vol 19) 1932 Mad 216 (216) : 33 Cri L Jour 362 \* (Vol 1) 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174 \* ('05) 2 Cri L Jour 826 (829) : 3 Low Bur Rul 97 (FB) \* ('11) 12 Cri L Jour 184 (184) (Sind).

[2] Interference cannot be limited to questions of law. (Vol 25) 1938 Nag 394 (396) : 39 Cri L Jour 917 : I L R (1938) Nag 442 (DB) \* ('37) 1937 Mad W N 332 (332) \* (Vol 22) 1935 All 439 (440) : 36 Cri L Jour 526 \* (Vol 12) 1925 All 298 (299) : 26 Cri L Jour 736 \* ('86) 9 All 52 (56, 57) (FB).

[3] No limit is placed on the grounds on which a further inquiry may be ordered. (Vol 21) 1934 All 944 (945) : 36 Cri L Jour 202 \* ('09) 10 Cri L Jour 299 (300) : 32 Mad 214 \* ('90) 14 Mad 334 (336, 337) (FB).

[4] An order of dismissal or discharge can be interfered with on any of the grounds mentioned in S. 435. (Vol 25) 1938 Nag 394 (396) : 39 Cri L Jour 917 : I L R (1938) Nag 442 (DB) \* (Vol 18) 1931 Rang 225 (233) : 32 Cri L Jour 950 : 9 Rang 239 (FB) \* ('88) 15 Cal 608 (619) (FB) \* ('12) 13 Cri L Jour 764 (765) (Cal) \* ('11) 12 Cri L Jour 440 (440) (Mad) \* ('99) 2 Oudh Cas 363 (364).

[5] The revising Court can order a further inquiry in the interests of justice even in a case in which it would be difficult to say that the order of the subordinate Magistrate is incorrect or improper or illegal. ('86) 9 All 52 (58) (FB).

[But see (Vol 20) 1933 Lah 561 (563) : 34 Cri L Jour 735.]

[6] The following cases hold that the revising Court can interfere in revision under this section in cases in which the revisional Court is not satisfied with the legality, correctness, propriety or regularity of the proceedings in the lower Court. (Vol 26) 1939 Sind 71 (72) : 40 Cri L Jour 454 : I L R (1939) Kar 370 (DB) \* (Vol 24) 1937 Rang 120 (121) : 38 Cri L Jour 709.

[7] The power should under the section be used sparingly and with caution and circumspection. (Vol 31) 944 Nag 318 (319) : I L R (1945) Nag 486 : 46 Cri L Jour 195 \* (Vol 26) 1939 Sind 71 (72) : 40 Cri L Jour 454 : I L R (1939) Kar 370 (DB) \* (Vol 25) 1938 Nag 394 (397) : 39 Cri L Jour 917 : I L R (1938) Nag 442

(DB) \* ('86) 9 All 52 (59) (FB). (Especially in cases where questions involved are mere matters of facts.) \* (Vol 12) 1925 Pat 447 (448) : 26 Cri L Jour 866 \* ('87) 1887 Rat 328 (330) \* ('07) 5 Cri L Jour 16 (17) (DB) (Cal) \* ('26) 27 Cri L Jour 565 (565) (Lah) \* ('09) 10 Cri L Jour 160 (163) (Bom) \* (Vol 14) 1927 All 804 (806) : 49 All 879 : 28 Cri L Jour 601.

[8] The following are some of the tests laid down in the application of rule of caution and circumspection:

[a] Two views possible on the evidence—Revising Court taking the view other than one taken by trial Court—Order for further inquiry not justified merely on that ground. ('86) 9 All 52 (58, 59) (FB) \* (Vol 26) 1939 Sind 71 (72) : 40 Cri L Jour 454 : I L R (1940) Kar 370 (DB) \* (Vol 25) 1938 Nag 394 (396) : 39 Cri L Jour 917 : I L R (1938) Nag 442 (DB) \* ('37) 1937 Mad W N 332 (332) \* (Vol 16) 1929 All 588 (588) : 30 Cri L Jour 755 \* (Vol 4) 1917 Bom 227 (228) : 18 Cri L Jour 646 (DB) \* (Vol 3) 1916 Lah 299 (300) : 17 Cri L Jour 161 \* (Vol 13) 1926 Nag 117 (118) : 21 Nag L R 88 : 26 Cri L Jour 1537 \* (Vol 19) 1932 Oudh 114 (115) : 33 Cri L Jour 383 \* (Vol 12) 1925 Pat 599 (601) : 26 Cri L Jour 886.

[b] Order passed after full inquiry and recording of all evidence produced by prosecution should not be lightly set aside. ('37) 1937 Mad W N 332 (332) \* (Vol 12) 1925 Lah 439 (440) : 26 Cri L Jour 1508 \* (Vol 20) 1933 Lah 561 (563) : 34 Cri L Jour 735 \* (Vol 16) 1929 Nag 360 (361) : 31 Cri L Jour 279 \* (Vol 20) 1933 Bom 158 (161) : 57 Bom 430 : 34 Cri L Jour 564 (DB). (Overruled in (Vol 22) 1935 Bom 137 : 59 Bom 125 : 36 Cri L Jour 648 (FB) on another point.) \* (Vol 21) 1934 Bom 48 (52) : 35 Cri L Jour 644 (DB) \* (Vol 12) 1925 Oudh 36 (37) : 25 Cri L Jour 66 \* ('32) 33 Cri L Jour 571 (572) (Oudh).

[c] An order should not be lightly set aside unless there is clearly a miscarriage of justice. (Vol 10) 1923 Lah 158 (159) : 24 Cri L Jour 622 \* ('02) 25 Mad 546 (547) \* (Vol 7) 1920 Mad 284 (285) : 20 Cri L Jour 517.

[d] An order of discharge should not be set aside in revision except on grounds which would justify the setting aside of an order of acquittal. (Vol 6) 1919 Mad 851 (853) : 20 Cri L Jour 101.

[e] An order of discharge or order dismissing a complaint should not be set aside unless it is perverse or manifestly unreasonable or *prima facie* incorrect, or foolish, or perfunctory, or based on incomplete evidence, or unless the Magistrate has not considered the evidence, or has not recorded sound reasons for the discharge. (Vol 29) 1942 Pesh 24 (25) : 43 Cri L Jour 611 \* (Vol 26) 1939 Pesh 16 (16) : 40 Cri L Jour 674 \* (Vol 25) 1938 Nag 394 (397) : 39 Cri L Jour 917 : I L R (1938) Nag 442 (DB) \* (Vol 24) 1937 Lah 682 (683) : 38 Cri L Jour 1072 \* ('36) 37 Cri L Jour 89 (90) (Nag.) \* (Vol 17) 1930 All 257 (259) : 52 All 257 : 31 Cri L Jour 995 \* (Vol 21) 1934 All 944 (946) : 36 Cri L Jour 202 \* ('32) 33 Cri L Jour 571 (572) (Oudh) \* (Vol 7) 1920 Mad 284 (285) : 20 Cri L Jour 517 \* (Vol 12) 1925 Pat 599 (601) : 26 Cri L Jour 886 \* (Vol 19) 1932 Oudh 114 (115) : 33 Cri L Jour 383 \* (Vol 22) 1935 Oudh 176 (177) : 10 Luck 192 : 35 Cri L Jour 1236. (Manifestly unreasonable.) \* (Vol 11) 1924 Cal 229 (229) : 25 Cri L Jour 191 (DB). (*Prima facie* incorrect.) \* (Vol 16) 1929 Cal 755 (755) : 31 Cri L Jour 475 (DB). (Do.) \* (Vol 20) 1933 Lah 561 (563) : 34 Cri L Jour 735 \* (Vol 7) 1920 Lah 380 (381) : 1 Lah 216 : 21 Cri L Jour 521. (Perfunctory.) \* (Vol 5) 1918 Pat 350 (351) : 19 Cri L Jour 263. (Do.) \* ('88) 13 Bom 376 (381, 382). (Not recording sound reasons for discharge.)

[f] It is not necessary that, before further inquiry is ordered, the order of the lower Court should be perverse or foolish or based on incomplete evidence. (Vol 15)

Section 436 — Note 5 (*contd.*)

1928 Pat 12 (12) : 28 Cri L Jour 857 \* (Vol 17) 1930 Oudh 415 (416) : 32 Cri L Jour 128.

(g) An order of discharge should not be interfered with in revision unless it is unreasonable. (Vol 26) 1939 Sind 71 (73) : 40 Cri L Jour 454 : ILR (1939) Kar 370 (DB).

(h) Further enquiry should not be ordered on bare possibility of an offence being disclosed on further evidence; there must be something to show that further evidence is available which would support a charge for such offence. ('37) 1937 Mad W N 871 (878) \* (Vol 10) 1923 Mad 59 (60) : 23 Cri L Jour 592.

(i) Further inquiry should not be ordered where it would be useless to do so. ('99) 1 Bom L R 852 (853).

[See ('40) 1940 Mad W N 871 (872).]

(j) Before a further inquiry is ordered it is to be seen whether an appeal from an acquittal would be accepted on the evidence as it stands. ('05) 2 Cri L Jour 116 (118) (Lah).

(k) In cases not triable only by Court of Session District Magistrate need not refer the case to the High Court instead of making an order himself. ('05) 2 Cri L Jour 826 (829) : 3 Low Bur Rul 97 (FB).

[9] An order of dismissal of a complaint under S. 203 cannot be set aside merely because the Magistrate has adopted a procedure which is to be deprecated. (Vol 28) 1941 Pat 419 (421) : 42 Cri L Jour 332.

[10] In determining whether an order is foolish or perverse it is to be seen whether taking a broad view of the material points requiring decision in the case and on consideration of the whole of the evidence, the order could have been passed by a Judge fairly and impartially dealing with the case. (Vol 20) 1933 Lah 561 (563) : 34 Cri L Jour 735.

[11] Order of lower Court carefully written and correct — No further inquiry should be ordered. (Vol 26) 1939 Sind 71 (72, 75) : 40 Cri L Jour 454 : I L R (1939) Kar 370 (DB) \* (Vol 13) 1926 Pat 34 (35, 36) : 26 Cri L Jour 1394 \* (Vol 17) 1930 Nag 108 (110) : 31 Cri L Jour 417. (This is so even where there is misappropriation of evidence but no irregularity or illegality.) \* (Vol 21) 1934 Oudh 327 (328) : 10 Luck 187 : 35 Cri L Jour 1151.

[12] The fact that the further inquiry may "embarrass a pending civil suit" is not a valid ground for refusing to direct such inquiry if there are otherwise valid grounds therefor. (Vol 19) 1932 Mad 216 (216) : 33 Cri L Jour 862.

[13] Magistrate in proceeding with inquiry under S. 202 intensively cross-examining witnesses to get at the truth — No legal ground for ordering further inquiry. (Vol 26) 1939 Pesh 16 (17) : 40 Cri L Jour 674.

[14] Lower Court not only discharged accused but ordered prosecution of complainant under S. 476 of the Code — Further inquiry cannot be ordered. (Vol 1) 1914 Cal 312 (313) : 15 Cri L Jour 16 (DB).

[See also (Vol 30) 1943 Sind 149 (151) : I L R (1943) Kar 105 : 44 Cri L Jour 728 (DB).]

[15] Sessions Judge or District Magistrate under this section can set aside orders of discharge on the ground of misappreciation or misapprehension of evidence. (Vol 25) 1938 Nag 394 (397, 398) : 39 Cri L Jour 917 : I L R (1938) Nag 442 (DB) \* ('37) 1937 Mad W N 332 (333) \* ('09) 9 Cri L Jour 192 (206) : 32 Mad 220 (FB). (Overruling 7 Cri L Jour 267.) \* (Vol 3) 1916 Sind 63 (63) : 10 Sind L R 68 : 17 Cri L Jour 349 (DB).

[But see (Vol 17) 1930 Nag 108 (110) : 31 Cri L Jour 417.]

6. "District Magistrate by himself or by any of the Magistrates subordinate to him." — [1] The section does not authorize a Sessions Judge to direct a further inquiry by a particular Magistrate.—The Sessions

Judge can only direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make further inquiry, leaving the District Magistrate to exercise a discretion as to the selection of any Magistrate subordinate to him. (Vol 24) 1937 Sind 86 (89, 90, 91) : 38 Cri L Jour 596 (DB) \* (Vol 17) 1930 Mad 953 (954) : 32 Cri L Jour 226 \* ('83) 10 Cal 207 (208) (DB) \* ('08) 7 Cri L Jour 493 (494) : 4 Low Bur Rul 233 \* ('09) 9 Cri L Jour 192 (208) : 32 Mad 220 (FB) \* ('55) 10 Bom 131 (142, 143).

[See however (Vol 21) 1934 Bom 48 (56) : 35 Cri L Jour 644 (DB).]

[2] The section contemplates that the further inquiry may be made by another Magistrate. ('09) 9 Cri L Jour 192 (208) : 32 Mad 220 (FB) \* ('87) 1887 Rat 328 (329).

[3] Different Magistrate from the one who originally made the inquiry may be asked to hold further inquiry, but such Magistrate must be equally empowered with the former, and not an inferior Magistrate. (Vol 3) 1916 Nag 97 (99) : 12 Nag L R 94 : 17 Cri L Jour 245.

[4] Where further inquiry has been ordered by the Sessions Judge into a complaint dismissed under S. 203 the District Magistrate cannot transfer the case from the Magistrate who dismissed the complaint. ('07) 5 Cri L Jour 112 (116) (DB) (Cal).

[5] The Sessions Judge can direct the District Magistrate to make a further inquiry even though the latter exercises powers under S. 30 of the Code. ('04) 1 Cri L Jour 1063 (1066) : 1904 Pun Re No. 15 Cr (DB).

[6] The District Magistrate himself can order a further inquiry even where a subordinate Magistrate specially empowered under S. 30 orders a discharge and even though the case is exclusively triable by a Court of Session. (Vol 3) 1916 Nag 97 (99) : 12 Nag L R 94 : 17 Cri L Jour 245.

7. Further inquiry can be made only by a Magistrate.—[1] The "further inquiry" in cases of discharge must be made only by a Magistrate and cannot be deputed to the police. ('84) 2 Weir 239 (239, 240).

[2] Sessions Judge directing further inquiry—Magistrate cannot order fresh investigation by police and dismiss the complaint merely on their report. (Vol 5) 1918 Lah 123 (128) : 19 Cri L Jour 436.

8. "Further inquiry" — Meaning of. — [1] The words "further inquiry" are not restricted to an inquiry under S. 202. (Vol 16) 1929 Pat 644 (649, 650) : 9 Pat 155 : 31 Cri L Jour 961 (D B) \* (Vol 18) 1931 Pat 50 (52) : 32 Cri L Jour 548.

[2] Complaint dismissed after initial examination of the complainant, and an order for further inquiry passed—Magistrate to whom the case is sent back may direct an inquiry under S. 202. (Vol 25) 1938 Pat 369 (371, 372) : 39 Cri L Jour 778 (D B).

[3] The words "further inquiry" are not limited to "inquiry upon further materials or further or additional evidence;" it may involve merely a reconsideration of the evidence already taken without any additional investigation of facts. (Vol 25) 1938 Mad 742 (743) : 39 Cri L Jour 828 \* (Vol 25) 1938 Pat 369 (371, 372) : 39 Cri L Jour 778 (D B) \* ('85) 10 Bom 131 (147) (D B) \* ('91) 14 Mad 334 (338) (F B). (8 Mad 336 Overruled.) \* ('91) 6 C P L R 11 (12) \* ('01) 14 C P L R 161 (162) \* ('99) 1 Bom L R 222 (223) (D B) \* ('88) 15 Cal 608 (620) (F B). (This must be taken to overrule 10 Cal 207, 10 Cal 1027 and 12 Cal 522 on this point.) \* ('01) 1901 Pun Re No. 2 Cr, p. 4 (5) (D B) \* (Vol 3) 1916 Sind 63 (63) : 10 Sind L R 68 : 17 Cri L Jour 349 (D B) \* ('86) 9 All 52 (56) (F B). (Overruling 1883 All W N 150.)

[See (Vol 9) 1922 Lah 409 (410) : 24 Cri L Jour 474.

[4] A further inquiry may be ordered on the same materials as were already before the lower Court. (Vol 12)

Section 436 — Note 8 (*cont'd.*)

1925 All 293 (299) : 26 Cri L Jour 736 \* ('88) 15 Cal 609 (317, 321, 324, 326) (F B) \* ('86) 9 All 52 (56) (F B). (Overruling 1883 All W N 150.) \* (Vol 13) 1926 Nag 117 (118) : 21 Nag L R 88 : 26 Cri L Jour 1537 \* (Vol 12) 1925 Oudh 36 (37) : 25 Cri L Jour 66 \* ('88) 2 C P L R 82 (83, 84) \* ('01) 1901 Pun Re No. 2 Cr, p. 4 (5) (D B) \* ('01) 14 C P L R 161 (162) \* ('90) 14 Mad 334 (336) (F B).

[But see ('87) 1887 Pun Re No. 63 Cr, p. 174 (175) (D B).]

[5] No additional evidence disclosed and no allegation made that such evidence exists — Further inquiry may be ordered. ('85) 10 Bom 131 (147) (D B) \* ('91) 1891 Pun Re No. 14 Cr, p. 49 (50) (D B) \* (Vol 21) 1934 All 944 (945) : 36 Cri L Jour 202 \* ('05) 2 Cri L Jour 826 (829) : 8 Low Bur Rul 97 (F B) \* (Vol 20) 1933 Lah 561 (563) : 34 Cri L Jour 735.

[See (Vol 12) 1925 Oudh 180 (181) : 26 Cri L Jour 959.]

[6] On the order of a further inquiry, the inquiry recommences where it was left off at the time when the improper order of discharge was passed. (Vol 25) 1938 Mad 742 (743) : 39 Cri L Jour 828.

9. Order can be only for a further inquiry. — [1] An order under this section can only be for a further inquiry. (Vol 27) 1940 Nag 128 (128) : 41 Cri L Jour 312 \* (Vol 25) 1938 Mad 112 (112) : 39 Cri L Jour 281 \* (Vol 19) 1932 Lah 362 (363) : 13 Lah 599 : 33 Cri L Jour 341.

[2] No direction should be made to fetter the lower Court's judicial discretion in any way. ('92) 15 Mad 39 (40) (DB).

[3] No directions or instructions can lawfully be given as to the manner in which the lower Court should conduct the inquiry. (Vol 25) 1938 Cal 22 (22) : 39 Cri L Jour 292 (DB) \* (Vol 18) 1931 Rang 225 (233) : 9 Rang 239 : 32 Cri L Jour 950 (F B) \* (1900) 2 Bom L R 586 (588).

[4] The revising Court cannot direct the subordinate Magistrate to do following things :—

(a) To hold a trial of the accused person. (Vol 18) 1931 Rang 225 (233, 234) : 9 Rang 239 : 32 Cri L Jour 950 (F B) \* (28) 29 Cri L Jour 572 (572) (Pat) \* ('90) 1890 All W N 147 (148) (DB) \* (Vol 7) 1920 All 266 (267) : 22 Cri L Jour 49 \* ('89) 2 C P L R. 82 (85) \* ('05) 2 Cri L Jour 128 (129) (Lah).

(b) To frame a particular charge and try the accused on that charge. (Vol 28) 1941 Mad 65 (65) : 42 Cri L Jour 102 \* (Vol 19) 1932 Lah 362 (363) : 13 Lah 599 : 33 Cri L Jour 341 \* ('09) 9 Cri L Jour 192 (208) : 32 Mad 220 (F B).

[See (Vol 32) 1945 Mad 424 (425) : ILR (1946) Mad 136 : 47 Cri L Jour 230.]

(c) To summon the accused to answer the complaint dismissed under S. 203. (Vol 27) 1940 Nag 128 (128) : 41 Cri L Jour 312 \* (Vol 25) 1938 Cal 22 (22) : 39 Cri L Jour 292 (DB) \* (Vol 15) 1928 All 684 (685) : 30 Cri L Jour 631 \* (Vol 12) 1925 Cal 576 (577) : 26 Cri L Jour 305 (DB) \* ('28) 29 Cri L Jour 372 (372) (Pat.).

(d) To restore a complaint dismissed under section 203 to file. (Vol 25) 1938 Mad 112 (112) : 39 Cri L Jour 281.

(e) To issue a warrant against the accused. ('97) 1 Cal W N 650 (651) (DB) \* (Vol 4) 1917 Cal 185 (186) : 18 Cri L Jour 1001 (DB).

(f) Except for the most cogent reasons to summon witnesses whom the Magistrate has considered unnecessary. (Vol 15) 1928 All 684 (685) : 30 Cri L Jour 631.

(g) To take evidence. ('07) 6 Cri L Jour 357 (358) (DB) (Cal).

[5] The following case holds that an order for *retial de novo* is not illegal. (Vol 21) 1934 Bom 48 (48, 57) : 35 Cri L Jour 544 (DB).

[6] A reference to the High Court by a District Magistrate to have an order of discharge set aside before he makes an order for further inquiry is unnecessary and uncalled for. ('05) 2 Cri L Jour 826 (829) : 8 Low Bur Rul 97 (F B).

[7] A District Magistrate under this section cannot quash a charge framed by a Sub-Magistrate. (Vol 28) 1941 Mad 804 (804).

10. Orders that can be revised.—[1] Order of dismissal of complaint under S. 203 — Direction for further inquiry can be made. (Vol 28) 1941 Pat 144 (144) : 42 Cri L Jour 358 \* (Vol 27) 1940 Nag 128 (128) : 41 Cri L Jour 312 \* ('02) 29 Cal 457 (459) (DB).

[2] Order of discharge of a person accused of any offence — Direction for further inquiry can be made. (Vol 28) 1941 Oudh 409 (411) : 42 Cri L Jour 536 \* (Vol 26) 1939 Cal 220 (224, 225) : 40 Cri L Jour 349 : I L R (1939) 1 Cal 407 (SB) \* (Vol 26) 1939 Sind 38 (39) : 40 Cri L Jour 287 : I L R (1939) Kar 228 (DB) \* (Vol 23) 1936 Nag 153 (156) : 37 Cri L Jour 983 : I L R (1936) Nag 92 \* (Vol 23) 1936 Nag 87 (88) : 37 Cri L Jour 715 : I L R (1936) Nag 54 \* (Vol 8) 1921 Pat 474 (475) \* (Vol 22) 1935 Pat 52 (53) : 14 Pat 299 : 36 Cri L Jour 650 (DB) \* (Vol 4) 1917 All 150 (151) : 18 Cri L Jour 706. (Discharge under S. 253.) \* (Vol 6) 1919 All 66 (67) : 42 All 128 : 20 Cri L Jour 778 \* ('86) 9 All 52 (55, 56) (F B) \* ('02) 1902 Pun L R Cr No. 68, p. 287 (288) \* ('04) 1 Cri L Jour 355 (356) (DB) (Cal).

[3] Orders not falling within the categories mentioned in the section cannot be revised. (Vol 31) 1944 Pesh 48 (48) : 46 Cri L Jour 156 (DB).

[4] The following orders are not within the section :—

(a) Order agreeing with a referred charge-sheet put in by the police. (Vol 19) 1932 Mad. 673 (674, 675) : 33 Cri L Jour 785.

(b) Order declining to proceed with a case on the ground of want of jurisdiction. (Vol 20) 1933 Mad 413 (416) : 34 Cri L Jour 800.

(c) Order under S. 249 of the Code. (Vol 21) 1934 All 17 (19) : 35 Cri L Jour 564 \* ('12) 13 Cri L Jour 860 (861) : 1913 Pun Re No. 9 Cr.

(d) Order under S. 247 of the Code. (Vol 12) 1925 Oudh 44 (45) : 25 Cri L Jour 359.

(e) Order which though ostensibly one of discharge is really one of acquittal. (Vol 12) 1925 Oudh 60 (60) : 25 Cri L Jour 39 \* (Vol 5) 1918 All 335 (336) : 19 Cri L Jour 596 \* (Vol 4) 1917 Mad 899 (899) : 17 Cri L Jour 80 (DB) \* (Vol 20) 1933 Nag 78 (79) : 29 Nag L R 201 : 34 Cri L Jour 519 \* (Vol 21) 1934 Oudh 327 (328) : 10 Luck 187 : 35 Cri L Jour 1151 \* ('10) 11 Cri L Jour 350 (350) (Mad) \* ('11) 12 Cri L Jour 364 (369) : 1911 Pun Re No. 10 Cr (SB).

(f) Order of acquittal. ('04) 1 All L Jour 415 (416) \* ('84) 10 Cal 551 (553) (DB). (Overruled in 12 Cal 473 (F B) on another point.) \* (Vol 5) 1918 Cal 943 (944) : 18 Cri L Jour 834 (DB) \* (1900) 1900 Pun Re No. 19 Cr, p. 44 (44) \* (1900) 23 Mad 225 (226) (DB) \* (Vol 2) 1915 Mad 23 (23) : 38 Mad 585 : 15 Cri L Jour 673 (DB) \* (Vol 6) 1919 Pat 70 (71) : 20 Cri L Jour 526. (Acquittal under S. 363, Penal Code—Order for fresh enquiry to ascertain if offences under S. 366 or S. 368 had been committed is improper.) \* ('84) 1884 All W N 13 (14).

(g) Order framing a charge. (Vol 20) 1933 Rang 214 (214) : 34 Cri L Jour 1083.

(h) Order directing case reported under S. 173 of the Code to be struck off. ('90) 1890 Rat 521 (522).

(i) Order directing withdrawal of complaint. (Vol 32) 1945 Mad 58 (59) : 46 Cri L Jour 421.

[5] Order dismissing complaint under S. 203—Order can be revised by District Magistrate or by Sessions Judge irrespective of the consideration whether order is

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legal or illegal. (Vol 5) 1918 Pat 270 (271) : 19 Cri L Jour 874 : 3 Pat L Jour 346 (DB).

[6] A Magistrate has no authority to direct a further inquiry in respect of a person against whom no complaint had been made and no regular process issued. (12) 13 Cri L Jour 304 (304) : 39 Cal 238 (DB).

11. Dismissal of complaint after issue of process. — [1] A dismissal of a complaint after process has been issued to the accused person is not a dismissal under S. 203, but is an order discharging the accused under S. 253, sub-s. (2). (Vol 21) 1934 All 51 (52) : 56 All 285 : 35 Cri L Jour 418.

12. Dismissal of complaint under S. 203 may be one after full inquiry. — [1] Dismissal under S. 203 made after full inquiry under S. 202 — Section applies. (Vol 22) 1935 All 439 (440) : 36 Cri L Jour 526.

13. "Person accused of an offence." — [1] The substitution of the words "person accused of an offence" for the words "any accused person" by the amendment of 1923 makes it clear that the section has no application to cases of persons proceeded against under Chapter VI or under S. 133, S. 145 or S. 488 of the Code. (Vol 11) 1924 Rang 207 (208) : 2 Rang 30 : 25 Cri L Jour 1146 \* (Vol 18) 1931 All 53 (54) : 32 Cri L Jour 570 : 53 All 148 \* (Vol 15) 1928 All 755 (756) : 51 All 408 : 30 Cri L Jour 63 \* (Vol 18) 1931 Lah 185 (185) : 32 Cri L Jour 21 \* (Vol 12) 1925 Oudh 736 (736) : 26 Cri L Jour 1251 \* (Vol 15) 1928 Rang 292 (293) : 30 Cri L Jour 709.

[See (Vol 12) 1925 Cal 262 (263) : 25 Cri L Jour 679 (DB).]

## 14. Contents of order for further inquiry. —

[1] An order for further inquiry should state the reasons therefor. (Vol 29) 1942 Mad 653 (654) : 44 Cri L Jour 70 \* (Vol 21) 1934 All 51 (52) : 56 All 285 : 35 Cri L Jour 418 \* ('90) 1890 All W N 147 (148) (DB) \* (Vol 1) 1914 Mad 676 (677) : 14 Cri L Jour 572 \* (Vol 13) 1926 Nag 374 (375) : 27 Cri L Jour 728 \* ('99) 2 Oudh Cas 363 (364) \* (Vol 5) 1918 Upp Bur 55 (56) : 3 Upp Bur Rul 16 : 19 Cri L Jour 14 \* ('09) 9 Cri L Jour 303 (304) (DB) (Cal) \* ('09) 9 Cri L Jour 446 (447) : 3 Sind L R 7 (DB) \* ('88) 15 Cal 608 (621) (FB).

[See (Vol 16) 1929 Nag 360 (361) : 31 Cri L Jour 279.]

[2] The reasons should arise upon materials to be found in the record and not upon extraneous matter which may have come to the knowledge of the Magistrate from other sources. ('90) 1890 All W N 147 (148) (DB).

[3] The order for further inquiry need not give the grounds at length and in detail inasmuch as it is likely to affect subsequent proceedings to the prejudice of the accused. (Vol 16) 1929 Lah 28 (29) : 30 Cri L Jour 590 \* (Vol 5) 1918 Upp Bur 55 (56) : 3 Upp Bur Rul 16 : 19 Cri L Jour 14 \* ('06) 3 Cri L Jour 120 (121) : 32 Cal 1090 (D13) \* ('08) 7 Cri L Jour 493 (494) : 4 Low Bur Rul 233.

[4] It is not for the revising authority under this section to say whether the accused is guilty or otherwise. The only thing he should see is whether there were sufficient reasons for the discharge or the dismissal. (Vol 8) 1921 Lah 283 (283).

[5] The revising Court, instead of merely criticising the order of discharge, should give its own reasons for holding that some particular offence has been made out *prima facie* by the prosecution evidence. ('37) 1937 Mad W N 729 (730).

15. Proviso—Notice. — [1] Under the present section as amended in 1923, by the addition of the proviso, it is imperative that before further inquiry is ordered in the case of a person who has been discharged, an opportunity should be given to the accused to show cause why further inquiry should not be

ordered. (Vol 21) 1934 All 51 (52) : 56 All 285 : 35 Cri L Jour 418 \* (Vol 20) 1933 Lah 1018 (1019) : 35 Cri L Jour 404 \* (Vol 20) 1933 Sind 299 (299) : 34 Cri L Jour 1157 (DB) \* (Vol 6) 1919 All 373 (374) : 20 Cri L Jour 769.

[But see (Vol 21) 1934 Rang 181 (182) : 35 Cri L Jour 1408. (Section is directory).]

[2] The proviso does not apply to the dismissal of a complaint under S. 203. (Vol 12) 1925 All 537 (538) : 47 All 722 : 26 Cri L Jour 1176 \* (Vol 14) 1927 Bom 426 (436) : 28 Cri L Jour 575 (DB) \* (Vol 15) 1929 Pat 508 (509) : 30 Cri L Jour 1030 (DB) \* (Vol 14) 1927 Oudh 264 (264) : 2 Luck 573 : 28 Cri L Jour 650 \* (Vol 22) 1935 Pesh 141 (141) : 36 Cri L Jour 1384 \* (Vol 14) 1927 Mad 19 (21) : 49 Mad 918 : 28 Cri L Jour 129 (FB) \* (Vol 16) 1929 Pat 230 (231) : 30 Cri L Jour 1069 \* (Vol 15) 1928 Mad 1198 (1198) : 29 Cri L Jour 1059.

[3] Magistrate directed to hold further inquiry in the case of dismissal of a complaint should not order notice before such further inquiry is held. (Vol 15) 1926 Mad 1198 (1198) : 29 Cri L Jour 1059 \* (Vol 12) 1925 Cal 576 (577) : 26 Cri L Jour 305 (DB) \* (Vol 6) 1919 Pat 567 (569) : 20 Cri L Jour 843 : 4 Pat L Jour 456 (DB) \* ('28) 29 Cri L Jour 572 (572, 573) (Pat).

16. Notice under S. 437 — Order, it can be passed under Section 436. — [1] Where a notice is issued under S. 437 to the accused to show cause why he should not be committed to the Court of Session, the Court is not prevented on cause being shown to order a further inquiry under S. 436. ('91) 18 Cal 75 (80) (DB).

## 17. Non-compliance with proviso — Effect. —

[1] A disregard of the proviso is an illegality that is likely to seriously prejudice an accused person who is ordered to be proceeded against. (Vol 21) 1934 All 51 (52) : 56 All 285 : 35 Cri L Jour 418 \* (Vol 20) 1933 Lah 1018 (1018) : 35 Cri L Jour 404 \* (Vol 20) 1933 Sind 299 (299) : 34 Cri L Jour 1157 (DB).

[But see (Vol 21) 1934 Rang 181 (182) : 35 Cri L Jour 1408.]

## 18. Who can apply under this section. — [1]

A private prosecutor is entitled to move the Court under this section. ('70) 6 Beag L R App 46 (47) (DB).

[2] An order of discharge of an accused person may also be interfered with at the instance of a third party where such order has the effect of operating to his detriment, or at the instance of an Inspector of Police. (Vol 16) 1929 Cal 319 (321) : 56 Cal 1023 : 31 Cri L Jour 315 (DB). (Third party.) \* (Vol 33) 1946 Sind 75 (78) : 47 Cri L Jour 221 : ILR (1946) Kar. 177 (DB). (Inspector of Police.)

[3] Complaint dismissed under S. 203, owing to absence of complainant — He will not afterwards be heard to say that matter should be sent back for further inquiry. (Vol 15) 1928 Cal 569 (570) : 29 Cri L Jour 798 (DB).

19. Burden of proof. — [1] It is not for the accused person who has been discharged to convince the Court of revision why further inquiry should not be ordered against him. It is for the prosecution to show why it should be ordered. (Vol 20) 1933 Lah 561 (564) : 34 Cri L Jour 735.

20. Limitation for application under the section. — [1] There is no limitation for an application under this section. (Vol 22) 1935 All 59 (60) : 35 Cri L Jour 128 \* (Vol 10) 1923 Nag 100 (100) : 23 Cri L Jour 745.

[2] The Court will not order a further inquiry in a case which comes up after a long delay after the occurrence and where there is no prospect of any public advantage in re-opening the case. ('10) 11 Cri L Jour 582 (583) : 4 Sind L R 53 (DB) \* (Vol 10) 1923 Mad 134 (134) : 23 Cri L Jour 600 (DB).

<sup>a</sup>[437]. When, on examining the record of any case under section 435 or otherwise, Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged :

Provided as follows :—

- (a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made ;
- (b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence.

[1882—S. 436; 1872—S. 296, para 2; 1861—S. 435.]

[a] Re-numbered for S. 436 by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923) S. 117.

#### Section 436 (contd.)

21. Effect of order for further inquiry. — [1] Further inquiry ordered — Lower Court is bound to carry out the order. (85) 10 Bom 131 (138, 140) (DB).

[2] Form of enquiry is left to the discretion of the Magistrate. If the Magistrate considers it fit to do so, he can forthwith proceed to summon the accused and try him and need not hold a preliminary inquiry before doing so. (Vol 25) 1938 Cal 22 (22) : 39 Cri L Jour 292 (DB) (Vol 25) 1938 Pat 369 (371) : 39 Cri L Jour 778 (DB).

[But see (28) 29 Cri L Jour 572 (573) (Pat).]

[3] Magistrate cannot only frame a charge but also proceed to hold a trial. (Vol 21) 1934 Mad 209 (210) : 35 Cri L Jour 691 (Vol 7) 1920 Pat 563 (566) : 21 Cri L Jour 594 : 5 Pat L Jour 47.

[4] Magistrate can determine what evidence he should allow to be called on behalf of the prosecution and may re-hear the same evidence called at the first hearing or hear other evidence if available. (Vol 18) 1931 Rang 225 (234) : 9 Rang 239 : 32 Cri L Jour 950 (FB).

[5] Magistrate may discharge the accused under S. 253 of the Code after further inquiry, or dismiss the complaint. (86) 9 All 52 (56) (FB) (Vol 25) 1938 Mad 112 (112) : 39 Cri L Jour 281 (281) (Vol 8) 1921 Cal 201 (201) : 22 Cri L Jour 528 (DB) (Vol 7) 1920 Pat 523 (525) : 21 Cri L Jour 660.

[6] A Subordinate Magistrate directed to make further inquiry into a warrant-case under this section has all the powers provided for by Chap. XXI of the Code. (Vol 18) 1931 Rang 225 (234) : 9 Rang 239 : 32 Cri L Jour 950 (FB) (84) 7 Mad 454 (457) (DB) (07) 6 Cri L Jour 279 (279) : 4 Low Bur Rul 42.

[7] Further inquiry ordered into a complaint dismissed for default—The Magistrate, instead of holding further inquiry as directed summoned accused and proceeded with the trial — Held, that action of the Magistrate was irregular but not bad for want of jurisdiction. (Vol 16) 1929 Pat 469 (471) : 8 Pat 537 : 31 Cri L Jour 146 (DB).

22. Court moved under this section not to report to High Court. — [1] There is nothing in S. 438 to limit the power of reference to proceedings under S. 435 other than those to which S. 436 is applicable. But save in exceptional circumstances, it will be the duty of the District Magistrate or Sessions Judge to act under S. 436 and not report the case under S. 438. (Vol 24) 1937 Oudh 81 (82) : 37 Cri L Jour 1128 : 12 Luck 523 (Vol 18) 1931 Rang 225 (233) : 9 Rang 239 : 32 Cri L Jour 950 (FB) (89) 1898 Rat 938 (938) (88) 1898 Pun Re No. 7 Cr. p. 11 (11) (01) 14 C P L R 161 (162).

23. District Magistrate moved under Section — can take cognizance of offence under Section 190

[1] Magistrate moved under this section is not mer bound to order a further inquiry but can himself take cognizance of the offence under S. 190 and order accused to be placed on his trial by a competent Magistrate. (Vol 18) 1931 Pat 50 (52) : 32 Cri L Jour 548

[2] Ordinarily the revising authority should confine himself to the exercise of those powers only as have been specified in this and the next section. (Vol 1926 Nag 374 (376) : 27 Cri L Jour 728.

24. Further inquiry into offence requiring sanction for prosecution. — [1] Person accused of particular offence discharged—Facts disclosing another offence requiring sanction or a complaint for its prosecution—No further inquiry can be ordered into latter offence in the absence of such sanction. (Vol 16) 19 All 374 (375) : 30 Cri L Jour 874.

25. Further inquiry by different Magistrate. *De novo* inquiry, if necessary. — [1] Further inquiry coming before Magistrate other than one who held former inquiry — Provisions of S 350, sub-s. (1) will apply — Magistrate can, in his discretion, act on evidence already recorded or take evidence *de novo*. (Vol 25) 1938 Mad 742 (743) : 39 Cri L Jour 828 (Vol 1) 1930 Mad 983 (984) : 32 Cri L Jour 236.

26. Applicability of Section 556 to proceedings under this section. — [1] Section 556 applies to proceedings under this section—Magistrate who presided at a meeting of the Municipal Board which directed the prosecution of the accused is disqualified from making an order for further inquiry against the accused. (13 Cri L Jour 30 (30) : 5 Sind L R 137 (DB).

27. Revision of order passed under this section. — [1] An order for further inquiry passed by a Sessions Judge or District Magistrate is open to revision by the High Court and the High Court can, in such revision consider the facts as well as the question of law involved in order to determine whether the Sessions Judge or District Magistrate has properly exercised his discretion under this section. (37) 1937 Mad W N 332 (333) (V 1) 1914 Mad 424 (424) : 15 Cri L Jour 373 (1900) 19 Pun L R Cr, p. 68 (69).

[2] The High Court would be slow to interfere with discretion exercised by Sessions Judge or District Magistrate. (Vol 24) 1937 Sind 86 (90) : 38 Cri L Jour 51 (DB) (Vol 2) 1915 All 86 (87) : 16 Cri L Jour 139.

#### SECTION 437 — SYNOPSIS

1. Scope.

2. "On examining the record of any case under Section 435 or otherwise."



Section 437 (*contd.*)

3. "The Sessions Judge or District Magistrate."
4. "That such case is triable exclusively by the Court of Session."
5. "Improperly discharged."
6. "Order him to be committed for trial."
7. "Upon the matter of which he has been . . . . . improperly discharged."
8. Only an order of discharge can be interfered with under this section.
9. Contents of order.
10. Previous refusal to interfere, whether bars subsequent interference.
11. Proviso (a).
12. Proviso (b).
13. Proper course where Sessions Judge or District Magistrate finds that the case is one triable by a Court of Session.
14. Effect of order for commitment.
15. Review of order under this section.
16. Revision of order under this section.
17. Applicability of Section 556 to proceedings under this section.
18. Applicability to Presidency Magistrates.

1. Scope.—[1] This section is mainly intended to meet case where Magistrate wrongly considers that he has jurisdiction to try a case. (Vol 22) 1935 All 366 (367, 368) : 36 Cri L Jour 1103.

2. "On examining the record of any case under Section 435 or otherwise." — [1] Words "or otherwise" mean "in any other way provided by the Code" and include examination of the record during the trial of another person who had been accused along with the discharged person and examination of the record in appeal. (Vol 17) 1930 Cal 61 (63) : 31 Cri L Jour 260 (DB).

3. "The Sessions Judge or District Magistrate." — [1] Application under this section should be made to the Sessions Judge or the District Magistrate and not to the High Court. See ('87) 1887 All W N 105 (105).

[2] High Court can under Ss. 439 and 423 order a commitment to the Court of Session of a person who has been improperly discharged. ('83) 6 All 40 (42) \* ('02) 27 Bom 84 (90) (D B) \* ('91) 16 Bom 580 (584) (D B) \* (Vol 3) 1916 Cal 477 (477) : 17 Cri L Jour 202 (DB).

[3] In cases transferred to an Additional Sessions Judge by the Sessions Judge, the Additional Sessions Judge can exercise the powers conferred upon a Sessions Judge by this section, by virtue of S. 438, sub-s. (2). (Vol 26) 1939 Bom 372 (373) : 40 Cri L Jour 951 (D B).

[4] District Magistrate is not barred from acting under this section because he is specially empowered under S. 30 of the Code to deal with the case himself. ('04) 1 Cri L Jour 502 (503) (D B) (Lah).

4. "That such case is triable exclusively by the Court of Session." — [1] In order that this section may apply it is necessary that the case is "triable exclusively by a Court of Session". (Vol 13) 1926 Cal 1090 (1091) : 53 Cal 645 : 27 Cri L Jour 1139 (D B) \* (Vol 6) 1919 Mad 45 (46) : 42 Mad 561 : 20 Cri L Jour 379 (D B) \* (Vol 17) 1930 Mad 103 (104) : 31 Cri L Jour 459 \* ('08) 8 Cri L Jour 47 (48) (All) \* (Vol 1) 1914 Bom 4 (5) : 15 Cri L Jour 292 (D B).

[2] Words in quotation refer to the eighth column of the second schedule to the Code. ('04) 1 Cri L Jour 502 (503) (D B) (Lah) \* (Vol 6) 1919 Low Bur 146 (147) : 9 Low Bur Rul 208 : 19 Cri L Jour 801.

[3] Charge not exclusively triable by Court of Session intimately connected with charge exclusively so triable

and forms part of same transaction — "Case" is exclusively triable by Court of Session and commitment may be ordered under this section in respect of charge exclusively triable by Court of Session, and in respect of other charges. (Vol 13) 1926 Cal 1090 (1091) : 53 Cal 645 : 27 Cri L Jour 1139 (D B) \* (Vol 1) 1914 Bom 4 (4, 5) : 15 Cri L Jour 292.

5. "Improperly discharged." — [1] Sessions Judge or the District Magistrate has a wide discretion to act under this section. ('04) 1 Cri L Jour 519 (524) : 26 All 564 (DB).

[2] Magistrate can consider and weigh the evidence but only from this point of view whether there are sufficient grounds for commitment and not whether there are sufficient grounds for conviction. (Vol 24) 1937 Pesh 12 (13) : 38 Cri L Jour 427 \* (Vol 22) 1935 Bom 137 (138) : 59 Bom 125 : 36 Cri L Jour 643 (FB) \* ('07) 6 Cri L Jour 406 (410, 411) (Cal) \* ('30) 1930 Mad W N 683 (684).

[3] If Magistrate considers and weighs the evidence as if he is a trial Court he will be usurping a jurisdiction which he has not got and a discharge based upon such a consideration of the evidence would be improper. (Vol 30) 1943 Pesh 89 (90) : 45 Cri L Jour 167 (DB) \* (Vol 24) 1937 All 373 (373) : 38 Cri L Jour 659 \* (Vol 12) 1925 Mad 1061 (1063, 1064) : 48 Mad 874 : 26 Cri L Jour 1570 \* (Vol 22) 1935 All 366 (368) : 36 Cri L Jour 1103 \* ('13) 14 Cri L Jour 529 (532) (Mad) \* (Vol 22) 1935 Bom 137 (138) : 59 Bom 125 : 36 Cri L Jour 643 (FB) \* (Vol 14) 1927 Rang 74 (78, 79) : 4 Rang 471 : 23 Cri L Jour 219.

[4] If on consideration whether there is a *prima facie* case for trial, Magistrate is of opinion that no reasonable Judge or jury would on the evidence convict the accused, he can discharge him otherwise he should commit him to the Court of Session. (Vol 12) 1925 Mad 1061 (1063) : 48 Mad 874 : 26 Cri L Jour 1570 \* (Vol 22) 1935 Bom 137 (138, 139) : 59 Bom 125 : 36 Cri L Jour 643 (FB) \* (Vol 7) 1920 Pat 591 (592) : 21 Cri L Jour 202.

[5] Circumstances under which an order of discharge under S. 209 will be set aside under this section are similar to those in which an order of discharge under S. 253 will be set aside. (Vol 25) 1938 Nag 394 (397, 398) : 39 Cri L Jour 917 : ILR (1938) Nag 442 (DB) \* (Vol 21) 1934 Pesh 52 (53) : 35 Cri L Jour 1282 (DB).

[But see (Vol 17) 1930 Oudh 415 (416) : 32 Cri L Jour 128.]

[6] Order of discharge can be interfered with, on the ground that the revising Court disagrees with the appreciation of the evidence by the Magistrate. (Vol 22) 1935 Bom 137 (139) : 59 Bom 125 : 36 Cri L Jour 643 (FB). (Overruling (Vol 20) 1933 Bom 158 : 57 Bom 430 : 34 Cri L Jour 564 in so far as it lays down that the superior Court cannot interfere unless the order is perverse, etc.) \* ('37) 1937 Mad W N 1240 (1240) \* (Vol 22) 1935 All 366 (368) : 36 Cri L Jour 1103 \* (Vol 17) 1930 Oudh 415 (416) : 32 Cri L Jour 128.

[But see (Vol 25) 1938 Nag 394 (398) : 39 Cri L Jour 917 : ILR (1938) Nag 442 (DB) \* (Vol 12) 1925 Pat 599 (601) : 26 Cri L Jour 886 \* (Vol 24) 1937 Pesh 12 (12) : 38 Cri L Jour 427 \* (Vol 21) 1934 Pesh 52 (53) : 35 Cri L Jour 1282 (DB).]

[7] Revising Court must consider all the grounds upon which the order of discharge is based, including a consideration of the evidence which has not been believed or held to be sufficient to establish a *prima facie* case for trial. ('03) 7 Cal W N 77 (79) (DB) \* ('30) 1930 Mad W N 683 (683).

[8] It is the duty of the revising Court to see whether the basis of the Magistrate's order of discharge, is correct or not. (Vol 26) 1939 Bom 372 (374) : 40 Cri L Jour 951 (DB).

Section 437—Note 5 (*contd.*)

[9] Fact that the case is one exclusively triable by a Court of Session, is not by itself a sufficient ground for ordering a commitment. ('84) 2 Weir 260 (261).

[10] Fact that the case is so important that it should be tried by a Court of Session, is not a sufficient ground for commitment. (Vol 3) 1916 Pat 233 (233): 1 Pat L Jour 97: 17 Cri L Jour 330 (DB) \* ('08) 8 Cri L Jour 47 (48) (All).

[11] Magistrate considered and weighed evidence properly and from correct point of view and discharged accused—Superior Court is not justified in setting order aside under this section. (Vol 11) 1924 Cal 639 (640): 51 Cal 849: 26 Cri L Jour 117 (DB).

[12] District Magistrate is not justified in ordering commitment unless it appears that the Magistrate had no ground for discrediting the evidence adduced for the Crown and that evidence related to the facts sufficient to form the basis for a conviction. ('07) 5 Cri L Jour 213 (215) (DB) (Bom).

[13] Magistrate entertaining doubt as to weight or quality of evidence—Task of resolving that doubt should be left to Court of Session. ('10) 11 Cri L Jour 692 (694): 35 Bom 163 (DB).

[14] Words "improperly discharged" are general and cover a discharge on any kind of charge and not merely a discharge on a charge of an offence exclusively triable by the Court of Session. (Vol 22) 1935 All 366 (368): 36 Cri L Jour 1103.

6. "Order him to be committed for trial."—[1] Words "order him to be committed" in the section do not mean more than "pass an order for his commitment." ('08) 7 Cri L Jour 29 (30): 31 Mad 40 (DB).

[2] Words "order him to be committed" mean "commit him for trial." ('86) 10 Bom 319 (323) (DB).

[3] Sessions Judge or the District Magistrate can himself commit the case to the Court of Session and need not direct the inferior Court to do so. ('86) 10 Bom 319 (323, 324) (DB) \* ('01) 28 Cal 397 (399) (DB) \* ('08) 7 Cri L Jour 29 (30): 31 Mad 40 (DB).

[But see (1865) 4 Suth W R Cr L 4 (4).]

7. "Upon the matter of which he has been . . . improperly discharged."—[1] Person accused of offence under one section of Penal Code acquitted of that offence—Revising Court cannot order commitment under this section for offence under another section of Penal Code. (Vol 5) 1918 Cal 943 (945): 18 Cri L Jour 834 (DB). (Per *Richardson J.*; *Teunon J. contra.*) \* (Vol 21) 1934 All 141 (143): 56 All 529: 35 Cri L Jour 865.

[2] Person accused of two offences—Magistrate framing charge for one only—Revising Court can order commitment in respect of other offence. (Vol 22) 1935 Sind 221 (222): 37 Cri L Jour 80: 29 Sind L R 428 (DB) \* (Vol 21) 1934 All 141 (144): 56 All 529: 35 Cri L Jour 865 \* (1900) 24 Mad 136 (139, 146) (SB). (23 Mad 225, dissented from.) \* (Vol 7) 1920 Mad 94 (95): 43 Mad 330: 21 Cri L Jour 91 (D B) \* (Vol 19) 1932 Nag 85 (85): 33 Cri L Jour 558 \* (Vol 12) 1925 Sind 190 (191): 19 Sind L R 353: 25 Cri L Jour 1368 (DB).

[3] Power of High Court to order commitment should rarely be used in midst of trial. (Vol 28) 1941 Oudh 409 (410, 412): 42 Cri L Jour 536 \* (Vol 13) 1926 Oudh 194 (195): 27 Cri L Jour 417.

[4] Before there can be discharge, *a fortiori* an implied discharge, the foundation of a charge must be in existence and the Magistrate must visualise or have been invited to visualise the possibility of framing the more serious charge. (Vol 32) 1945 Mad 459 (460) \* (Vol 18) 1931 Lah 402 (403, 404): 22 Cri L Jour 1029.

[5] Magistrate taking cognizance of minor offence—Offence triable by Court of Session disclosed in evidence—Prosecution not pressing for charge on latter

offence—There cannot be said to be discharge in respect of that offence, and no commitment can be ordered under this section. (Vol 6) 1919 Mad 847 (847): 41 Mad 982: 19 Cri L Jour 945 (D B).

[6] Person not before inferior Court as accused person and no evidence recorded against him—He cannot under this section, be directed to be committed to Court of Session. ('75) 24 Suth W R Cr 70 (70) (D B) \* ('81) 1881 Pun Re No. 22 Cr, p. 47 (49) (D B).

8. Only an order of discharge can be interfered with under this section.—[1] Revising Court cannot set aside an order of acquittal. (Vol 21) 1934 All 141 (142): 56 All 529: 35 Cri L Jour 865 \* ('5) 1918 Cal 943 (944): 18 Cri L Jour 834 (D B) \* ('99) 23 Mad 225 (226) (D B) \* (Vol 7) 1920 Mad 94: 43 Mad 330: 21 Cri L Jour 91 (D B) \* ('93) Cal 633 (640) (D B).

[2] Discharge may be an implied one. (Vol 30) 19 Pesh 89 (90): 45 Cri L Jour 167 (D B) \* (Vol 23) 19 Oudh 409 (411): 42 Cri L Jour 536 \* (Vol 22) 19 Sind 221 (222): 37 Cri L Jour 80: 29 Sind L R 4 (D B) \* ('98) 1898 Pun Re No. 1 Cr, p. 1 (2) (D B).

9. Contents of order.—[1] Superior Court interferes with order of discharge under this section—must indicate reasons justifying it in doing so, so that order may be examined by High Court if, and when, is challenged. (Vol 22) 1935 Bom 137 (143): 59 Bc 125: 36 Cri L Jour 643 (F B).

10. Previous refusal to interfere, whether by subsequent interference.—[1] A applied to revising Court under S. 435 to pass order under S. 437—Court refused to interfere—In course of trial of another accused, Court thought that it was proper case to interfere under S. 437 and ordered accordingly—Court he acted on examining record "otherwise" and form refusal did not bar latter order. (Vol 17) 1930 Cal 1 (63): 31 Cri L Jour 260 (D B).

11. Proviso (a).—[1] If no opportunity under proviso (a) is given to the accused order is liable to be set aside. (Vol 12) 1925 Mad 1061 (1061): 48 Mad 874: 26 Cri L Jour 1570 \* ('83) 6 Mad 372 (373) (D B).

[2] Witness asked in course of his examination question as to his liability to be committed to Sessions Court on charge of murder of which he was, in previous proceedings, discharged—*Held*, that was not sufficient compliance with requirements to show cause, ('92) 189 Rat 588 (589).

[3] No notice given before making order for commitment, but Committing Magistrate gave notice—Irregularity is curable under S. 537. ('97) 1897 Rat 899 (900) [But see ('05) 2 Cri L Jour 774 (775) (D B) (Mad).]

12. Proviso (b).—[1] "Other offence" committed, must be one exclusively triable by a Court of Session, otherwise the Court cannot order an inquiry into that offence under this section. (Vol 21) 193 Oudh 327 (327): 10 Luck 187: 35 Cri L Jour 1151.

[2] If the Magistrate has inquired into the offence and has discharged the accused, a further inquiry may be ordered under S. 436 but not a new inquiry under this section. (Vol 21) 1934 Oudh 327 (328): 10 Luck 187: 35 Cri L Jour 1151 \* ('93) 20 Cal 633 (640) (D B).

13. Proper course where Sessions Judge or District Magistrate finds that the case is one triable by a Court of Session.—[1] Sessions Judge finding that case is exclusively triable by Court of Session, but has been tried by inferior Court—He should order commitment of accused under this section, and not alter charge and deal with punishment himself. (Vol 9) 1922 All 545 (546): 23 Cri L Jour 456.

[2] All evidence taken by inferior Court—District Magistrate disagreeing with order of discharge—He should, if case is exclusively triable by Court of Session



**438.** (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under *Report to High Court*. section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him "[by or under any general or special order of the Sessions Judge]."

[1882—S. 438 ; 1872—S. 296, Para. 1; 1861—S. 434.]

[a] *Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 (XVIII) of 1923), S. 115, for "by the Sessions Judge."*

#### Section 437—Note 13 (*contd.*)

commit case for trial under S. 437 and not order further inquiry. ('37) 1937 Mad W N 868 (870)\* (Vol 3) 1916 Nag 97 (99) : 12 Nag L R 94 : 17 Cri L Jour 245\* ('88) 15 Cal 608 (621) (FB).

14. Effect of order for commitment.— [1] Order for commitment made under this section—Magistrate need not take evidence once again but should re-open original proceedings, frame charge, explain it to accused, require him to give list of witnesses for Court of Session, examine any of witnesses not already examined and then make short formal order of committal as under orders of higher Court. (Vol 12) 1925 Rang 82 (83) : 2 Rang 447 : 26 Cri L Jour 1106.

15. Review of order under this section.—[1] Order for commitment cannot be altered or reviewed by the same Court in view of evidence taken subsequent to the date of the order. (Vol 20) 1933 Mad 247 (248, 249) : 34 Cri L Jour 278.

16. Revision of order under this section.—[1] Order for commitment under this section is open to revision by the High Court. (Vol 14) 1927 All 279 (281) : 49 All 443 : 28 Cri L Jour 281 (DB)\* (Vol 22) 1935 Bom 137 (139) : 59 Bom 125 : 36 Cri L Jour 643 (FB)\* ('03) 7 Cal W N 327 (328) (DB)\* ('04) 1 Cri L Jour 275 (277) : 27 Mad 54.

[2] Order for commitment can be revised on points of law and fact. (Vol 6) 1919 Low Bur 146 (147, 148) : 9 Low Bur Rul 208 : 19 Cri L Jour 801\* (Vol 1) 1914 Mad 424 (424) : 15 Cri L Jour 373 (DB)\* (Vol 7) 1920 Pat 46 (48) : 21 Cri L Jour 328\* (Vol 12) 1925 Pat 279 (280) : 25 Cri L Jour 1089\* ('07) 5 Cri L Jour 100 (101) : 30 Mad 224\* ('07) 6 Cri L Jour 406 (408) (DB) (Cal)\* (Vol 21) 1934 Sind 27 (29) : 35 Cri L Jour 584 (DB).

[But see (Vol 2) 1915 All 86 (87) : 16 Cri L Jour 139.]

[3] High Court will be slow to exercise power of revision save in rare cases. (Vol 22) 1935 Bom 137 (139, 140) : 59 Bom 125 : 36 Cri L Jour 643 (FB) \* (Vol 2) 1915 All 86 (87) : 16 Cri L Jour 139 \* (1900) 2 Weir 549 (550).

[4] On face of proceeding, case illegal, arbitrary, capricious or improper — Revision lies. (Vol 28) 1941 Oudh 409 (412) : 42 Cri L Jour 536 \* (Vol 24) 1937 Lab 217 (220) : 38 Cri L Jour 992 \* ('37) 1937 Mad W N 1240 (1240) \* (Vol 21) 1934 Sind 27 (28) : 35 Cri L Jour 884 (DB) \* (Vol 17) 1930 Oudh 415 (416) : 32 Cri L Jour 128 \* (Vol 12) 1925 Sind 190 (192) : 19 Sind L R 353 : 25 Cri L Jour 1368 (DB).

[5] Exercise of the discretion by Sessions Judge or District Magistrate in ordering commitment of discharged person will not be interfered with by the High Court. (Vol 30) 1943 Oudh 233 (237) : 44 Cri L Jour 309 (DB) \* (Vol 24) 1937 All 373 (374) : 38 Cri L Jour 659.

17. Applicability of Section 556 to proceedings under this section.—[1] Sessions Judge who had him-

self made a complaint under S. 476 cannot, on the accused being discharged by the Magistrate, order a commitment under this section. (Vol 14) 1927 Bom 35 (36, 37) : 28 Cri L Jour 53 (DB).

[2] It is undesirable that the Sessions Judge ordering a commitment should try the case himself. (Vol 2) 1915 Bom 237 (239) : 16 Cri L Jour 754 (DB).

18. Applicability to Presidency Magistrates. — [1] This section does not apply to orders of discharge passed by Presidency Magistrates. ('97) 1 Cal W N 49 (51) (DB).

#### SECTION 438 — SYNOPSIS

1. Who can make a report under this section.
2. Power of the Sessions Judge or the District Magistrate under this section.
3. Power of Sessions Judge or District Magistrate to report in respect of proceedings pending before him.
4. Report to the High Court for enhancement of sentence.
5. Power of District Magistrate to make a report to the High Court regarding the legality of order or sentence passed by a Sessions Judge.
6. "Any proceeding."
7. "May, if he thinks fit."
8. Contents of report.
9. Previous refusal to make reference, whether bars subsequent reference.
10. Stay of proceedings.
11. Sub-section (2).

1. Who can make a report under this section. — [1] Joint Magistrate has no power to make reference. ('70) 14 Suth W R Cr 25 (26) (DB).

[2] Order of acquittal—Fact that Provincial Government could have appealed against order does not take away District Magistrate's power to make reference—District Magistrate and Provincial Government are distinct terms—S. 439 (5) has no application to such case. (Vol 25) 1938 Mad 349 (350) : ILR (1938) Mad 675 (FB). \* (Vol 17) 1930 All 741 (741) : 53 All 42 : 32 Cri L Jour 143.

[3] Ordinarily District Magistrate should not make reference from acquittal. (Vol 21) 1934 All 714 (715) : 35 Cri L Jour 1289.

2. Power of the Sessions Judge or the District Magistrate under this section — [1] Where the Sessions Judge or the District Magistrate finds, on examining the records of a proceeding, that the judgment or order is contrary to law or that the sentence is too severe or inadequate, he has power to report the matter for orders of the High Court under this section. ('81) 1881 All W N 12 (12) \* ('91) 14 Mad 334 (341) (FB) \* ('73) 20 Suth W R Cr 50 (50) (DB).

[2] Sessions Judge or District Magistrate cannot exercise power under this section if he himself has

Section 438—Note 2 (*contd.*)

jurisdiction to rectify error or illegality or to pass suitable orders in respect of the matter. (Vol 15) 1928 Sind 69 (70) : 22 Sind L R 201 : 28 Cri L Jour 978 (DB) \* (97) 1897 Rat 937 (937) \* (01) 14 C P L R 161 (161).

[But see (Vol 18) 1931 Rang 225 (233) : 32 Cri L Jour 950 : 9 Rang 239 (FB).]

[3] Order of discharge by subordinate Court improper—Sessions Judge or District Magistrate can pass orders under S. 436 or S. 437 without making report. (09) 9 Cri L Jour 192 (208) : 32 Mad 220 (FB) \* (98) 1898 Rat 988 (988) \* (01) 14 C P L R 161 (161).

[4] Sessions Judge as appellate Court having power to direct prosecution under S. 195—No report regarding order refusing to sanction prosecution should be made. (97) 1897 Rat 937 (937).

[5] Where a Sub-divisional Magistrate, wrongfully declined to take action under S. 145 of the Code, held that the District Magistrate should not report the matter to the High Court. (Vol 13) 1926 Cal 1049 (1050, 1051) : 27 Cri L Jour 1083 (DB).

[See however (Vol 16) 1929 Cal 751 (752) : 31 Cri L Jour 544 (DB).]

[6] Where an order committing an accused person to the Court of Session is found to be void, the Sessions Judge should not refer such order to the High Court, as he should in such a case disregard the commitment and send the accused person to the District Magistrate to be dealt with by him according to law. (82) 11 Cal L Rep 55 (56) (DB).

[See also (Vol 29) 1942 Mad 440 (441) : 43 Cri L Jour 715]

[7] In cases, where the District Magistrate or the Sessions Judge finds that he has himself no power to deal with the matter and the illegality or irregularity is such that the interference of the High Court is necessary, the proper course is to report the matter for the orders of the High Court. (Vol 30) 1943 Lah 8 (9) : 43 Cri L Jour 901 \* (Vol 28) 1941 Pat 105 (106) : 42 Cri L Jour 340 \* (Vol 25) 1938 Cal 416 (416) : 39 Cri L Jour 569 (DB) \* (Vol 23) 1936 All 852 (853) : 38 Cri L Jour 301 \* (Vol 16) 1929 Pat 139 (140) : 7 Pat 579 : 30 Cri L Jour 673 (DB) \* (13) 14 Cri L Jour 63 (63) : 35 All 103 \* (Vol 13) 1926 Lah 575 (575) : 27 Cri L Jour 846 \* (04) 1 Cri L Jour 329 (330) (DB) (Bom) \* (Vol 4) 1917 Cal 314 (315) : 18 Cri L Jour 104 (DB) \* (09) 10 Cri L Jour 569 (570) (DB) (Mad) \* (Vol 32) 1945 Nag 286 (288) : 1 L R (1945) Nag 995.

[8] The power to report under this section is limited to the extent of forwarding the results of examination. (Vol 23) 1936 All 852 (853) : 38 Cri L Jour 301 \* (Vol 11) 1924 Oudh 331 (333) : 25 Cri L Jour 440.

[9] The power to report does not enable the Court to quash the proceedings or set aside any order of the subordinate Magistrate. (Vol 32) 1945 Mad 58 (59) : 46 Cri L Jour 421 \* (Vol 33) 1946 Mad 412 (413) : 47 Cri L Jour 872 \* (Vol 28) 1941 Pat 105 (106) : 42 Cri L Jour 340 \* (Vol 28) 1936 All 852 (853) : 38 Cri L Jour 301 \* (Vol 11) 1924 Oudh 331 (333) : 25 Cri L Jour 440 \* (1900) 23 Mad 540 (543) (DB) \* (Vol 12) 1925 Cal 1234 (1234) : 26 Cri L Jour 1166 (DB) \* (Vol 16) 1929 Cal 204 (205) : 30 Cri L Jour 401 (DB) \* (96) 22 Bom 549 (550) (DB) \* (Vol 9) 1922 Oudh 145 (146) : 23 Cri L Jour 271. (A District Magistrate cannot set aside an order of acquittal.)

[10] Revision for enhancement of sentence—Sessions Judge can report but cannot revise order itself. (Vol 27) 1940 Lah 95 (95) : 41 Cri L Jour 458.

[11] Section does not allow Court to compound matter. (Vol 7) 1920 All 169 (169) : 42 All 474 : 21 Cri L Jour 447.

[12] The Court has no power to order further inquiry in a matter not covered by S. 436, or to order the

accused to be committed for trial in a case not covered by S. 437. (88) 1888 Rat 407 (407) \* (Vol 25) 1938 Cal 416 (416) : 39 Cri L Jour 569 (DB).

[13] The fact that the High Court has examined the record of a case on an incompetent reference under this section does not preclude the High Court from interfering under S. 439 where it finds such interference necessary. (Vol 29) 1942 Oudh 443 (444) : 43 Cri L Jour 763 \* (Vol 24) 1937 Pat 440 (443) : 38 Cri L Jour 919 : 16 Pat 413 (DB).

[14] Where the reference is against acquittal, the law does not require that the Court making the reference should issue a notice to the accused before the reference is made. (Vol 29) 1942 Oudh 443 (444) : 43 Cri L Jour 763.

3. Power of Sessions Judge or District Magistrate to report in respect of proceedings pending before him.—[1] Trial or appeal pending before Sessions Judge or District Magistrate—He must decide case or appeal himself—He cannot refer question arising therein to High Court. (Vol 23) 1936 Pesh 81 (82) : 37 Cri L Jour 470 \* (Vol 1) 1914 Lah 266 (268) : 15 Cri L Jour 485 (DB) \* (Vol 2) 1915 All 185 (186) : 16 Cri L Jour 433 (DB) \* (96) 22 Bom 759 (760) (DB) \* (Vol 1) 1914 Mad 100 (101) : 15 Cri L Jour 472 \* (Vol 6) 1919 All 394 (394) : 20 Cri L Jour 392 \* (Vol 1) 1914 Low Bur 226 (226) : 7 Low Bur Rul 251 : 15 Cri L Jour 667 \* (09) 9 Cri L Jour 248 (248) : 1 Sind L R 4 (DB).

[2] Power to report is not confined to proceedings of lower Court—Sessions Judge subsequent to passing order finding order to be illegal—He has power to report in respect of such order. (Vol 17) 1930 All 817 (817) : 32 Cri L Jour 364 \* (Vol 21) 1934 Lah 155 (155) : 15 Lah 63 : 35 Cri L Jour 1436 \* (97) 22 Bom 949 (959) (DB) \* (Vol 25) 1938 Bom 225 (227) : 39 Cri L Jour 495 : 1 L R (1938) Bom 331 (FB).

[But see (Vol 20) 1933 Pat 697 (697) : 13 Pat 150 : 35 Cri L Jour 22.]

[3] Although it is unusual for a Judge to make a report regarding the legality of his own order, he can do so and, at any rate, when the matter ultimately comes before the High Court, it has ample powers under S. 439 to pass orders on the reference. (Vol 25) 1938 Bom 225 (227) : 39 Cri L Jour 495 : 1 L R (1938) Bom 331 (FB) \* (Vol 21) 1934 Lah 155 (155) : 15 Lah 63 : 35 Cri L Jour 1436 \* (Vol 17) 1930 All 817 (817, 818) : 32 Cri L Jour 364 \* (Vol 16) 1929 Bom 309 (311) : 53 Bom 578 : 31 Cri L Jour 309 (DB).

[But see (93) 1893 Rat 652 (653).]

[4] Where a Sessions Judge, on hearing the appeal preferred by an accused, is of opinion that the conviction of the other accused who had not preferred appeals or in whose case only an unappealable sentence was passed, is illegal, he must report the matter for the orders of the High Court. (Vol 4) 1917 All 372 (373) : 39 All 549 : 18 Cri L Jour 684 \* (Vol 5) 1918 All 228 (229) : 19 Cri L Jour 482 \* (88) 1888 Rat 358 (359).

[But see (04) 1 Cri L Jour 533 (533) : 17 C P L R 36.]

[5] Section 272 of the Code must be read subject to this section and, therefore, even after the accused has claimed to be tried, the Sessions Judge can, instead of proceeding to choose jurors and trying the case, refer the same to the High Court under this section. (Vol 32) 1945 Bom 413 (416) : 47 Cri L Jour 138 (DB).

4. Report to the High Court for enhancement of sentence.—[1] Appeal against conviction preferred to District Magistrate or Sessions Judge—He can report for enhancement of sentence if sentence is inadequate. (Vol 20) 1933 Cal 791 (792) : 35 Cri L Jour 27 (DB) \* (07) 5 Cri L Jour 88 (89) : 30 Mad 48 (DB)

Section 438—Note 4 (*contd.*)

[2] Report for enhancing sentence should not be made unless circumstances of case call for severer sentence. ('93-1900) 1893-1900 Low Bur Rul 5 (6) \* ('09) 10 Cri L Jour 27 (28) (All).

[3] Record called for under S. 435—District Magistrate or Sessions Judge can report for enhancing sentence. ('41) 1941 Nag L Jour 551 (551) \* (Vol 27) 1940 Lah 95 (95) : 41 Cri L Jour 458 : ILR (1941) Lah 377 \* (Vol 21) 1934 Sind 154 (155) : 36 Cri L Jour 27 (DB) \* (Vol 8) 1921 Cal 260 (260) : 22 Cri L Jour 574 (DB) \* ('08) 7 Cri L Jour 119 (120) : 32 Bom 162 (DB).  
[See however (Vol 15) 1928 Lah 660 (660) : 29 Cri L Jour 235.]

[4] Sentence considered inadequate by prosecution—District Magistrate or Sessions Judge should, if possible, be moved before accused has served sentence. (Vol 15) 1928 Pat 201 (201, 202) : 29 Cri L Jour 261 (DB).

5. Power of District Magistrate to make a report to the High Court regarding the legality of order or sentence passed by a Sessions Judge.—[1] The words "or otherwise" do not confer on the District Magistrate any power to make a report to the High Court calling in question the correctness, legality or propriety of the orders of a Sessions Judge. (Vol 19) 1932 All 124 (125) : 33 Cri L Jour 474 (DB) \* ('96) 23 Cal 250 (252) (DB) \* ('96) 23 Cal 249 (250) (DB) \* (Vol 3) 1916 Bom 158 (158) : 41 Bom 47 : 17 Cri L Jour 529 (DB) \* (Vol 24) 1937 Pesh 6 (7) : 38 Cri L Jour 835 \* (Vol 20) 1933 Pat 305-305 : 34 Cri L Jour 947 (DB) \* (Vol 18) 1931 Rang 251 (251) : 32 Cri L Jour 1125 : 9 Rang 352 \* (Vol 14) 1927 All 279 (281) : 28 Cri L Jour 281 : 49 All 443 (DB) \* (Vol 14) 1927 Lah 85 (85) : 27 Cri L Jour 480 \* (Vol 14) 1927 Sind 45 (46) : 27 Cri L Jour 1253 : 21 Sind L R 48 (DB) \* (Vol 11) 1924 Lah 437 (439) : 25 Cri L Jour 928 : 5 Lah 11 (DB).

[2] Once the matter is before the High Court, it can interfere under S. 439 notwithstanding the invalidity in the manner in which the proceedings are brought to its notice. (Vol 19) 1932 All 124 (125) : 33 Cri L Jour 474 (DB) \* (Vol 11) 1924 All 770 (772) : 46 All 851 : 25 Cri L Jour 1277 \* (Vol 24) 1937 Sind 203 (204) : 38 Cri L Jour 961 : 31 Sind L R 409 (DB).

[3] Appeal by accused dismissed by Sessions Judge—District Magistrate afterwards referring case to High Court for enhancement of sentence.—There is no legal bar to entertain reference. (Vol 20) 1933 Cal 791 (792) : 35 Cri L Jour 27 (DB) \* ('08) 7 Cri L Jour 119 (120) : 32 Bom 162 (DB).

[But see (Vol 26) 1939 Lah 323 (323) : 40 Cri L Jour 879 \* ('04) 1 Cri L Jour 1115 (1115) (DB) (Bom).]

6. "Any proceeding."—[1] "Proceeding" means proceeding before Court.—Hence order by Magistrate in executive capacity is not revisable. (Vol 27) 1940 Cal 30 (31) : 41 Cri L Jour 442 : I L R (1939) 2 Cal 582 (DB).

7. "May, if he thinks fit."—[1] Where the superior Court calls for the records, it is not bound to make a report in every case; but it should exercise a sound judicial discretion. (Vol 18) 1931 Lah 107 (108, 110) : 12 Lah 471 : 32 Cri L Jour 653.

[2] The power of superior Court to report to the High Court is not controlled by the powers of the High Court under S. 439. (Vol 20) 1933 Bom 485 (486) : 58 Bom 49 : 35 Cri L Jour 311 (DB).

[3] The reporting Court has power to report matters such as stay of criminal proceedings, and the High Court may deal with such questions, if not under S. 439, under powers conferred upon it by the Letters Patent or S. 561A. (Vol 20) 1933 Bom 485 (486) : 58 Bom 49 : 35 Cri L Jour 311 (DB).

[4] The reporting authority should, ordinarily, in making a report, bear in mind the limitations to the High Court's revisional jurisdiction. (Vol 18) 1931 Cal

619 (621) : 58 Cal 1081 : 32 Cri L Jour 1237 (DB) \* ('08) 7 Cri L Jour 267 (271) : 31 Mad 133.

[5] The power to report should be exercised only if the circumstances of the case really call for it. (Vol 18) 1931 Cal 619 (622) : 58 Cal 1081 : 32 Cri L Jour 1237 (DB) \* (Vol 25) 1938 Nag 56 (57) : 39 Cri L Jour 660 : I L R (1938) Nag 248.

[6] A case should not be reported merely because the Sessions Judge is of a different opinion as to the value of the evidence adduced before the Magistrate. ('37) 38 Cri L Jour 889 (890) (Oudh) \* (Vol 23) 1936 Pat 626 (627) : 38 Cri L Jour 2 \* ('81) 1881 All W N 12 (12) \* (Vol 16) 1929 Cal 169 (169) : 56 Cal 924 : 30 Cri L Jour 579 (DB) \* (Vol 21) 1934 Oudh 280 (280) : 35 Cri L Jour 951 \* (Vol 24) 1937 Pat 110 (112) : 38 Cri L Jour 470.

[7] Case should not be reported on the ground that a conviction could not be supported on the merits unless the circumstances are such as to leave no reasonable doubt of the matter. (Vol 14) 1927 All 475 (476) : 49 All 551 : 28 Cri L Jour 399.

[8] A reference should not, ordinarily, be made except on matters involving questions of law, and even in such cases, only if the error of law is of such a character that it is necessary in the interests of justice to call for the interference of a higher authority. (Vol 31) 1944 Oudh 25 (27) : 45 Cri L Jour 137 \* (Vol 21) 1934 Oudh 278 (278) : 36 Cri L Jour 838 \* (Vol 12) 1925 Cal 1068 (1068) : 26 Cri L Jour 651 (DB) \* (Vol 24) 1937 Pat 110 (112) : 38 Cri L Jour 470 \* (Vol 18) 1931 Cal 619 (622) : 58 Cal 1081 : 32 Cri L Jour 1237 (DB) \* (Vol 18) 1931 Rang 225 (233) : 9 Rang 239 : 32 Cri L Jour 950 (FB) \* (Vol 33) 1946 Oudh 108 (110) : 47 Cri L Jour 306.

[9] A case should not be reported simply with the object of altering the conviction for an offence to one for a cognate offence, where there is no change in the sentence and the accused has not been prejudiced by such conviction or on the mere ground that the conviction, as it stood, would be discouraging to the police. ('83) 9 Cal 847 (848) (DB) \* ('93) 7 C P L R Cr 34 (35).

[10] A reference on a question of law should not be made merely to obtain a ruling on the question, for the purpose of instructing the Magistrate, where the reporting authority does not dissent from the actual decision arrived at on the merits. (Vol 12) 1925 All 318 (319) : 47 All 409 : 26 Cri L Jour 865 \* (Vol 25) 1938 Nag 56 (57) : 39 Cri L Jour 660 : I L R (1938) Nag 248 \* (Vol 24) 1937 Pesh 73 (73) : 38 Cri L Jour 838 (DB) \* ('36) 1936 Oudh W N 220 (221) \* ('02) 5 Oudh Cas 316 (317, 318) \* (Vol 12) 1925 All 318 (319) : 47 All 409 : 26 Cri L Jour 865.

[11] A reference should not ordinarily be made in pending proceedings. ('38) 40 Pun L R 311 (313) \* (Vol 23) 1936 Pat 626 (627) : 38 Cri L Jour 2.

[12] Where there are cross-cases in one of which an order under S. 250 has been made and the final order in the connected case shows that there is a clear doubt about the facts, and the cross-cases are before the Sessions Court, it need not confine them in water-tight compartments when considering whether the order under S. 250 should be upheld and may recommend to the High Court under this section that such order should be set aside. (Vol 31) 1944 Oudh 25 (27) : 45 Cri L Jour 137.

[13] Where the trial Court accepting the verdict of jury convicted the accused but the appellate Court finding itself unable to interfere under S. 423 (2) referred the matter to High Court for the purpose of directing the trial Court to make a reference under S. 307, it was held that the reference was incompetent as the High Court had no power to direct the trial Court to make a

439. (1) In the case of any proceeding the record of which has been called for by itself or *High Court's powers* which has been reported for orders, or which otherwise comes to its *of revision.* knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections <sup>a[\*]</sup> 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

**Section 438 — Note 7 (contd.)**

reference under S. 307. (Vol 24) 1937 Pat 440 (443) : 38 Cri L Jour 919 : 16 Pat 413 (DB).

[14] A report should not be made after an unduly long delay, if by such delay the accused is prejudiced. (1864) 1 Suth W R Cr 34 (34) (DB) (Vol 15) 1928 Pat 201 (201, 202) : 29 Cri L Jour 261 (DB).

[15] The reporting authority should not place obstacles in the way of a party preferring an appeal by calling for the records for the purpose of recommending enhancement of the sentence. (Vol 4) 1917 Upp Bur 2 (3) : 2 Upp Bur Rul 124 : 18 Cri L Jour 355.

[16] In declining to make a report, it is improper to make any comments on the merits of the case. (66) 5 Suth W R Cr 2 (2) (DB).

8. Contents of report. — [1] The report should conform to the forms prescribed by the various High Courts. (Vol 21) 1934 Pat 316 (316) : 35 Cri L Jour 1020 (Vol 18) 1931 Cal 619 (621) : 58 Cal 1081 : 32 Cri L Jour 1237 (DB) (Vol 14) 1927 Cal 261 (262) : 28 Cri L Jour 210 (DB).

[2] The report should not be made in the form of a letter to the Registrar of the High Court but should be made by a judicial order. (Vol 11) 1924 Rang 295 (296) : 25 Cri L Jour 1303.

[3] The report should state precisely and briefly the essential facts of the case. (07) 5 Cri L Jour 86 (87) : 29 Mad 517 (DB) (1909) 9 Cri L Jour 502 (502) (Mad).

[4] Question of law involved in case should be formulated clearly in reference. (Vol 19) 1932 All 407 (408) (DB) (Vol 12) 1925 Oudh 558 (558) : 26 Cri L Jour 527.

[5] Along with statement of facts, grounds of reference and results of examination must be stated. (09) 9 Cri L Jour 502 (502) (Mad) (69) 10 Suth W R Cr 50 (50) (1883) Oudh S. C. No. 64, p. 73 (74).

[6] Referring authority should indicate in what particular portion of order he considers error of fact or law to exist. (Vol 13) 1931 Cal 619 (621) : 58 Cal 1081 : 32 Cr. L. J. 1237 (DB) (1883) Oudh S. C. No. 64, p. 73 (74).

[7] Where the reference relates to the sentence passed, he should state for what reasons and in what respects he desires a variation or a setting aside of the sentence. (04) 1 Cri L Jour 605 (606) : 27 All 25.

[8] Where the subordinate Magistrate submits an explanation in any case, the reporting authority should submit the explanation along with the report and should also refer to and comment on such explanation. (82) 8 Cal 644 (645) (DB) (82) 11 Cal L Rep 55 (56) (Vol 21) 1934 Pat 316 (316) : 35 Cri L Jour 1020 (Vol 29) 1942 Nag 88 (39) : 1 L R (1942) Nag 494 : 43 Cri L Jour 323 (Vol 19) 1932 All 633 (635) : 34 Cri L Jour 480.

[9] In commenting on the case, unnecessary strictures on subordinate Magistrate and other authorities should not be passed. (Vol 20) 1933 Lah 36 (36) : 33 Cri L Jour 915.

[10] Where the District Superintendent of Police moves the District Magistrate, in the form of an official letter, to move the High Court in any matter, the District Magistrate should not treat such letter as part of the judicial proceeding and forward it to the High Court. (Vol 14) 1927 All 727 (728) : 28 Cri L Jour 946 (87) 1887 Pat 346 (341).

[11] Where a Prosecuting Inspector moves the Dis-

trict Magistrate to report a case to the High Court, the District Magistrate should himself examine the notes of the Inspector and if he finds any portion to be of value, he should embody such portion in his own order or report. (Vol 23) 1936 Sind 243 (243) : 38 Cri L Jour 117 : 30 Sind L R 368 (DB) (Vol 16) 1929 All 273 (276) : 51 All 663 : 30 Cri L Jour 562 (DB).

[12] Where the Sessions Judge refuses to refer the matter to the High Court, he need not write an order giving his reasons for refusal. (Vol 31) 1944 All 272 (273) : 1 L R (1944) All 541 : 46 Cri L Jour 118.

9. Previous refusal to make reference, whether bars subsequent reference. — [1] A Sessions Judge who refused to make a reference is not debarred from making another reference in the same case on the basis of facts coming to his knowledge subsequently. (Vol 14) 1927 Bom 360 (360) : 28 Cri L Jour 896 (DB).

10. Stay of proceedings. — [1] The Sessions Judge or the District Magistrate has no power to order stay of proceedings in the subordinate Magistrate's Court pending orders on his reference. (05) 2 Cri L Jour 534 (538) (D B) (Cal) (08) 26 Mad 137 (138, 139).

11. Sub-section (2). — [1] Sub-section (2) empowers an Additional Sessions Judge to exercise all the powers of a Sessions Judge under chapter XXXII. (Vol 26) 1939 Bom 372 (373) : 40 Cri L Jour 951 (DB).

[2] An Additional Sessions Judge can make a report under this section if the matter is transferred to him by a general or special order of the Sessions Judge. (03) 1903 All W N 28 (28, 29) (D B) (1900-02) 1 Low Bur Rul 119 (119).

[3] Appeal against conviction preferred by accused transferred to Additional Sessions Judge — Latter in acquitting accused making report to High Court that another accused who had not appealed should also be acquitted — Report held improper. (Vol 21) 1934 Oudh 86 (87) : 35 Cri L Jour 396.

**SECTION 439 — SYNOPSIS**

1. Revisional jurisdiction.
2. Refusal to entertain reference, whether bars application in revision.
3. Reference to be decided on basis of position on date of proceedings.
4. Appeal may be treated as revision.
5. Obeying order of Court does not bar application.
6. Finding of Civil Court—Binding nature of.
7. Admissions of fact before referring Court, whether to be accepted by High Court.
8. What proceedings can be revised.
9. Who can apply in revision—Third parties.
10. Alien enemy, if can apply in revision.
11. Applicant in contempt.
12. Revision against acquittal.
13. Finding of acquittal cannot be converted into one of conviction—Sub-section (4).
14. Revision against order of discharge.
15. Revision against finding of fact.
16. Interference on questions of law.
17. Revision of discretionary orders.
18. Revision of appellate orders.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed, than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

<sup>4</sup>[(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.]

[1882—S. 439; 1872—Ss. 297, 299, Para. 3; 1861—Ss. 400 to 406.]

[a] The figure "195" was repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 119. [b] Added, *ibid*.

### OBJECTS AND REASONS.

"Clause 439. — In accordance with various suggestions made we have modified sub-section (5) of this clause by providing that a party who is entitled to appeal and does not choose to exercise his right shall not be entitled to apply for revision. This will not

interfere with the right of a revisional Court to interfere of its own motion where it is of opinion that substantial justice has not been done . . . ."

— S. C. R., 1898.

#### Section 439 (*contd.*)

19. Revision of orders in proceedings under Chapter VIII.
20. Cases in which the High Court will refuse to exercise its discretion in favour of interference.
21. Onus.
22. High Court has all the powers of a Court of Appeal.
23. Re-trial—When to be ordered.
24. Power to interfere with interlocutory orders and in pending proceedings.
25. Stay of proceedings.
26. Power to quash commitment—Extent of.
27. Enhancement of sentence.
28. Limits of the power of enhancement.
29. Sub-section (6).
30. Dismissal of appeal or revision by accused—Subsequent application for enhancement of sentence—Accused, if can challenge conviction.
31. Costs, if can be awarded in revision.
32. Verdict of jury—Interference.
33. Power to review previous orders.
34. Declaratory orders.
35. Power to order detention under the Reformatory Schools Act.
36. Rule for one relief — Other relief can be granted.
37. Power to order transfer of case.
38. Limitation for revision.
39. Abatement on death of applicant.
40. New plea in revision.
41. Accused must be heard before order is made to his prejudice—Sub-section (2).
42. Appealable case—Revision—Sub-section (5).
43. Order in revision—Letters Patent appeal.
  1. Revisional jurisdiction. — [1] Main question which High Court has to consider in revision is whether substantial justice has been done. ('36) 37 Cri L Jour 1022 (1032) (DB) (All).

[See (Vol 30) 1943 Pat 44 (47) : 44 Cri L Jour 25.]

[2] No failure of justice—High Court will not interfere in revision, even though there may have been irregularity or impropriety in proceedings of lower Court. (Vol 31) 1944 Pat 378 (379) : 23 Pat 457 : 46 Cri L Jour 438 (DB) \* (Vol 30) 1943 All 23 (24) : I L R (1942) All 945 : 44 Cri L Jour 187 \* (Vol 30) 1943 Mad 169 (170) : 44 Cri L Jour 321 \* (Vol 30) 1943 Pat 3 (4) : 43 Cri L Jour 923 \* (Vol 29) 1942 All 443 (444) : 44 Cri L Jour 76 \* (Vol 29) 1942 Mad 657 (657) : 44 Cri L Jour 91 \* (Vol 29) 1942 Oudh 342 (343) : 43 Cri L Jour 503 \* (Vol 26) 1939 Bom 89 (90) : 40 Cri L Jour 346 (DB) \* (Vol 25) 1938 Lah 832 (832) : 40 Cri L Jour 186 \* (Vol 24) 1937 Sind 81 (85) : 38 Cri L Jour 742 \* (Vol 23) 1936 Lah 1015 (1016) : 38 Cri L Jour 123 \* (Vol 22) 1935 Cal 316 (320) : 62 Cal 749 : 36 Cri L Jour 982 (DB) \* (Vol 19) 1532 Oudh 298 (302, 305) : 8 Luck 135 : 34 Cri L Jour 58 (DB) \* (Vol 17) 1930 Sind 315 (316) : 24 Sind L R 446 : 32 Cri L Jour 521 (DB) \* (Vol 19) 1932 Cal 651 (651, 652) : 33 Cri L Jour 771 : 60 Cal 201 (DB) \* (Vol 19) 1932 Bom 473 (474) : 33 Cri L Jour 801 (DB).

[See (Vol 7) 1920 Upp Bur 28 (29) : 22 Cri L Jour 309 : 3 Upp Bur Rul 270 \* ('07) 6 Cri L Jour 287 (287) : 4 Low Bur Rul 49 (LB) \* ('09) 9 Cri L Jour 15 (21) : 4 Low Bur Rul 315 (FB) \* ('80) 1860 Pun Re No. 41 Cr, p. 94 (96) (FB)].

[3] Powers of High Court under this section are limited by S. 537. ('84) 1884 Pun Re No. 36, Cr, p. 63 (66) (DB).

[4] Order of lower Court proper one or not wrong—High Court will not interfere. (Vol 30) 1943 Lah 304 (305) : 45 Cri L Jour 162 \* (Vol 22) 1935 All 630 (631) : 36 Cri L Jour 1102 \* (Vol 2) 1915 All 134 (136) : 37 All 187 : 16 Cri L Jour 322 \* (Vol 15) 1923 Lah 546 (550) : 29 Cri L Jour 366 (DB) \* (Vol 11) 1924 Cal 538 (538) : 24 Cri L Jour 5 (DB).

[See (Vol 26) 1939 Sind 230 (231) : I L R (1939) Kar 751 : 40 Cr L Jour 823 (DB) \* (Vol 24) 1937 Mad 313 (313, 314) : 38 Cri L Jour 690 \* (Vol 4) 1917 Mad 664 (664) : 17 Cri L Jour 389 (DB).]

[5] Failure of justice — It is the duty of High Court to interfere for the purpose of preventing abuse of

## Section 439 — Note 1.

provisions of the law. (Vol 32) 1945 All 26 (28) : 1 L R 1941 All 751 : 45 Cri L Jour 211 (Vol 30) 1943 Mad 57 (58) : 45 Cri L Jour 74 (Vol 5) 1918 Upp Bur 53 (54) : 2 Upp Bur Bul 157 : 15 Cri L Jour 512 (13) 14 Cri L Jour 522 (SB) (Cal).

[6] High Court can interfere even where defect in proceedings amounts only to an irregularity and not to an illegality. (Vol 28) 1936 Nag 181 (182) : 1 L R (1936) Nag 87 : 37 Cri L Jour 1006.

[7] Within the limits High Court has wide discretion which will be exercised in each case according to the view which the Court may take of requirements of justice. (Vol 27) 1940 Sind 65 (66) : 1 L R (1940) Kar 157 : 41 Cri L Jour 568 (DB) (Vol 26) 1939 All 5 (5) : 1 L R (1939) All 991 : 40 Cri L Jour 153 (Vol 26) 1939 Sind 335 (337) : 1 L R (1940) Kar 83 : 41 Cri L Jour 143 (DB) (Vol 24) 1937 Pat 110 (112) : 38 Cri L Jour 470 (Vol 23) 1936 Lah 1015 (1016) : 38 Cri L Jour 123 (Vol 23) 1936 Nag 160 (161) : 1 L R (1937) Nag 38 : 39 Cri L Jour 349 (Vol 6) 1919 All 258 (259) : 41 All 537 : 20 Cri L Jour 347 (Vol 18) 1931 Lah 145 (150) : 32 Cri L Jour 700 (Vol 9) 1922 Pat 160 (161) : 23 Cri L Jour 272 (Vol 18) 1931 Cal 607 (613) : 59 Cal 275 : 33 Cri L Jour 3 (DB) (Vol 9) 9 Cri L Jour 211 (212) : 5 Nag L R 4 (Vol 5) 1918 Mad 538 (540) : 40 Mad 1130 : 18 Cri L Jour 612 (DB) (Vol 5) 1918 Mad 494 (495) : 18 Cri L Jour 329 (Vol 19) 1932 Cal 697 (697) : 33 Cri L Jour 636 (DB) (Vol 19) 1932 Bom 637 (637) : 56 Bom 554 : 34 Cri L Jour 142 (DB).

[See (Vol 33) 1946 Pat 122 (123) (DB) (Vol 04) 1 Cri L Jour 390 (411, 412) : 28 Bom 533 (DB).]

[8] The generality of powers of High Court cannot be cut down by any decisions. (Vol 18) 1931 Mad 242 (244) : 32 Cri L Jour 763 (DB) (Vol 04) 1 Cri L Jour 390 (411) : 28 Bom 533 (DB) (Vol 27) 1940 Sind 65 (66) : 1 L R (1940) Kar 157 : 41 Cri L Jour 568 (DB) (Vol 12) 1925 Bom 138 (139) : 26 Cri L Jour 466 (DB) (Vol 08) 8 Cri L Jour 250 (255) : 1908 Pun Re No. 11 Cr (SB) (Vol 18) 1931 Cal 619 (621) : 32 Cri L Jour 1237 : 58 Cal 1081 (DB) (Vol 20) 1933 Bom 492 (492) : 58 Bom 40 : 35 Cri L Jour 317 (DB) (Vol 09) 9 Cri L Jour 211 (212) : 5 Nag L R 4.

[9] It is necessary in practice to recognize certain principles of interference so that whole time of High Court may not be consumed in applications for revision. (Vol 94) 1894 Rat 708 (709) (Vol 24) 1937 Sind 293 (294) : 39 Cri L Jour 123 : 32 Sind L R 87 (DB) (Vol 87) 1887 Rat 338 (339).

[10] While considering propriety or legality of a proceeding in revision, High Court cannot take into consideration any matter extraneous to the record. (Vol 27) 1940 Sind 65 (66) : 1 L R (1940) Kar 157 : 41 Cri L Jour 568 (DB).

[11] Right of revision excluded by any specific provision of law — It cannot be exercised. (Vol 32) 1945 P C 48 (49, 52) : 72 Ind App 57 : 1 L R (1945) Kar P C 97 : 46 Cri L Jour 589 : 1945 F C R 161 (P C) (Vol 33) 1946 P C 169 (172) : 47 Cri L Jour 933 : 73 Ind App 199 (P C) (Vol 31) 1944 Lah 396 (396) : 46 Cri L Jour 16 (Vol 30) 1943 All 26 (38, 41, 44) : 1 L R (1943) All 238 : 44 Cri L Jour 216 (FB) (Vol 5) 1918 Pat 103 (105, 113, 120) : 3 Pat L Jour 581 : 19 Cri L Jour 833 (FB) (Vol 6) 1919 Pat 84 (86) : 4 Pat L Jour 174 : 20 Cri L Jour 177 (SB).

[12] Where act done is without jurisdiction the ordinary powers of Court of revision to correct it are not excluded. (Vol 28) 1941 Lah 5 (5, 6) : 1 L R (1941) Lah 121 : 42 Cri L Jour 248 (DB) (Vol 28) 1941 Sind 97 (98) : 1 L R (1942) Kar 246 : 42 Cri L Jour 645 (D B) (Vol 1) 1914 Cal 22 (25) : 41 Cal 400 : 14 Cri L Jour 678 (D B) (Vol 99) 1899 Pun Re No. 2 Cr, p. 5 (7) (F B) (Vol 20) 1933 Lah 1019 (1020) : 35 Cri L Jour 505 (

(Vol 6) 1919 Nag 98 (99, 100) : 20 Cri L Jour 445 (Vol 7) 1920 Low Bur 86 (37) : 21 Cri L Jour 561 : 10 Low Bur Bul 156 (35) 1935 Mad W N 1841 (1841) (Vol 1) 1914 Oudh 381 (382, 383) : 17 Oudh Cas 263 : 15 Cri L Jour 668 (Vol 1) 1914 Sind 67 (68) : 7 Sind L R 194 : 15 Cri L Jour 544 (DB) (Vol 16) 1929 Pat 714 (716) : 31 Cri L Jour 466 (Vol 13) 1926 Pat 51 (52) : 26 Cri L Jour 1511 (08) 8 Cri L Jour 119 (121) : 35 Cal 774 (DB) (Vol 09) 9 Cri L Jour 382 (382) : 31 All 150 (03) 25 All 537 (540, 541) (Vol 01) 24 Mad 45 (46, 47) (DB) (Vol 11) 1924 Nag 294 (295) : 25 Cri L Jour 353 (Vol 5) 1918 Upp Bur 4 (4) : 3 Upp Bur Bul 35 : 19 Cri L Jour 381 (79) 5 Cal 7 (19, 20) : 4 Cal L Rep 309 (F B) (1900) 24 Bom 527 (531, 532) (DB).

[See (Vol 5) 2 Cri L Jour 618 (637) : 33 Cal 68 (F B) (Vol 9) 1922 Pat 435 (436, 438) : 2 Pat 94 : 23 Cri L Jour 549 (F B) (Vol 3) 1916 Pat 292 (294) : 1 Pat L Jour 336 : 17 Cri L Jour 369 (F B).]

[13] The jurisdiction of superior Court can be taken away only by express words or by necessary implication. (Vol 12) 13 Cri L Jour 31 (31, 32) : 5 Sind L R 179 (D B). [See (Vol 20) 1933 Lah 1019 (1020) : 35 Cri L Jour 505.]

[But see (Vol 17) 1930 Bom 486 (486) : 54 Bom 664 : 32 Cri L Jour 397 (DB) (Vol 20) 1933 Rang 288 (289) : 11 Rang 361 : 35 Cri L Jour 1 (F B).]

[14] The power of revision should not be so exercised as to make one portion of the Code conflict with another. (Vol 25) 1938 Rang 103 (103) : 39 Cri L Jour 492 (Vol 1) 1914 All 211 (211, 212) : 36 All 403 : 15 Cri L Jour 598 (Vol 1) 1914 Nag 40 (42) : 10 Nag L R 177 : 16 Cri L Jour 131 (92-96) 1892-96 Upp Bur Bul 101 (102) (83) 8 Bom 197 (198) (DB).

[15] An argument *ad misericordiam* is out of place in a Court of revision which is concerned with law and procedure. (Vol 18) 1931 Oudh 80 (80) : 32 Cri L Jour 124.

[16] Ordinarily High Court will not pass any order curtailing privileges granted to accused person by lower Court unless accused person himself desires otherwise. (Vol 24) 1937 Nag 285 (287, 288) : 38 Cri L Jour 1058 : ILR (1937) Nag 541.

[17] Application for revision by one of the parties aggrieved by order of lower Court — Whole record before High Court — It can deal with cases of other persons aggrieved by the order even though they have not applied in revision. (Vol 28) 1941 Pat 444 (445) : 42 Cri L Jour 347.

2. Refusal to entertain reference, whether bars application in revision. — [1] Reference under S. 438 not entertained by High Court — Convicted person is not deprived of the right to apply to High Court in revision. (Vol 9) 1922 All 502 (502) : 45 All 11 : 23 Cri L Jour 496 (DB) (Vol 15) 1928 Oudh 292 (295) : 29 Cri L Jour 657 (DB).

[2] High Court refusing to interfere with order of lower Court after going into merits of the case — Any subsequent application for revision would be barred by provisions of S. 369 as order passed upon reference would be a 'judgment' within the meaning of that section. (Vol 33) 1946 Bom 276 (278) (FB).

3. Reference to be decided on basis of position on date of proceedings. — [1] A reference under S. 438 must be decided on the basis of the position as it was on the date when the proceedings giving rise to the reference began. (Vol 27) 1940 Pat 313 (316) : 41 Cri L Jour 217.

4. Appeal may be treated as revision. — [1] An appeal may be dealt with as a revision, when no appeal lies under the Code, or even where an appeal filed is withdrawn or the appeal abates on death of appellant. (Vol 5) 2 Cri L Jour 105 (106) (All) (Vol 75) 1875 Rat 97 (97) (DB) (Vol 89) 16 Cal 799 (802) (TR) (Vol 79) 2 Mad 30



ection 439 — Note 4 (*contd.*)

2. 35) (DB) \* (Vol 15) 1928 Lah 230 (231) : 29 Cri Jour 905 (DB) \* ('09) 10 Cri L Jour 255 (256) (DB) 30m)\* (Vol 15) 1928 Rang 158 (159) : 6 Rang 108 : 29 ri L Jour 646 \* ('93) 9 Cal 513 (515, 517) (DB) \* (Vol 18) 331 Lah 97 (97) : 32 Cri L Jour 732 \* ('78) 2 Bom 564 (68, 570) (SB).

[2] Where an appeal lies, and the time therefor has expired, an appeal filed beyond time cannot be treated as revision. (Vol 13) 1926 Sind 215 (216) : 20 Sind L R : 27 Cri L Jour 780 (DB).

[3] On appeal against conviction, High Court considering that conviction is right but sentence is too severe—*Held*, that it can reduce sentence in exercise of its revisional jurisdiction and then dismiss appeal summarily under S. 421 on the ground that there is no further cause for interference. (Vol 24) 1937 Bom 148 (49) : 38 Cri L Jour 572 : ILR (1937) Bom 365 (DB).

5. Obeying order of Court does not bar application.—[1] Mere fact that applicant was prepared to obey order of lower Court does not bar application in revision. (Vol 6) 1919 All 19 (20) : 21 Cri L Jour 59.

6. Finding of Civil Court — Binding nature of. — [1] Finding of civil Court as to the character of a document which is the subject of prosecution is not binding on the High Court in revision, especially when the person affected could not have appealed. (Vol 20) 933 Cal 481 (482) : 34 Cri L Jour 526 (DB).

7. Admissions of fact before referring Court, whether to be accepted by High Court.—[1] Application made to Sessions Judge for making reference to High Court — On hearing of application, admissions of fact made by either party — Sessions Judge afterwards making reference — Such admissions ought to be accepted by High Court for the purpose of reference. (Vol 12) 1925 Cal 1020 (1020) : 27 Cri L Jour 133 (DB).

8. What proceedings can be revised.—[1] The words "which otherwise comes to its knowledge" do not mean which comes to the knowledge of the High Court in any other way whatsoever but in any other way provided by the Code. ('12) 13 Cri L Jour 753 (756) : 36 Mad 275 (DB). (Following (1884) 10 Cal 268 (DB).)

[2] Reference made to the High Court by a Sessions Judge or District Magistrate—High Court held, can act under this section notwithstanding irregularity or invalidity of reference. (Vol 24) 1937 Pat 440 (443) : 16 Pat 413 : 38 Cri L Jour 919 (DB) \* (Vol 24) 1937 Pesh 73 (73) : 38 Cri L Jour 838 (DB).

[See also (Vol 25) 1938 Bom 225 (227) : 39 Cri L Jour 495 : ILR (1938) Bom 331 (FB).]

[3] The powers of revision are given to the High Court in the case of any proceeding the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge—When the High Court has before it on appeal a record of a criminal proceeding, the condition precedent is performed and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revisional powers if it chooses to do so. (Vol 22) 1935 P C 35 (36) : 62 Ind App 36 : 36 Cri L Jour 482 : 57 All 156 (PC).

[4] The words "the record of which has been called for by itself" are not used in contradistinction to "which otherwise comes to its knowledge," but as contrasted with "which has been reported for orders." ('12) 13 Cri L Jour 753 (755, 756) : 36 Mad 275 (DB) \* (Vol 4) 1917 Oudh 400 (401, 402) : 19 Oudh Cas 136 : 18 Cri L Jour 100 (DB).

[5] The "proceeding" must be confined to the proceeding before any inferior criminal Court. ('42) 1942 Nag L Jour 242 (244) \* (Vol 28) 1941 Lah 71 (72, 73) : ILR (1940) Lah 577 : 42 Cri L Jour 448 (DB).

[6] A military tribunal acting under the martial law

is not an ordinary criminal Court subject to the usual rules of appeal and revision. (Vol 18) 1931 Bom 37 (60) : 55 Bom 263 : 32 Cri L Jour 403 (SB).

[7] A Commissioner of Police acting under S. 27 of the Bombay City Police Act, 1912, is merely an executive officer and not a Court subordinate to High Court and therefore an order passed under that section is not open to revision. (Vol 25) 1941 Bom 334 (336) : 43 Cri L Jour 25 : 196 Ind Cas 537 (DB).

[8] Board constituted under Punjab Relief of Indebtedness Act started proceedings for contempt of Court against a party appearing before it and fined him—*Held*, that order of Board was open to revision. (Vol 25) 1938 Lah 366 (367) : 39 Cri L Jour 658.

[9] Application in revision can be entertained against order of a Magistrate trying an offence under S. 212 of the Madras Estates Land Act. (Vol 25) 1938 Mad 879 (879) : 39 Cri L Jour 984.

[10] The High Court has no jurisdiction over Courts which are not British Indian Courts. ('83) 9 Cal 288 (289) (DB).

[11] This section is not applicable to order by a District Judge declaring a person a tout under S. 36 of Legal Practitioners Act. (Vol 28) 1941 Lah 1 (4, 5) : ILR (1941) Lah 133 : 42 Cri L Jour 289 (DB) \* (Vol 25) 1938 Mad 634 (635) : ILR (1938) Mad 988.

[12] Where the High Court cannot interfere owing to a right of revision or appeal being barred by statute, it may report the case to the Provincial Government with its recommendation. (Vol 8) 1916 Sind 65 (66) : 9 Sind L R 205 : 17 Cri L Jour 231 (DB).

[13] High Court cannot maintain revision, either civil or criminal, from the appellate order of a Revenue Commissioner confirming an order of the Deputy Commissioner directing payment of fines for violation of Forest Rules framed under S. 162 of the C. P. Land Revenue Act. ('47) 13 Cut L T 14 (16, 20) (DB).

9. Who can apply in revision—Third parties. [1] The High Court has jurisdiction to entertain applications from third parties in revision, even though the application is made for the benefit of a party who could have appealed but has not done so and so cannot, under sub-s. (5), himself apply in revision. (Vol 30) 1943 Bom 304 (305) : 44 Cri L Jour 786 : 208 Ind Cas 455 (DB) \* (Vol 28) 1941 Lah 324 (325) : 42 Cri L Jour 890 \* (Vol 20) 1933 Cal 361 (362) : 34 Cri L Jour 814 (DB) \* (Vol 19) 1932 Lah 559 (561) : 33 Cri J Jour 881 \* (Vol 11) 1924 Oudh 171 (172) : 24 Cri L Jour 186 \* (Vol 17) 1930 Oudh 497 (498) : 32 Cri L Jour 104 (DB) \* (Vol 18) 1931 Sind 127 (128) : 25 Sind L R 213 : 32 Cri L Jour 923 (DB) \* (Vol 7) 1920 Bom 292 (293) : 21 Cr L Jour 377 : 44 Bom 385 (DB).

[See (Vol 21) 1934 Sind 72 (74) : 28 Sind L R 140 : 35 Cri L Jour 1254 (DB).]

[See also (Vol 16) 1929 Cal 319 (321) : 56 Cal 1023 : 31 Cri L Jour 315 (DB).]

[But see (Vol 19) 1932 Sind 211 (214) : 26 Sind L R 345 : 34 Cri L Jour 67 (DB).]

[2] Application from third parties should not be entertained without strong case. (Vol 18) 1931 Bom 140 (140) : 55 Bom 353 : 32 Cri L Jour 471 (DB) \* (Vol 15) 1928 Lah 507 (509) : 29 Cri L Jour 343 (DB) \* (Vol 20) 1933 Cal 361 (362) : 34 Cri L Jour 814 (DB) \* (Vol 18) 1931 Cal 410 (411) : 58 Cal 1303 : 32 Cri L Jour 844 (DB).

[3] Where an order of discharge has the effect of operating to the detriment of a third person, the latter has a right to apply in revision against such order. (Vol 16) 1929 Cal 319 (321) : 56 Cal 1023 : 31 Cri L Jour 315 (DB).

10. Alien enemy, if can apply in revision. — [1], Alien enemy, residing in British India by license of the King, can complain against crimes committed against his person or property and apply in revision to High

Section 439—Note 10 (*contd.*)

Court against order discharging the accused. (Vol 3) 1910 Mad 531 (552, 553) : 20 Cri L Jour 161.

11. Applicant in contempt.—[1] A person applying to High Court and enlarged on bail, afterwards disappearing and thus breaking his bail — He is in contempt and is not entitled to have his application in revision heard. (Vol 10) 1923 All 227 (327) : 24 Cri L Jour 240 \* (Vol 15) 1928 Cal 241 (241) (DB) \* ('80) 1880 Pun Re No. 18 Cr, p. 31 (31) (DB).

[See also (Vol 26) 1939 All 5 (6) : 40 Cri L Jour 153 : ILR (1938) All 991].

[2] Practice of Patna High Court — Application in criminal revision against order of conviction in which sentence of imprisonment has been passed not to be entertained until convicted person has surrendered to serve out his sentence. ('43) 1942 Pat W N 54 (55).

12. Revision against acquittal.—[1] It is the practice of the High Court not to interfere, ordinarily, in revision with orders of acquittal, whether on reference under S. 438 or on the application of the complainant. (Vol 38) 1946 All 457 (464, 465) : 47 Cri L Jour 955 (DB) \* (Vol 32) 1945 Mad 240 (240) : ILR (1945) Mad 894 : 46 Cri L Jour 744 \* (Vol 31) 1944 Nag 136 (137) : I L R (1944) Nag 176 : 45 Cri L Jour 766 \* (Vol 29) 1942 Oudh 443 (444) : 43 Cri L Jour 763 \* (Vol 24) 1937 Lah 132 (133) : 17 Lah 604 : 38 Cri L Jour 432 \* (Vol 24) 1937 Oudh 283 (284) : 38 Cri L Jour 329 \* (Vol 10) 1923 Bom 74 (75) : 24 Cri L Jour 700 (DB) \* (Vol 21) 1934 All 714 (715) : 35 Cri L Jour 1289 \* (Vol 15) 1928 Sind 176 (177) : 30 Cri L Jour 251 (DB) \* (Vol 20) 1933 Nag 259 (260) : 29 Nag L R 365 : 35 Cri L Jour 28 \* (Vol 16) 1929 Cal 169 (169) : 56 Cal 924 : 30 Cri L Jour 579 (DB) \* (Vol 12) 1925 All 318 (319) : 47 All 409 : 26 Cri L Jour 865 \* (Vol 3) 1916 Pat 152 (154) : 1 Pat L Jour 264 : 18 Cri L Jour 151 (DB) \* (Vol 31) 1944 Bom 107 (108) : ILR (1944) Bom 302 : 45 Cri L Jour 612 (FB) \* (Vol 30) 1943 Mad 566 (567) : 44 Cri L Jour 794 \* (Vol 30) 1943 Mad 565 (566) : 44 Cri L Jour 788 \* (Vol 30) 1943 Oudh 451 (452) : 45 Cri L Jour 75 \* (Vol 30) 1943 Sind 55 (55) : 43 Cri L Jour 927 (DB) \* ('42) 21 Pat 102 (109, 113) (DB) \* (Vol 29) 1942 Oudh 130 (131) : 43 Cri L Jour 280 \* (Vol 28) 1941 Bom 410 (411) : 43 Cri L Jour 174 (DB) \* (Vol 28) 1941 Pat 362 (363) \* (Vol 24) 1937 Nag 103 (104) : 38 Cri L Jour 719 : ILR (1937) Nag 163 \* (Vol 24) 1937 Sind 100 (101) : 38 Cri L Jour 665 (DB) \* (Vol 23) 1936 Rang 247 (248) : 37 Cri L Jour 832 : 14 Rang 744 \* (Vol 27) 1940 Nag 357 (360) : 41 Cri L Jour 919 (That an order of acquittal is not based on merits does not make any difference in this respect).

[See however (Vol 5) 1918 Cal 701 (702, 704) : 18 Cri L Jour 849 (DB)].

[But see (Vol 16) 1929 Pat 139 (140) : 7 Pat 579 : 30 Cri L Jour 673 (DB)].

[2] High Court has jurisdiction to interfere on reference under S. 438 on application of complainant with order of acquittal. (Vol 31) 1944 All 137 (141, 142) : I L R (1944) All 403 : 46 Cri L Jour 38 (F B) \* (Vol 34) 1947 Oudh 35 (41) \* (Vol 29) 1942 Oudh 443 (444) : 43 Cri L Jour 763 \* (Vol 28) 1941 Bom 410 (411) : 43 Cri L Jour 174 (D B) \* (Vol 26) 1939 Sind 75 (75, 76) : I L R (1939) Kar 395 : 40 Cri L Jour 524 (D B) \* (Vol 25) 1938 Cal 613 (615) : 39 Cri L Jour 938 (D B) \* (Vol 24) 1937 Nag 394 (394, 395) : I L R (1938) Nag 157 : 39 Cri L Jour 75 \* (Vol 23) 1936 Nag 40 (41) : 31 Nag L R 261 : 36 Cri L Jour 1336 \* (Vol 3) 1916 Mad 931 (932) : 39 Mad 505 : 16 Cri L Jour 600 \* (Vol 10) 1923 Cal 11 (12) : 50 Cal 159 : 24 Cri L Jour 206 (D B) \* (Vol 14) 1927 Rang 74 (74, 76) : 4 Rang 471 : 28 Cri L Jour 219 \* (Vol 13) 1926 Pat 176 (179) : 5 Pat 25 : 27 Cri L Jour 235 (D B) \* (Vol 17) 1930 Lah 159 (161) : 31 Cri L Jour 584 \* (Vol 15) 1928 Lah 844 (845) : 29

Cri L Jour 538 \* (Vol 16) 1929 Bom 306 (307, 308) : 53 Bom 564 : 30 Cri L Jour 1062 (D B) \* (Vol 3) 1916 Mad 1106 (1107) : 16 Cri L Jour 553 \* ('76) 1 All 139 (142, 144, 150) (FB).

[But see (Vol 25) 1933 Lah 339 (341) : 39 Cri L Jour 621 (D B) \* ('92) 15 Mad 36 (39) (D B) \* ('78) 3 Bom 150 (151) (D B) \* (Vol 9) 1922 Sind 22 (23) : 15 Sind L R 171 : 23 Cri L Jour 343 (D B).]

[3] In exceptional and proper cases High Court will interfere. (Vol 30) 1943 Oudh 157 (159) : 44 Cri L Jour 174 \* ('43) 1943 Pat W N 12 (13) \* (Vol 29) 1942 Oudh 443 (444) : 43 Cri L Jour 763 \* ('42) 21 Pat 102 (109, 113) (D B) \* (Vol 28) 1941 Pat 287 (287) : 42 Cri L Jour 622 \* (Vol 25) 1938 Cal 613 (615) : 39 Cri L Jour 988 (D B) \* (Vol 24) 1937 Lah 132 (133) : 38 Cri L Jour 432 : 17 Lah 604 \* (Vol 24) 1937 Nag 72 (73) : 38 Cri L Jour 334 : I L R (1937) Nag 286 \* (Vol 24) 1937 Sind 100 (101) : 38 Cri L Jour 665 (D B) \* (Vol 23) 1936 Nag 40 (41) : 36 Cri L Jour 1336 : 31 Nag L R 261 \* (Vol 17) 1930 Lah 159 (161) : 31 Cri L Jour 584 \* (Vol 10) 1923 Bom 455 (455) : 24 Cri L Jour 734 (D B) \* (Vol 19) 1932 All 188 (190) : 54 All 416 : 34 Cri L Jour 18 (Vol 21) 1934 All 714 (715) : 35 Cri L Jour 1289 \* (Vol 3) 1916 Low Bur 16 (17) : 8 Low Bur Rul 356 : 17 Cri L Jour 91 \* (Vol 27) 1940 Nag 357 (360) : 41 Cri L Jour 919.

[But see (Vol 10) 1923 Bom 264 (265) : 26 Cri L Jour 751 (D B). (Order made without proper hearing — No legal disposal — High Court declined to interfere on the ground that revision was filed by complainant.)]

[4] High Court will interfere only where serious injustice has been caused by an error of law. (Vol 27) 1940 Cal 531 (532) : I L R (1940) 1 Cal 585 : 42 Cri L Jour 100 (D B) \* (Vol 27) 1940 Nag 357 (360) : 41 Cri L Jour 919 \* (Vol 25) 1938 Lah 739 (741) : 40 Cri L Jour 131 \* (Vol 24) 1937 Pat 110 (112) : 38 Cri L Jour 470 \* (Vol 24) 1937 Pat 646 (647) : 39 Cri L Jour 78 \* (Vol 6) 1919 Mad 658 (653) : 42 Mad 109 : 20 Cri L Jour 49 (D B) \* (Vol 14) 1927 Mad 473 (474) : 28 Cri L Jour 270 \* (Vol 20) 1933 Oudh 257 (258) : 34 Cri L Jour 661 \* ('76) 1 All 139 (142 to 145) (F B). ((1874) 6 N W P H C R 357, Overruled.) \* ('07) 5 Cri L Jour 171 (173) (D B) (Bom.)

[But see (Vol 26) 1939 Lah 406 (411) : 40 Cri L Jour 942 (D B).]

[5] Order of acquittal based upon appreciation of evidence will not be interfered with unless finding is based on erroneous view of the law. (Vol 30) 1943 Oudh 451 (453) : 45 Cri L Jour 75 \* (Vol 28) 1941 Oudh 7 (10) : 41 Cri L Jour 891 (D B) \* (Vol 24) 1937 Nag 103 (104) : I L R (1937) Nag 163 : 38 Cri L Jour 719 \* ('36) 37 Cri L Jour 1081 (1082) (D B) (Cal) \* ('35) 1935 All W R 1148 (1148) \* (Vol 3) 1916 Mad 931 (932) : 39 Mad 505 : 16 Cri L Jour 600 \* (Vol 20) 1933 Nag 36 (37) : 28 Nag L R 298 : 34 Cri L Jour 145 \* ('84) 1884 Pun Re No. 16 Cr, page 23 (24) (D B) \* ('75) 23 Suth W R Cr 64 (64) (D B) \* (Vol 26) 1939 Pat 28 (29) : 39 Cri L Jour 968 \* (Vol 24) 1937 Oudh 233 (234) : 38 Cri L Jour 329 \* ('12) 13 Cri L Jour 53 (54) (Upp Bur) \* ('84) 6 All 484 (485) (D B) \* (Vol 21) 1934 All 190 (191) : 35 Cri L Jour 998 \* ('09) 10 Cri L Jour 417 (418) (All) \* (Vol 14) 1927 Mad 981 (983) : 28 Cri L Jour 957 : 51 Mad 180.

[6] Applicant in revision against acquittal being a private complainant—Case against interference is much stronger. (Vol 1) 1914 All 364 (365) : 15 Cri L Jour 429 \* (Vol 13) 1926 Nag 115 (116) : 23 Nag L R 99 : 26 Cri L Jour 1348 \* (Vol 17) 1930 Pat 241 (242) : 9 Pat 113 : 31 Cri L Jour 789 (D B) \* ('35) 36 Cri L Jour 1090 (1091) (Pat).

[See however (Vol 26) 1939 Lah 406 (411) : 40 Cri L Jour 942 (D B).]



Section 439—Note 12 (*contd.*)

[7] Complainant can apply to District Magistrate to move and latter may himself move Provincial Government to prefer an appeal against the acquittal. (Vol 12) 1925 Pat 321 (322) : 26 Cri L Jour 516 (DB)\* (Vol 23) 1936 Rang 247 (248) : 37 Cri L Jour 832 : 14 Rang 744 \* (Vol 1) 1914 All 76 (76) : 15 Cri L Jour 364 \* (Vol 11) 1924 All 624 (624) : 26 Cri L Jour 127\* (90) 15 Bom 349 (350) (DB)\* (Vol 14) 1927 Nag 170 (174) : 23 Nag L R 40 : 28 Cri L Jour 523 \* (Vol 15) 1928 Sind 176 (176) : 30 Cri L Jour 251 (DB) \* (93-1900) 1893-1900 Low Rur Rul 126 (126).

[See (Vol 2) 1915 Oudh 203 (204) : 16 Cri L Jour 352\* (81) 2 Weir 570 (571)\* (Vol 24) 1937 Sind 160 (101) : 38 Cri L Jour 665 (DB).]

[See also (73) 19 Suth W R Cr 55 (55) (DB).]

[8] Only cases in which applications by private parties against acquittals will be entertained are those in which there has been a failure of justice through want of jurisdiction, or a failure to understand the law applicable to the case, or in personal cases such as those of defamation and adultery. (Vol 28) 1941 Bom 410 (411) : 43 Cri L Jour 174 (DB)\* (Vol 23) 1936 Rang 247 (248, 249) : 37 Cri L Jour 832 : 14 Rang 744 \* (Vol 4) 1917 Upp Bur 7 (8) : 3 Upp Bur Rul 19 : 18 Cri L Jour 970\* (Vol 6) 1919 Nag 64 (65) : 20 Cri L Jour 708.

[See however (37) 1937 Mad W N 19 (19).]

[9] High Court will interfere only in most serious cases. (Vol 26) 1939 Pat 611 (620) : 18 Pat 544 : 41 Cri L Jour 191 (DB)\* (Vol 24) 1937 Nag 103 (104) : 38 Cri L Jour 719 : 1 L R (1937) Nag 163\* (Vol 24) 1937 Nag 123 (124) : 38 Cri L Jour 433 \* (Vol 8) 1921 All 76 (76) : 22 Cri L Jour 597\* (Vol 13) 1926 Cal 945 (946) : 53 Cal 471 : 27 Cri L Jour 975 (DB)\* (Vol 8) 1921 All 266 (266) : 22 Cri L Jour 337\* (Vol 4) 1917 Bom 226 (227) : 41 Bom 560 : 18 Cri L Jour 668 (DB)\* (Vol 12) 1925 Pat 165 (167) : 25 Cri L Jour 1266\* (Vol 18) 1931 Oudh 273 (273) : 32 Cri L Jour 828 (DB) \* (Vol 10) 1923 Mad 171 (171, 175) : 45 Mad 986 : 24 Cri L Jour 17 (DB).

[10] Setting aside of acquittal urgently demanded in the interests of public justice.—High Court will interfere. (Vol 27) 1940 Cal 531 (531) : ILR (1940) 1 Cal 585 : 42 Cri L Jour 100 (DB)\* (Vol 24) 1937 Oudh 77 (78) : 37 Cri L Jour 490 \* (Vol 23) 1936 Nag 40 (42) : 36 Cri L Jour 1336 : 31 Nag L R 261\* (Vol 18) 1931 Rang 94 (94) : 8 Rang 663 : 32 Cri L Jour 928\* (Vol 14) 1927 Nag 170 (174, 175) : 23 Nag L R 40 : 28 Cri L Jour 523\* (Vol 8) 1921 All 76 (76) : 22 Cri L Jour 597. (Illustrative case.)\* (12) 13 Cri L Jour 771 (771) : 6 Sind L R 120 (DB)\* (Vol 13) 1926 Pat 176 (179) : 5 Pat 25 : 27 Cri L Jour 235 (DB)\* (Vol 16) 1929 Cal 639 (640) : 30 Cri L Jour 1013 (DB)\* (Vol 19) 1932 Mad 537 (538) : 33 Cri L Jour 629\* (Vol 11) 1924 Oudh 171 (172) : 24 Cri L Jour 186\* (Vol 12) 1925 Rang 193 (193) : 26 Cri L Jour 511 \* (Vol 9) 1922 Mad 502 (503) : 45 Mad 913 : 23 Cri L Jour 683 (FB).

[11] Before the High Court can be induced to interfere, it must be satisfied that the acquittal is wrong altogether apart from the reasons given by the trying Magistrate. (36) 37 Cri L Jour 1081 (1082) (DB) (Cal).

[12] Interests of justice requiring it.—Held judgment of acquittal can be declared to be wrong though it is not found necessary in the interests of justice to set it aside. (37) 1937 Mad W N 19 (19).

[13] High Court interfering and setting aside acquittal.—It can only order a re-trial. (Vol 31) 1944 Nag 136 (137) : ILR (1944) Nag 176 : 45 Cri L Jour 766 \* (Vol 28) 1941 Bom 410 (411) : 43 Cri L Jour 174 (DB)\* (Vol 28) 1941 Lah 425 (425) : 43 Cri L Jour 113\* (Vol 4) 1917 Upp Bur 7 (7) : 3 Upp Bur Rul 19 : 18 Cri L Jour 970\* (Vol 13) 1926 Rang 154 (156) : 4 Rang

140 : 27 Cri L Jour 1398 (DB)\* (75) 9 All 134 (133) (FB)\* (Vol 17) 1930 Lah 139 (139) : 31 Cri L Jour 354.

[See (Vol 31) 1944 All 137 (141, 142) : 1 L R 1944 All 403 : 46 Cri L Jour 35 (FB)\* (Vol 24) 1937 All 240 (243) : 38 Cri L Jour 523. (Overruled in (Vol 31) 1944 All 137 : 1 L R (1944) All 403 : 46 Cri L Jour 35 (FB) on another point.)]

13. Finding of acquittal cannot be converted into one of conviction.—Sub-section (4).—[1] High Court in revision cannot convert a finding of acquittal into one of conviction, though appellate Court can do so. (Vol 28) 1941 All 309 (316) : 1 L R (1941) All 465 : 42 Cri L Jour 779 (DB)\* (Vol 28) 1941 Lah 425 (425) : 43 Cri L Jour 113\* (Vol 26) 1939 Lah 406 (411) : 40 Cri L Jour 942 (DB)\* (Vol 26) 1939 Sind 75 (75) : ILR (1939) Kar 385 : 40 Cri L Jour 524 (DB)\* (Vol 21) 1937 All 240 (243) : 38 Cri L Jour 521 (DB). (Overruled on another point in (Vol 31) 1944 All 137 : 1 L R (1944) All 403 : 46 Cri L Jour 35 (FB).)\* (Vol 24) 1937 Nag 123 (124) : 38 Cri L Jour 433\* (Vol 23) 1936 Pesh 172 (175) : 37 Cri L Jour 1039 (DB)\* (Vol 16) 1929 Bom 366 (366) : 53 Bom 584 : 30 Cri L Jour 1062 (DB)\* (Vol 16) 1929 Nag 87 (88) : 30 Cri L Jour 405\* (Vol 12) 1925 Rang 230 (231) : 3 Rang 68 : 26 Cri L Jour 1119\* (Vol 11) 1924 Bom 456 (456) : 26 Cri L Jour 830 : 48 Bom 510 (DB)\* (10) 11 Cri L Jour 622 (622) (Mad)\* (86) 9 All 134 (135) (FB).

[But see (Vol 16) 1929 Pat 139 (140) : 7 Pat 579 : 30 Cri L Jour 673 (DB)\* (Vol 10) 1923 All 432 (433)\* (Vol 20) 1933 Lah 661 (664) : 35 Cri L Jour 250 (DB)\* (Vol 5) 1918 All 65 (66) : 20 Cri L Jour 22 (DB)\* (Vol 1) 1914 Mad 258 (260) : 37 Mad 119 : 15 Cri L Jour 180 (DB).]

[2] Where A is charged with offence X (a major offence) but is convicted of offence Y (a minor offence) under the provisions of Ss. 237 and 238 or the appellate Court alters the finding to one of conviction for offence X while the accused was expressly charged in the lower Court only with offence X, there is acquittal in respect of offence X in such circumstances.—Sub-section (4) applies to such cases also and High Court cannot convict A of offence X. (Vol 15) 1928 P C 254 (257) : 50 All 722 : 29 Cri L Jour 828 : 53 Ind App 390 (PC)\* (Vol 34) 1947 Cal 162 (171, 172).

[3] Sub-section (4) limits the powers of the High Court when acting as a Court of revision, but not as a Court of appeal. (Vol 1) 1914 Mad 258 (259) : 15 Cri L Jour 180 : 37 Mad 219 (DB).

[4] A charged with offence X but convicted of offence Y—A appeals from his conviction to High Court and the case is also before High Court under its revisional jurisdiction.—It can, as appellate Court, convict A of offence X and as Court of revision enhance sentence so as to make it appropriate to altered finding. (Vol 28) 1941 Lah 465 (470) : ILR (1942) Lah 129 : 43 Cri L Jour 235 (FB)\* (Vol 1) 1914 Mad 258 (260) : 15 Cri L Jour 180 : 37 Mad 219 (DB)\* (Vol 13) 1926 Rang 154 (156) : 27 Cri L Jour 1393 : 4 Rang 140 (DB)\* (Vol 11) 1924 Rang 93 (97) : 1 Rang 436 : 25 Cri L Jour 247 (DB) \* (04) 1 Cri L Jour 942 (944) : 1904 Pun Re No. 12 Cr (DB).

[5] Passing of order under S. 471 of the Code after acquittal for safe custody of accused person is not altering acquittal to one of conviction. (Vol 9) 1922 Mad 54 (55) : 23 Cri L Jour 71.

[6] Order of re-trial, after setting aside acquittal in revision, does not amount to conversion of finding of acquittal into one of conviction. (Vol 24) 1937 All 240 (243) : 38 Cri L Jour 521 (DB). (Overruled on another point in (Vol 31) 1944 All 137 : ILR (1944) All 403 : 46 Cri L Jour 35 (FB).)

## Section 439 (Contd.)

14. Revision against order of discharge.—[1] Revisions against Orders of discharge -- High Court will not interfere where there is no clear error or defect in the proceedings which has resulted in grave injustice, but the question is one merely as to appreciation of doubtful evidence. (Vol 26) 1939 Bom 372 (374); 40 Cri L Jour 951 (DB)\* (Vol 6) 1919 Mad 851 (853); 20 Cri L Jour 101\* (1900) 1900 Pun Re No. 8 Cr, p. 20 (21).

[See (Vol 28) 1936 Nag 192 (197); ILR (1936) Nag 205; 38 Cri L Jour 307.]

[See also (Vol 25) 1938 Nag 334 (335); 39 Cri L Jour 458; ILR (1939) Nag 393\* (10) 11 Cri L Jour 110 (111) (Lab).]

[2] High Court has jurisdiction to interfere with order of discharge even at the instance of a private prosecutor where it is improper. (Vol 26) 1939 Cal 220 (224, 225); 40 Cri L Jour 349; I L R (1939) 1 Cal 407 (SB)\* (Vol 25) 1938 Nag 334 (335); 39 Cri L Jour 458; ILR (1939) Nag 393\* (Vol 14) 1927 Rang 74 (76); 4 Rang 471; 28 Cri L Jour 219.

[See (Vol 28) 1941 Mad 579 (580); 42 Cri L Jour 640.]

[See also (Vol 16) 1929 Cal 319 (321); 56 Cal 1023; 31 Cri L Jour 315 (DB).]

15. Revision against finding of fact.—[1] As a general rule, the High Court will not in revision interfere with a finding of fact. (Vol 32) 1945 Mad 145 (145)\* (Vol 32) 1945 Oudh 214 (215); 20 Luck 376; 46 Cri L Jour 576\* (Vol 32) 1945 Oudh 102 (104); 46 Cri L Jour 587\* (Vol 32) 1945 Sind 188 (207); I L R (1945) Kar 129 (DB)\* (Vol 31) 1944 All 257 (259); I L R (1944) All 758; 46 Cri L Jour 122 (F B)\* (Vol 31) 1944 Bom 248 (249); I L R (1944) Bom 437; 46 Cri L Jour 208 (D B)\* (Vol 31) 1944 Mad 503 (504); 46 Cri L Jour 377\* (Vol 31) 1944 Sind 222 (223); I L R (1944) Kar 246; 46 Cri L Jour 309 (D B)\* (Vol 29) 1942 Bom 32 (32); 43 Cri L Jour 341 (D B)\* (Vol 29) 1942 Nag 96 (97); I L R (1942) Nag 383; 43 Cri L Jour 717\* (Vol 28) 1941 All 321 (323, 324); I L R (1941) All 617; 42 Cri L Jour 839 (D B)\* (Vol 26) 1939 Lah 108 (110); I L R (1938) Lah 611; 40 Cri L Jour 519\* (Vol 26) 1939 Pat 187 (187); 40 Cri L Jour 220\* (Vol 25) 1938 Pat 105 (106); 39 Cri L Jour 379\* (35) 36 Cri L Jour 1215 (1215) (Rang)\* (Vol 22) 1935 Cal 316 (325); 52 Cal 749; 36 Cri L Jour 982 (DB)\* (Vol 18) 1931 Cal 619 (621); 58 Cal 1081; 32 Cri L Jour 1237 (D B)\* (Vol 21) 1934 Lah 264 (266); 35 Cri L Jour 1447 (D B)\* (Vol 20) 1933 Nag 38 (35); 34 Cri L Jour 1038.

[2] Interference in revision will not be made specially when the findings of facts of the lower Courts are concurrent. (Vol 32) 1945 Mad 409 (410); 47 Cri L Jour 220\* (Vol 32) 1945 Nag 200 (201); I L R (1945) Nag 542\* (Vol 31) 1944 Nag 285 (285); I L R (1944) Nag 732\* (Vol 29) 1942 Mad 668 (669); 44 Cri L Jour 5\* (Vol 29) 1942 Oudh 438 (439); 43 Cri L Jour 739\* (Vol 29) 1942 Oudh 270 (272); 17 Luck 577; 43 Cri L Jour 406\* (Vol 28) 1941 Lah 305 (305); 42 Cri L Jour 825\* (Vol 28) 1936 Pat 38 (38); 37 Cri L Jour 309\* (Vol 5) 1918 Bom 241 (243); 19 Cri L Jour 97 (D B)\* (Vol 13) 1926 All 321 (322); 27 Cri L Jour 426; 48 All 608\* (Vol 15) 1928 Bom 221 (222); 29 Cri L Jour 877 (D B)\* (Vol 12) 1925 Lah 42 (42); 26 Cri L Jour 398\* (Vol 14) 1927 Pat 126 (130); 6 Pat 1; 28 Cri L Jour 359\* (Vol 21) 1934 Rang 42 (43); 35 Cri L Jour 849\* (Vol 20) 1933 Sind 396 (396); 28 Sind L R 22; 35 Cri L Jour 270 (D B)\* (Vol 22) 1935 Sind 195 (105); 36 Cri L Jour 1464 (D B).

[See however (Vol 11) 1924 Oudh 250 (251); 26 Oudh Cas 363; 25 Cri L Jour 1098. (Where the lower Courts have recorded hesitating findings, the rule may be relaxed.)\* (Vol 1) 1914 Lah 111 (112); 15 Cri L Jour

17\* (Great doubt about the guilt of accused—Concurrent findings of fact were set aside in revision.)]

[3] Court of revision will not decide between two conflicting sets of witnesses or two conflicting issues of fact. (Vol 28) 1941 Oudh 476 (478); 42 Cri L Jour 530\* (Vol 11) 1924 All 299 (300); 46 All 64; 25 Cri L Jour 327\* (73) 20 Suth W R Cr 40 (41) (D B)\* (Vol 19) 1932 Nag 97 (98); 28 Nag L R 106; 33 Cri L Jour 835\* (89) 1889 Pun Re No. 23 Cr, p. 77 (78).

[4] Court of revision will not interfere merely because lower Courts have taken different views of evidence in the case. (Vol 23) 1936 Pat 626 (627); 38 Cri L Jour 2\* (34) 35 Cri L Jour 189 (189) (All)\* (1900) 2 Bom L R 334 (335) (D B)\* (98) 1898 Rat 977 (977)\* (72) 18 Suth W R 7 (7) (D B)\* (Vol 12) 1925 Rang 193 (193, 194); 26 Cri L Jour 511 (D B).

[See (71) 15 Suth W R Cr 14 (14).]

[5] Court of revision does not look into evidence to see whether finding of lower Court is correct. (46) 47 Cri L Jour 320 (320) (Cal)\* (Vol 32) 1945 Sind 51 (55); 47 Cri L Jour 84; I L R (1944) Kar 411 (DB)\* (95) 22 Cal 391 (409) (DB)\* (Vol 20) 1933 Mad 279 (279); 34 Cri L Jour 524\* (Vol 12) 1925 Oudh 65 (66); 25 Cri L Jour 1169\* (Vol 4) 1917 Pat 662 (670); 18 Cri L Jour 915\* (Vol 16) 1929 Sind 150 (151); 30 Cri L Jour 906 (DB)\* (82) 1882 All W N 146 (147) (DB).

[See (Vol 7) 1920 All 66 (66); 21 Cri L Jour 362\* (83) 8 Bom 197 (199) (DB).]

[But see (Vol 3) 1916 Pat 151 (152); 1 Pat L Jour 165; 18 Cri L Jour 271 (DB).]

[6] Court of revision will not go into the weight or sufficiency of evidence. (Vol 31) 1944 Nag 235 (285); ILR (1944) Nag 732\* (Vol 9) 1922 Nag 172 (174); 23 Cri L Jour 391\* (Vol 32) 1945 Oudh 12 (15); 46 Cri L Jour 680\* (Vol 33) 1946 Cal 302 (302, 303)\* (Vol 21) 1934 All 846 (847); 36 Cri L Jour 490\* (Vol 29) 1942 Oudh 356 (357); 43 Cri L Jour 398\* (Vol 4) 1917 Cal 100 (101); 18 Cri L Jour 301 (DB)\* (68) 1868 Pun Re No. 14 Cr, p. 35 (36) (DB)\* (96) 19 Mad 238 (239) (DB)\* (77) 2 Cal 405 (410) (DB).

[See (Vol 26) 1939 Lah 108 (110); I L R (1938) Lah 611; 40 Cri L Jour 519.]

[7] Court of revision will not question a finding as to the credibility of witnesses. (Vol 33) 1946 All 7 (7)\* (Vol 33) 1946 Oudh 108 (110); 47 Cri L Jour 306\* (Vol 29) 1942 Pat 183 (185); 20 Pat 898; 43 Cri L Jour 570 (DB)\* (Vol 19) 1932 All 185 (186); 33 Cri L Jour 943\* (1900) 1900 Pun Re No. 10 Cr, p. 23 (24)\* (Vol 20) 1933 Nag 384 (387); 30 Nag L R 55; 35 Cri L Jour 577\* (72) 18 Suth W R Cr 3 (4) (DB).

[8] Court of revision will not substitute, where two views are possible, its own view of evidence for that of lower Court. (Vol 27) 1940 Sind 175 (176); ILR (1940) Kar 494; 41 Cri L Jour 937 (DB)\* (09) 10 Cri L Jour 160 (163) (DB) (Bom)\* (74) 24 Suth W R Cr 60 (61) (DB)\* (73) 20 Suth W R Cr 61 (62) (DB)\* (85) 8 Mad 336 (340) (DB)\* (Vol 3) 1916 Mad 931 (932, 933); 39 Mad 505; 16 Cri L Jour 600\* (Vol 18) 1931 Lah 98 (99); 32 Cri L Jour 1129\* (08) 7 Cri L Jour 353 (357); 1908 Pun Re No. 8 Cr (DB)\* (Vol 15) 1928 Pat 88 (88); 28 Cri L Jour 901\* (81) 1881 Rat 177 (178)\* (Vol 22) 1935 Rang 192 (193); 35 Cri L Jour 1044\* (Vol 15) 1928 Pat 13 (15); 28 Cri L Jour 834.

[See (37) 38 Cri L Jour 889 (890) (Oudh)\* (Vol 17) 1930 Lah 543 (544); 32 Cri L Jour 302.]

[9] Lower Court not properly appreciating evidence—No ground for interference in revision. (78) 2 Mad 38 (41) (DB)\* (95) 19 Bom 714 (715) (DB)\* (Vol 14) 1927 All 727 (728); 28 Cri L Jour 946\* (Vol 28) 1941 Cal 185 (192); I L R (1941) 1 Cal 67; 42 Cri L Jour 490\* (Vol 13) 1928 Nag 115 (116); 28 Cri L Jour 1848 28 Nag L R 99\* (Vol 14) 1927 Mad 484 (485); 28 Cri L Jour 207\* (02) 4 Bom L R 686 (686) (DB).

Section 439 — Note 15 (*contd.*)

[See (Vol 1) 1914 Mad 241 (243) : 15 Cri L Jour 285 (DB).]

[10] Court of revision will not interfere on question of motive: (Vol 14) 1927 Mad 613 (614) : 28 Cri L Jour 388.

[11] There must be some substantial error of law to justify High Court to exercise its exceptional powers of revision. (Vol 14) 1927 Mad 434 (435) : 28 Cri L Jour 207 \* ('04) 1 Cri L Jour 390 (396) : 28 Bom 533 (DB) \* (Vol 32) 1945 Oudh 12 (15) : 46 Cri L Jour 680 \* (Vol 14) 1927 Mad 1011 (1012) : 51 Mad 86 : 28 Cri L Jour 1005 \* (Vol 3) 1916 Lah 425 (426) : 17 Cri L Jour 273.

[12] The power of High Court is not limited to questions of law alone. ('13) 14 Cri L Jour 529 (534) (SB) (Mad) \* ('95) 22 Cal 998 (1001) (DB).

[13] High Court has jurisdiction to entertain a revision on question of fact. ('46) 25 Pat 571 (579). (Different or additional finding of fact may be made in revision.) \* (Vol 28) 1941 Oudh 7 (10) : 41 Cri L Jour 891 (DB) \* ('37) 1937 Mad W N 51 (52) \* (Vol 11) 1924 Lah 585 (586) : 25 Cri L Jour 435 \* ('12) 13 Cri L Jour 897 (803) (SB) (Cal) \* (Vol 14) 1927 Bom 177 (183) : 28 Cri L Jour 373 : 51 Bom 310 (DB) \* (Vol 11) 1924 All 299 (300) : 46 All 64 : 25 Cri L Jour 377 \* (Vol 16) 1929 Lah 797 (800) : 10 Lah 241 : 30 Cri L Jour 815 (DB). (Overruled in (Vol 32) 1945 Lah 130 : I L R (1944) Lah 391 : 46 Cri L Jour 566 (SB) on another point.) \* (Vol 14) 1927 All 647 (649) : 28 Cri L Jour 967 \* ('90) 14 Bom 331 (336, 341) (DB) \* (Vol 11) 1924 Pat 758 (759, 760) : 26 Cri L Jour 113 \* (Vol 13) 1926 Oudh 557 (559) : 27 Cri Jour 1193 \* ('04) 1 Cri L Jour 390 (396, 411) : 28 Bom 533 (DB) \* ('95) 22 Cal 998 (1001) (DB).

[But see (Vol 16) 1929 All 587 (588) : 30 Cri L Jour 756.]

[14] In special and exceptional circumstances High Court is entitled to go into questions of fact and do justice. (Vol 33) 1946 Mad 223 (224). (Lower Court overlooking important aspect of the case and not giving proper consideration to statements of accused.) \* (Vol 32) 1945 Sind 188 (207) : I L R (1945) Kar 129 (DB) \* (Vol 30) 1943 Oudh 444 (446, 447) : 19 Luck 399 : 45 Cri L Jour 386 \* (Vol 29) 1942 Oudh 473 (475) : 18 Luck 408 : 43 Cri L Jour 830 \* (Vol 29) 1942 Pat 489 (490) : 44 Cri L Jour 95 \* (Vol 28) 1941 All 87 (89) : I L R (1940) All 751 : 42 Cri L Jour 352 \* (Vol 33) 1946 All 416 (420) \* (Vol 28) 1941 Rang 324 (329) : 1941 Rang I R 566 : 43 Cri L Jour 373 (DB) \* ('37) 1937 Mad W N 51 (52) \* (Vol 24) 1937 Mad 968 (969) : 39 Cri L Jour 144 \* (Vol 24) 1937 Sind 293 (294) : 39 Cri L Jour 123 : 32 Sind L R 87 (DB) \* (Vol 23) 1936 Pat 626 (627) : 38 Cri L Jour 2 \* (Vol 20) 1933 Bom 482 (482) : 58 Bom 40 : 35 Cri L Jour 317 (DB) \* ('06) 3 Cri L Jour 153 (157) : 33 Cal 295 (DB) \* ('07) 5 Cri L Jour 344 (347, 348) (DB) (Cal) \* ('07) 6 Cri L Jour 70 (72, 73) (DB) (Bom) \* (Vol 18) 1931 Lah 153 (156) : 32 Cri L Jour 708 \* (Vol 5) 1918 Nag 152 (154) : 19 Cri L Jour 666.

[See (Vol 7) 1920 All 66 (66) : 21 Cri L Jour 362 \* (Vol 7) 1920 All 66 (66) : 21 Cri L Jour 362 \* (Vol 28) 1941 Oudh 7 (10) : 41 Cri L Jour 891 (DB). (Power should be sparingly exercised.) \* (Vol 11) 1924 All 1 (3) : 45 All 656 : 24 Cri L Jour 817 (DB). (Do.) \* (Vol 5) 1918 Cal 208 (209) : 18 Cri L Jour 437 (SB). (Do.) \* (Vol 10) 1923 Oudh 8 (9) : 25 Cri L Jour 278. (Do.)]

[15] Occasion arising for going into facts of the case — High Court will not interfere unless conscience of the Court is aroused to such an extent as to compel the Court to expressly say that the applicant ought not to

have been convicted on the evidence. (Vol 4) 1917 Pat 662 (671) : 18 Cri L Jour 915.

[See (Vol 23) 1936 Sind 243 (244) : 38 Cri L Jour 117 : 30 Sind L R 368.]

[16] High Court will interfere in the following cases with findings of facts of the lower Courts :—

(a) Where the finding has been arrived at contrary to well-established principles of law. (Vol 33) 1946 All 227 (231) \* (Vol 28) 1941 Rang 324 (329) : 1941 Rang L R 566 : 43 Cri L Jour 373 (DB) \* (Vol 24) 1937 Mad 968 (969) : 39 Cri L Jour 144 \* (Vol 12) 1925 Pat 131 (136) : 26 Cri L Jour 738 \* (Vol 16) 1929 Pat 429 (431) : 30 Cri L Jour 546 \* (Vol 15) 1928 All 1 (1) : 29 Cri L Jour 92 (DB) \* ('04) 1 Cri L Jour 305 (320) : 28 Bom 479 \* ('04) 1 Cri L Jour 1111 (1112) (DB) (Bom) \* (Vol 6) 1919 Lah 284 (285) : 20 Cri L Jour 258 \* (Vol 12) 1925 Lah 42 (43) : 26 Cri L Jour 393 \* ('82) 10 Cal L Rep 521 (522).

(b) Where there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at, on the evidence produced. (Vol 32) 1945 Mad 111 (113) (DB) \* (Vol 31) 1944 All 257 (259) : I L R (1944) All 758 : 46 Cri L Jour 122 (FB) \* (Vol 29) 1942 Oudh 473 (475) : 18 Luck 408 : 43 Cri L Jour 830 \* (Vol 27) 1940 Mad 465 (466) : 41 Cri L Jour 769 : ILR (1940) Mad 762 (FB) \* (Vol 28) 1941 Oudh 7 (10) : 41 Cri L Jour 891 (DB) \* (Vol 25) 1938 Pat 105 (106) : 39 Cri L Jour 379 \* (Vol 25) 1938 Rang 103 (104) : 39 Cri L Jour 492 \* (Vol 24) 1937 Sind 293 (294) : 39 Cri L Jour 123 : 32 Sind L R 87 (DB) \* (Vol 23) 1936 All 364 (365) : 37 Cri L Jour 675 \* (Vol 23) 1936 Pat 499 (500) : 38 Cri L Jour 77 \* (Vol 23) 1936 Pesh 72 (74) : 37 Cri L Jour 603 \* (Vol 23) 1936 Sind 243 (245) : 38 Cri L Jour 117 : 30 Sind L R 368 (DB) \* ('35) 36 Cri L Jour 1215 (1215) (Rang) \* ('84) 8 Bom 197 (199) (DB) \* ('04) 1 Cri L Jour 305 (310, 311) : 28 Bom 479 (DB) \* (Vol 17) 1930 Cal 645 (646) : 31 Cri L Jour 1225 \* ('13) 14 Cri L Jour 120 (122) (DB) (Cal) \* (Vol 19) 1932 Lah 436 (438) : 13 Lah 585 : 33 Cri L Jour 333 \* (Vol 21) 1934 Lah 264 (269) : 35 Cri L Jour 1447 (DB) \* (Vol 22) 1935 Nag 90 (104) : 36 Cri L Jour 744 \* (Vol 12) 1925 Nag 123 (124) : 25 Cri L Jour 1073 \* (Vol 21) 1934 Rang 60 (61) : 35 Cri L Jour 808.

(c) Where there is something in the way in which the lower Court has looked at the law or the method by which it has dealt with the evidence which makes it so doubtful whether the finding is correct, that it would amount to a miscarriage of justice to allow it to stand. ('43) 1943 Pat W N 12 (13) \* (Vol 7) 1920 All 85 (86) : 21 Cri L Jour 552 \* (Vol 21) 1934 All 735 (736, 737) : 36 Cri L Jour 33 \* ('90) 14 Bom 115 (118) \* ('91) 15 Bom 351 (365) (DB) \* ('95) 22 Cal 998 (1001, 1003) (DB) \* (Vol 18) 1931 Cal 619 (621) : 58 Cal 1081 : 32 Cri L Jour 1237 (DB) \* ('08) 7 Cri L Jour 267 (268, 269) : 31 Mad 133 \* (Vol 7) 1920 Nag 71 (72, 74) : 21 Cri L Jour 140 \* (Vol 21) 1934 Oudh 424 (425) : 35 Cri L Jour 1278 \* (Vol 21) 1934 Rang 42 (43) : 35 Cri L Jour 849 \* (Vol 20) 1933 Sind 359 (360) : 35 Cri L Jour 206 (DB) \* (Vol 20) 1933 Sind 396 (396) : 28 Sind L R 22 : 35 Cri L Jour 270 (DB) \* ('35) 36 Cri L Jour 1215 (1215) (Rang).

[See (Vol 16) 1929 Nag 87 (88) : 30 Cri L Jour 405 \* (Vol 27) 1940 Pat 97 (101) : 41 Cri L Jour 349.]

[See also ('96) 19 Mad 241 (242) (DB).]

[17] In showing cause against a rule for enhancement under sub-s. (6), the accused is entitled to show cause also against his conviction and may enter into questions of fact for that purpose. (Vol 15) 1928 All 1 (152, 153) : 30 Cri L Jour 933 (FB) \* (Vol 16) 1929 La 584 (584) : 30 Cri L Jour 699.

16. Interference on questions of law.—[1] High Court will not, in revision, interfere in every case which an error of law has been committed. (Vol 1

Section 439—Note 16 (*contd.*)

1932 Bom 637 (637) : 56 Bom 554 : 34 Cri L Jour 142 (DB) \* (Vol 15) 1928 Nag 172 (172) : 29 Cri L Jour 486 \* (Vol 15) 1928 Nag 113 (114) : 29 Cri L Jour 86 \* (Vol 20) 1933 Sind 37 (39) : 26 Sind L R 105 : 34 Cri L Jour 305 (DB) \* (Vol 18) 1931 Rang 161 (162, 163) : 32 Cri L Jour 1068 \* (08) 9 Cri L Jour 15 (21) : 4 Low Bur Rul 315 (FB) \* (10) 11 Cri L Jour 389 (390) (Lah) \* (Vol 17) 1930 Sind 315 (316) : 24 Sind L R 446 : 32 Cri L Jour 521 (DB).

[See also (Vol 23) 1936 All 322 (322) : 37 Cri L Jour 694 : 58 All 920.]

[2] The discretion to interfere in case of question of law should be exercised only to prevent substantial injustice or where there is involved a point of law which may govern other cases. (Vol 28) 1941 Sind 82 (83) : I L R (1941) Kar 324 : 42 Cri L Jour 623 (DB) \* (Vol 24) 1937 Sind 293 (294) : 39 Cri L Jour 123 : 32 Sind L R 87 (DB) \* (Vol 23) 1936 Lah 507 (507) : 37 Cri L Jour 722 \* (Vol 19) 1932 Bom 637 (637) : 56 Bom 554 : 34 Cri L Jour 142 (DB) \* (Vol 19) 1932 Oudh 113 (114) : 33 Cri L Jour 811 \* (Vol 15) 1928 Nag 343 (344) : 30 Cri L Jour 220 \* (Vol 15) 1928 Rang 284 (285) : 30 Cri L Jour 736 \* (Vol 13) 1926 Oudh 557 (559) : 27 Cri L Jour 1193 \* (74) 11 Bom H C R 125 (127) \* (Vol 3) 1916 Pat 152 (154) : 1 Pat L Jour 264 : 13 Cri L Jour 151 (DB) \* (Vol 19) 1932 Lah 362 (363) : 13 Lah 599 : 33 Cri L Jour 341 \* (Vol 25) 1938 Mad 976 (977) : 40 Cri L Jour 312 \* (13) 14 Cri L Jour 295 (296) (DB) (Cal) \* (Vol 13) 1926 Pat 499 (503) : 6 Pat 224 : 27 Cri L Jour 1090 (DB).

[See also (Vol 15) 1928 All 402 (402) : 29 Cri L Jour 663.]

[3] An order which proceeds upon an error of law, but which is otherwise a proper order, ought not to be set aside. (Vol 26) 1939 All 166 (168) : 40 Cri L Jour 347 \* (36) 37 Cri L Jour 1081 (1082) (Cal) \* (Vol 12) 1925 Oudh 739 (740) : 26 Cri L Jour 1619 \* (Vol 11) 1924 Oudh 32 (32) : 25 Cri L Jour 336 \* (Vol 8) 1921 Pat 331 (332) : 22 Cri L Jour 374 \* (32) 1932 Mad W N 1353 (1357).

[See (Vol 17) 1930 Nag 61 (62) : 26 Nag L R 50 : 31 Cri L Jour 284 \* (Vol 2) 1915 Mad 11 (11) : 15 Cri L Jour 256.]

[4] Lower Court deliberately ignoring facts which would oust its jurisdiction and trying the accused for a lesser offence over which it has jurisdiction—High Court will set aside the sentence in revision. (Vol 29) 1942 Mad 31 (32) : 43 Cri L Jour 361 \* (Vol 14) 1927 Mad 307 (307) : 28 Cri L Jour 164.

[5] Action of Court in ignoring facts ousting its jurisdiction not deliberate—High Court may not interfere unless it is otherwise a fit case for interference. (Vol 29) 1942 Mad 31 (32) : 43 Cri L Jour 361 \* (Vol 14) 1927 Mad 307 (307) : 28 Cri L Jour 164 \* (Vol 13) 1926 Pat 393 (394) : 27 Cri L Jour 1017 \* (Vol 13) 1926 Pat 36 (37) : 26 Cri L Jour 1559 (DB) \* (02) 4 Bom L R 267 (268) (DB) \* (89) 13 Bom 502 (505) \* (83) 10 Cal 85 (86) (DB).

17. Revision of discretionary orders.—[1] High Court will not in revision lightly interfere with the exercise of discretion of the inferior Courts. (Vol 32) 1945 Oudh 20 (21) : 47 Cri L Jour 27 \* (Vol 31) 1944 Sind 170 (171) : I L R (1944) Kar 7 : 45 Cri L Jour 813 (DB) \* (Vol 31) 1944 Oudh 243 (244) : 45 Cri L Jour 730 \* (Vol 30) 1943 Bom 82 (83) : I L R (1943) Bom 167 : 44 Cri L Jour 999 (DB) \* (Vol 30) 1943 Mad 89 (89) : I L R (1943) Mad 456 : 44 Cri L Jour 304 \* (Vol 30) 1943 Nag 236 (238) : I L R (1943) Nag 637 : 44 Cri L Jour 643 \* (Vol 27) 1940 Nag 357 (360) : 41 Cri L Jour 919 \* (Vol 27) 1940 Pat 97 (101) : 41 Cri L Jour 349 \* (Vol 26) 1939 Pat 183 (185) : 17 Pat 869 : 40 Cri L Jour 516 (DB) \* (Vol 26) 1939 Sind

230 (231) : I L R (1939) Kar 751 : 40 Cri L Jour 823 (DB) \* (Vol 24) 1937 Mad 313 (314) : 38 Cri L Jour 690 \* (Vol 14) 1927 Lah 353 (353, 354) : 23 Cri L Jour 255 \* (Vol 19) 1932 Bom 63 (64) : 56 Bom 61 : 33 Cri L Jour 262 (DB) \* (Vol 16) 1929 Cal 593 (595) : 57 Cal 44 : 30 Cri L Jour 1107 (DB) \* (Vol 11) 1924 Cal 529 (529) : 24 Cri L Jour 233 (DB) \* (Vol 14) 1927 All 38 (39) : 49 All 230 : 27 Cri L Jour 1130 \* (Vol 20) 1933 Lah 409 (410) : 14 Lah 615 : 34 Cri L Jour 342 \* (Vol 17) 1930 Rang 156 (158) : 8 Rang 1 : 31 Cri L Jour 824 \* (Vol 20) 1933 Rang 89 (90) : 34 Cri L Jour 332 \* (Vol 2) 1915 All 86 (87) : 16 Cri L Jour 139.

[2] High Court can interfere where discretion has not been exercised reasonably. (Vol 26) 1939 Cal 220 (223, 224, 226) : I L R (1939) 1 Cal 407 : 40 Cri L Jour 349 (SB) \* (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538 \* (Vol 25) 1938 Nag 334 (335) : 39 Cri L Jour 458 : I L R (1939) Nag 393 \* (Vol 23) 1936 Nag 131 (132) : I L R (1936) Nag 87 : 37 Cri L Jour 1006 \* (Vol 23) 1936 Sind 47 (48) : 39 Cri L Jour 716 (DB) \* (Vol 1) 1914 All 487 (489) : 15 Cri L Jour 727 \* (Vol 2) 1915 Mad 821 (824) : 16 Cri L Jour 20 (DB) \* (Vol 14) 1927 All 149 (150) : 23 Cri L Jour 9 \* (Vol 11) 1924 Cal 114 (114, 115) : 25 Cri L Jour 189 (DB) \* (Vol 12) 1925 Sind 190 (192) : 19 Sind L R 353 : 25 Cri L Jour 1368 (DB) \* (Vol 16) 1929 Pat 512 (512) : 31 Cri L Jour 607.

[3] Discretion by lower Court not exercised at all—High Court can interfere. (Vol 27) 1940 Pat 32 (33) : 41 Cri L Jour 234 \* (Vol 27) 1940 Sind 233 (234) : I L R (1941) Kar 32 : 42 Cri L Jour 182 (DB) \* (Vol 26) 1939 Pat 206 (207) : 40 Cri L Jour 538 \* (Vol 19) 1932 Mad 495 (496) : 33 Cri L Jour 783 \* (Vol 10) 1923 Nag 260 (261) : 24 Cri L Jour 361 \* (75) 24 Suth W R Cr 64 (65) (DB).

[But see (1865) 2 Suth W R Cr 44 (44).]

[4] Sentence to be passed in any particular case is generally in the discretion of the Court which tries the case and will not ordinarily be interfered with unless it is so severe or so lenient that it amounts to an improper exercise of discretion. (Vol 33) 1946 Sind 62 (63) : I L R (1945) Kar 409 \* (Vol 32) 1945 All 207 (213) : I L R (1945) All 450 : 47 Cri L Jour 132 (DB) \* (Vol 31) 1944 Mad 302 (307) : 46 Cri L Jour 667 (DB) \* (Vol 29) 1942 Mad 603 (604) : 43 Cri L Jour 859 \* (Vol 29) 1942 Rang 49 (50, 51) : 1941 Rang L R 595 : 43 Cri L Jour 525 (DB) \* (Vol 28) 1941 All 309 (309) : I L R (1941) All 465 : 42 Cri L Jour 779 (DB) \* (Vol 25) 1938 Rang 331 (333) : 40 Cri L Jour 49 (DB) \* (Vol 24) 1937 Lah 195 (196) : 38 Cri L Jour 428 \* (Vol 24) 1937 Pat 275 (276) : 38 Cri L Jour 572 (DB) \* (Vol 23) 1936 Sind 233 (235) : 38 Cri L Jour 114 (DB) \* (Vol 22) 1935 Lah 337 (337, 338) : 16 Lah 1131 : 36 Cri L Jour 1001 (DB) \* (07) 5 Cri L Jour 36 (38) : 30 Mad 103 (FB) \* (Vol 8) 1921 Bom 456 (456) : 22 Cri L Jour 324 (DB) \* (73) 20 Suth W R Cr 22 (23) (DB) \* (73) 20 Suth W R Cr 15 (16) (DB) \* (33) 34 Cri L Jour 271 (273) (Nag) \* (Vol 20) 1933 Oudh 430 (431) : 35 Cri L Jour 128 \* (Vol 21) 1934 Nag 117 (117) : 35 Cri L Jour 760 \* (Vol 21) 1934 Pat 214 (215) : 35 Cri L Jour 1327 : 13 Pat 63.

[See also (Vol 30) 1943 Bom 304 (305) : 44 Cri L Jour 786 (DB).]

18. Revision of appellate orders.—[1] Revision against appellate order—High Court will, as a general rule, take as the facts of the case the findings of the lower appellate Court and not of the first Court. (Vol 4) 1917 All 394 (394) : 18 Cri L Jour 435 \* (13) 14 Cri L Jour 590 (591) (DB) (Cal) \* (Vol 12) 1925 Oudh 190 (181) : 26 Cri L Jour 959.

[See (Vol 14) 1927 Sind 39 (41) : 21 Sind L R 107 : 27 Cri L Jour 1233 \* (Vol 9) 1922 All 122 (122) : 23 Cri L Jour 241. (Rule is not absolute one.)]

Section 439 — Note 18 (*contd.*)

[2] Lower appellate Court not going into questions left with it at the trial by the first Court with thoroughness—High Court will investigate the original trial and see whether the nature of the procedure and the decision arrived at were such as to leave no doubt that the accused had a fair trial and that the decision was given according to law. (Vol 6) 1919 All 167 (168) : 20 Cri L Jour 370.

[See also (Vol 26) 1939 Pat 28 (29) : 39 Cri L Jour 968.

[3] High Court may in revision set aside an order unimarily dismissing an appeal, where on facts it finds that the appeal ought not to have been so dismissed. 36) 37 Cri L Jour 904 (905) (DB) (Cal).

[4] Appellate Court wrongly dismissing appeal as barred by limitation—High Court cannot in revision consider appeal on merits—It can only remand appeal to appellate Court for disposal on merits. (Vol 30) 1943 Ind 39 (46) : 41 Cri L Jour 295 (FB).

[5] Appellate Court simply confirmed conviction and sentence passed by trial Court without writing any judgment and there was nothing on the record to show that the appeal was properly heard or disposed of—High Court in revision remanded appeal for re-hearing and fresh disposal. (Vol 30) 1943 Mad 66 (66, 67) : 44 Cri L Jour 287.

[6] Appellate Court basing its decision on presumption under S. 6, Bengal Public Gaming Act, but not rising in circumstances of case and not on independent evidence on record—Case ought to be remanded for further hearing in accordance with law. (Vol 28) 1941 Cal 113 (415) : 113 (1941) Cal 58 : 42 Cri L Jour 645.

19. Revision of orders in proceedings under Chapter VIII. — [1] Orders in proceedings under Chapter VIII—Question whether it is necessary in the interests of keeping the peace to take security from a person is essentially a question which concerns the Magistrate and the local police—High Court will interfere only on very strong and clear grounds which go to show that there has been in the particular case, a miscarriage of justice. (Vol 30) 1943 All 23 (24) : 1 L R (1943) All 945 : 41 Cri L Jour 187 \* (Vol 30) 1943 Mad 169 (170) : 44 Cri L Jour 321 \* (Vol 27) 1940 Sind 175 (176) : 1 L R (1940) Kar 494 : 41 Cri L Jour 937 (DB) \* (Vol 26) 1939 Sind 167 (168) : 40 Cri L Jour 708 : 1 L R (1939) Kar 662 (193) \* (Vol 24) 1937 Nag 70 (71, 72) : 38 Cri L Jour 447 : 1 L R (1936) Nag 200 \* (Vol 21) 1934 Cal 482 (484) : 61 Cal 588 : 35 Cri L Jour 952 (DB) \* (Vol 10) 1923 Nag 53 (54) : 23 Cri L Jour 741.

20. Cases in which the High Court will refuse to exercise its discretion in favour of interference. — [1] The High Court will generally refuse to interfere in the following cases:

[a] Unexplained delay in applying in revision. (Vol 32) 1945 All 207 (213) : 1 L R (1945) All 450 : 47 Cri L Jour 182 (DB) \* (Vol 28) 1941 Pat 362 (368) \* (05) 2 Cri L Jour 154 (154) : 27 All 486 \* (97-01) 1 Upp Bur Rul 103 (103) \* (Vol 14) 1927 Cal 61 (62) : 28 Cri L Jour 59 (DB).

[See (Vol 29) 1933 Cal 647 (650) : 35 Cri L Jour 29 (DB).]

[b] Another remedy open to party—He not pursuing it. (Vol 21) 1937 Lah 132 (133) : 17 Lah 604 : 38 Cri L Jour 432 \* (Vol 23) 1936 Lah 1015 (1016) : 38 Cri L Jour 125 \* (Vol 23) 1936 Sind 156 (157) : 37 Cri L Jour 1082 : 23 Sind L R 131 (DB) \* (Vol 15) 1928 Mad 1174 (1175) : 30 Cri L Jour 133 (DB) \* (Vol 19) 1932 Mad 720 (721) : 36 Mad 149 : 33 Cri L Jour 826 \* (Vol 7) 1920 Nag 198 (198) : 21 Cri L Jour 863 \* (02) 29 Cal 382 (384) (DB) \* (Vol 13) 1926 Pat 176 (178) : 5 Pat 25 : 27 Cri L Jour 235 (DB) \* (Vol 16) 1929 Pat 640 (641) : 30 Cri L Jour 765 \* (Vol 21) 1934 Sind 78 (78) : 35 Cal L Jour 1251 (1251) \* (04) 30 All 331 (333)

(DB) \* (Vol 8) 1921 All 80 (81) : 43 All 497 : 22 Cri L Jour 715 (DB) \* (09) 10 Cri L Jour 190 (191) : 36 Cal 643 (DB).

[c] Where the case is petty or trifling. (Vol 25) 1938 Sind 70 (70) : 39 Cri L Jour 474 : 32 Sind L R 684 (DB) \* (Vol 16) 1929 Oudh 240 (240) : 30 Cri L Jour 799 \* (72) 17 Suth W R Cr 37 (37) (DB).

[d] Only ground of interference being discovery, subsequent to the decision, of new evidence. (Vol 12) 1925 Oudh 673 (673) : 26 Cri L Jour 1278 \* (74) 21 Suth W R Cr 47 (48) (DB) \* (86) 2 Weir 574 (574, 575).

[e] Where the order passed has, at the time of revision already expired or spent its force. (Vol 30) 1943 Mad 566 (567) : 44 Cri L Jour 794 \* (Vol 30) 1943 Oudh 451 (452) : 45 Cri L Jour 75 \* (Vol 29) 1942 Mad 532 (533) : 43 Cri L Jour 755 \* (Vol 29) 1942 Pat 331 (332) : 43 Cri L Jour 637 \* (Vol 27) 1940 Pat 471 (472) : 41 Cri L Jour 451 \* (Vol 11) 1924 Mad 896 (896) : 25 Cri L Jour 1304 \* (Vol 3) 1916 Mad 626 (626) : 16 Cri L Jour 272 (DB) \* (Vol 4) 1917 Upp Bur 5 (5) : 3 Upp Bur Rul 17 : 18 Cri L Jour 967 \* (Vol 22) 1935 Pat 461 (463) : 36 Cri L Jour 1263. (High Court will interfere for special reasons.) \* (Vol 16) 1929 Pat 46 (48) : 7 Pat 369 : 30 Cri L Jour 302. (Do.) \* (Vol 9) 1922 Mad 76 (77, 78) : 23 Cri L Jour 404. (Do.)

[f] Where the accused has undergone his term of imprisonment, High Court will not generally interfere with the conviction. (88) 1888 Rat 409 (409) \* (98) 22 Bom 760 (761) (DB) \* (74) 24 Suth W R Cr 71 (72) (DB) \* (81) 7 All 135 (136). (In proper cases High Court can interfere.) \* (Vol 3) 1916 All 236 (236) : 38 All 395 : 17 Cri L Jour 513. (Do.)

[See (Vol 13) 1926 Bom 256 (256) : 27 Cri L Jour 557 (DB).]

21. Onus. — [1] High Court will not interfere in revision unless the person invoking its interference satisfies the Court that the order is open to interference on legal grounds. (Vol 1) 1914 All 530 (531) : 36 All 485 : 15 Cri L Jour 519 \* (Vol 10) 1923 Pat 238 (239) : 24 Cri L Jour 495 (DB) \* (Vol 13) 1926 Nag 348 (348) : 27 Cri L Jour 475. (Accused must allege hardship on account of illegality of procedure which he makes a ground for revision.) \* (84) 35 Cri L Jour 416 (416) (Oudh) \* (09) 10 Cri L Jour 160 (163) (DB) (Bom).

22. High Court has all the powers of a Court of appeal. — [1] High Court has power to interfere with orders in respect of which no appeal would lie under the Code; what the law says is that the High Court may exercise the same powers in revision in any proceeding whatever, as it could have exercised in hearing an appeal. (Vol 30) 1943 Pat 313 (314) : 44 Cri L Jour 801 \* (02) 27 Bom 84 (88) (DB) \* (10) 12 Cri L Jour 50 (54) : 1910 Pun Re No. 33 Cr (DB).

[2] The power to order a further inquiry is a power which is exercisable by a Court of appeal and can, therefore, be exercised by the High Court in revision in any proceeding and therefore in revision of an order of discharge passed by a Presidency Magistrate. (02) 27 Bom 84 (88) (DB) \* (01) 28 Cal 652 (667, 668) (FB) \* (09) 10 Cri L Jour 385 (388) : 36 Cal 994 (DB) \* (Vol 4) 1917 Cal 261 (262) : 17 Cri L Jour 428 (DB).

[See also (88) 15 Cal 608 (619) (FB).]

[But see (07) 5 Cri L Jour 83 (84) : 33 Cal 1282 (DB) \* (1900) 27 Cal 126 (129) (DB) \* (07) 6 Cri L Jour 400 (401) (DB) (Cal).]

[3] In a revision from an acquittal or a discharge High Court can reverse such acquittal or discharge, and direct a further inquiry. (11) 12 Cri L Jour 497 (497) (Mad) \* (12) 13 Cri L Jour 771 (771) : 6 Sind L R 120 (DB) \* (12) 13 Cri L Jour 456 (457) (Lah).

[4] Revision from acquittal or discharge—High Court can direct retrial. (Vol 29) 1942 Lah 70 (71) : 1 L R (1942) Lah 125 : 43 Cri L Jour 453 (FB) \* (Vol 28)

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1941 Lah 214 (215) : 42 Cri L Jour 860 : I L R (1941) Lah 423 (DB) \* (Vol 24) 1937 All 240 (243) : 38 Cri L Jour 521 (DB). (Overruled on another point in (Vol 31) 1944 All 137 : I L R (1944) All 403 : 46 Cri L Jour 38 (FB).) \* (Vol 24) 1937 Pat 110 (112) : 38 Cri L Jour 470 \* (Vol 24) 1937 Pat 646 (647) : 39 Cri L Jour 78 \* (Vol 5) 1918 Cal 392 (393) : 18 Cri L Jour 519 (DB) \* (Vol 12) 1925 Oudh 321 (322) : 28 Oudh Cas 384 : 27 Cri L Jour 854 \* ('12) 13 Cri L Jour 759 (760) : 39 Cal 931 (DB) \* ('85) 8 Mad 336 (340) (DB) \* ('12) 13 Cri L Jour 771 (771) : 6 Sind L R 120 (DB) \* ('93-1900) 1893-1900 Low Bur Rul 41 (41).

[5] Revision from acquittal or discharge — High Court can direct a commitment to be made. (Vol 14) 1927 Rang 74 (80) : 4 Rang 471 : 28 Cri L Jour 219 \* (Vol 15) 1928 Mad 1267 (1268) : 52 Mad 156 : 30 Cri L Jour 184 (FB) \* ('12) 13 Cri L Jour 771 (771) : 6 Sind L R 120 (DB) \* ('08) 8 Cri L Jour 263 (267) : 1908 Pun Re No. 14 Cr \* (Vol 19) 1932 Nag 85 (85) : 33 Cri L Jour 558 \* (Vol 13) 1926 Oudh 194 (195) : 27 Cri L Jour 417 \* ('72) 19 Sudh W R Cr 56 (56) (DB) \* ('83) 6 All 40 (41, 42) (DB) \* ('02) 27 Bom 84 (88, 90) (DB).

[6] Revision from conviction — High Court can reverse the finding and sentence, and acquit or discharge the accused. (Vol 28) 1941 Cal 90 (91) : 42 Cri L Jour 383 (DB) \* (Vol 23) 1936 Nag 249 (250) : 38 Cri L Jour 936 : I L R (1937) Nag 178 \* (Vol 11) 1924 Pat 377 (379) : 24 Cri L Jour 478 \* (Vol 17) 1930 Nag 255 (259) : 31 Cri L Jour 705 \* (Vol 17) 1930 Oudh 250 (251) : 6 Luck 26 : 31 Cri L Jour 1015 \* (Vol 21) 1934 Lah 648 (648) : 36 Cri L Jour 468 (DB) \* ('11) 12 Cri L Jour 495 (495) (DB) (Mad) \* (Vol 15) 1928 Pat 249 (250) : 29 Cri L Jour 259 \* (Vol 21) 1934 Lah 415 (415) : 35 Cri L Jour 1447 \* (Vol 19) 1932 Lah 436 (438) : 33 Cri L Jour 333 : 13 Lah 535 \* ('06) 3 Cri L Jour 385 (388) (DB) (Cal) \* (Vol 14) 1927 All 238 (238) : 28 Cri L Jour 166.

[See (Vol 25) 1938 Mad 723 (723, 724) : 39 Cri L Jour 871.]

[7] Revision from conviction—High Court can order a retrial. (Vol 32) 1945 All 98 (100) : I L R (1945) All 131 : 46 Cri L Jour 539 \* (Vol 4) 1917 Lah 191 (192) : 18 Cri L Jour 112 \* ('85) 8 Mad 336 (340) (DB). (Overruled on another point in 14 Mad 334 (FB).) \* ('23) 24 Cri L Jour 714 ('715) (DB) (Cal) \* ('67) 4 Bom H C R Cr 3 (3) \* (Vol 20) 1933 Pat 91 (92) : 11 Pat 779 : 34 Cri L Jour 215 (DB) \* (Vol 17) 1930 Mad 443 (443, 444) : 30 Cri L Jour 1160.

[See (Vol 13) 1926 Cal 1173 (1174) : 27 Cri L Jour 1138 \* (Vol 25) 1938 Nag 493 (495) : 40 Cri L Jour 73.]

[8] Revision from conviction—High Court can order a commitment to be made. ('80) 1880 Pun Re No. 30 Cr, p. 76 (77) (DB) \* ('26) 27 Cri L Jour 871 (872) (DB) (Cal) \* ('92) 16 Bom 580 (584, 586) (DB) \* ('78) 1878 Pun Re No. 18 Cr, p. 45 (45) (DB) \* (Vol 7) 1920 Cal 40 (41) : 21 Cri L Jour 10 (DB) \* ('93) 15 All 205 (206) (DB).

[9] Revision from conviction — High Court can alter the finding and sentence. (Vol 28) 1941 Oudh 476 (478) : 42 Cri L Jour 530 \* (Vol 28) 1941 Pat 492 (495) : 42 Cri L Jour 579 \* (Vol 28) 1941 Cal 90 (91) : 42 Cri L Jour 383 (DB) \* \* ('38) 1938 All L Jour 769 (772) \* (Vol 23) 1936 Mad 788 (789) : 37 Cri L Jour 1158 (DB) \* (Vol 22) 1935 Nag 177 (178) : 36 Cri L Jour 854 \* ('06) 4 Cri L Jour 490 (491) : 3 Low Bur Rul 232 \* (Vol 12) 1925 Sind 193 (193) : 18 Sind L R 301 : 25 Cri L Jour 462 (DB) \* (Vol 18) 1931 Oudh 274 (277) : 7 Luck 102 : 32 Cri L Jour 905 (DB) \* ('95) 22 Cal 391 (409) (DB) \* (Vol 18) 1931 All 17 (18) : 58 All 226 : 32 Cri L Jour 564 \* (Vol 14) 1927 Lah 208 (208) : 28 Cri L Jour 753 : 9 Lah 214 \* (Vol 7) 1920 Nag 142 (143) : 21 Cri L Jour 647 \* ('13) 14 Cri

L Jour 595 (595) (Lah) \* (Vol 1) 1914 Mad 61 (61) : 15 Cri L Jour 440 \* (Vol 19) 1932 Pat 241 (242) : 11 Pat 392 : 33 Cri L Jour 709 (DB).

[10] Revision from conviction—High Court can reduce sentence or alter the nature of the sentence. (Vol 32) 1945 All 98 (100) : I L R (1945) All 131 : 46 Cri L Jour 539 \* (Vol 32) 1945 Mad 145 (146) \* (Vol 28) 1941 Pat 492 (495) : 42 Cri L Jour 579 \* (Vol 25) 1938 Lah 366 (367, 368) : 39 Cri L Jour 658 \* (Vol 19) 1932 Lah 10 (11) : 33 Cri L Jour 114 \* ('66) 6 Sudh W R Cr 7 (9) (FB) \* (Vol 12) 1925 All 591 (592) : 26 Cri L Jour 1232 \* ('69) 4 Mad H C R App xxxvi (xxxvi) \* (Vol 18) 1931 Pat 342 (343) : 32 Cri L Jour 1166 \* (Vol 19) 1932 Sind 159 (160) : 34 Cri L Jour 24 (DB) \* (Vol 14) 1927 Oudh 296 (297) : 2 Luck 503 : 28 Cri L Jour 673 \* ('84) 6 All 622 (622) (FB).

[11] Revision from order other than of acquittal or conviction—High Court can alter or reverse such order. (Vol 32) 1945 All 226 (226, 227) : I L R (1945) All 282 : 47 Cri L Jour 89 \* (Vol 30) 1943 Nag 236 (238) : I L R (1943) Nag 637 : 44 Cri L Jour 643 \* (Vol 29) 1942 Lah 214 (215) : 43 Cri L Jour 791 \* ('39) 40 Cri L Jour 32 (33) (Mad) \* (Vol 24) 1937 Sind 116 (118) : 31 Sind L R 77 : 38 Cri L Jour 873 (DB) \* (Vol 23) 1936 Sind 183 (139) : 33 Cri L Jour 168 : 30 Sind L R 322 (DB) \* (Vol 19) 1932 Lah 433 (434) : 33 Cri L Jour 335 \* (Vol 12) 1925 Oudh 233 (233) : 25 Cri L Jour 1375 \* (Vol 8) 1921 Pat 463 (465) : 24 Cri L Jour 486 \* (Vol 6) 1919 Low Bur 146 (147, 148) : 9 Low Bur Rul 208 : 19 Cri L Jour 801 \* (Vol 14) 1927 Mad 139 (140) : 27 Cri L Jour 1391 \* (Vol 7) 1920 Bom 311 (312) : 44 Bom 686 : 21 Cri L Jour 384 (DB) \* ('03) 7 Cal W N 327 (329) (DB) \* (Vol 13) 1926 All 402 (403) : 27 Cri L Jour 523 \* (Vol 20) 1933 Rang 89 (90) : 34 Cri L Jour 832 \* ('86) 2 Weir 575 (575) (FB) \* (Vol 15) 1928 Oudh 104 (105, 106) : 3 Luck 287 : 29 Cri L Jour 102 \* (Vol 7) 1920 Pat 112 (113) : 21 Cri L Jour 338.

[12] High Court can in revision make any amendment or any consequential or incidental order that may be just or proper. (Vol 29) 1942 Lah 214 (215) : 43 Cri L Jour 791 \* (Vol 28) 1941 Lah 210 (211) : 42 Cri L Jour 651 \* (Vol 28) 1941 Rang 135 (138) : 1941 Rang L R 65 : 42 Cri L Jour 690 (DB) \* (Vol 28) 1941 Sind 217 (220) : I L R (1941) Kar 422 : 43 Cri L Jour 259 (DB) \* (Vol 24) 1937 Sind 116 (118) : 31 Sind L R 77 : 38 Cri L Jour 873 (DB) \* (Vol 9) 1922 Mad 54 (55) : 23 Cri L Jour 71 \* (Vol 2) 1915 Low Bur 34 (35) : 8 Low Bur Rul 290 : 16 Cri L Jour 670 \* (Vol 8) 1921 Cal 149 (150) : 23 Cri L Jour 235 (DB) \* (Vol 4) 1917 Cal 285 (286) : 18 Cri L Jour 294 (DB) \* (Vol 12) 1925 Nag 297 (298) : 26 Cri L Jour 1378 : 21 Nag L R 191 \* ('10) 11 Cri L Jour 496 (497) : 13 Oudh Cas 161 \* ('69) 4 Mad H C R App xlvii (xlviii) \* ('03) 25 All 315 (316).

[See ('33) 34 Cri L Jour 271 (273) (Nag).]

[13] High Court in revision can direct lower Court under S. 428 to record additional evidence — But the Court must come to its own conclusions on such evidence and not merely accept the lower Court's finding. ('01) 3 Bom L R 677 (678) (DB) \* ('85) 8 Mad 336 (340) (DB) \* ('07) 6 Cri L Jour 357 (358) (Cal) \* (Vol 22) 1935 Mad 325 (326) : 37 Cri L Jour 99 \* (Vol 3) 1916 Mad 775 (775, 778) : 16 Cri L Jour 767 (DB).

23. Re-trial.—When to be ordered. — [1] The power of the High Court to order re-trial in revision against acquittal is discretionary and will be ordered only in cases when there has been a miscarriage of justice. (Vol 29) 1942 Lah 70 (71) : I L R (1942) Lah 125 : 43 Cri L Jour 453 (FB) \* (Vol 19) 1932 All 191 (192) : 33 Cri L Jour 885 : 54 All 413. (Complainant not getting fair hearing at the trial.) \* ('72) 7 Mad H C R App v (v) \* (Vol 31) 1944 Nag 186 (187) : I L R (1944) Nag 176 : 45 Cri L Jour 766 \* (Vol 28) 1941 All 309 (310) : I L R (1941)



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All 165 : 42 Cri L Jour 779 (DB) \* (Vol 28) 1941 Lah 425 (425) : 43 Cri L Jour 118 \* (Vol 19) 1932 All 188 (190) : 34 Cri L Jour 18 : 54 All 416. (Trial being of public importance.) \* (Vol 25) 1938 Rang 193 (194) : 1938 Rang L R 121 : 39 Cri L Jour 623. (Appellate Court mis-directing itself on a question of law.) \* (Vol 28) 1941 Lah 214 (215) : I L R (1941) Lah 423 : 42 Cri L Jour 660 (DB). (Do)

[2] Where the trial Court fails to appreciate the questions of fact which it has to determine in order to adjudicate on the plea of right of private defence, the High Court will order a re-trial in a revision against acquittal. (Vol 24) 1937 Pat 110 (112) : 38 Cri L Jour 470.

[3] A re-trial can be ordered even where no appeal is preferred against the acquittal by the Government. (Vol 28) 1941 Lah 214 (215) : I L R (1941) Lah 423 : 42 Cri L Jour 660 (DB) \* (Vol 21) 1937 All 210 (213) : 38 Cri L Jour 521. Allowed in (Vol 31) 1944 All 137 : I L R (1944) All 465 : 16 Cri L Jour 38 (PB) but overruled on another point.)

[4] A re-trial will not be ordered merely because the revisional authority disagrees with the trial Court as to the offence constituted by proved facts. (Vol 29) 1943 Lah 70 (71) : I L R (1942) Lah 125 : 43 Cri L Jour 453 (PB) \* (Vol 28) 1936 Pesh 172 (175) : 37 Cri L Jour 1039 (DB).

[5] Prosecution launched only with a view to humiliate accused -- Re-trial will not be ordered. (Vol 27) 1940 All 19 (21) : 41 Cri L Jour 281.

[6] Due to errors defects in the prosecution case chance of conviction being remote -- Re-trial will not be ordered. (Vol 11) 1924 Cal 975 (976) : 51 Cri 921 : 26 Cri L Jour 15 (DB).

[7] Direction by High Court in revision against acquittal to the lower appellate Court to re-hear appeal on the same evidence held would amount to a direction to convert an acquittal into a conviction; and, therefore, High Court would not remand the case for such a purpose. (Vol 24) 1937 Nag 123 (124) : 38 Cr. L. J. 433. See (Vol 4) 1917 Lupp Bur 7 (7) : 3 Upp Bur Rul 19 : 18 Cri L Jour 970.]

[8] High Court in revision against conviction will order a re-trial where there has been a confusion in the trial Court about the offence committed and the accused has been prejudiced thereby. (Vol 25) 1938 Sind 70 (70) : 39 Cri L Jour 474 : 32 Sind L R 681 (DB).

[9] Accused admitting offence under misapprehension -- High Court in revision against conviction will order re-trial. (Vol 24) 1937 Mad 679 (680) : 43 Cri L Jour 58.

[10] Proven convictions of accused not brought to notice of Magistrate and, consequently accused not charged under S. 75, Penal Code -- High Court in revision against conviction will order re-trial. (Vol 25) 1938 Oudh 261 (261) : 40 Cri L Jour 25.

[11] Accused tried and convicted of minor offence when he ought to have been convicted of grave offence -- High Court in revision against conviction will order re-trial. (Vol 7) 1922 Mad H C R App v (vi).

[12] Lower appellate Court reversing finding of fact without discussing reasons -- Revision against conviction -- Re-trial will be ordered. (Vol 22) 1935 Pat 301 (301, 302) : 36 Cri L Jour 1339 (DB).

[13] Findings affected by irregular local inspection -- Re-trial will be ordered in the revision against conviction. (Vol 4) 1917 Cal 212 (212) : 44 Cal 711 : 18 Cri L Jour 177 (DB).

[14] A re-trial will not be ordered where the accused has already undergone a considerable part of the sentence or where the sentence awarded is trifling. (Vol 18) 1931 Lah 767 (767) : 33 Cri L Jour 145 \* (Vol 4) 1917 Pat 420 (421) : 18 Cri L Jour 737. (Sentence trifling.)

[15] The prosecution should not be allowed an opportunity to fill in the gaps deliberately left by them by remanding the case for re-trial. (Vol 25) 1938 Pat 39 (40) : 39 Cri L Jour 278.

[See (Vol 12) 1925 Cal 603 (605) : 26 Cri L Jour 849 (DB).]

[16] Conviction impeached in revision on ground of non-compliance with provisions of the Code -- High Court will interfere and order a re-trial only where non-compliance has prejudicially accused. (Vol 25) 1938 Lah 832 (832) : 40 Cri L Jour 186.

[17] Appellate Court not writing proper judgment in accordance with S. 367 -- High Court in revision is not bound to send the case back to appellate Court for re-hearing but may go into evidence and deal with the case itself. (Vol 23) 1936 Nag 160 (160, 161) : I L R (1937) Nag 38 : 39 Cri L Jour 319.

24. Power to interfere with interlocutory orders and in pending proceedings. -- [1] The enumeration of the powers of the High Court in revision, as those of a Court of appeal, is not exhaustive and the section only enacts that among the powers possessed by the High Court, are the powers of a Court of appeal, and not that the High Court shall exercise only those powers which are conferred on a Court of appeal. (Vol 12) 1925 Mad 39 (40) : 47 Mad 722 : 25 Cri L Jour 1009 \* (27) 1927 Mad W N 716 (718, 719) \* (203) 27 Bom 84 (88) (DB).

[See also (11) 12 Cri L Jour 50 (54, 55) : 1910 Pun Re No. 33 Cr (DB).]

[2] High Court has powers in revision to interfere with proceedings of lower Court at any stage. (Vol 8) 1921 Sind 137 (140) : 16 Sind L R 1 : 23 Cri L Jour 305 (DB) \* (Vol 22) 1935 Sind 81 (81) : 36 Cri L Jour 881 (DB) \* (11) 12 Cri L Jour 615 (616) (Lah) \* (Vol 12) 1925 Mad 315 (316) : 26 Cri L Jour 421 \* (92) 1892 All W N 102 (102, 103) \* (Vol 3) 1916 Mad 408 (409) : 39 Mad 581 : 16 Cri L Jour 477 \* (96) 20 Bom 543 (545) (DB) \* (Vol 15) 1928 Oudh 104 (105) : 3 Luck 287 : 39 Cri L Jour 102 \* (Vol 11) 1924 Cal 1018 (1022) : 25 Cri L Jour 1258 \* (13) 14 Cri L Jour 5 (22) (DB) (Cal) \* (24) 1 Cri L Jour 514 (517) : 1904 Pun Re No. 8 Cr \* (13) 14 Cri L Jour 398 (399, 400) (DB) (Cal) \* (26) 9 Cri L Jour 23 (24) : 3 Low Bur Rul 109 \* (97) 19 All 291 (293).

[See also (12) 13 Cri L Jour 443 (444) (All).]

[But see (85) 1885 Pun Re No. 45 Cr, p. 103 (103) (DB).]

[3] Power to interfere at any stage should be exercised sparingly and with circumspection as aggrieved party will have ultimately a right of appeal or revision. (Vol 29) 1942 Nag 38 (38) : I L R (1942) Nag 494 : 43 Cri L Jour 323 \* (Vol 27) 1940 Nag 390 (393) : I L R (1942) Nag 333 : 42 Cri L Jour 208 \* (Vol 22) 1935 Sind 81 (81) : 36 Cri L Jour 881 (DB) \* (Vol 18) 1931 Mad 419 (419) : 54 Mad 595 : 32 Cri L Jour 895 \* (Vol 18) 1931 Mad 240 (240) : 54 Mad 251 : 32 Cri L Jour 779.

[4] High Court will interfere with interlocutory orders as a general rule. (Vol 29) 1942 All 148 (149, 150) : I L R (1942) All 344 : 43 Cri L Jour 490 (PB) \* (Vol 27) 1940 Nag 390 (393) : I L R (1942) Nag 333 : 42 Cri L Jour 208 \* (Vol 7) 1920 All 8 (9) : 21 Cri L Jour 379 \* (Vol 20) 1933 Oudh 387 (387) : 9 Luck 61 : 35 Cri L Jour 148 \* (Vol 16) 1929 Oudh 513 (543) : 5 Luck 297 : 31 Cri L Jour 479 \* (Vol 13) 1926 Nag 304 (304) : 22 Nag L R 34 : 27 Cri L Jour 707 \* (Vol 15) 1928 Bom 181 (185, 186) : 52 Bom 151 : 29 Cri L Jour 817 (DB) \* (Vol 17) 1930 Lah 881 (882) : 32 Cri L Jour 145 \* (Vol 17) 1930 Lah 346 (346) : 32 Cri L Jour 82 (DB) \* (Vol 18) 1931 Mad 419 (419) : 54 Mad 395 : 32 Cri L Jour 895 \* (Vol 22) 1935 Mad 257 (258) : 38 Mad 430 : 36 Cri L Jour 781 (DB).

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[See (Vol 2) 1915 Bom 98 (98) : 16 Cri L Jour 484 (DB)]

[5] Pending proceedings — High Court will interfere in revision as a general rule. (Vol 27) 1940 Sind 65 (66) : 41 Cri L Jour 568 : I L R (1940) Kar 157 (DB) \* (Vol 25) 1938 Nag 283 (284) : 40 Cri L Jour 197 : I L R (1939) Nag 686 \* (Vol 20) 1933 Pat 116 (117) : 34 Cri L Jour 1145 \* (Vol 7) 1920 Nag 31 (31) : 21 Cri L Jour 343 \* (Vol 15) 1928 Bom 184 (185) : 52 Bom 151 : 29 Cri L Jour 317 (DB) \* (Vol 20) 1933 Rang 297 (298) : 35 Cri L Jour 52 \* (Vol 20) 1933 Sind 196 (197) : 27 Sind L R 214 : 34 Cri L Jour 884 (DB) \* (Vol 10) 1923 Lah 663 (664) : 26 Cri L Jour 167 \* (Vol 18) 1931 Cal 521 (522) : 32 Cri L Jour 1042 (DB) \* (Vol 5) 1918 Mad 164 (165) : 19 Cri L Jour 63 \* (Vol 14) 1927 Oudh 571 (572) : 28 Cri L Jour 814.

[See (Vol 12) 1925 Mad 315 (316) : 26 Cri L Jour 421 \* (Vol 22) 1935 Cal 731 (732) : 37 Cri L Jour 139 : 62 Cal 469 (DB).]

[6] As a general rule High Court will not quash charges framed in the trial Court. (Vol 29) 1942 Nag 38 (38, 39) : I L R (1942) Nag 494 : 43 Cri L Jour 328 : \* (Vol 29) 1942 Rang 48 (48) : 1941 Rang L R 599 : 43 Cri L Jour 492 (DB) \* ('38) 1938-1 Mad L Jour 810 (813) \* ('37) 39 Pun L R 957 (957) \* (Vol 2) 1935 Rang 292 (293) : 36 Cri L Jour 1293 \* (Vol 4) 1917 Mad 657 (658) : 17 Cri L Jour 394 \* (Vol 19) 1932 Lah 349 (349) : 34 Cri L Jour 82 \* (Vol 20) 1933 All 211 (212) : 34 Cri L Jour 956.

(7) Case of an exceptional nature — High Court will interfere in revision. (Vol 29) 1942 Rang 48 (48) : 1941 Rang L R 599 : 43 Cri L Jour 492 (DB) \* (Vol 27) 1940 Sind 65 (66) : 41 Cri L Jour 568 : I L R (1940) Kar 157 (D B) \* ('38) 1938-1 Mad L Jour 810 (813) \* (Vol 25) 1938 Nag 283 (284) : 40 Cri L Jour 197 : I L R (1939) Nag 686 \* (Vol 17) 1930 Lah 881 (882) : 32 Cri L Jour 145 \* (Vol 10) 1923 Lah 278 (278) : 24 Cri L Jour 118 \* (Vol 14) 1927 Mad 975 (976) : 51 Mad 84 : 28 Cri L Jour 979 \* (Vol 20) 1933 Oudh 387 (388) : 9 Luck 61 : 35 Cri L Jour 148 \* (Vol 21) 1934 Sind 183 (183) : 36 Cri L Jour 331 (D B) \* (Vol 21) 1934 Nag 138 (139).

[8] Bare statement of facts without any elaborate argument sufficient to convince High Court that the case is fit for its interference at interlocutory stage — Case is of exceptional nature. (Vol 29) 1942 Rang 48 (48, 49) : 1941 Rang L R 599 : 43 Cri L Jour 492 \* ('98) 25 Cal 233 (235) (D B) \* (Vol 17) 1930 Lah 881 (882) : 32 Cri L Jour 145 \* (Vol 18) 1931 Pat 140 (142) : 10 Pat 596 : 32 Cri L Jour 782 \* (Vol 12) 1925 Nag 345 (346) : 26 Cri L Jour 1093 \* (Vol 7) 1920 Nag 31 (31) : 21 Cri L Jour 343 \* (Vol 20) 1933 Oudh 387 (388) : 9 Luck 61 : 35 Cri L Jour 148.

[9] In the admitted circumstances of the case, it would be a mock trial if the case is allowed to proceed — Case is of exceptional nature. (Vol 20) 1933 Oudh 387 (388) : 9 Luck 61 : 35 Cri L Jour 148 \* (Vol 12) 1925 All 311 (312) : 26 Cri L Jour 748.

[10] High Court may quash proceedings where no offence appears to have been committed on the face of the proceedings. (Vol 30) 1943 Nag 327 (329) : I L R (1944) Nag 288 : 45 Cri L Jour 175 \* (Vol 29) 1942 Lah 122 (123) : 43 Cri L Jour 632 \* (Vol 29) 1942 Nag 38 (39) : I L R (1942) Nag 494 : 43 Cri L Jour 328 \* (Vol 27) 1940 Sind 65 (66) : 41 Cri L Jour 568 : I L R (1940) Kar 157 (D B) \* (Vol 23) 1936 All 354 (356) : 37 Cri L Jour 713 \* (Vol 15) 1928 Bom 184 (185, 186) : 52 Bom 151 : 29 Cri L Jour 317 \* (Vol 21) 1934 Lah 434 (435) : 36 Cri L Jour 20 \* (Vol 20) 1933 Cal 647 (651) : 35 Cri L Jour 29 (D B) \* (Vol 12) 1925 Cal 100 (102) : 52 Cal 188 : 26 Cri L Jour 545 (D B) \* (Vol 20) 1933 Bom 409 (411) : 37 Bom 690 : 35 Cri L Jour 230 \* ('35)

1935 Mad W N 1342 (1343) \* (Vol 20) 1933 Sind 196 (197) : 27 Sind L R 214 : 34 Cri L Jour 884 (D B) \* (Vol 20) 1933 Rang 297 (298) : 35 Cri L Jour 52 \* (Vol 19) 1932 Pat 72 (78) : 33 Cri L Jour 349.

[But see (Vol 4) 1917 Mad 657 (658) : 17 Cri L Jour 394.]

[11] Where civil proceedings in respect of the same matter are pending case is of exceptional nature. (Vol 2) 1915 Cal 596 (596) : 16 Cri L Jour 309 (D B) \* ('13) 14 Cri L Jour 128 (128) (Lah).

[12] No proper sanction obtained for institution — High Court may quash proceedings. (Vol 9) 1922 Cal 298 (300) : 50 Cal 135 : 24 Cri L Jour 111 (D B) \* (Vol 12) 1925 Lah 266 (267) : 5 Lah 550 : 26 Cri L Jour 537 \* (Vol 9) 1922 Lah 183 (185) \* ('81) 6 Cal 584 (585) (D B) \* (Vol 13) 1926 All 30 (33) : 48 All 60 : 26 Cri L Jour 1485 \* (Vol 4) 1917 Mad 657 (658) : 17 Cri L Jour 394.

[13] Where grave injustice will be done by the continuation of the proceedings, High Court will quash proceedings. (Vol 27) 1940 Cal 579 (580) : 42 Cri L Jour 264 (D B) \* ('38) 40 Pun L R 776 (777).

[See ('95) 22 Cal 131 (138) (D B) \* (Vol 27) 1940 Nag 360 (361) : 41 Cri L Jour 753 \* (Vol 27) 1940 Sind 65 (66) : 41 Cri L Jour 568 : I L R (1940) Kar 157 (DB).]

[See also (Vol 12) 1925 Cal 100 (102) : 52 Cal 188 : 26 Cri L Jour 545 (D B).]

[14] No useful purpose served by continuance of the proceedings, High Court may quash them. (Vol 30) 1943 Oudh 410 (411, 412) : 19 Luck 300 : 44 Cri L Jour 789 \* (Vol 5) 1918 All 106 (107) : 19 Cri L Jour 727 \* (Vol 4) 1917 All 371 (371) : 18 Cri L Jour 46 \* ('10) 11 Cri L Jour 525 (527) : 38 Cal 68 (D B).

[15] Where the interests of justice require immediate interference, High Court may quash proceedings. (Vol 27) 1940 Nag 390 (393) : 42 Cri L Jour 208 : I L R (1942) Nag 333 \* (Vol 12) 1925 Mad 39 (40) : 47 Mad 722 : 25 Cri L Jour 1009.

[16] Where on the face of the proceedings there appears some infraction or evasion of the law calling for prompt redress — High Court may quash proceedings. (Vol 22) 1935 Sind 81 (81) : 36 Cri L Jour 881 (D B) \* (Vol 11) 1924 Mad 735 (735) : 25 Cri L Jour 556 \* ('08) 9 Cri L Jour 270 (270) : 1 Sind L R 30 \* (Vol 7) 1920 Nag 31 (31) : 21 Cri L Jour 343 \* ('99) 26 Cal 786 (791) (D B) \* (Vol 5) 1918 Nag 31 (32) : 20 Cri L Jour 764 \* ('09) 9 Cri L Jour 151 (152) (Lah).

[17] On the presentation of complaint, the complainant was immediately and without his being examined called upon to show cause why he should not be prosecuted under S. 182 of the Penal Code—Held that fact that the prosecution had not actually been ordered would not prevent the High Court from entertaining revision at the instance of the complainant. (Vol 7) 1920 All 303 (304) : 22 Cri L Jour 81.

[18] The fact that a person has been harassed already by two similar complaints, both of which have been dismissed or he himself discharged, is ample grounds for quashing a third complaint made on the same facts. (Vol 29) 1942 Lah 122 (123) : 43 Cri L Jour 632.

[19] Trial by jury — Case remanded for re-trial — Jury empanelled on second occasion including foreman of jury at former trial — Case cannot proceed by simply discharging this juror and substituting in his place another person, but proceedings must be held before entirely new jury—Order refusing to empanel fresh jury set aside by High Court in revision. (Vol 28) 1941 Cal 328 (329) : 42 Cri L Jour 674 (D B).

[20] Proceedings under S. 147—Magistrate dropping proceedings on untenable ground and passing order which could only be passed after hearing all the evidence—Order set aside and Magistrate directed to pro-



## Section 439.—Note 24 (contd.)

and in accordance with law. (Vol 28) 1941 Pat 281 (282) : 42 Cri L Jour 620.

[21] Case against accused registered under Ss. 147 and 323, Penal Code — Investigating officer reporting that no case under S. 147 was made out and case under S. 323 was non-cognizable—Magistrate ordering case to be registered accordingly—Succeeding Magistrate calling for charge sheet under S. 147 acting merely on Government orders and without sufficient materials on record—Proceedings quashed in revision. (Vol 28) 1941 Pat 395 (398) : 42 Cri L Jour 504.

[22] Question as to which of two or more Courts should inquire into any offence arising during pendency of trial — It must be decided by High Court. (Vol 29) 1912 Rang 18 (18) : 1941 Rang L R 599 : 43 Cri L Jour 492 (D B).

[23] Proceedings void for want of jurisdiction cannot be liberally quashed — High Court can direct further proceedings to be stayed. (Vol 10) 1923 Mad 326 (326) : 24 Cri L Jour 351 (D B).

[But see (Vol 12) 1925 Lah 266 (267) : 26 Cri L Jour 537 : 5 Lah 550.]

25. Stay of proceedings. — [1] High Court can, in a proper case, stay proceedings in the lower Court. (Vol 28) 1941 Rang 114 (116) : 1941 Rang L R 82 : 42 Cri L Jour 573 & (Vol 19) 1932 Mad 720 (721, 722) : 56 Mad 149 : 33 Cri L Jour 826 & (10) 11 Cri L Jour 525 (527) : 38 Cal 65 (D B) & (73) 20 Suth W R Cr 23 (27) (D B).

[See (Vol 18) 1931 All 209 (209) : 33 All 111 : 32 Cri L Jour 376 & (37) 1937 Mad W N 21 (22).]

[But see (66) 5 Suth W R Misc App 24 (24).]

[2] Subject-matter of both criminal case and of pending civil suit being the same—High Court will stay criminal case — Rule not invariable one. (Vol 14) 1927 Lah 17 (18) : 27 Cri L Jour 1114 & (Vol 7) 1920 Pat 816 (818) : 22 Cri L Jour 189 & (06) 5 Cri L Jour 199 (201) (D B) (Cal) & (Vol 4) 1917 Pat 621 (622) : 18 Cal 1 Jour 771 & (Vol 19) 1932 Sind 210 (211) : 27 Sind L R 1 : 34 Cri L Jour 548 (D B) & (Vol 3) 1916 Mad 1123 (1123) : 16 Cri L Jour 637 & (Vol 14) 1927 Lah 744 (745) : 28 Cri L Jour 326 & (Vol 7) 1920 Low Bar 47 (48) : 10 Low Bar Ref 103 : 21 Cri L Jour 353 & (07) 6 Cri L Jour 131 (132) : 30 Mad 226 (D B) & (Vol 30) 1913 Oudh 181 (186) : 18 Luck 419 : 44 Cri L J. & 169 & (94) 18 Bom 581 (584) & (Vol 16) 1929 Pat 500 (501) : 30 Cri L Jour 1101 & (Vol 1) 1914 Sind 80 (80) : 5 Sind L R 20 : 15 Cri L Jour 661 (D B).

[But see (66) 23 Cal 610 (612) (D B).]

[3] Question in civil and criminal proceedings different though allied — Criminal proceedings need not be stayed. (Vol 5) 1921 Lah 386 (388) : 23 Cri L Jour 700.

[4] Subsequent institution of civil suit will not be a ground for staying criminal proceedings unless cause of action for civil suit arose subsequent to criminal proceeding. (Vol 11) 1911 Cri L Jour 291 (292) (Cal) & (Vol 7) 1920 L. & 138 (138) : 21 Cri L Jour 339.

[5] Proceedings under S. 436 of the Code started out of a civil case and proceeding to a stage of decision — In the meanwhile, pending civil case appealed against and appeal pending — High Court pronouncing judgment in criminal case should be stayed pending disposal of appeal. (Vol 11) 1927 Lah 659 (670) : 28 Cri L Jour 776.

[See also (Vol 3) 1916 Pat 54 (54) (S. L. J. 125 (D B)).]

[But see Rang L R Sup Vol. 426 (426, 428) (D B).]

[6] High Court staying proceedings and fact communicated to lower Court — Latter in spite of order for stay proceeding to pass orders — Orders must be deemed to be without jurisdiction. (Vol 12) 1925 Pat 358 (358) : 26 Cri L Jour 565.

[7] Accused citing as witness person who can neither be served nor examined on commission — Trial cannot be stopped. (Vol 23) 1936 Pesh 101 (102) : 37 Cri L Jour 618 & (04) 1 Cri L Jour 275 (277) : 27 Mad 54 & (79) 2 All 398 (400, 401) (D B).

[8] Bad livelihood proceedings pending for long time due to fault of accused—Murder taking place of witness in those proceedings — High Court will not interfere to stay proceedings. (Vol 20) 1933 Pat 116 (117) : 34 Cri L Jour 1145.

26. Power to quash commitment — Extent of.

[1] Commitment made under S. 437 of the Code can be quashed in revision. (1904) 1 Cri L Jour 275 (277) : 27 Mad 54 & (79) 2 All 398 (400, 401) (D B).

[2] High Court is not limited to questions of law, but may go into questions of fact also. (07) 6 Cri L Jour 406 (408) (D B) (Cal) & (03) 7 Cal W N 327 (329) (D B) & (07) 5 Cri L Jour 100 (101) : 30 Mad 224 & (Vol 12) 1925 Pat 279 (280, 281) : 25 Cri L Jour 1089 & (Vol 7) 1920 Pat 46 (48) : 21 Cri L Jour 328.

[3] High Court will interfere with order under S. 437, only where it is manifest that it is improper. (Vol 26) 1939 Mad 253 (255) : 40 Cri L Jour 392.

[See also (37) 1937 Mad W N 1240 (1240).]

27. Enhancement of sentence.—[1] High Court can, in revision, enhance sentence passed by lower Court. (Vol 22) 1935 P C 35 (36) : 36 Cri L Jour 482 : 57 All 156 : 62 Ind App 36 (P C).

[2] High Court must comply with provisions of sub-s. (2) of this section and give accused an opportunity of being heard either personally or by pleader before enhancing sentence. (Vol 33) 1946 Bom 276 (277) : 47 Cri L Jour 700 & (Vol 18) 1931 Cal 450 (451) : 32 Cri L Jour 890 (D B).

[3] It is only where a legal sentence has been passed that the High Court can enhance it. (Vol 6) 1919 Lah 29 (30) : 1919 Pun Ro No. 27 Cr : 20 Cri L Jour 684.

[4] Order under S. 562 passed by lower Court — Under sub-s. (3) of S. 562 High Court may in revision set aside such order and in lieu thereof pass sentence on a first offender according to law — High Court's order passing sentence in such a case would not be enhancement of sentence, there being no sentence to be enhanced. (Vol 26) 1939 Sind 339 (339) : 41 Cri L Jour 187 : LLR (1940) Kar 88 (D B).

[5] Ordinarily High Court is unwilling to take action in the matter of enhancement. (Vol 29) 1942 Mad 415 (416) : 43 Cri L Jour 671 & (Vol 27) 1940 Pesh 49 (51) : 42 Cri L Jour 254 (D B) & (Vol 26) 1939 Pesh 47 (49) : 41 Cri L Jour 132 (D B) & (Vol 25) 1938 Lah 260 (262) : 39 Cri L Jour 502 : I L R (1938) Lah 347 (D B) & (87) 39 Pun L R 11 (12) & (Vol 15) 1928 All 417 (418) : 30 Cri L Jour 222 (D B) & (Vol 1) 1914 Bom 29 (30) : 15 Cri L Jour 365 (D B) & (Vol 12) 1925 Sind 188 (189) : 17 Sind L R 268 : 26 Cri L Jour 177 (D B) & (Vol 9) 1922 Nag 65 (67) : 18 Nag L R 101 : 22 Cri L Jour 757 & (Vol 15) 1928 Nag 58 (63) : 28 Cri L Jour 996 & (Vol 16) 1929 Pat 161 (164) : 8 Pat 181 : 30 Cri L Jour 737 (D B) & (Vol 15) 1928 All 287 (288) : 29 Cri L Jour 446 (D B) & (Vol 1) 1914 Bom 179 (179) : 15 Cri L Jour 367 (D B).

[6] Application by private complainant—High Court is unwilling to take action for enhancement. (Vol 28) 1941 All 309 (310) : I L R (1941) All 465 : 42 Cri L Jour 779 (D B) & (Vol 27) 1940 Nag 249 (251) : 41 Cri L Jour 784 : I L R (1942) Nag 208 & (Vol 27) 1940 Nag 276 (276) : 41 Cri L Jour 793 : I L R (1942) Nag 277 & (Vol 26) 1939 Oudh 54 (54, 55) : 14 Luck 401 : 40 Cri L Jour 181 (D B) & (Vol 26) 1939 Pat 611 (620) : 41 Cri L Jour 191 : 18 Pat 544 (D B) & (Vol 25) 1938 Lah 116 (118) : 39 Cri L Jour 296 & (Vol 15) 1928 All 119 (419) : 30 Cri L Jour 219 (D B) & (Vol 11) 1924 Bom 320 (320) : 48 Bom 358 : 25 Cri L Jour 966 (D B).

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\*(Vol 16) 1929 Cal 340 (340, 341): 56 Cal 964: 30 Cri L Jour 979 \*(Vol 13) 1926 Sind 254 (254): 19 Sind L R 64 (DB) \*(Vol 13) 1926 Rang 106 (107): 27 Cri L Jour 815 \*(Vol 20) 1933 Ondh 421 (422): 35 Cri L Jour 118 (DB).

[7] In exceptional cases High Court will interfere and enhance sentence. (Vol 29) 1942 Mad 415 (416): 43 Cri L Jour 671 \*(Vol 27) 1940 Nag 276 (277): 41 Cri L Jour 793: ILR (1942) Nag 277 \*(Vol 26) 1939 Pat 611 (620): 41 Cri L Jour 191: 18 Pat 544 (DB) \*(Vol 25) 1938 Lah 116 (116): 39 Cri L Jour 296 \*(Vol 15) 1928 All 417 (418): 30 Cri L Jour 222 (DB) \*(Vol 15) 1928 All 419 (419): 30 Cri L Jour 219 (DB) \*(Vol 18) 1931 Rang 52 (53): 8 Rang 578: 32 Cri L Jour 353 \*(10) 11 Cri L Jour 593 (593): 4 Sind L R 86 (DB).

[8] High Court will exercise its powers of enhancement even *suo motu*. (Vol 23) 1936 Sind 233 (235): 38 Cri L Jour 114 (DB).

[9] Court would not interfere if sentence passed involves substantial punishment, but would interfere if sentence is manifestly inadequate so as to amount to miscarriage of justice. (Vol 33) 1946 Sind 62 (63): ILR (1945) Kar 409: 47 Cri L Jour 578 (DB) \*(Vol 32) 1945 Ondh 215 (216): 47 Cri L Jour 2 (DB) \*(Vol 31) 1944 Mad 302 (307): 46 Cri L Jour 667 (DB) \*(Vol 29) 1942 Rang 49 (50, 51): 1941 Rang L R 595: 43 Cri L Jour 525 \*(Vol 28) 1941 All 309 (310): ILR (1941) All 465: 42 Cri L Jour 779 (DB) \*(140) 42 Pun L R 150 (153) \*(Vol 24) 1937 Bom 80 (80, 81): 38 Cri L Jour 658 (DB) \*(Vol 24) 1937 Lah 215 (217): 38 Cri L Jour 720 \*(Vol 23) 1936 Sind 233 (235): 38 Cri L Jour 114 (DB) \*(Vol 22) 1935 Nag 177 (178): 36 Cri L Jour 554 \*(Vol 12) 1925 Ondh 723 (725): 26 Cri L Jour 1364 (DB) \*(Vol 12) 1925 Nag 321 (322): 26 Cri L Jour 821 \*(198) 1898 Pun Re No. 17 Cr, p. 37 (39) (FB) \*(173) 20 Suth W R Cr 22 (23) \*(Vol 20) 1933 Pat 179 (179): 34 Cri L Jour 407 (DB) \*(Vol 24) 1937 Rang 254 (255): 1937 Rang L R 169: 38 Cri L Jour 1051 (DB).

[10] Mere fact that High Court itself would have passed heavier sentence is not a ground for enhancing sentence in revision. (Vol 11) 1924 Rang 373 (373) \*(28) 29 Cri L Jour 276 (276) (Lah) \*(Vol 21) 1934 Lah 613 (614): 36 Cri L Jour 414 \*(Vol 12) 1925 Ondh 723 (725): 26 Cri L Jour 1364 (DB) \*(Vol 21) 1934 Bom 471 (474): 36 Cri L Jour 351 (DB).

[11] Murder case—High Court would not ordinarily interfere and enhance sentence, unless it thinks that sentence of death is the only sentence that could be passed. (Vol 26) 1939 Rang 225 (238): 40 Cri L Jour 725 \*(Vol 25) 1938 Rang 331 (333): 40 Cri L Jour 49 (DB) \*(37) 1937 Mad W N 1241 (1242) (DB) \*(Vol 22) 1935 Lah 337 (337, 338): 16 Lah 1181: 36 Cri L Jour 1001 (DB) \*(Vol 12) 1925 Bom 268 (269, 270): 49 Bom 450: 26 Cri L Jour 968 (DB) \*(Vol 17) 1930 Mad 446 (447): 53 Mad 585: 31 Cri L Jour 1193 (DB) \*(Vol 20) 1933 Nag 307 (309): 30 Nag L R 9: 34 Cri L Jour 1168 (DB).

[See (Vol 25) 1938 Lah 260 (262): 39 Cri L Jour 502: ILR (1938) Lah 347 (DB).]

[12] High Court will not interfere in the following cases:

(a) Where interference would involve imprisonment of a person already discharged from jail after undergoing term of imprisonment. (42) 44 Pun L R 167 (171) \*(Vol 28) 1941 Rang 135 (138): 1941 Rang L R 65: 42 Cri L Jour 690 (DB) \*(Vol 3) 1916 Sind 3 (4): 9 Sind L R 95: 17 Cri L Jour 3 (DB) \*(Vol 15) 1928 Pat 201 (202): 29 Cri L Jour 261 (DB) \*(Vol 21) 1934 Lah 613 (614): 36 Cri L Jour 414 \*(Vol 1) 1914 Bom 36 (43): 15 Cri L Jour 362 (DB) \*(Vol 32) 1945 Ondh 215

(217): 47 Cri L Jour 2 (DB). (That circumstance alone will not be insuperable obstacle to enhancement if necessary.) \*(Vol 33) 1946 Pat 239 (242): 24 Pat 715: 48 Cri L Jour 178 (DB) (Do.) \*(Vol 13) 1926 Bom 256 (256): 27 Cri L Jour 557 (DB). (Do.)

(b) Case non-appealable and no evidence recorded. (Vol 22) 1935 Bom 37 (39): 36 Cri L Jour 527 (DB).

(c) Material justifying award of higher punishment not brought to the notice of lower Court by negligence of prosecution. (Vol 16) 1929 All 267 (268): 30 Cri L Jour 505 (DB) \*(05) 2 Cri L Jour 228 (229): 1905 Pun Re No. 19 Cr \*(Vol 1) 1914 Bom 179 (179): 15 Cri L Jour 367 (DB) \*(Vol 1) 1914 Bom 36 (36): 15 Cri L Jour 362 (DB) \*(Vol 16) 1929 All 270 (270, 271): 30 Cri L Jour 529 (DB) \*(Vol 3) 1916 Sind 3 (3, 4): 9 Sind L R 95: 17 Cri L Jour 3 (DB) \*(06) 3 Cri L Jour 341 (342): 1905 Pun Re No. 43 Cr. (Re-trial not ordered.) \*(02) 15 C P L R 87 (88).

(d) Application by complainant for enhancement—Crown not appearing and supporting the rule. (Vol 16) 1929 Cal 785 (786, 787): 31 Cri L Jour 209 (DB).

(e) Where long delay has elapsed since the decision of lower Court. (Vol 33) 1946 Cal 36 (40): ILR (1944) 2 Cal 237: 47 Cri L Jour 446 (DB) \*(Vol 26) 1939 Rang 225 (238): 40 Cri L Jour 725 \*(11) 12 Cri L Jour 604 (604) (DB) (Bom) \*(Vol 15) 1928 Lah 926 (928): 29 Cri L Jour 291 \*(12) 13 Cri L Jour 121 (121) (Mad).

[13] In dealing with questions of enhancement High Court will regard them not only from the point of view of public interest but also from that of the circumstances of the particular case before it. (Vol 27) 1940 Nag 276 (277): 41 Cri L Jour 793: ILR (1942) Nag 277 \*(Vol 18) 1931 All 13 (14): 53 All 223: 32 Cri L Jour 312 (DB) \*(Vol 20) 1933 Lah 660 (660): 34 Cri L Jour 1207 \*(Vol 20) 1933 Sind 9 (12): 26 Sind L R 416: 34 Cri L Jour 143 (DB) \*(Vol 22) 1935 Lah 337 (338): 16 Lah 1131: 36 Cri L Jour 1001 (DB) \*(Vol 16) 1929 Ondh 150 (151): 30 Cri L Jour 544 (DB) \*(Vol 14) 1927 Bom 501 (508, 509): 28 Cri L Jour 1012 (DB) \*(09) 10 Cri L Jour 217 (217): 2 Sind L R 1 (DB).

23. Limits of the power of enhancement. — [1] There is no limitation upon the power of enhancement other than that imposed by sub-s. (3) and by the maximum sentence prescribed for the offence. (Vol 22) 1935 All 989 (993): 37 Cri L Jour 49 (DB).

[2] Sub-section (3) applies only to sentences passed by Magistrates—Sentence passed by Assistant Sessions Judge—High Court can enhance sentence to maximum limit prescribed for the offence, irrespective of limits of powers exercisable by Assistant Sessions Judge. (Vol 22) 1935 Ondh 239 (241): 36 Cri L Jour 454: 10 Luck 664 (DB) \*(Vol 22) 1935 All 989 (993): 37 Cri L Jour 49 (DB).

[3] Even in cases to which sub-s. (3) applies, the High Court can enhance sentence exceeding that awardable by the lower Court, though the maximum punishment that the High Court can give is that which might have been inflicted for such offence by a Presidency or first class Magistrate. (Vol 2) 1915 Sind 33 (33): 9 Sind L R 32: 16 Cri L Jour 712 (DB) \*(Vol 2) 1915 All 185 (186): 16 Cri L Jour 433 (DB) \*(Vol 20) 1933 Sind 87 (88): 34 Cri L Jour 618 (DB) \*(Vol 7) 1920 Lah 213 (214): 1 Lah 453: 21 Cri L Jour 557 (DB).

[4] First Class Magistrate, acting otherwise than under S. 34 himself giving maximum sentence that he is empowered to give—High Court cannot enhance such sentence in revision. (Vol 2) 1915 All 185 (186): 16 Cri L Jour 433 (DB) \*(Vol 12) 1925 Lah 318 (318): 26 Cri L Jour 757 (DB).

[5] Conviction by Magistrate acting under S. 34—Although sub-s. (3) did not apply to the case and therefore High Court could give maximum sentence prescribed for offence, it was not desirable, except in exceptional

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acc., to award a sentence exceeding that awardable by first-time who tried the case. (Vol 10) 1923 Lah 600 (300) : 21 Cri L Jour 932 (DB).

29. Sub-section (6). — [1] It is open to accused person to attack findings of fact in the same manner and to the same extent in which he could have done if he had appealed against his conviction. (Vol 14) 1927 Sind 39 (11); 21 Sind L R 107; 27 Cri L Jour 1233 (DB) & (Vol 26) 1939 Cal 197 (499); 40 Cri L Jour 877 (DB).

[2] High Court, when adjudicating upon an application for enhancement of sentence, is converted into a Court of appeal against a conviction. (Vol 32) 1915 Lah 130 (133, 136) : 1 L R (1914) Lah 391 : 46 Cri L Jour 566 (SR) & (Vol 16) 1929 Lah 584 (585) : 30 Cri L Jour 399.

[See (Vol 31) 1941 Cal 17 (52) : 1 L R (1941) 2 Cal 1 : 45 Cri L Jour 309 (PB).]

[3] High Court must examine evidence in the case in order to decide propriety of the conviction. (Vol 28) 1941 Cal 90 (91) : 42 Cri L Jour 383 (DB).

[4] Case for prosecution not supported by reliable evidence — High Court must give accused benefit of doubt and acquit him. (36) 38 Pun L R 228 (229).

[See also (Vol 12) 1925 Nag 321 (321, 322) : 26 Cri L Jour 821.]

[5] Accused convicted by verdict of jury — Accused cannot, in a notice to show cause against enhancement of sentence, challenge verdict except on grounds specified in S. 423, sub-s. (2). — High Court cannot go into facts of the case to consider whether or not jury were right in their conclusions on fact. (Vol 31) 1944 Cal 17 (33); 45 Cri L Jour 309 : 1 L R (1944) 2 Cal 1 (PB) & (Vol 27) 1940 Bom 279 (280) : 1 L R (1940) Bom 500 : 41 Cri L Jour 916 (DB) & (Vol 23) 1936 All 850 (851) : 1 L R (1937) All 308 : 38 Cri L Jour 137 (DB) & (36) 37 Cri L Jour 859 (860) : 62 Cal 952 (DB) & (Vol 23) 1936 Mad 516 (519) : 59 Mad 904 : 37 Cri L Jour 909 (DB).

[6] Case of murder tried by jury — Accused sentenced to transportation for life and notice issued under this section to accused to show cause why death sentence should not be passed — Held that in cases where death sentence is proper sentence if the accused is guilty High Court on a rule to enhance the sentence has all the powers that it would have if the appropriate sentence had been passed by the Sessions Court and a reference made to it under S. 371. (Vol 31) 1944 Cal 17 (33) : 1 L R (1944) 2 Cal 1 : 45 Cri L Jour 309 (PB).

[7] Conviction by jury — High Court can consider whole of the evidence in order to satisfy itself as to the exact nature of the offence in order to determine what sentence should be imposed. (Vol 27) 1940 Bom 279 (280) : 41 Cri L Jour 916 : 1 L R (1940) Bom 500 (DB).

[8] Accused convicted on his own plea of guilty in the trial Court — He is not entitled, on notice being issued to him for showing cause against enhancement of sentence, to go behind the plea of guilty at a confession of the fact alleged or to withdraw the plea. (Vol 16) 1929 Cal 747 (749, 751) : 30 Cri L Jour 1038 : 58 Cal 1145 (SB).

[But see (Vol 22) 1935 Rang 49 (50) : 12 Rang 616 : 36 Cri L Jour 336 (DB).]

[9] Where the High Court under sub-s. (3) of S. 562 sets aside the order and passes a sentence in lieu thereof, it cannot be said that it enhances a sentence within the meaning of this sub-section so as to enable the accused to be heard on the merits of the case. (Vol 30) 1943 Mad 321 (321) : 44 Cri L Jour 774 & (Vol 26) 1939 Sind 339 (339) : 41 Cri L Jour 187 : 1 L R (1940) Kar 88 (DB).

30. Dismissal of appeal or revision by accused — Subsequent application for enhancement of

sentence — Accused, if can challenge conviction. —

[1] Accused person appealing to High Court against his conviction — Appeal dismissed — Application there-after made in revision by Government for enhancement of sentence — Enhancement of sentence in subsequent revision application not barred. (Vol 26) 1939 Rang 392 (392, 393) : 41 Cri L Jour 108 : 1940 Rang L R 145. (Enhancement cannot amount to alteration or review of judgment in appeal within S. 369.) & (Vol 13) 1926 Bom 555 (556) : 50 Bom 783 : 27 Cri L Jour 1173 (DB). (Do.) & (Vol 19) 1932 Pat 126 (127, 128) : 10 Pat 872 : 33 Cri L Jour 155 (DB). (Do.) & (Vol 19) 1932 Nag 72 (74, 75) : 33 Cri L Jour 728 (DB). (Do.) & (Vol 32) 1945 All 341 (346) : ILR (1945) All 527 (DB) (Section 369 must be read subject to S. 430.) & (Vol 29) 1942 All 334 (341) : ILR (1942) All 892 : 43 Cri L Jour 867 (DB). (Do.)

[2] Accused appealing to High Court against his conviction — Appeal dismissed — Subsequent application made in revision by Government for enhancement of sentence — Accused cannot be allowed to show cause against conviction a second time under sub-s. (6) — There is no difference in this respect between cases where appeal is heard on merits and where it was disposed of summarily. (Vol 26) 1939 Rang 392 (392, 393) : 41 Cri L Jour 108 : 1940 Rang L R 145 & (Vol 23) 1936 Sind 233 (234, 235) : 38 Cri L Jour 114 (DB) & (Vol 16) 1929 Sind 26 (27) : 22 Sind L R 453 : 29 Cri L Jour 936 (DB) & (Vol 14) 1927 Bom 666 (667) : 28 Cri L Jour 465 (DB) & (Vol 17) 1930 Bom 593 (594) : 54 Bom 822 : 32 Cri L Jour 242 (DB) & (Vol 12) 1925 Mad 993 (994) : 26 Cri L Jour 583 (DB).

[3] Accused applying in revision against his conviction — Application dismissed — Subsequently application made by Government or a reference made under S. 438 for enhancement of sentence — Held principle of S. 369 would apply — Accused cannot re-open question of conviction which had been decided against him. (Vol 13) 1926 Bom 555 (557) : 50 Bom 783 : 27 Cri L Jour 1173 (DB) & (Vol 23) 1936 Sind 233 (234) : 38 Cri L Jour 114 (DB) & (Vol 21) 1934 Bom 471 (473) : 36 Cri L Jour 351 (DB) & (Vol 12) 1925 Mad 993 (994) : 26 Cri L Jour 583 (DB). (Question of enhancement is not barred — High Court can enhance sentence.)

[But see (Vol 32) 1945 Lah 130 (135, 137) : 1 L R (1944) Lah 391 : 46 Cri L Jour 566 (SB). (Overruling (Vol 14) 1927 Lah 317 : 8 Lah 521 : 28 Cri L Jour 266 and (Vol 16) 1929 Lah 797 : 10 Lah 241 : 30 Cri L Jour 815.)]

[4] Where an appeal is filed by the accused and comes up for admission, it would be better, before the notice for enhancement, if any, is sent, to send for the records of the lower Court. (Vol 17) 1930 Mad 446 (447) : 53 Mad 585 : 31 Cri L Jour 1193 (DB).

[5] Both appeal and application for enhancement filed — Court must first of all deal with appeal on merits — Only after disposing of appeal it can consider whether notice should issue. (Vol 20) 1933 Bom 153 (156) : 35 Cri L Jour 747 (DB) & (Vol 12) 1925 Bom 268 (269) : 49 Bom 450 : 28 Cri L Jour 968 (DB).

[See also (Vol 13) 1926 Bom 555 (558, 559) : 50 Bom 783 : 27 Cri L Jour 1173 (DB).]

[But see (Vol 21) 1934 Bom 198 (199) : 58 Bom 392 : 35 Cri L Jour 1435 (DB).]

[6] Where at the hearing of a revision by accused against his conviction, the High Court considers it necessary to enhance sentence, it is not necessary nor is it required by law to serve notice on accused who is already before Court represented by counsel. (36) 37 Cri L Jour 859 (860) : 62 Cal 952 (DB).

31. Costs, if can be awarded in revision. — [1] Application to revise proceedings of civil Court taken under S. 195 — Costs cannot be awarded. (Vol 4) 1917 Mad 158 (158) : 17 Cri L Jour 134.

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[2] High Court has no jurisdiction to interfere with an award of costs in proceedings under S. 145. (Vol 8) 1916 Pat 393 (396) : 17 Cri L Jour 348.

32. Verdict of jury—Interference.—[1] Revision against the verdict of a jury — Powers of High Court are confined to powers of appellate Court under sub-s. (2) of S. 423—It cannot alter or reverse such verdict unless it is of opinion that such verdict is erroneous owing to misdirection by Judge or to misunderstanding on part of jury of law as laid down by him. (Vol 31) 1944 Cal 17 (31) : I L R (1944) 2 Cal 1 : 45 Cri L Jour 309 (FB) \* (Vol 16) 1929 All 364 (364) : 30 Cri L Jour 622 (DB) \* ('10) 11 Cri L Jour 657 (658) (Low Bur)

[But see (Vol 15) 1928 Oudh 277 (280) : 3 Luck 494 : 29 Cri L Jour 983 (DB).]

[2] Conditions of S. 423, sub-s. (2) satisfied — Even verdict of acquittal will be set aside. (Vol 8) 1921 Cal 269 (270) : 23 Cri L Jour 41 (DB).

[But see ('01)-25 Bom 680 (690, 691) (FB).]

33. Power to review previous orders. — [1] Order to the prejudice of the accused made without notice to accused — Order is without jurisdiction and will not prevent Court from entertaining fresh application for same relief. (Vol 11) 1924 Mad 640 (644) : 47 Mad 428 : 26 Cri L Jour 370 (DB) \* (Vol 12) 1925 Oudh 476 (477) : 26 Cri L Jour 543.

[2] *Ex parte* order in revision can be reconsidered subsequently. (Vol 18) 1931 Pat 81 (82) : 32 Cri L Jour 551.

34. Declaratory orders. — [1] Although High Court may not find it necessary in the interests of justice to set aside an acquittal, still it may declare that finding of lower Court is not correct. ('37) 1937 Mad W N 19 (20).

35. Power to order detention under the Reformatory Schools Act.—[1] Section 439, sub-s. (1), gives the High Court the necessary power to pass an order under sub-s. (2) of S. 8, Reformatory Schools Act of detaining a boy accused in a reformatory not only on appeal but also in revision. (Vol 15) 1928 Bom 348 (349) : 29 Cri L Jour 1016 (DB).

36. Rule for one relief — Other relief can be granted.—[1] Where the rule issued is to show cause why the appeal should not be re-heard by the lower Court, it is within the competence of the High Court to order that the order of the lower Court be set aside. (Vol 12) 1925 Cal 1182 (1183) (DB).

37. Power to order transfer of case —[1] High Court cannot, in revision, order a transfer of a case, as S. 526 is not one of the sections mentioned in this section. (Vol 11) 1924 Rang 100 (100) : 1 Rang 632 : 25 Cri L Jour 485.

38. Limitation for revision.—[1] No limitation is prescribed by law for revision. (Vol 29) 1942 Pat 150 (152) : 43 Cri L Jour 537 \* (Vol 33) 1946 Pat 104 (105) \* (Vol 23) 1936 Nag 266 (266) : 38 Cri L Jour 262 \* (Vol 17) 1930 Oudh 401 (401) : 31 Cri L Jour 1012.

[2] An application for revision should be made at the earliest possible moment. (Vol 4) 1917 Cal 680 (681) : 18 Cri L Jour 694 (D B). (The rule is not inflexible.) \* (Vol 19) 1932 Oudh 242 (242) : 7 Luck 699 : 33 Cri L Jour 506 (DB) \* (Vol 17) 1930 Oudh 401 (402) : 31 Cri L Jour 1012 \* (Vol 14) 1927 Cal 61 (62) : 28 Cri L Jour 59 (DB) \* (Vol 13) 1926 All 577 (578) : 27 Cri L Jour 1021.

[3] The practice of the High Courts has been to refuse applications made after sixty days of the date of order complained of. (Vol 27) 1940 Pat 135 (137) : 41 Cri L Jour 171 \* (Vol 26) 1939 Pat 320 (320) : 40 Cri L Jour 196 \* (Vol 4) 1917 Cal 680 (681) : 18 Cri L Jour 694. (Deducting time taken in prosecuting with due diligence—Application under S. 498 to lower Court.) \* ('12) 13 Cri L Jour 531 (532) : 5 Sind L R 265 (DB) \* (Vol 14) 1927 Cal 574 (574) : 54 Cal 394 : 28 Cri L Jour 639 (DB).

[See (Vol 32) 1945 All 207 (213) : I L R (1945) All 450 : 47 Cri L Jour 132 (DB).]

[See however (Vol 21) 1934 Lah 264 (265) : 35 Cri L Jour 1447 (D B) \* (Vol 13) 1926 All 767 (768) : 49 All 228 : 27 Cri L Jour 1132 \* (Vol 17) 1930 Oudh 401 (402) : 31 Cri L Jour 1012 \* (Vol 19) 1932 Oudh 242 (242) : 33 Cri L Jour 506 : 7 Luck 699 (DB) ]

[4] Fresh period of sixty days does not accrue from the date when application under S. 438 is refused. (Vol 26) 1939 Pat 320 (320) : 40 Cri L Jour 196 \* (Vol 16) 1929 Pat 404 (405) : 3 Pat 468 : 30 Cri L Jour 1053 (DB).

[5] Time spent in trying to move District Magistrate to prefer an appeal against acquittal cannot be deducted. (Vol 27) 1940 Nag 259 (260) : 41 Cri L Jour 745 : I L R (1942) Nag 255.

[6] Time required for getting copy of the order should be excluded. (Vol 4) 1917 Cal 849 (849) : 43 Cal 1029 : 17 Cri L Jour 419 (DB).

[7] Practice of not entertaining applications made after sixty days from order complained of will be departed from in exceptional cases. (Vol 27) 1940 Nag 259 (260) : 41 Cri L Jour 745 : I L R (1942) Nag 255 \* (Vol 27) 1940 Pat 135 (137) : 41 Cri L Jour 171 \* (Vol 26) 1939 Pat 320 (320) : 40 Cri L Jour 196 \* (Vol 23) 1936 Nag 266 (266) : 38 Cri L Jour 262 \* (Vol 4) 1917 Cal 680 (681) : 18 Cri L Jour 694 (DB) \* (Vol 14) 1927 Cal 574 (574) : 54 Cal 394 : 28 Cri L Jour 639 (DB) \* (Vol 20) 1933 Oudh 257 (258) : 34 Cri L Jour 661 \* (Vol 17) 1930 Oudh 401 (402) : 31 Cri L Jour 1012.

[See (Vol 28) 1941 Sind 97 (99) : I L R (1942) Kar 246 : 42 Cri L Jour 645 (DB).]

[8] Petition not made in time owing to oversight of petitioner's legal adviser—No ground for departing from settled practice. (Vol 14) 1927 Cal 574 (574) : 54 Cal 394 : 28 Cri L Jour 639 (DB).

[9] Revision petition admitted by High Court — It must be disposed of on merits and plea of limitation will not be entertained in such a case. (Vol 33) 1946 Pat 104 (105).

39. Abatement on death of applicant. — [1] Revision petition abates except as to fine on the death of applicant. (Vol 27) 1940 Lah 274 (274) : 41 Cri L Jour 729 \* (Vol 24) 1937 Oudh 320 (321) : 13 Luck 306 : 38 Cri L Jour 509 \* (Vol 6) 1919 Lah 347 (348) : 1919 Pun Re No. 8 Cr : 20 Cri L Jour 214.

[2] Revision against order under S. 250 does not abate on death of the applicant. ('09) 9 Cri L Jour 103 (104) : 1908 Pun Re No. 24 Cr.

[3] Applicant in revision dying after he makes his application — High Court can take action *suo motu* if the record indicates that, there is sufficient reason to do so. (Vol 23) 1936 All 313 (314) : 37 Cri L Jour 562.

40. New plea in revision.—[1] A plea not raised in trial Court or in lower appellate Court will not, in the absence of failure of justice, be allowed to be raised in revision in High Court. ('42) 1942 Nag L Jour 329 (332) \* (Vol 26) 1939 Sind 337 (337) : 41 Cri L Jour 246 : I L R (1940) Kar 91 (DB) \* (Vol 25) 1938 Pat 99 (102, 103) : 39 Cri L Jour 353 : 16 Pat 650 (DB) \* (Vol 24) 1937 Lah 702 (703) : 38 Cri L Jour 1026 \* (Vol 23) 1936 Pat 636 (636, 637) : 38 Cri L Jour 192 \* (Vol 19) 1932 Oudh 31 (32) : 33 Cri L Jour 280 (DB) \* (Vol 1) 1914 Oudh 345 (347) : 17 Oudh Cas 142 : 15 Cri L Jour 516 \* (Vol 19) 1932 Mad 371 (372) : 55 Mad 90 : 32 Cri L Jour 1131 \* (Vol 19) 1932 Mad 535 (536) : 33 Cri L Jour 626 \* (Vol 18) 1931 All 12 (12) : 32 Cri L Jour 311 (DB) \* (Vol 11) 1924 Cal 980 (980) : 25 Cri L Jour 1107 (D B) \* (Vol 11) 1924 All 131 (132) : 45 All 680 : 24 Cri L Jour 811 \* (Vol 20) 1933 Pat 598 (599) : 35 Cri L Jour 95 (DB) \* ('04) 1 Cri L Jour 797 (799) : 31 Cal 710 (DB).

Section 439—Note 40 (*contd.*)

[2] Plea not raised in revision in Court below under S. 435 will not be allowed to be raised in High Court in the absence of failure of justice. (Vol 20) 1933 All 264 (266) : 55 All 301 : 34 Cri L Jour 414 (FB).

[3] Failure of justice—High Court has power to allow point to be raised. (Vol 30) 1943 Mad 587 (588) : 45 Cri L Jour 74 \* ('12) 13 Cri L Jour 482 (483) : 40 Cal 41 (DB) \* ('79) 5 Cal L Rep 287 (288, 290) (DB).

[4] High Court may, in a proper case, take notice of the point *suo motu* even if it had not been taken by applicant in lower Courts. (Vol 22) 1935 Nag 23 (25).

[5] Point going to the root of jurisdiction such as a point as to the misjoinder of trials—High Court will allow new plea to be taken for first time in revision. (Vol 12) 1925 Cal 248 (249) : 25 Cri L Jour 307 (DB) \* (Vol 8) 1921 Pat 291 (292) : 21 Cri L Jour 619 (DB) \* (Vol 13) 1926 Bom 110 (111) : 49 Bom 892 : 27 Cri L Jour 305 (DB) \* ('79) 5 Cal L Rep 287 (288) (DB).

[But see (Vol 29) 1942 Oudh 439 (441) : 43 Cri L Jour 668 \* (Vol 22) 1935 Oudh 176 (178) : 10 Luck 192 : 35 Cri L Jour 1236 (DB) \* ('02) 1902 Pun L R No. 182, p. 518 (549) \* ('67) 4 Bom H C R Cr 33 (33).]

[6] Mere acquiescence in illegal procedure adopted by lower Court does not estop accused from raising plea of illegality of trial. ('43) 24 Pat L Tim 326 (327) \* (Vol 25) 1938 Nag 493 (495) : 40 Cri L Jour 73.

[7] Applicant in revision cannot be allowed to raise, at the hearing, a point not raised by him in his application. (Vol 31) 1944 Nag 40 (44) : I L R (1944) Nag 150 : 45 Cri L Jour 250 \* (Vol 20) 1933 All 264 (266) : 55 All 301 : 34 Cri L Jour 414 (FB) \* (Vol 12) 1925 Pat 378 (380) : 4 Pat 231 : 26 Cri L Jour 932 (DB) \* (Vol 20) 1933 Pat 597 (597) : 34 Cri L Jour 1025.

[8] Applicant in revision should confine himself to the ground upon which the order issuing notice to show cause was made. (Vol 7) 1920 All 268 (270) : 42 All 646 : 22 Cri L Jour 228.

[9] Rule issued on application for revision without any restriction—High Court can go into all grounds mentioned in application. ('08) 7 Cri L Jour 10 (11) : 35 Cal 141 (DB).

[10] Where a rule is limited to particular point High Court will not go into other points. ('08) 7 Cri L Jour 159 (161) : 35 Cal 133.

41. Accused must be heard before order is made to his prejudice — Sub-section (2). — [1] No order can be made to the prejudice of an accused person unless he has had an opportunity of being heard in the High Court in his defence. (Vol 33) 1946 Cal 452 (457) : 48 Cri L Jour 46 (DB) \* (Vol 28) 1941 Pat 287 (287) : 42 Cri L Jour 622 \* ('84) 10 Cal 268 (273, 274) (D B). (Overruled on another point in 12 Cal 473 (FB).) \* ('81) 1881 Rat 179 (179) (SB) \* ('93) 1893 Rat 634 (634) (DB) \* (Vol 20) 1933 Lah 433 (434) : 34 Cri L Jour 371.

[See (Vol 21) 1934 Mad 473 (474) : 57 Mad 1101 : 35 Cri L Jour 1134.]

[But see (Vol 12) 1925 All 392 (393) : 26 Cri L Jour 963.]

[2] The issue of warrant of arrest is not order to the prejudice of accused. (Vol 2) 1915 Low Bur 34 (35) : 8 Low Bur Rul 290 : 16 Cri L Jour 670.

[3] District Magistrate referring the case under S. 438, gave hearing before making reference — There is no compliance with sub-s. (2). (Vol 5) 1918 Cal 169 (170) : 19 Cri L Jour 701 (DB).

[4] Accused not given any notice before order made to his prejudice — High Court ordered notice re-heard the matter. (Vol 14) 1927 Cal 702 (704) : Cal 417 : 28 Cri L Jour 831 (DB).

[5] Accused appealing against their conviction. Accused before the Court — Their advocates given opportunity of being heard as to why their sentence should not be enhanced — Procedure is correct—No to accused themselves need not be given for second time to show cause against enhancement. (Vol 21) 1934 105 (110) : 61 Cal 6 : 35 Cri L Jour 554 (DB) \* (Vol 1927 Sind 85 (88) : 27 Cri L Jour 1265 (DB).

[See also ('36) 37 Cri L Jour 859 (860) : 62 Cal (DB).]

[6] This sub-section does not apply to an accused person to whom compensation has been ordered to be paid under S. 250 and such order is sought to be aside in revision. (Vol 24) 1937 Sind 125 (125) : 38 L Jour 783 : 31 Sind L R 51 (DB) \* ('88) 1888 Pun No. 14 Cr, p. 24 (25, 26) (DB).

[7] The sub-section has no application to a case where the applicant is not an accused person and order of the lower Court is only confirmed by the High Court upon a reference made to it under S. 438. (Vol 1946 Bom 276 (277, 278) (FB).

[8] Application for revision against order of acquittal—High Court can set aside order only in respect of accused persons who are actually parties to the revision application — Order of acquittal in respect of accused persons who are not parties to the revision cannot be touched by High Court. (Vol 28) 1941 Pat 287 (287) Cri L Jour 622.

42. Appealable case—Revision—Sub-section — [1] A revision cannot be entertained in an appeal case, at the instance of the party who could have appealed but has not done so. (Vol 29) 1942 Oudh 441 : 43 Cri L Jour 668 \* ('41) ILR (1941) 1 Cal 418 (DB) \* (Vol 27) 1940 Bom 279 (280) : 41 Cri L Jour 916 : ILR (1940) Bom 500 (DB) \* (Vol 26) 1939 R 392 (393) : 41 Cri L Jour 108 : 1940 Rang L R 14 (Vol 24) 1937 Bom 153 (153, 154) : I L R (1937) 1 263 : 38 Cri L Jour 606 (DB) \* (Vol 24) 1937 Lah 133 : 17 Lah 604 : 38 Cri L Jour 432 \* (Vol 24) 1 Oudh 524 (527) : 38 Cri L Jour 1062 : 13 Luck 618 ( \* (Vol 24) 1937 Sind 100 (101) : 38 Cri L Jour 665 ( \* (Vol 22) 1935 Rang 393 (393, 394) : 37 Cri L Jour 9 (Vol 3) 1916 All 316 (317) : 17 Cri L Jour 157 \* ('16) 1929 Pat 640 (641) : 30 Cri L Jour 765 \* (Vol 1929 Sind 176 (177) : 30 Cri L Jour 905 (DB).

[See however (Vol 23) 1936 Nag 160 (161) : I (1937) Nag 38 : 39 Cri L Jour 349.]

[2] Where an appeal lies under some provision of other than the Code the sub-section does not preclude maintainability of a revision under the Code. (Vol 1927 Lah 161 (162) : 28 Cri L Jour 230.

[But see (Vol 22) 1935 Rang 393 (393) : 37 Cri L Jour 94.]

[3] High Court can take up the case in revision on reference under S. 438 or *suo motu* though this will ordinarily be done. (Vol 30) 1943 Bom 304 (305) Cri L Jour 786 (DB). (Reference under S. 438.) \* ('29) 1942 Oudh 443 (444) : 43 Cri L Jour 763. (Do.) (Vol 3) 1916 All 316 (317) : 17 Cri L Jour 157. (Do.) ('04) 1 Cri L Jour 477 (477) : 2 Low Bur Rul 209. ( \* (Vol 18) 1931 Lah 145 (148) : 32 Cri L Jour 100. (Do.) \* ('02) 2 Weir 447 (448). (Do.) \* (Vol 33) 1946 Cal 452 (458) : 48 Cri L Jour 46 (DB). (*Suo motu.*) \* ('31) 1944 Pat 232 (233, 234) : 23 Pat 108 : 45 Cri L Jour 725 (DB). (Do.) \* (Vol 12) 1925 Mad 239 (239) : 21 L Jour 747 (DB). (Do.) \* (Vol 4) 1917 Upp Bur 2 18 Cri L Jour 355 : 2 Upp Bur Rul 124. (Do.) \* (Vol 1924 Sind 129 (129) : 17 Sind L R 245 : 25 Cri L Jour 134 (DB) (Do.) \* (Vol 12) 1925 Sind 206 (206) : 18

*Optional with Court to hear parties.*

**440.** No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision :

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

[1882—S. 440 ; 1872—S. 297.]

*Statement by Presidency Magistrate of grounds of his decision to be considered by High Court.*

or order.

[1882 — S. 441.]

**441.** When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section- 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue ; and the Court shall consider such statement before overruling or setting aside the said decision or order.

[1882 — S. 442 ; 1872— S. 299 Paras. 1, 2; 1861 — S. 406.]

**Section 439—Note 42 (contd.)**

L R 262 : 25 Cri L Jour 1862 (DB). (Do.) \* (Vol 11) 1924 Rang 98 (100) : 1 Rang 604 : 25 Cri L Jour 270 \* (1900) 2 Bom L R 334 (335) (DB) \* ('02) 24 All 346 (348).

[4] The mere fact that accused has failed to appeal is not a ground for making a reference to High Court to exercise its powers of revision. ('06) 4 Cri L Jour 446 (447) (DB) (Bom) \* ('99) 1 Bom L R 117 (118) (DB).

[See (Vol 32) 1945 Oudh 20 (21) : 47 Cri L Jour 27.]

[5] Court is not bound to treat application for revision as appeal when no such request is made. (Vol 19) 1932 Oudh 27 (28) : 7 Luck 501 : 33 Cri L Jour 278.

[6] Application treated as appeal but dismissed on merits. (Vol 19) 1932 Rang 147 (148) : 10 Rang 315 : 33 Cri L J 763.

**43. Order in revision — Letters Patent appeal.—**

[1] No appeal lies under the Letters Patent from an order of a single Judge on a revision application. (Vol 2) 1915 Mad 831 (832) : 39 Mad 539 : 16 Cri L Jour 303 (DB) \* (Vol 3) 1916 Mad 1223 (1224) : 16 Cri L Jour 464 (DB) \* ('94) 17 Mad 105 (105).

[But see (Vol 1) 1914 Mad 712 (713) : 15 Cri L Jour 362 (DB).]

#### Section 440 — Note 1

[1] This section is, to a certain extent, an exception to the general rule that no one should be condemned unheard, in that it provides that in revision no party has a right to be heard. (Vol 33) 1946 Bom 276 (277, 278) : 47 Cri L Jour 700 (FB) \* (Vol 27) 1940 All 426 (426) : 1 L R (1940) All 539 : 41 Cri L Jour 876 \* (Vol 12) 1925 Oudh 558 (558) : 26 Cri L Jour 527.

[2] The proviso enacts that the Court may, if it thinks fit, hear any party either personally or by pleader. ('81) 7 Cal 447 (451) (DB) \* ('81) 7 Cal 523 (535, 536) (DB).

[3] A private complainant may be heard in revision proceedings. (Vol 7) 1920 Cal 571 (571, 572) : 21 Cri L Jour 682 (DB) \* (Vol 16) 1929 Bom 443 (444) : 31 Cri L Jour 883 \* (Vol 10) 1923 Cal 11 (12) : 50 Cal 159 : 24 Cri L Jour 208 (DB) \* (Vol 2) 1915 Cal 388 (389) : 42 Cal 612 (624) : 18 Cri L Jour 122 (DB).

[4] In matters of importance a private complaint will generally be heard. ('92) 19 Cal 880 (886) (DB).

[5] A revision which practically amounts to an appeal against an acquittal will be discouraged. ('90) 14 Mad 363 (364) (DB).

[6] Where the Sessions Judge, in his order of reference, had written a complete order setting forth his view and a reply had been submitted by the Magistrate concerned and the facts were clear beyond all doubt, the High Court refused to hear the party. (Vol 14) 1927 All 724 (726) : 29 Cri L Jour 88.

[7] Order admitting revision only on question of sentence—Counsel can be heard only on that question. (Vol 27) 1940 All 426 (426) : 1 L R (1940) All 539 : 41 Cri L Jour 876.

[8] Section 12 (3), Bar Councils Act, does not preclude High Court from hearing complainant when it is considering finding of tribunal appointed under S. 11 of that Act. (Vol 18) 1931 Cal 680 (681) (SB).

[9] The accused must be heard when order is intended to be made to his prejudice. The fact that the Magistrate who referred the case to the High Court under S. 438 gave a hearing to the accused is not sufficient. (Vol 5) 1918 Cal 169 (170) : 19 Cri L Jour 701 (DB).

[10] Revision against conviction — High Court can reduce sentence without notice to Crown. (Vol 34) 1947 Lah 47 (48, 49) : 1 L R (1946) Lah 295 (SB).

#### Section 441 — Note 1

[1] This section does not abrogate the terms of Ss. 263 and 370 ; it merely allows the Presidency Magistrate to supplement the reasons which should have already been stated under Ss. 263 and 370. (Vol 10) 1923 Mad 185 (186) : 46 Mad 253 : 24 Cri L Jour 84 \* (Vol 10) 1923 Cal 725 (726) : 25 Cri L Jour 492 (DB).

[2] The failure to record any reasons at all under Ss. 263 and 370, though irregular, will not be a ground for interference in revision, if the grounds set forth in the statement under this section are sufficient to support the order of the lower Court, and if there is no failure of justice. (Vol 29) 1942 Mad 603 (604) : 43 Cri L Jour 859 \* (Vol 10) 1923 Mad 185 (186, 187) : 46 Mad 253 : 24 Cri L Jour 84 \* ('09) 10 Cri L Jour 117 (118) (DB) (Mad).

[3] The section does not enable Presidency Magistrate to give fresh reasons for their decisions contradictory to those already given. (Vol 17) 1930 Mad 225 (225) : 31 Cri L Jour 460.

#### Section 442—Note 1

[1] The section applies to all revisions by a High Court whether under S. 435 or S. 439. It, however, im-



## PART VIII.

### SPECIAL PROCEEDINGS.

#### <sup>a</sup>CHAPTER XXXIII.

"As regards the new Chapter XXXIII it will be observed that it applies to offences punishable with imprisonment which are alleged to have been committed outside a presidency-town. The first step to be taken to secure that such a case shall be tried under the provisions of the chapter is a claim to be made by the accused person before the Magistrate. Unless such a claim is made at one of the stages indicated for the trial of a summons-case, or of a warrant-case, or for the enquiry preliminary to commitment, the provisions of this chapter will not apply. The Magistrate then makes such enquiry as he thinks necessary. As a guide to the Magistrate in coming to a finding as to whether the case should be tried under the provisions of the chapter or not, it is provided that if the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, he shall find that the case should be tried under the provisions of the chapter. For other cases with which both European British subjects and Indian British subjects are connected, the Magistrate must be satisfied that it is expedient for the ends of justice that the case shall be so tried. This, it is observed, is the same criterion as that now contained in clause (e) of sub-section (1) of S. 526 of the Code of Criminal Procedure, relating to the powers of a High Court to transfer criminal cases. If the Magistrate rejects the claim, the person has a right of appeal to the Sessions Judge whose decision is final, and if the claim is rejected by the Magistrate, the Magistrate is required to stay proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided. The period allowed for the presentation of an appeal is fixed by the amendment of the Indian Limitation Act, 1908, made by clause 39 of the Bill at seven days (Limitation Act, Art. 150A). The persons who will be included within the term 'complainant' for the purpose of these provisions are then defined by the proposed S. 444. Incidentally public servants and officers and servants of companies, associations or bodies to which the Local Government by general or special order may declare the provisions of the section to apply will not be included within the definition merely because they have made a complaint or given information in their official or quasi-official capacity. The procedure in summons-cases punishable with imprisonment . . . is then laid down. For warrant-cases which would normally be triable under the provisions of Chapter XXI of the Code, if it is found that the case ought to be tried under the provisions of the chapter, a Magistrate is required, if he does not discharge the accused, to commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court. Normally in the Court of Session the case will then be tried by a jury of mixed nationality, the majority of the jurors being either Indians or Europeans and Americans according as the accused person is an Indian or a European subject of His Majesty."—S. O. R. [XII of 1923].

#### SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED.

**443.** (1) Where, in the course of the trial outside a presidency-town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—

(a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or

(b) that, in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,

record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case.

#### Section 442—Note 1 (contd.)

plies that the powers of revision under Chapter XXXII are exercisable only in respect of findings, sentences or orders of inferior Courts. (1909) 9 Cri L Jour 378 (381) : 1909 Pun Re No. 4 Cr (D B).

#### SECTION 443 — SYNOPSIS.

1. Scope of the Chapter.
2. "Any offence punishable with imprisonment."
3. "Claims that the case ought to be tried under the provisions of this Chapter."
4. "After making such inquiry . . . in support of his claim."
5. Proof in the case of European British subject.
6. In view of the connexion with the case of a racial issue—Clause (b).
7. "Where the Magistrate rejects the claim,"

1. Scope of the Chapter. — [1] This chapter is designed to apply to cases of racial distinction where there is a real dispute between a European and an Indian, or *vice versa*. The mere fact that the accused is a European British subject and information was given by Indian British subject under circumstances not sufficient to make the informant a complainant within S. 444 will not bring the case within the chapter. (Vol 26) 1939 Cal 545 (552) : 1 I L R (1939) 1 Cal 162 : 41 Cri L Jour 72 (DB).

[See also (Vol 25) 1938 Sind 150 (151) : 39 Cri L Jour 789 : 1 I L R (1939) Kar 38 (DB).]

[2] A claim by the accused and a finding by the Magistrate are necessary ingredients for the application of this chapter. (Vol 26) 1939 Cal 545 (554) : 1 I L R (1939) 1 Cal 162 : 41 Cri L Jour 72 (DB) \* (Vol 25) 1938 Sind 150 (151) : 39 Cri L Jour 789 : 1 I L R (1939)

(2) Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.

(3) Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided.

[1882—S. 443; 1872—S. 72 Paras. 1, 2 and S. 74 Para. 1; 1861—S. 39.]

[a] Chapter 33 (Ss. 443 to 449) was substituted by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 27, for the original Chap. 23 (Ss. 443 to 463). This chapter does not apply to proceedings of a Special Tribunal constituted under the Criminal Law Amendment Ordinance, 1943 (No. 29 of 1943); see S. 6 (2) of that Ordinance.

**Section 443—Note 1 (contd.)**

Kar 38 (DB)\* (Vol 12) 1925 Oudh 469 (471) : 28 Oudh Cas 230 : 26 Cri L Jour 1217 \* (Vol 33) 1946 Nag 225 (225) : 47 Cri L Jour 364 : I L R (1946) Nag 627.

[See also (Vol 28) 1941 Pat 163 (164, 165).]

[See however (Vol 25) 1938 Rang 105 (107) : 39 Cri L Jour 470.]

[3] Where both the accused and the complainant are European British subjects or Indian British subjects, no racial issue arises and this chapter does not apply. (Vol 16) 1929 Lah 187 (188) : 30 Cri L Jour 918 (DB).

2. "Any offence punishable with imprisonment." — [1] The provisions of this chapter can be invoked for the trial of the offence of murder because a person charged for murder may ultimately be convicted of a lesser offence. (Vol 19) 1932 Lah 490 (491, 492) : 13 Lah 755 : 33 Cri L Jour 529 (DB).

[2] Chapter does not apply to proceedings under Chapter VIII of the Code. (Vol 20) 1933 Lah 1019 (1020) : 35 Cri L Jour 505 \* ('11) 12 Cri L Jour 248 (249) (Low Bur).

3. "Claims that the case ought to be tried under the provisions of this Chapter." — [1] Whereas in a claim to be dealt with under Chap. XLIV-A the claimant has always to prove his status, in a claim under Chapter XXXIII this is so only if the claim is based upon cl. (a) of sub-s. (1) of this section. (Vol 12) 1925 Cal 384 (386, 387) : 51 Cal 980 : 26 Cri L Jour 385 \* (Vol 12) 1925 Cal 14 (18) : 52 Cal 347 : 26 Cri L Jour 401 (DB).

[2] If a claim is made and a finding favourable to the accused is recorded by the Magistrate, such a finding is final and the Bench of Magistrates in a summons-case, or a Sessions Judge in a warrant-case is bound to act under the provisions of this chapter. (Vol 12) 1925 Oudh 469 (471) : 28 Oudh Cas 230 : 26 Cri L Jour 1217 \* (Vol 19) 1932 Lah 490 (492) : 13 Lah 755 : 33 Cri L Jour 529 (DB).

[3] If the prosecution is aggrieved by an order under this section it should take steps to have the order set aside by moving the High Court in revision. (Vol 20) 1933 Lah 1019 (1020) : 35 Cri L Jour 505.

[See also (Vol 30) 1943 Lah 8 (9) : 43 Cri L Jour 901.]

[4] When the finding of the Magistrate is adverse to the claim, it is final unless the accused appeals to the Sessions Judge in which case the decision of the Sessions Judge will be final. (Vol 12) 1925 Oudh 469 (471) : 28 Oudh Cas 230 : 26 Cri L Jour 1217.

[5] A finding rejecting the accused's claim without giving him an opportunity of adducing evidence in support of his claim will not be one to which the provisions of sub-s. (2) will apply. ('37) I L R (1937) 2 Cal 741 (744, 745) (DB).

[6] The omission to record the finding by the Magistrate does not vitiate the proceedings of committing the accused to the Court of Session under S. 446 if the finding is implied in the committal order. (Vol 25) 1938 Rang 105 (106, 107) : 39 Cri L Jour 470.

[7] The direction contained in Chapter XXXIII is to

be followed only where a plea of status is raised. (Vol 26) 1939 All 602 (603) : 40 Cri L Jour 917 : I L R (1939) All 851.

[8] The mere fact that an accused person is a European British subject does not *ipso facto* entitle him to a right of the special procedure under this chapter. (Vol 16) 1929 Lah 187 (188) : 30 Cri L Jour 918 (DB).

[9] Where the accused merely stated that they were European British subjects and claimed to be tried as such, it was held that there was no claim to be tried under Chapter XXXIII. (Vol 12) 1925 Oudh 469 (471) : 28 Oudh Cas 230 : 26 Cri L Jour 1217.

[10] The stage at which this claim is to be preferred is specially mentioned in sub-s. (1), when it is put forward by the accused on his own initiative; but there does not appear to be any restriction in this behalf in a case where the Magistrate informs the accused under S. 447 of his rights. (Vol 12) 1925 Cal 384 (386) : 51 Cal 980 : 26 Cri L Jour 385.

[11] An accused person may relinquish or waive his right to be tried under this chapter. Once a Magistrate has taken proceedings under Chap. XXXIII he cannot himself direct that the proceedings should not go on under that chapter. (Vol 26) 1939 Cal 545 (555) : I L R (1939) 1 Cal 162 : 41 Cri L Jour 72 (DB) \* (Vol 25) 1938 Sind 150 (151) : 39 Cri L Jour 789 : I L R (1939) Kar 38 (DB) \* ('11) 12 Cri L Jour 436 (436) : 7 Nag L R 93 \* ('93) 16 Mad 308 (309) (DB) \* (Vol 5) 1918 Pat 59 (60) : 18 Cri L Jour 986 \* ('88) 12 Bom 561 (567) (DB).

[See however (Vol 30) 1943 Sind 123 (124) : I L R (1943) Kar 1 : 44 Cri L Jour 586 (DB).]

[12] If the accused does not want that the proceedings should go on under this chapter, the proper course is for him to apply to the High Court which can pass appropriate orders under S. 561A. (Vol 25) 1938 Sind 150 (151) : 39 Cri L Jour 789 : I L R (1939) Kar 38 (DB).

4. "After making such inquiry . . . in support of his claim." — [1] Inquiry into claim is left to Magistrate's discretion — Provision as to allowing time to accused to adduce evidence in support of his claim is mandatory. ('87) I L R (1937) 2 Cal 741 (745) (DB).

5. Proof in the case of European British subject. — [1] Before a person can be held to be a European British subject, he must both make the claim and establish it. (Vol 26) 1939 Cal 545 (548) : I L R (1939) 1 Cal 162 : 41 Cri L Jour 72 (DB) \* ('88) 12 Bom 561 (568) (DB).

[2] Whether or not an accused is European British subject is a matter of fact. ('66) 6 Suth W R Or 13 (14) (DB) \* ('68) 10 Suth W R Or 6 (6).

[3] An affidavit filed by the accused stating his parentage and birth-date and supported by a certified copy of the certificate of marriage of his parents is sufficient to prove claim. (Vol 14) 1927 Cal 307 (307, 308) : 54 Cal 52 : 28 Cri L Jour 481 (DB) \* (Vol 13) 1926 Cal 1203 (1205) : 53 Cal 746 : 27 Cri L Jour 1304 (DB).



444. For the purposes of section 443, "complainant" means any person making a complaint or, in relation to any case of which cognizance is taken under clause (b) of section 190, sub-section (1), any person who has given information relating to the commission of the offence within the meaning of section 154:

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the <sup>a</sup>[Provincial Government] may, by general or special order published in the <sup>b</sup>[Official Gazette], declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor, public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a police-officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

[1882 -- S. 414 ; 1872 -- S. 72 para 1, S. 76 para 1.]

[a] Substituted by A. O. for "Local Government." [b] Substituted by A. O. for "Local Official Gazette."

445. (1) Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons-case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian, for the trial of the case.

(2) Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case, together with their opinions thereon, shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.

(3) Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.

(4) In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for

#### Section 443 (contd.)

6. In view of the connexion with the case of a racial issue.—Clause (b).—[1] The trial Court has the discretion to decide whether it is expedient that the case should be tried under the provisions of this chapter. (Vol 30) 1943 Lah 8 (10) : 43 Cri L Jour 901.

[2] Where complaints under Ss. 193 and 406 against a British Indian subject are made by the High Court as the result of an application made by a European British subject, the European British subject and the Indian British subject are undoubtedly connected with the case within the meaning of this clause, although the complainant in such a case cannot be said to be the European British subject so as to make clause (a) applicable. (Vol 30) 1943 Lah 8 (10) : 43 Cri L Jour 901.

[3] The mere fact that an Indian British subject was a co-accused with a European British subject in the indictment under which the commitment to the Sessions Court had been made, is not sufficient to bring the case under this clause. (Vol 12) 1925 Cal 501 (502) : 26 Cri L Jour 662 (DB).

7. "Where the Magistrate rejects the claim," etc.—Sub-section (2). — [1] Sub-section (2) does not mean that, even though the provisions of this Code have been entirely ignored from start to finish, the High Court, in revision, will have no power to put the matter right. (37) I L R (1937) 2 Cal 741 (743) (DB).

[2] Where a Magistrate rejects the claim of the accused without complying with the provisions of

sub-s. (1), the order is improper. (37) I L R (1937) 2 Cal 741 (745) (DB).

[3] While the Legislature has provided an appeal from an order rejecting a claim, it has provided no appeal from an order accepting such claim. But such order is open to revision. (Vol 30) 1943 Lah 8 (9) : 43 Cri L Jour 901 \* (Vol 20) 1933 Lah 1019 (1020) : 35 Cri L Jour 505 \* (Vol 33) 1946 Nag 225 (226) : 47 Cri L Jour 364 : I L R (1946) Nag 627.

#### Section 444—Note 1

[1] Where a public servant makes a complaint, this chapter does not apply. (Vol 13) 1926 Pat 566 (568) : 27 Cri L Jour 1041 (D B) \* (Vol 12) 1925 Cal 501 (502) : 26 Cri L Jour 662 (D B) \* (Vol 13) 1926 Sind 230 (230, 231) : 20 Sind L R 178 : 27 Cri L Jour 770.

[2] In criminal prosecution launched against an Indian British subject by a European employee on behalf of railway administration, the accused cannot claim to be tried under this chapter. (Vol 11) 1924 Rang 373 (374) : 26 Cri L Jour 190.

[3] A police officer making report under S. 173 is not a complainant. (Vol 26) 1939 Cal 545 (556) : I L R (1939) 1 Cal 162 : 41 Cri L Jour 72 (D B).

[4] A *durwan* or any other person going to police-station and giving information that a certain man is lying on floor with blood-marks on his person is not a complainant. (Vol 26) 1939 Cal 545 (556) : I L R (1939) 1 Cal 162 : 41 Cri L Jour 72 (D B).

trial by a like Bench to such other district as the High Court may, by general or special order, direct.

(5) Notwithstanding anything contained in this section, the <sup>a</sup>[Provincial Government] may, by notification in the <sup>b</sup>[Official Gazette], direct that all summons-cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.

[1882 — S. 445 ; 1872 — Ss. 73, 438 ; 1861 — Ss. 40, 165.]

[a] Substituted by A. O. for "Local Government". [b] Substituted by A. O. for "Local Official Gazette."

**446.** (1) Where a Magistrate or a Sessions Judge decides under section 443 that a case *Procedure in* ought to be tried under the provisions of this Chapter and the case is a warrant-*warrant-cases.* case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court.

(2) Where an accused is committed to the Court of Session under sub-section (1), the Court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly :

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the provisions of section 284A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

[1882—S. 446 ; 1872 — S. 74 para. 2.]

*Court to inform accused persons of their rights in certain cases.*

**447.** If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall forthwith inform the accused person of his rights under this Chapter.

[1882—S. 447; 1872—S. 75 Para. 1, S. 438 Para. 2.]

**448.** [References to Sessions Judge to be construed as references to High Court in Rangoon.]  
*Repealed by A. O.*

[1882—S. 448.]

#### Section 446 — Note 1

[1] Before committing a case under this section the Magistrate should arrive at a decision under S. 443 that the case ought to be tried under this chapter. (Vol 25) 1938 Rang 105 (107) : 39 Cri L Jour 470.

[2] The section is mandatory, and the case must be committed to the Court of Session. (Vol 16) 1929 All 84 (84) : 51 All 483 : 30 Cri L Jour 218.

[3] Charge once framed under Chapter 33 cannot be cancelled under S. 213 (2) —But High Court can under S. 561-A direct proceedings to be treated under Ch. 21 if accused so want it. (Vol 25) 1938 Sind 150 (151) : 39 Cri L Jour 789 : I L R (1939) Kar 38 (DB) \* (Vol 18) 1931 All 366 (367) : 53 All 690 : 32 Cri L Jour 866.

[4] In a joint trial, a Magistrate cannot assume jurisdiction against an Indian British subject by discharging the European British subject. (Vol 16) 1929 All 84 (84) : 51 All 483 : 30 Cri L Jour 218.

[5] Before a Magistrate commits the case under this section, he must consider whether there are grounds for discharging the accused ; therefore he cannot commit the case without holding any preliminary enquiry under Chapter XVIII. (Vol 26) 1939 All 602 (604) : 40 Cri L Jour 917 : I L R (1939) All 861 \* (Vol 20) 1933 Pat 877 (877) : 12 Pat 707 : 35 Cri L Jour 174 (DB).

[6] "Magistrate" in sub-s. (1) means Magistrate having jurisdiction to inquire into case — Magistrate not empowered to hold inquiry in view of S. 29-A — Magis-

trate should direct complainant to make complaint to a Magistrate having such power and should not himself commit accused to sessions. (Vol 26) 1939 All 602 (604) : 40 Cri L Jour 917 : I L R (1939) All 851.

[7] As regards quashing of commitments the limitation imposed by S. 215 does not in terms apply to commitments made under this section but the High Court should not go beyond the rule contained in S. 215 when dealing with such commitments and interfere on grounds of pure fact. (Vol 32) 1945 Lah 1 (2) : 46 Cri L Jour 643 (DB).

[8] Decision by Magistrate that Chap. 33 applies to case is final and cannot be interfered with by Sessions Judge. (Vol 19) 1932 Lah 490 (492) : 13 Lah 755 : 33 Cri L Jour 529 (DB).

[9] Accused committed under S. 446 (1) — Trial must be by jury under S. 446 (2) unless the accused requires to be tried with the aid of assessors in accordance with S. 284A. (Vol 12) 1925 Lah 236 (236, 237) : 5 Lah 515 : 26 Cri L Jour 540 (FB).

#### Section 447 — Note 1

[1] An omission by a Magistrate to inform an accused of his right under this chapter as required by this section is absolutely cured by the provisions of S. 534. (Vol 22) 1935 Rang 67 (68) : 13 Rang 104 : 36 Cri L Jour 595 (FB). (Overruling (Vol 12) 1925 Rang 239 : 5 Rang 220 : 26 Cri L Jour 1371 on another point.)

*Special provisions  
relating to appeal.*

#### 449. (1) Where—

(a) a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, or  
(b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or  
(c) a case is tried by jury in the High Court in a presidency-town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency-town, have been triable under the provisions of this Chapter, then, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained in the Letters Patent of any High Court, the [Provincial Government] may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-section (1).

(3) An appeal under sub-section (1) or sub-section (2) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court.

[1882—S. 449; 1872—S. 76]

[a] *Substituted by A. O., for "Local Government".*

#### SECTION 449 — SYNOPSIS.

1. Scope.
2. Finality of a finding under Section 443.
3. Leave to appeal to the High Court—Clause (c).
4. Proof of nationality under clause (c).
5. Power of High Court on appeal or on reference under Section 307.

1. Scope.—[1] The right of appeal under clause (a) exists only when the trial is held under this chapter. Therefore, a person, who could have claimed but has not claimed to be tried under this chapter, has no right of appeal under clause (a). (Vol 22) 1935 Rang 67 (68) : 13 Rang 104 : 36 L Jour 595 (FB). (Overruling (Vol 12) 1925 Rang 239 : 3 Rang 220 : 26 Cri L Jour 1371 on another point.)

[2] Right of appeal under cl. (c) is subject to a condition, namely, that the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency-town, have been triable under the provisions of this chapter. (Vol 26) 1939 Cal 545 (554) : 41 Cri L Jour 72 : I L R (1939) 1 Cal 162 (DB) & (Vol 14) 1927 Cal 307 (308) : 54 Cal 52 : 28 Cri L Jour 481 (DB).

[3] Failure to claim the benefit of S. 528-A does not debar an accused person from urging, so far as the right of appeal under clause (c) of this section is concerned, that the conditions mentioned in clause (a) or (b) of S. 443 exist. And if this is shown, the accused is under the present clause (c) entitled to the right of appeal. (Vol 12) 1925 Cal 14 (16) : 53 Cal 347 : 26 Cri L Jour 401 (DB).

[See however (Vol 26) 1939 Cal 545 (555) : 41 Cri L Jour 72 : I L R (1939) 1 Cal 162 (DB).]

2. Finality of a finding under Section 443.—[1] Magistrate passing an erroneous order that accused should be tried under this chapter — No steps taken to set it aside — Crown cannot challenge it at appellate stage. (Vol 12) 1925 Cal 501 (502) : 26 Cri L Jour 662 (DB).

3. Leave to appeal to the High Court — Clause (c). — [1] An application for leave to appeal under cl. (c) may be heard by a Division Bench rather than by the Judge who tried the case. (Vol 12) 1925 Cal 673 (674) : 52 Cal 636 : 26 Cri L Jour 835 (DB).

[But see (Vol 12) 1925 Cal 14 (15) : 52 Cal 347 : 26 Cri L Jour 401 (DB).]

[2] The proper time to raise the question of a right to be dealt with under this chapter, is when leave to appeal is applied for. (Vol 12) 1925 Cal 14 (19) : 52 Cal 347 : 26 Cri L Jour 401 (DB).

[See however (Vol 26) 1939 Cal 545 (555) : 41 Cri L Jour 72 : I L R (1939) 1 Cal 162 (DB).]

[3] Application for leave to appeal should be made with notice to the Crown; but once leave is granted without such notice it cannot be revoked on the ground of want of such notice. (Vol 12) 1925 Cal 14 (15) : 52 Cal 347 : 26 Cri L Jour 401 (DB).

4. Proof of nationality under clause (c).—[1] An affidavit filed by the applicant stating his parentage and date of birth and supported by a certified copy of the marriage certificate of his parents is admissible in proof of the nationality of the applicant. (Vol 14) 1927 Cal 307 (307, 308) : 54 Cal 52 : 28 Cri L Jour 481 (DB).

5. Power of High Court on appeal or on reference under S. 307. — [1] High Court can entertain an appeal under this section even against a conviction based on the unanimous verdict of a jury on a matter of fact. (Vol 23) 1936 Nag 103 (105) : 37 Cri L Jour 607 : 31 Nag L R Sup 215 (DB). (High Court must assume that finding of fact is correct — Onus is on appellant to prove otherwise.) & (Vol 12) 1925 Lah 401 (402) : 6 Lah 98 : 26 Cri L Jour 1241 (DB).

[2] Trial by jury — Serious instances of nondirection and misdirection — Appeal to High Court under S. 449 — High Court can consider evidence and maintain conviction and is not bound to order retrial. (Vol 33) 1946 P C 82 (85) : I L R (1946) Lah 119 : 47 Cri L Jour 616 : 73 Ind App 77 (PC). (Affirming (Vol 32) 1945 Lah 105 : I L R (1945) Lah 290 : 47 Cri L Jour 4 (FB); Overruling 21 Cal 955 and 25 Cal 280.)

[3] Trial by jury — Appeal—Inadmissible evidence admitted in trial Court — High Court can maintain conviction if other evidence is sufficient to sustain such conviction — High Court is not bound to order retrial. (Vol 33) 1946 P C 82 (85) : I L R (1946) Lah 119 : 47 Cri L Jour 616 : 73 Ind App 77 (PC). (Affirming (Vol 32) 1945 Lah 105 : I L R (1945) Lah 290 : 47 Cri L Jour 4 (FB).)

<sup>a</sup>450 to 462. [Repealed.]

[a] See foot-remark: [a] to Chapter XXXIII

## CHAPTER XXXIV.

### LUNATICS.

*Procedure in case of accused being lunatic* 464. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the <sup>a</sup>[Provincial Government] directs, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

<sup>b</sup>[ (2A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466. ]

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he <sup>b</sup>[shall record a finding to that effect and] shall postpone further proceedings in the case.

[1882—S. 464; 1872—Ss. 423, 424; 1861—S. 338.]

[a] Substituted by A. O. for "Local Government".

[b] Inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 120.

#### Section 449—Note 5 (contd.)

[4] In cases tried by jury under Ch. 33 an appeal lies under this section to the High Court on a matter of fact as well as law and therefore High Court's powers on reference under S. 307 in such cases are wider than those in other cases. To justify an interference by the High Court under S. 307 in such cases it is not necessary that the finding of jury should be manifestly wrong or perverse. (Vol 12) 1925 Lah 401 (402); 6 Lah 98; 26 Cri L Jour 1241 (DB).

[See also (Vol 27) 1940 Nag 17 (22); 41 Cri L Jour 289; 1 L R (1940) Nag 394 (FB). (Obiter — Per Niyogi and Bose JJ. in Order of Reference.)]

[But see (Vol 13) 1926 Pat 566 (568); 27 Cri L Jour 1041 (DB).]

#### Section 464 — Note 1

[1] This section has nothing to do with the question whether the accused was or was not of unsound mind when he is alleged to have committed the offence (1900) 1900 All W N 47 (48).

[2] It is only in cases where the accused appears to be incapable, by reason of mental infirmity, of taking his trial that the issue of insanity must be tried. (Vol 15) 1928 Lah 796 (798); 9 Lah 371; 29 Cri L Jour 204 (DB) & ('05) 2 Cri L Jour 91 (93) (DB) & (Vol 19) 1932 Oudh 190 (190, 191); 33 Cri L Jour 542.

[3] It is not incumbent upon a Magistrate to order a medical enquiry upon a mere defence of insanity. (Vol 15) 1928 Lah 796 (798); 9 Lah 371; 29 Cri L Jour 204 (DB).

[4] The Magistrate must have reason to believe that the accused is of unsound mind. ('31) 32 Cri L Jour 816 (817) (DB) (Lah).

[5] The Magistrate must be satisfied that there is a *prima facie* case against the accused in respect of the offence charged. ('94) 1894 Pun Re No. 11, Cr, p. 35 (37) (DB).

[6] An enquiry must be made before the Magistrate begins to record evidence in the case. (Vol 7) 1920 All 854 (355); 42 All 137; 21 Cri L Jour 83 (DB).

[7] Enquiry should not be limited to the examination of the Civil Surgeon or the medical officer. Opportunity should be given to the party to rebut the evidence of the Civil Surgeon. (Vol 20) 1933 Oudh 362 (363); 34 Cri L Jour 914.

[8] The prosecution should be allowed an opportunity of producing evidence to rebut the evidence given

by the party. (Vol 25) 1938 Posh 24 (25); 39 Cri L Jour 737.

[9] If the accused is found to be of unsound mind and incapable of making his defence the Magistrate must not proceed with the case but must postpone further proceedings. ('88) 2 Weir 581 (581) & ('81) 5 Bom 262 (263) (DB) & ('92-96) 1 Upp Bur Rul 50 (51) & ('68) 10 Suth W R Cr 37 (37) (DB) & (Vol 12) 1925 Mad 440 (441); 48 Mad 388; 26 Cri L Jour 701 & ('82) 1882 All W N 106 (106) & (1900) 1900 All W N 47 (48) & ('63) 1868 Pun Re No. 28 Cr, p. 30 (31) (DB).

[10] Section does not apply to proceedings under S. 488 — But procedure laid down therein should be followed when person proceeded against appears to be of unsound mind. (Vol 12) 1925 Mad 440 (441); 48 Mad 388; 26 Cri L Jour 701.

[11] Medical evidence is necessary only in proceedings under this section. Where an accused is acquitted on the ground of his being insane at the time of the commission of the offence, medical evidence as to his insanity is not necessary under S. 471 for his being ordered to be kept in safe custody. (Vol 28) 1941 Rang 352 (352); 1941 Rang L R 544; 43 Cri L Jour 228.

[12] A House Surgeon, not empowered, cannot make an examination, and the defect cannot be cured by examining him as a witness in the case. (Vol 20) 1933 Sind 267 (270, 271); 35 Cri L Jour 200 (DB).

[13] A Magistrate acting under this section must have before him a medical officer's statement reduced to writing. ('72-92) 1872-92 Low Bur Rul 87 (88).

[14] The medical expert must be examined as a *preliminary* to the holding of the enquiry and not at the very close of the case. Subsequent examination of the expert does not cure the defect. (Vol 7) 1920 All 354 (355); 42 All 137; 21 Cri L Jour 83 (DB).

[15] A mere written certificate of a medical officer that a prisoner is of unsound mind and incapable of making his defence is not sufficient evidence of insanity. The officer must be called as a witness and must be personally examined. ('68) 9 Suth W R Cr 23 (25) (DB) & ('66) 1866 Pun Re No. 49 Cr, p. 57 (57) (DB).

[16] The opinion expressed by the Civil Surgeon is not to be regarded as final, or binding on the Magistrate. ('95) 1895 Rat 832 (833).

[17] The opinion of the medical officer in proceedings under this section has reference to the condition of the accused at the time of the opinion and not at

**465.** (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, <sup>and if the jury or Court, as the case may be, is satisfied of</sup> fact, the Judge shall record a finding to that effect and shall postpone further proceedings in case and the jury, if any, shall be discharged].

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

[1882—S. 465 ; 1872—S. 425 ; 1861—S. 389.]

a) *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 121, for "and, if satisfied of the fact, shall pass judgment accordingly, and thereupon the trial shall be postponed."

**466.** (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, <sup>whether the</sup> case is one in which bail may be taken or not], may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

Section 464 — Note 1 (*contd.*)

time of the alleged offence. (66) 1866 Pan Re 56 Cr, p. 63 (63) (DB).

[18] Orders under this section are open to revision. (60) 1900 All W N 47 (48, 49).

#### Section 465 — Note 1

[1] This section as well as S. 464 relate to unsoundness of mind at the time of trial, and not at the time of the commission of the offence. (Vol 19) 1932 Oudh (190) : 33 Cri L Jour 542 \* (Vol 4) 1917 All 328 (9) : 18 Cri L Jour 470.

[2] As a preliminary condition to the applicability of 464 and 465, it must appear to the Court that the accused is of unsound mind and is consequently incapable of making his defence. If it does so appear, in the fact has to be tried and decided before calling on the prisoner to stand his trial for the offence charged. (Vol 25) 1938 Cal 6 (7) : 39 Cri L Jour 308 (B) \* (Vol 19) 1932 Oudh 190 (191) : 33 Cri L Jour 2 \* (Vol 25) 1938 Cal 6 (7) : 39 Cri L Jour 308 (D B) (65) 2 Cri L Jour 91 (93) (D B) (All).

[3] The decision cannot be based merely on information received out of Court from the Civil Surgeon or on answers to questions put to the accused, but must be based on evidence taken before the jury or assessors. (9) 1849 All W N 181 (184) \* (1862-65) 1 Bom H C R 33 (35) (D B) \* (Vol 14) 1927 Cal 289 (289) : 27 Cri Jour 896 (D B).

[4] In cases where the accused has been examined by a Civil Surgeon or other medical officer, such surgeon or officer should be examined on oath like any other witness in the presence of the jury or assessors. (73) 19 (4) W R Cr 15 (15) (DB) \* (Vol 13) 1926 Lah 498 (38) : 7 Lah 315 : 27 Cri L Jour 552 (D B) \* (Vol 17) 30 All 450 (451) : 31 Cri L Jour 899 (D B) \* (Vol 4) 17 All 328 (329) : 18 Cri L Jour 470.

[5] Where the Court or the jury decide that the accused is of unsound mind, and consequently incapable of making his defence, the trial should be postponed. (64) 1 Suth W R Cr 11 (12) (D B) \* (1865) 3 Suth W R Cr 70 (70) (D B).

[6] The mere fact that it is "problematic" whether the accused is capable of making his defence is not sufficient. (86) 2 Weir 187 (189) (DB).

[7] Accused, weak of intellect, due to constant epileptic fits. — Weakness making him incapable of making his defence. — Case falls under this section. (32-96) 1 Upp Bur Rul 38 (39).

[8] The provisions of this section are mandatory and

hence the omission to decide the preliminary issue will vitiate the whole trial. (Vol 13) 1926 Lah 498 (499) : 7 Lah 315 : 27 Cri L Jour 552 (D B) \* (Vol 7) 1920 All 354 (356) : 42 All 137 : 21 Cri L Jour 83 (D B) \* (Vol 14) 1927 Cal 289 (290) : 27 Cri L Jour 896 (D B) \* (Vol 17) 1930 All 450 (451, 452) : 31 Cri L Jour 899 (D B) \* (1862-65) 1 Bom H C R Cr 33 (33) (D B) \* (66) 3 Cri L Jour 80 (81) : 1905 Pan Re No. 54 Cr (D B).

[9] The onus of proof that the accused is of sound mind is on the prosecution. (Vol 11) 1924 Cal 713 (714) : 51 Cal 584 : 25 Cri L Jour 1051 (D B).

[But see (Vol 25) 1938 Pesh 24 (25) : 39 Cri L Jour 737.]

[10] In inquiry under this section, prosecution has to begin. (Vol 12) 1925 Cal 479 (479) : 51 Cal 827 : 26 Cri L Jour 276.

[11] The inquiry under this section is treated as part of the trial of the accused. (73) 19 Suth W R Cr 15 (15) (D B).

[12] Inquiry under this section is not trial in the sense of ascertaining the guilt of the accused. (Vol 5) 1918 Pat 179 (181) : 3 Pat L Jour 291 : 19 Cri L Jour 135 (S B).

[13] On a reference to the High Court for confirmation of sentence of death, the High Court may, if it entertains doubts as to the accused's sanity, return the case to the Sessions Judge for further inquiry. (1865) 2 Suth W R Cr 33 (33) (D B).

#### Section 466 — Note 1

[1] Accused found to be of unsound mind and incapable of making defence — Court must proceed under this section — Court proceeding with trial — Order passed on merits is illegal. (82) 1882 All W N 106 (106) \* (88) 2 Weir 581 (581) \* (68) 10 Suth W R Cr 37 (37) (D B) \* (80-81) 5 Bom 262 (263, 264) (DB).

[2] Magistrate proceeding under this section cannot add any other condition not mentioned therein. (Vol 20) 1933 Sind 267 (270) : 35 Cri L Jour 200 (D B).

[3] Where a Magistrate, instead of proceeding under this section, proceeds with trial to its completion and then orders the accused to be detained pending orders of the Government, the High Court will interfere in revision. (1900) 1900 All W N 47 (48, 49).

[4] The High Court in revision will either pass an order under this section itself or direct the lower Court to proceed under it. (81) 5 Bom 262 (263, 264) (D B) \* (Vol 20) 1933 Sind 267 (271) : 35 Cri L Jour 200 (D B) \* (88) 9 Suth W R Cr 23 (25) (D B) \* (68) 10 Suth W R Cr 37 (37) (D B) \* (92-96) 1 Upp Bur Rul 50 (51).

<sup>b</sup>[(2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the <sup>c</sup>[Provincial Government]:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the <sup>c</sup>[Provincial Government] may have made under the Indian Lunacy Act, 1912.]

[1882—S. 466 ; 1872—S. 426 ; 1861—S. 390.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 122, for "if the case is one in which bail may be taken". [b] *Substituted*, *ibid.* [c] *Substituted* by A. O. for "Local Government".

**467. (1)** Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

[1882—S. 467 ; 1872—S. 427 ; 1861—S. 391.]

*Procedure on accused appearing before Magistrate or Court.* **468. (1)** If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused <sup>a</sup>[\*] to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465, as the case may be, <sup>b</sup>[and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466].

[1882—S. 468; 1872—S. 428; 1861—S. 392.]

[a] The word "person" was *repealed* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 123. [b] *Added*, *ibid.*

**469.** When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

[1812—S. 469; 1872—S. 424.]

**470.** Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting

#### Section 467 — Note 1

[1] This section provides for the trial of a person who was incapable of making his defence but has been subsequently found capable of defending himself. ('80) 2 Weir 581 (581).

[2] Trial postponed under S. 464 or S. 465 is to be resumed not at the point at which it was previously stopped but should be commenced *de novo*. ('89) 2 Weir 582 (582) (DB) & ('86) 6 Suth W R Cr 3 (4) (DB).

[3] The resumed trial is not illegal because the Judge or the assessors are different from those present at the time of the enquiry under S. 465. (Vol 5) 1918 Pat 179 (182) : 3 Pat L Jour 291 : 19 Cri L Jour 135 (SB).

[4] The resumed trial is not contrary to law merely because the Judge did not place on the record his finding that the accused was capable of making his defence or omitted to state the grounds for his conclusion. (Vol 21) 1934 Lah 123 (124) : 35 Cri L Jour 863 (DB).

#### Section 468—Note 1

[1] Under sub-s. (1) Court need not take evidence as to capacity of accused to make his defence—Magistrate with certificate of Inspector-General of Jails before him and appearance of accused in dock, taking view the accused was capable of making defence and committing him—Inquiry and commitment held legal. (Vol 22 1935 Pat 501 (502)).

#### Section 469—Note 1

[1] A Magistrate, rightly commits for trial prisoner, whom he finds to be sane at the time of the preliminary enquiry, although he appears to have been of unsound mind when he committed the act. ('68) Suth W R Cr 23 (23) (DB).

#### Section 470—Note 1

[1] Accused acquitted under the section is not to be set at large; the procedure prescribed under S. 47

the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

[1882—S. 470; 1872—S. 429; 1861—S. 393.]

**471. (1)** Whenever <sup>a</sup>[the finding] states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be <sup>b</sup>[detained] in safe custody in such place and manner as the Magistrate or Court thinks fit, <sup>c</sup>[and shall report the action taken to the <sup>d</sup>[Provincial Government]] <sup>e</sup>[ \* \* \* ]:

<sup>e</sup>[Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the <sup>d</sup>[Provincial Government] may have made under the Indian Lunacy Act, 1912.]

<sup>f</sup>[ \* \* \* ]  
<sup>g</sup>[(2)] The <sup>d</sup>[Provincial Government] may empower the officer in charge of the jail in which a person is confined under the provisions of section 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under <sup>h</sup>[ \* \* \* ] section 473 or section 474.

[1882—S. 471; 1872—S. 430; 1861—S. 394.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 124, for "such judgment." [b] Substituted, *ibid.*, for "kept." [c] Inserted, *ibid.* [d] Substituted by A. O. for "Local Government." [e] The words "and shall report the case for the orders of the Local Government" were repealed by the Repealing and Amending Act, 1914 (10 [X] of 1914), S. 3 and Sch. II. [f] Subsections (2) and (3) were repealed by the Indian Lunacy Act, 1912 (4 [IV] of 1912), S. 101 and Sch. II. [g] Renumbered for (4) by Act (18 [XVIII] of 1923), S. 124. [h] The words and figures "Section 472" were repealed by the Repealing and Amending Act (10 [X] of 1914), S. 3 and Sch. II.

**472.** [Lunatic prisoners to be visited by Inspector General.] Repealed by the Indian Lunacy Act, 1912 (4 [IV] of 1912), S. 101 and Sch. II.

**473.** If such person is <sup>a</sup>[detained] under the provisions of section 466, and <sup>b</sup>[in the case of a person detained in a jail, the Inspector General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them] shall certify that, in his or their opinion, such

#### Section 470—Note 1 (contd.)

should be followed. ('04) 1 Cr L Jour 854 (863) (Nag) & (Vol 9) 1922 Mad 54 (54): 23 Cr L Jour 71 & ('93-1900) 1893-1900 Low Bur Rul 630 (631).

[2] The onus of proving that the case of the accused comes within S. 84 of the Penal Code is on him. (Vol 7) 1920 Cal 39 (40): 21 Cr L Jour 317 (DB) & ('95) 22 Cal 817 (819).

[3] Accused's case governed by exception to S. 84, Penal Code — Accused is to be acquitted and not discharged. ('04) 1 Cr L Jour 854 (862).

#### Section 471 — Note 1

[1] The provision regarding detention of accused in safe custody is imperative and should be followed whether the accused is acquitted either by the Court of first instance or by the Court of appeal. (Vol 32) 1945 Nag 77 (78): 11 R (1945) Nag 551: 46 Cr L Jour 745 & (Vol 5) 1918 Bom 110 (114): 43 Bom 134: 19 Cr L Jour 771 (DB) & ('02) 29 Cal 493 (496) (DB).

[2] Where the Court of first instance acquits the accused but does not pass orders for his safe custody, the Court of appeal or the High Court in revision is competent to pass such orders. (Vol 28) 1941 Rang 352 (352): 1941 Rang L R 544: 43 Cr L Jour 228 & (Vol 2) 1915 Low Bur 34 (35): 8 Low Bur Rul 290: 16 Cr L Jour 670 & (Vol 9) 1922 Mad 54 (55): 23 Cr L Jour 71. (Order by appellate or revisional Court will not amount to changing order of acquittal into one of conviction.)

[3] No medical evidence as to the insanity of the accused is necessary for his being ordered to be detained in safe custody. (Vol 28) 1941 Rang 352 (352): 1941 Rang L R 544: 43 Cr L Jour 228.

[4] The Court cannot at its discretion deliver the accused to his friends or relatives but should detain him in a jail or send him to a lunatic asylum or mental home. (Vol 32) 1945 Nag 77 (78): 11 R (1945) Nag 551: 46 Cr L Jour 745. (It is the sole prerogative of the Government to deliver him or not to the care of his friends or relatives.) & (Vol 25) 1938 Rang 96 (96): 39 Cr L Jour 544 & (Vol 15) 1928 Cal 653 (654): 56 Cal 208: 29 Cr L Jour 847 (DB) & (Vol 2) 1915 Low Bur 34 (35): 8 Low Bur Rul 290: 16 Cr L Jour 670.

[5] When the accused is sane at the time of the trial he may be detained in a jail. (Vol 5) 1918 Bom 110 (114): 43 Bom 134: 19 Cr L Jour 771 (DB).

[6] The detention of the accused is not as a convict, but only to prevent him from doing harm to himself or to others. (Vol 9) 1922 Mad 54 (55): 23 Cr L Jour 71 & (Vol 12) 1925 Mad 1238 (1240): 27 Cr L Jour 46 (DB).

[7] Courts are competent to send the accused to any place of safe custody including the lunatic asylum, but such action must be reported to the Government for their information. (Vol 12) 1925 Mad 1238 (1240): 27 Cr L Jour 46 (DB) & (Vol 15) 1928 Cal 238 (240): 30 Cr L Jour 247 (DB) & (Vol 22) 1935 Oudh 143 (152): 36 Cr L Jour 392.

#### Section 473—Note 1

[1] Proceedings are revived against the accused after the certificate is issued under the section. (Vol 21) 1934 Lah 123 (124): 35 Cr L Jour 869 (DB).

[2] Formal proof of certificate is not necessary. ('36) 63 Cal 425 (427) (DB). (Certificate is a public document — Genuineness is to be presumed.)



person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and Magistrate or Court shall deal with such person under the provisions of section 468; and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence.

[1882—S. 473; 1872—S. 432; 1861—S. 395, cl. (2).]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 125, for "confined." [b] *Substituted, ibid.*, for "such Inspector General or visitors."

**474. (1)** If such person is <sup>a</sup>[detained] under the provisions of section 466 or section 471, and such Inspector General or visitors shall certify that, in his or their judgment, he may be <sup>b</sup>[released] without danger of his doing injury to himself or to any other person, the <sup>c</sup>[Provincial Government] may thereupon order him to be <sup>b</sup>[released] or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the <sup>c</sup>[Provincial Government], which may order his <sup>d</sup>[release] or detention as it thinks fit.

[1882 — S. 474; 1872 — S. 433; 1861 — S. 395 cl. (3).]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 126, for "confined." [b] *Substituted, ibid.*, for "discharge." [c] *Substituted* by A. O. for "Local Government." [d] *Substituted* by Act 18 [XVIII] of 1923, S. 126, for "discharge."

<sup>a</sup>**[475. (1)]** Whenever any relative or friend of any person detained under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody, the <sup>b</sup>[Provincial Government] may, upon the application of such relative or friend and on his giving security to the satisfaction of such <sup>b</sup>[Provincial Government] that the person delivered shall—

- (a) be properly taken care of and prevented from doing injury to himself or to any other person, and
- (b) be produced for the inspection of such officer, and at such times and places, as the <sup>b</sup>[Provincial Government] may direct, and
- (c) in the case of a person detained under section 466, be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.

[1882 — S. 475; 1872 — S. 434; 1861—S. 397.]

[a] *Substituted* by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 127 for the original section. [b] *Substituted* by A. O. for "Local Government".

#### Section 474—Note 1

[1] After a person is ordered to be detained in safe custody by a Court acting under S. 466 or S. 471, the Provincial Government alone has to decide the fate of the accused. (Vol 5) 1918 Bom 110 (118) : 43 Bom 134 : 19 Cri L Jour 771 (DB) & Vol 15) 1928 Cal 653 (654) : 56 Cal 208 : 29 Cri L Jour 847 (DB).



## CHAPTER XXXV.

## PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE.

**\*476.** (1) When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate.

<sup>b</sup>[Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.]

For the purposes of this sub-section, a <sup>[c]</sup> Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200.

(3) Where it is brought to the notice of such Magistrate or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.

[1882 — S. 476 ; 1872 — Ss. 471, 477 ; 1861 — Ss. 171, 176.]

[a] This section and Ss. 476-A and 476-B were substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 128, for the original section 476. [b] Inserted, *ibid*, 1926 (2 [II] of 1926), S. 6.

[c] The word "Chief" was repealed, *ibid*.

## SECTION 476—SYNOPSIS.

1. Scope and applicability.
2. Limit of time for taking action under the section.
3. "Any Civil, Revenue or Criminal Court."
4. "Offence referred to in section 195, sub-section (1), clause (b) or clause (c)."
5. "In or in relation to a proceeding in that Court."
6. "Whether on application made to it in this behalf or otherwise."
7. "After such preliminary inquiry, if any, as it thinks necessary."
8. Absence of preliminary enquiry — Effect of.
9. Notice.
10. "Is . . . . of opinion that it is expedient in the interests of justice that an enquiry should be made."
11. Complaint in respect of an offence under section 193, Penal Code — Perjury.
12. Complaint in respect of other offences.
13. "Record a finding to that effect."
14. "Make a complaint thereof in writing."
15. "Shall forward the same to a Magistrate of the first class having jurisdiction."
16. "May take sufficient security," etc.
17. Effect of complaint under the section — Sub-section (2).
18. Validity of an order directing a complaint to be filed under the section, whether can be questioned in the trial of the case.
19. Power of Court complaining under this sec-

20. Power of Magistrate to transfer case forwarded to him under the section.

21. Stay of proceedings before the Magistrate pending disposal of appeal in original proceedings—Sub-section (3).

22. Stay of proceedings under this section.

23. Transfer of proceedings under this section.

24. Nature of proceedings under the section.

25. Abatement.

26. Review.

1. Scope and applicability.— [1] This section prescribes the procedure to be followed in case of complaints by Courts in respect of offences mentioned in clauses (b) and (c) of S. 195 sub-s. (1). ('85) 7 All 871 (873, 874) (F B).

[2] The Court should not launch a prosecution unless it considers that it is expedient in the interests of justice, and is not undertaken to satisfy the private grudge of a litigant. (Vol 24) 1937 Lah 867 (868) : 39 Cri L Jour 237 \* (Vol 17) 1930 Lah 873 (874) : 31 Cri L Jour 1174.

[3] Though a wide discretion is given to the Court under the section, such discretion should be exercised with great care and caution. (Vol 10) 1923 All 601 (603) : 24 Cri L Jour 900 \* (Vol 7) 1920 All 217 (217) : 21 Cri L Jour 400.

[See also (Vol 6) 1919 Lah 37 (38) : 20 Cri L Jour 815.]

[4] The object of this section as well as of S. 195 is to provide a safeguard against frivolous or vexatious prosecutions. (Vol 23) 1936 Pat 346 (349) : 15 Pat 26 : 37 Cri L Jour 893 (D B) \* (Vol 21) 1934 All 885 (886) : 35 Cri L Jour 785.

[5] There is an "inquiry" even in summons-cases.

Section 476—Note 1 (contd.)

Lah 233 (254) : 11 Cri L Jour 736 : I L R (1941) Lah 145.

[6] This section is exhaustive of the powers of a Civil, Criminal or Revenue Court to make complaints and such a Court cannot make a complaint in cases not covered by the section, under its inherent jurisdiction. (Vol 18) 1931 All 443 (447) : 53 All 804 : 32 Cri L Jour 1105 (SB) \* (Vol 32) 1945 Mad 458 (459).

[7] The provisions of the Code do not apply to village Magistrates in Madras and such Magistrates are not bound to follow the procedure under this section when making a complaint. ('85) Weir 3rd Edn. 697 (697).

[8] By reason of S. 77, Madras Village Courts Act, as amended by Act 2 of 1937, the provisions of Ss. 476, 476-A and 476-B apply to a village Court. The following case decided before the amendment is no longer good law. (Vol 23) 1936 Mad 89 (91) : 37 Cri L Jour 159 : 59 Mad 165 (DB).

2. Limit of time for taking action under the section. — [1] Before the amendment of 1923 it was held that there was nothing in the section to compel the Court to take action immediately and mere delay in taking action did not vitiate the proceedings. (Vol 6) 1919 Bom 103 (106) : 43 Bom 300 : 20 Cri L Jour 433 (DB) \* ('08) 7 Cri L Jour 35 (40) : 32 Bom 184 \* (Vol 6) 1919 Cal 391 (392, 393) : 20 Cri L Jour 184 (DB) \* ('69) 3 Beng L R A C 10 (13) (DB) \* (Vol 4) 1917 Lah 303 (304) : 1916 Pun Re No. 29 Cr : 18 Cri L Jour 337 (DB) \* (Vol 5) 1918 Oudh 407 (407) : 19 Cri L Jour 981 \* (Vol 6) 1919 Pat 78 (80) : 20 Cri L Jour 274 \* (Vol 6) 1919 Pat 189 (191) : 20 Cri L Jour 202 \* (Vol 1) 1914 Sind 129 (131) : 7 Sind L R 187 : 15 Cri L Jour 541 (DB) \* (Vol 2) 1915 All 135 (136) : 37 All 344 : 16 Cri L Jour 465 (DB) \* ('08) 8 Cri L Jour 403 (404) (DB) (Mad) \* ('12) 13 Cri L Jour 723 (731) (1B) (Mad).

[But see (Vol 10) 1923 Mad 228 (229) : 23 Cri L Jour 712. (Order under the section must be made at close of proceedings or immediately thereafter.) \* (Vol 6) 1919 Mad 410 (411) : 42 Mad 422 : 20 Cri L Jour 309 (FB). (Do.) \* ('09) 9 Cri L Jour 41 (44, 46, 51) (FB) (Mad). (Do.) \* ('08) 7 Cri L Jour 54 (55, 60) (FB) (Mad). (Do.) \* (Vol 4) 1917 Low Bur 86 (87) : 18 Cri L Jour 331. (Do.) \* (Vol 4) 1917 All 425 (426) : 38 All 695 : 18 Cri L Jour 4. (Proceedings under the section should be taken as soon as possible.) \* ('10) 11 Cri L Jour 20 (20) (All). (Do.) \* ('08) 7 Cri L Jour 159 (162) : 35 Cal 133 (DB). (Obiter.) \* (Vol 6) 1919 Cal 165 (166) : 20 Cri L Jour 286 (DB). (Delay of one year.) \* (Vol 7) 1920 Pat 430 (432) : 21 Cri L Jour 549. (Order passed after an undue delay can be set aside.) \* (Vol 7) 1920 Pat 500 (501) : 21 Cri L Jour 633. (Do.) \* (Vol 3) 1916 Lah 259 (260) : 17 Cri L Jour 470.]

[2] Under the present Code as amended in 1923 an order under this section need not be made in the course of the proceedings or in relation to which the offence was committed or immediately thereafter and mere delay in preferring the complaint under this section will not vitiate the proceedings. (Vol 28) 1941 Mad 574 (574) : 42 Cri L Jour 817. (Mere delay will not vitiate proceedings.) \* (Vol 20) 1933 Mad 125 (126) : 34 Cri L Jour 92. (Do.) \* (Vol 25) 1938 Lah 429 (430) : 39 Cri L Jour 698. (Do.) \* (Vol 27) 1940 Lah 526 (527) : 42 Cri L Jour 324. (Complaint not made immediately can be entertained.) \* (Vol 23) 1935 Oudh 113 (115) : 36 Cri L Jour 319 : 10 Luck 503. (No hard and fast rule can be laid down that in all cases order under section must be set aside on ground of delay.) \* (Vol 27) 1940 Bom 131 (133) : 41 Cri L Jour 526 : I L R (1940) Bom 403. (Whether Court will accede to application made long after termination of proceedings depends on merits and circumstances of case.)

[See also (Vol 30) 1943 Bom 113 (115). (Delay of four years after issue of notices — Held proceedings may be dropped.) \* (Vol 24) 1937 Rang 62 (64) : 38 Cri L Jour 615 : 1937 Rang L R 276.]

[But see (Vol 21) 1934 Oudh 272 (276) : 35 Cri L Jour 908 : 10 Luck 14. (Power to be exercised in continuation of the same proceedings.) \* (Vol 17) 1930 Lah 316 (317) : 31 Cri L Jour 1135. (Do.)]

3. "Any Civil, Revenue or Criminal Court." — [1] After repeal of Ordinance (II of 1942), Special Judges ceased to exist—Sessions Judge has no jurisdiction under S. 476 to direct filing of complaint against a person in respect of offence alleged to have been committed before Court of Special Judge. (Vol 32) 1945 Pat 64 (66) : 23 Pat 701 : 46 Cri L Jour 605 (DB). [2] Even though a District Magistrate acting under S. 8 (2), Sind Frontier Regulation, does not act upon evidence which he himself has heard, he is still a Court within the meaning of S. 476, Cr. P. C. (Vol 29) 1942 Sind 75 (76) : I L R (1942) Kar 66 : 43 Cri L Jour 705 (DB).

[3] Special Judge sitting as Court under U. P. Encumbered Estates Act can as civil Court proceed under S. 476. (Vol 28) 1941 Oudh 48 (49) : 16 Luck 237 : 42 Cri L Jour 85.

[4] Company Judge conducting proceedings under S. 195, Companies Act, is a Court within the meaning of this section. (Vol 28) 1941 Lah 52 (52) : I L R (1940) Lah 669 : 42 Cri L Jour 351 (DB).

[5] Munsif before whom deposit under S. 83, T. P. Act, is made is Court within S. 476 : (Vol 34) 1947 Pat 37 (38).

[6] The High Court has full powers under this section to prefer a complaint in respect of an offence committed in or in relation to any proceedings before it including a revision. Its jurisdiction is not taken away because an appeal is allowed in the case of a complaint or refusal to lay a complaint by the subordinate Court. (Vol 12) 1925 Rang 321 (322) : 3 Rang 303 : 27 Cri L Jour 4 (FB) \* (Vol 24) 1937 All 681 (682) : I L R (1937) All 774 : 38 Cri L Jour 1080 (DB). (High Court in revision can make complaint.) \* (Vol 24) 1937 Sind 193 (195) : 38 Cri L Jour 1002 (DB). (Offence committed in relation to proceedings in lower Court—High Court in revision can direct complaint to be made.) \* (Vol 3) 1916 Mad 1065 (1066) : 16 Cri L Jour 740 (DB) \* (Vol 21) 1934 Mad 316 (317, 318) : 57 Mad 682 : 35 Cri L Jour 780 (DB) \* (Vol 20) 1933 Lah 98 (99) \* (Vol 22) 1935 Lah 677 (679) : 36 Cri L Jour 1485. (Order to prosecute passed in appeal.)

[7] If the High Court in revision does not itself wish to enquire under this section it can order the trial Court to enquire. (Vol 24) 1937 Sind 193 (195) : 38 Cri L Jour 1002 (DB).

[8] Where during trial of a suit in High Court fabricated documents are put in evidence, in the absence of the Judge who tried the case, any Judge of the High Court can make a complaint under this section. (Vol 24) 1937 Mad 716 (717) : I L R (1937) Mad 612 : 38 Cri L Jour 871 (DB.)

[9] If a case or proceeding has been before various Courts and an offence is committed in that proceeding or case all such Courts have jurisdiction to make a complaint. (Vol 27) 1940 Lah 292 (297) : 41 Cri L Jour 843 (DB).

[10] The successor in office of the presiding officer of a Court before whom the offence was committed, can make a complaint in respect of the offence. (Vol 27) 1940 Lah 292 (297) : 41 Cri L Jour 843 (DB).

[11] A Special Judge under the Special Criminal Courts Ordinance 2 [II] of 1942 (Since repealed) is not merely a *persona designata* but a Court.

## Section 475—Note 6 (contd.)

[3] Where the Court becomes aware of the commission of any of the offences mentioned in S. 195 (1), cl. (b) and (c), it fails in its duty, if it does not itself take action but waits for the aggrieved party to make an application. (Vol 28) 1941 Sind 217 (218) : I L R (1941) Kar 422 : 43 Cri L Jour 259 (DB). (Fact that private party chooses to proceed only against some of the offenders is no ground for Court abstaining from taking action against others found to be concerned in offence.) \* (Vol 10) 1923 Nag 258 (259, 260) : 23 Cri L Jour 605 \* (Vol 17) 1930 Cal 721 (727) : 32 Cri L Jour 377 : 58 Cal 374 (DB).

[4] The proper attitude and principle that should guide the Court in the case of offences against public justice is exactly that of a police officer who actually sees the commission of a cognizable offence. (Vol 10) 1923 Nag 258 (259, 260) : 23 Cri L Jour 605.

[5] Application bringing offence to notice of Court defective and invalid—Court ought not to simply dismiss application, but should itself proceed to take action. (Vol 17) 1930 Cal 721 (727) : 32 Cri L Jour 377 : 58 Cal 374 (DB).

[6] The Court should not dismiss an application under this section merely on the ground that it is actuated by malice and private grudge or on the ground of the applicant's non-appearance. (Vol 25) 1938 Lah 429 (430) : 39 Cri L Jour 698 \* (Vol 13) 1926 Pat 81 (86) : 5 Pat 262 : 27 Cri L Jour 641 (DB) \* ('43) 1943 Pat W N 139 (141) \* (Vol 27) 1940 Lah 526 (527) : 42 Cri L Jour 324. (Applicant's non-appearance.)

[7] Dismissal of application by a party under this section, on the ground, for example, of withdrawal or non-prosecution is no bar to the entertainment of a second application or to the Court taking action itself *suo motu*. (Vol 27) 1940 Lah 526 (526) : 42 Cri L Jour 324. (Application dismissed for non-appearance of applicant—Second application can be made.) \* (Vol 23) 1936 Nag 156 (157) : 37 Cri L Jour 977 : I L R (1937) Nag 336. (Ordinarily, however, it would be undesirable to do so unless some fresh facts have emerged showing that the previous order was clearly wrong.) \* (Vol 16) 1929 Pat 242 (244) : 8 Pat 736 : 31 Cri L Jour 143 (DB). (Dismissal of previous application for non-prosecution.) \* (Vol 19) 1932 Mad 130 (130) : 33 Cri L Jour 272 \* (Vol 22) 1935 Pesh 1 (2) : 36 Cri L Jour 470 (DB). (*Suo motu* action by Court.)

[8] A refusal by the Court to file a complaint does not attract the applicability of the doctrine of *autre fois acquit*, and the Court does not become *functus officio* so as to be disabled from filing a fresh complaint. (Vol 25) 1938 Pat 99 (102) : 16 Pat 650 : 39 Cri L Jour 353 (DB) \* (Vol 17) 1930 Sind 315 (315, 316) : 24 Sind L R 446 : 32 Cri L Jour 521 (DB).

[9] Application to Court to prefer complaint against A and B and against person not named but whose character and description indicated in application—Court refusing to make complaint—High Court in appeal ordering complaint to be filed against A and B—In the course of trial of A and B, Court held could prefer fresh complaint against unnamed person, although it originally refused the application. (Vol 16) 1929 Cal 242 (243) : 30 Cri L Jour 1084 (DB).

[10] The Court has no power to review the order made on a previous application under this section. ('11) 12 Cri L Jour 556 (557) (DB) (Mad).

[But see (Vol 24) 1937 All 76 (77) : 38 Cri L Jour 318 \* (Vol 17) 1930 Sind 315 (315) : 24 Sind L R 446 : 32 Cri L Jour 521 (DB).]

7. "After such preliminary inquiry, if any, as it thinks necessary." [1] In order to arrive at a decision as to whether action should be taken or not the Court

may, if it thinks fit, hold such preliminary inquiry as it considers necessary. (Vol 31) 1944 Nag 359 (360) : I L R (1945) Nag 438 : 46 Cri L Jour 766 (Form of enquiry is for Judge to decide.) \* (Vol 25) 1938 Cal 877 (879) : 40 Cri L Jour 450 \* ('36) 37 Cri L Jour 518 (520) (Oudh) \* (Vol 18) 1931 Cal 344 (345) : 32 Cri L Jour 674 : 58 Cal 1211 (DB).

[2] The inquiry need not be such as to satisfy the Court that the offence has been actually committed but merely that it appears to have been committed. (Vol 25) 1938 Rang 297 (298) : 40 Cri L Jour 56 \* (Vol 13) 1926 Mad 1008 (1008) : 50 Mad 660 : 27 Cri L Jour 1149 (DB) \* (Vol 18) 1931 Cal 438 (440) : 58 Cal 727 : 32 Cri L Jour 883 (DB).

[3] The power to make a preliminary inquiry is in the discretion of the Court. (Vol 30) 1943 Mad 50 (51) : I L R (1943) Mad 303 : 44 Cri L Jour 177 \* (Vol 24) 1937 Pat 534 (536) : 39 Cri L Jour 103 \* (Vol 22) 1935 Pat 515 (517) : 36 Cri L Jour 1354 : 15 Pat 69 (DB) \* (Vol 17) 1930 Lah 55 (56) : 31 Cri L Jour 179 \* (Vol 2) 1915 Mad 229 (232) : 38 Mad 1044 : 15 Cri L Jour 271 (DB) \* (Vol 22) 1935 Oudh 113 (115) : 36 Cri L Jour 319 : 10 Luck 503 \* ('88) 1888 Pun Re No. 2 Cr, p. 2 (3) (DB) \* ('12) 13 Cri L Jour 141 (141) : 34 All 267 \* ('11) 12 Cri L Jour 209 (210) (DB) (Cal) \* (Vol 3) 1916 Bom 218 (219, 220) : 17 Cri L Jour 249 (DB).

[But see ('80) 5 Cal 184 (187) (DB).]

[4] Whether an inquiry is necessary or not will depend on the facts and circumstances of each case. (Vol 18) 1931 Cal 436 (437) : 58 Cal 215 : 32 Cri L Jour 826 \* ('11) 12 Cri L Jour 209 (211) (DB) (Cal).

[5] *Prima facie* case already made out even in course of proceedings in which offence is alleged to have been committed—Preliminary inquiry not necessary. (Vol 24) 1937 Rang 62 (65) : 38 Cri L Jour 615 : 1937 Rang L R 276 \* (Vol 21) 1934 Pat 536 (537) : 36 Cri L Jour 26 \* ('88) 1888 Pun Re No. 2 Cr, p. 2 (3) (DB)

[6] Sufficient documentary evidence on record—No oral evidence called for—Preliminary inquiry not necessary. (Vol 18) 1931 Cal 436 (437) : 58 Cal 215 : 32 Cri L Jour 826.

[7] Court can direct a complaint to be filed under this section even without taking any evidence. (Vol 27) 1940 Lah 203 (204) : 41 Cri L Jour 701 \* (Vol 3) 1916 Bom 218 (219, 220) : 17 Cri L Jour 249 (DB).

[8] Complaint to be laid upon application of private person—Order depending on evidence of other facts on record—Preliminary enquiry must be held and accused must be made aware of allegations against him and materials upon which allegations are based. (Vol 24) 1937 Rang 62 (65) : 38 Cri L Jour 615 : 1937 Rang L R 276.

[9] Court deciding to hold preliminary inquiry and take evidence—Court is not confined to record of proceedings, but is entitled to consider information otherwise acquired. (Vol 27) 1940 Bom 131 (133) : 41 Cri L Jour 526 : I L R (1940) Bom 403.

[10] The person sought to be prosecuted has no right to cross-examine the witnesses examined in the inquiry. (Vol 3) 1916 Bom 218 (219, 220) : 17 Cri L Jour 249 (DB) \* (Vol 13) 1926 Mad 1008 (1008, 1009) : 50 Mad 660 : 27 Cri L Jour 1149 (DB) (Following ('12) 13 Cri L Jour 141 (141) : 34 All 267, dissenting from (Vol 10) 1923 Mad 228 : 23 Cri L Jour 712.)

[But see (Vol 8) 1921 Pat 121 (121, 122) : 22 Cri L Jour 458 : 6 Pat L Jour 146 (DB) \* (Vol 10) 1923 Pat 542 (544) : 24 Cri L Jour 806 \* (Vol 24) 1937 Rang 62 (66) : 38 Cri L Jour 615 : 1937 Rang L R 276 \* (Vol 25) 1938 Rang 297 (298) : 40 Cri L Jour 56 \* (Vol 8) 1921 All 98 (99) : 22 Cri L Jour 143.]

[11] The enquiry under the section need not be exhaustive so as to let in all the available evidence of the prosecution against the accused. (Vol 22) 1935 Pat

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7:15 Pat 69:36 Cri L Jour 1354 (DB) (Vol 14)  
1 628 (629) : 55 Cal 279 : 28 Cri L Jour 783

The nature, method and extent of the inquiry  
ely in the discretion of the Court. (Vol 24) 1937  
(536) : 39 Cri L Jour 103 (Vol 22) 1935 Pat  
) : 15 Pat 69:36 Cri L Jour 1354 (DB) (Vol 13)  
ad 1008 (1008) : 50 Mad 660 : 27 Cri L Jour  
) (Vol 22) 1935 Oudh 113 (115) : 10 Luck  
Cri L Jour 319 (Vol 3) 1916 Bom 218 (219,  
Cri L Jour 249 (DB) (Vol 18) 1931 Cal 438  
3 Cal 727 : 32 Cri L Jour 883 (DB).  
The filing of a complaint under this section is  
act which is open to appeal. (Vol 18) 1931  
(441) : 58 Cal 727 : 32 Cri L Jour 883 (DB)  
1920 Pat 500 (500) : 21 Cri L Jour 635.  
However ('93-1900) 1893-1900 Low Bur Rul  
(Preliminary enquiry is not judicial.)  
The Court should record at least a summary of  
ment of the witnesses examined in the inquiry.  
14 Cal 789 (790) : 42 Cal 240 : 15 Cri L Jour

confession by the person sought to be pro-  
secuted under this section amounts to a confes-  
sion of the accused person under S. 30, Evidence Act.  
924 Bom 445 (446) : 26 Cri L Jour 993 (DB).  
The enquiry should ordinarily be conducted by  
the Court which directs the complaint to be filed.  
1937 Rang 62 (66) : 38 Cri L Jour 615 : 1937  
Rang 276 (Vol 15) 1928 All 21 (22) : 28 Cri  
L Jour 16 (Vol 6) 1919 Pat 266 (267) : 20 Cri L Jour

The Court can order an inquiry by the police.  
21 Pat 94 (95) : 22 Cri L Jour 403 : 6 Pat L  
Jour (Vol 4) 1917 Lah 267 (268) : 1917 Pun  
Jour : 18 Cri L Jour 893 (DB).

The Court can under this section ask for assistance  
in investigating into the offence. (Vol 6) 1919  
105 : 43 Bom 300 : 20 Cri L Jour 438 (DB)  
1930 Cal 515 (520) : 58 Cal 346 : 31 Cri L  
Jour (DB).

The Court cannot act solely on the basis of the  
report and prefer a complaint. (Vol 18) 1931 Cal  
58 Cal 727:32 Cri L Jour 883 (DB) (Vol 8)  
4 (95) : 22 Cri L Jour 403 : 6 Pat L Jour  
(Vol 4) 1917 Mad 82 (83) : 39 Mad 768 : 18  
434 (SB) (Vol 3) 1916 Mad 1110 (1112) :  
our 209 : 39 Mad 750 (FB) (1892-96) 1 Upp  
(26).

The Court (Vol 11) 1924 Pat 138 (139) : 24 Cri L Jour  
3) 1946 Oudh 227 (228) : 47 Cri L Jour 531.]  
Section 162 does not prohibit the use, in pro-  
ceeding under this section, of statements made by any  
police-officer in the course of investigation  
under XIV, in cases where the alleged offence  
was not under investi-  
gation when the statements were  
made. 14) 1927 Rang 113 (116) : 5 Rang 26 : 28  
433 (DB) (Vol 24) 1937 Rang 62 (66) : 38  
615 : 1937 Rang L R 276.

Where a superior Court directs the subordinate  
Court to make an inquiry, the former Court should not  
proceed on the report of the inquiry by the latter  
Court for order of prosecution. (Vol 8) 1921 Oudh 159  
(160) : 22 Cri L Jour 751 (Vol 6)  
17 (88) : 20 Cri L Jour 815.

However (Vol 4) 1917 Pat 15 (17) : 18 Cri L  
Jour 553 (DB).]

The effect of preliminary enquiry — Effect of  
Court is not bound to hold a preliminary

inquiry under the section and the absence of an inquiry  
does not *per se* vitiate the proceedings. (Vol 24) 1937  
Mad 716 (717) : 38 Cri L Jour 871 : I L R (1937) Mad  
612 (DB) (Vol 24) 1937 Pat 534 (536) : 39 Cri L Jour 103  
(Vol 6) 1919 All 15 (17) : 21 Cri L Jour 276 (Vol  
13) 1926 All 21 (22) : 26 Cri L Jour 1506 (Vol 12) 13 Cri  
L Jour 689 (690) (D B) (Bom) (Vol 5) 2 Cri L Jour 54  
(55) (D B) (Bom) (Vol 2) 6 Cal W N 295 (297) (D B) (Vol  
17) 1930 Cal 515 (518) : 58 Cal 346 : 31 Cri L  
Jour 1055 (D B) (Vol 12) 1925 Lah 312 (314) : 6  
Lah 34 : 27 Cri L Jour 98 (Vol 17) 1930 Rang 201  
(202) : 8 Rang 25 : 31 Cri L Jour 793.

[See however ('82) 1882 All W N 229 (230) (Vol 75)  
23 Suth W R Cr 39 (40) (DB).]

[2] Where no inquiry is necessary or an inquiry  
would not have put the Court in a better position for  
dealing with the case, an order without inquiry is not  
bad. (Vol 28) 1941 Lah 52 (52) : I L R (1940) Lah  
669 : 42 Cri L Jour 351 (D B) (Vol 83) 5 All 62 (64, 65).

[3] Inquiry necessary — Lower Court not exercising  
sound discretion in not holding inquiry — Order is liable  
to be interfered with in revision. (Vol 4) 1917 All 132  
(133) : 18 Cri L Jour 883 (Vol 11) 12 Cri L Jour 209  
(211) (DB) (Cal.) (Vol 7) 1920 Pat 548 (550) : 21 Cri L  
Jour 158 (Vol 8) 1921 Lah 56 (56) : 2 Lah 63 : 22  
Cri L Jour 329 (Vol 5) 3 Cri L Jour 73 (74) : 1905 Pun  
L R No. 163 Cr, p. 571 (573) (Vol 1) 1914 Sind 129  
(130) : 7 Sind L R 187 : 15 Cri L Jour 541 (D B) (Vol  
8) 1921 All 98 (99) : 22 Cri L Jour 143. (Person  
sought to be prosecuted not party to previous proceed-  
ing — Evidence therein recorded behind his back —  
Order without inquiry set aside.) (Vol 5) 1918 Cal  
967 (968) : 18 Cri L Jour 117 (DB). (Incident relating to  
offence taking place outside Court — Judge could not  
have had knowledge of it — Order without inquiry set  
aside.)

[4] Where the Judge who took proceedings under  
this section was different from the Judge who tried the  
original proceeding in or in relation to which the  
offence was committed, it would be proper to hold a  
preliminary inquiry. (Vol 17) 1930 Cal 282 (284)  
(DB).

[But see (Vol 17) 1930 Cal 721 (724, 726) : 58 Cal  
374 : 32 Cri L Jour 377 (D B) (Vol 11) 12 Cri L Jour 209  
(211) (D B) (Cal.).]

9. Notice.—[1] In an inquiry under this section it  
is not necessary for the Court to issue a notice to the  
person alleged to have committed the offence. (Vol 25)  
1938 Lah 641 (641) : I L R (1938) Lah 188 : 40 Cri L  
Jour 140 (Vol 24) 1937 Mad 716 (717) : 38 Cri L Jour  
871 : I L R (1937) Mad 612 (DB) (Vol 24) 1937 Pat 534  
(536) : 39 Cri L Jour 103 (Vol 22) 1935 Oudh 113  
(115) : 10 Luck 503 : 36 Cri L Jour 319 (Vol 18)  
1931 Cal 436 (437) : 58 Cal 215 : 32 Cri L Jour 826.

[See also (Vol 31) 1944 Nag 359 (360) : I L R (1945)  
Nag 438 : 46 Cri L Jour 766.]

[2] It is desirable and expedient to give notice to the  
person sought to be proceeded against under this  
section. (Vol 33) 1946 All 156 (158) : I L R (1946) All  
62:47 Cri L Jour 545 (DB) (Vol 12) 1925 Bom 436 (437):  
49 Bom 710 : 26 Cri L Jour 1139 (Vol 11) 1924 All  
435 (436) : 25 Cri L Jour 488 (Following ('06) 28 All  
142 : 2 Cri L Jour 598 and ('12) 13 Cri L Jour 707 (All).)  
(Vol 22) 1935 Oudh 113 (115) : 36 Cri L Jour 319 :  
10 Luck 503 (Vol 5) 1918 Nag 61 (62) : 20 Cri L Jour  
777 (Vol 5) 2 Cri L Jour 54 (55) (DB) (Bom) (Vol 18)  
1931 Cal 436 (437) : 58 Cal 215:32 Cri L Jour 826 (Vol  
17) 1930 Lah 55 (55, 56) : 31 Cri L Jour 179 (Vol 10)  
1923 Rang 79 (79) : 24 Cri L Jour 736.

[3] The omission to issue notice is not by itself a  
ground for setting aside an order under this section  
unless it has caused prejudice to the person complained  
against. ('10) 12 Cri L Jour 205 (206) (Vol 10) 1923 Rang 79 (79) : 24 Cri L Jour 736.

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1919 All 15 (17): 21 Cri L Jour 276\*(Vol 22) 1935 Oudh 113 (115): 36 Cri L Jour 319: 10 Luck 503 \*(Vol 5) 1918 Pat 448 (449): 19 Cri L Jour 169 \*(11) 12 Cri L Jour 85 (87) (Low Bur).

[4] In the following cases notice was held desirable, for want of which the High Court set aside the lower Court's order:

(a) Where prosecution was ordered upon evidence given by witnesses whom the person sought to be prosecuted had no opportunity to cross-examine. (Vol 10) 1923 Mad 228 (229): 23 Cri L Jour 712 \*(Vol 14) 1927 Lah 173 (174): 28 Cri L Jour 227.

(b) Where the application under this section was made to a successor-in-office of the Judge who had tried the case in respect of which the offence had been committed. (Vol 14) 1927 Cal 718 (721): 28 Cri L Jour 840 (DB).

(c) Where the Court held a preliminary inquiry and recorded additional evidence. (Vol 33) 1946 All 156 (158): I L R (1946) All 62: 47 Cri L Jour 545 (DB) \*(Vol 11) 1924 All 435 (436): 25 Cri L Jour 488.

(d) Where there was no evidence before the Court one way or the other to show any dishonest motive. (Vol 6) 1919 Oudh 348 (349): 20 Cri L Jour 791.

10. "Is . . . . of opinion that it is expedient in the interests of justice that an inquiry should be made."—[1] The Court taking action under this section should be of opinion that it is expedient in the interests of justice that an inquiry should be made in respect of the offence alleged to have been committed. (Vol 31) 1944 Sind 212 (214): I L R (1944) Kar 211: 46 Cri L Jour 622 (DB) \*(43) 1943 Pat W N 139 (141) \*(Vol 28) 1941 Bom 408 (408): I L R (1942) Bom 26: 43 Cri L Jour 167 (DB) \*(Vol 28) 1941 Mad 574 (575): 42 Cri L Jour 817 \*(Vol 27) 1940 Pat 97 (99): 41 Cri L Jour 349 \*(Vol 24) 1937 Rang 62 (64): 38 Cri L Jour 615: 1937 Rang L R 276 \*(Vol 19) 1932 Bom 551 (552): 34 Cri L Jour 33 (DB) \*(Vol 20) 1933 Nag 179 (182): 34 Cri L Jour 649 \*(Vol 17) 1930 Lah 55 (56): 31 Cri L Jour 179 \*(Vol 15) 1928 Mad 733 (734): 29 Cri L Jour 732 \*(Vol 21) 1934 Sind 155 (156): 36 Cri L Jour 10 (DB).

[2] The Court should see that prosecution is undertaken in the interests of justice and not to satisfy private grudge of a litigant. (Vol 24) 1937 Lah 867 (869): 39 Cri L Jour 237.

[3] All that a Court has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether the offence alleged has or has not been committed. (Vol 28) 1941 Mad 574 (574): 42 Cri L Jour 817 \*(Vol 2) 1915 All 345 (346): 16 Cri L Jour 817 \*(96) 23 Cal 532 (535) (DB) \*(Vol 9) 1922 Pat 84 (87): 23 Cri L Jour 381 \*(Vol 15) 1928 Pat 161 (161): 6 Pat 760: 29 Cri L Jour 111 (DB) \*(Vol 19) 1932 Bom 551 (553): 34 Cri L Jour 33 (DB) \*(34) 35 Cri L Jour 1392 (1392) (Lah).

[4] The Court need not and should not decide the question of guilt or innocence of the party against whom proceedings are taken. (Vol 33) 1946 All 156 (158): I L R (1946) All 62: 47 Cri L Jour 545 (DB) \*(Vol 29) 1942 Sind 75 (76): I L R (1942) Kar 66: 43 Cri L Jour 705 (DB) \*(10) 11 Cri L Jour 87 (40): 37 Cal 250 (DB) \*(Vol 1) 1914 Nag 40 (43): 10 Nag L R 177: 16 Cri L Jour 161.

[5] Before setting the criminal law in motion the Court should exercise great care and caution, and must be satisfied that there is reasonable foundation for the charge in respect of which the prosecution is directed. (Vol 28) 1936 Rang 473 (474): 38 Cri L Jour 226 \*(10) 11 Cri L Jour 87 (40): 37 Cal 250 (DB) \*(Vol 1) 1914 Nag 40 (43): 10 Nag L R 177: 16 Cri L Jour 161.

[6] No prosecution ought to be directed unless there is a reasonable probability of conviction. (Vol 33) 1946

All 156 (158): I L R (1946) All 62: 47 Cri L Jour 545 (DB) \*(Vol 21) 1934 All 1065 (1066): 57 All 351 \*(Vol 31) 1944 Lah 51 (55): I L R (1943) Lah 760: 45 Cri L Jour 371 \*(Vol 31) 1944 Sind 155 (161): I L R (1944) Kar 133 \*(Vol 14) 1927 Pat 47 (48): 27 Cri L Jour 1240 \*(Vol 11) 1924 Pat 436 (437) \*(Vol 17) 1930 Oudh 404 (404): 31 Cri L Jour 938: 6 Luck 86 \*(29) 30 Cri L Jour 407 (407) (DB) (Nag) \*(Vol 12) 1925 Nag 412 (413): 26 Cri L Jour 1350 \*(Vol 25) 1938 Cal 677 (680): 40 Cri L Jour 450 \*(Vol 24) 1937 Lah 867 (868): 39 Cri L Jour 237 \*(Vol 24) 1937 Rang 62 (64): 38 Cri L Jour 615: 1937 Rang L R 276 \*(Vol 23) 1936 Rang 473 (474): 38 Cri L Jour 226 \*(Vol 22) 1935 Mad 1044 (1044): 37 Cri L Jour 15 \*(Vol 14) 1927 Mad 996 (996).

[See however (Vol 13) 1926 Mad 238 (240): 27 Cri L Jour 280 (DB).]

[7] There must be sufficient materials before the Court to show that an offence is likely to have been committed. (Vol 12) 1925 All 544 (545): 26 Cri L Jour 1126.

[See also (Vol 28) 1941 Nag 155 (156, 157): I L R (1942) Nag 388.]

[8] Where there is no legal evidence showing that there is reason to believe that an offence has been committed a complaint ought not to be preferred. (12) 13 Cri L Jour 43 (43, 44) (All) \*(Vol 21) 1934 Oudh 377 (378): 35 Cri L Jour 1277 \*(Vol 5) 1918 Pat 251 (252): 20 Cri L Jour 94 (DB) \*(Vol 6) 1919 Pat 143 (144): 20 Cri L Jour 818.

[9] Where it is obvious that a prosecution is bound to end in a failure a complaint ought not to be preferred. (Vol 14) 1927 Lah 352 (353): 28 Cri L Jour 293.

[10] The opinion of the Court should be a judicial opinion based on evidence and not on fanciful or empty grounds. (Vol 1) 1914 Nag 40 (42, 43): 10 Nag L R 177: 16 Cri L Jour 161 \*(36) 37 Cri L Jour 16 (17) (Nag).

[11] The opinion should not be perverse and based upon a mere surmise or suspicion. (Vol 2) 1915 Mad 1193 (1195): 17 Cri L Jour 42 (DB) \*(Vol 4) 1917 Mad 971 (975): 17 Cri L Jour 515 (FB) \*(1900) 1900 All W N 149 (150) \*(76) 1 Cal 450 (454) (DB) \*(28) 29 Cri L Jour 534 (535) (Lah).

[12] It is not necessary that there should be legal evidence for the Court taking action under this section. It can act on its knowledge of what was said by the accused person at the time of negotiations of a compromise before the Court. (Vol 4) 1917 Mad 971 (975): 17 Cri L Jour 515 (FB).

[13] If a responsible officer like a senior subordinate Judge makes a report that certain statements made on oath are false, the Court can act under this section. (Vol 27) 1940 Lah 203 (204): 41 Cri L Jour 701.

[14] Proceedings under this section should not be resorted to when the criminal case is calculated to hamper the fair trial of the issue in the civil Court before which the matter will probably go ere long. (Vol 27) 1940 Nag 72 (73): 41 Cri L Jour 182.

[15] Prosecution directed under this section inexperienced, ill-advised and calculated to bring the administration of justice into contempt — Order for prosecution is liable to be set aside. (04) 1 Cri L Jour 692 (693, 694) (DB) (All).

[16] B and C prosecuted at instance of A on charge of falsification of accounts—B and C acquitted, but complaining against A for perjury—A acquitted and applying to Court for prosecuting B and C for perjury—Held that prosecution was not expedient in the interests of justice. (Vol 15) 1928 All 548 (549): 29 Cri L Jour 784.

[17] The Court ordering a complaint under this section should itself be of opinion that the prosecution is expedient in the interests of justice. (Vol 29) 1942 Nag 80 (81): I L R (1942) Nag 695: 43 Cri L Jour 649 \*(09) 10 Cri L Jour 525 (526) (All). (Ordering of complaint by

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Munsif on District Judge's suggestion and information is bad.) \* (Vol 11) 1924 All 453 (454): 26 Cri L Jour 18 (DB). (Sessions Judge simply obeying appellate Court's direction to take action under this section — Order for prosecution set aside.)

[18] Where, the Court ordering a complaint has applied its mind to the matter and considered the question of expediency, the order is not bad simply because the appellate Court directed action to be taken under this section. (Vol 6) 1919 Pat 78 (80): 20 Cri L Jour 274 \* (Vol 7) 1920 Pat 430 (431): 21 Cri L Jour 549 \* (Vol 20) 1933 Sind 37 (38, 39): 26 Sind L R 105: 34 Cri L Jour 305 (DB).

[19] The Court need not form its opinion in the proceeding in which the offence was committed. It is enough if it is formed before the complaint is filed under this section. (Vol 11) 1924 Rang 54 (55): 1 Rang 372: 26 Cri L Jour 523.

11. Complaint in respect of an offence under section 193, Penal Code—Perjury. — [1] The Court should not prefer a complaint for perjury unless there is some *prima facie* proof that the alleged statement or evidence is intentionally false. (Vol 27) 1940 Lah 203 (204): 41 Cri L Jour 701 \* (\*38) 42 Cal W N 31 (32) (DB) \* (Vol 19) 1932 Bom 551 (552): 34 Cri L Jour 33 (113) \* (\*00) 3 Cri L Jour 45 (46) (All) \* (\*21) 22 Cri L Jour 393 (394) (All) \* (Vol 5) 1918 Cal 106 (107): 19 Cri L Jour 230 (DB) \* (\*11) 12 Cri L Jour 265 (266) (Lah) \* (\*09) 10 Cri L Jour 7 (8) (DB) (Mad) \* (\*83) 2 Weir 193 (194) (DB) \* (Vol 2) 1915 Low Bur 59 (59): 16 Cri L Jour 154 \* (Vol 3) 1916 Sind 70 (71): 9 Sind L R 170: 17 Cri L Jour 96 (DB) \* (Vol 7) 1920 Sind 49 (50, 51): 14 Sind L R 69: 21 Cri L Jour 787

[See (Vol 29) 1942 Sind 98 (99): I L R (1942) Kar 64: 43 Cri L Jour 720 (DB).]

[2] Witness stating that he does not recollect particular fact — Prosecution should not be ordered. (\*10) 14 Cal W N xxx (xxxi).

[3] No documentary evidence to falsify statement question being purely of oath against oath between two parties—Prosecution is undesirable. (Vol 22) 1935 Mad 1044 (1045): 37 Cri L Jour 15 \* (Vol 8) 1921 All 86 (87): 23 Cri L Jour 143 (DB) \* (Vol 7) 1920 Pat 419 (423): 5 Pat L Jour 28: 21 Cri L Jour 145.

[4] Where it is difficult to arrive at a certainty or to reach any conclusion which can be rated more highly than the most likely conclusion on the balance of probabilities, a prosecution for perjury is undesirable. (Vol 23) 1936 Pat 162 (164): 37 Cri L Jour 193.

[5] Two Courts taking divergent views of evidence — Prosecution for perjury is not expedient in the interests of justice. (Vol 26) 1939 Mad 779 (780): 40 Cri L Jour 890 \* (Vol 10) 1923 Pat 102 (103): 22 Cri L Jour 756 \* (Vol 18) 1931 Lah 404 (405): 32 Cri L Jour 652 \* (Vol 7) 1920 Pat 171 (174): 21 Cri L Jour 500. (Unless very strong case is made out against deponent.) \* (Vol 19) 1932 All 874 (875): 34 Cri L Jour 105. (Do.) \* (Vol 4) 1917 Nag 69 (70): 19 Cri L Jour 769. (Do.) \* (\*17) 21 Cal W N cxliii (cxliii) (Do).

[6] If the false evidence is clearly immaterial to the decision of the case, a complaint for perjury should not be made. (Vol 32) 1945 Pat 295 (295, 296): 47 Cri L Jour 177 \* (Vol 28) 1941 Pat 591 (592): 42 Cri L Jour 757 \* (Vol 14) 1927 Cal 515 (516): 28 Cri L Jour 310 (DB) \* (Vol 24) 1937 Lah 867 (869): 39 Cri L Jour 237 \* (\*88) 1888 All W N 218 (218).

[But see (Vol 26) 1939 Lah 529 (530): 41 Cri L Jour 204 \* (\*38) 42 Cal W N 31 (32) (DB) \* (Vol 16) 1929 All 936 (937): 30 Cri L Jour 1154 \* (\*04) 26 All 509 (511): 1 Cri L Jour 434 (DB) \* (\*81) Weir 3rd Edn. 842 (843) \* (\*73) 19 Suth W R Cr 69 (70) (DB).]

[7] A witness is entitled to a *locus penitentie*. Before directing his prosecution for perjury Court should see whether he has availed himself of the same. (\*13) 14 Cri L Jour 280 (280, 281): 16 Oudh Cas 81 \* (Vol 11) 1924 All 83 (84): 24 Cri L Jour 779 \* (\*03) 1903 All W N 68 (69) \* (\*04) 1 Cri L Jour 969 (970, 971) (DB) (Bom).

[8] In later statement in same deposition witness correcting himself and reverting to truth—He should not be prosecuted. (Vol 13) 1926 Pat 517 (517): 27 Cri L Jour 953 \* (Vol 15) 1928 Lah 862 (863): 29 Cri L Jour 679 \* (\*11) 12 Cri L Jour 405 (406) (Lah) \* (1900) 2 Weir 168 (169) (DB) \* (Vol 16) 1929 Nag 279 (280): 30 Cri L Jour 724 \* (Vol 22) 1935 Nag 145 (146): 31 Nag L R 308: 36 Cri L Jour 935 \* (Vol 11) 1924 Oudh 373 (373): 26 Cri L Jour 10 \* (Vol 9) 1922 Oudh 198 (199): 25 Oudh Cas 139: 23 Cri L Jour 652 \* (\*93-1900) 1893-1900 Low Bur Rul 247 (248) \* (Vol 20) 1933 Sind 412 (415, 416): 35 Cri L Jour 519 (DB) \* (Vol 21) 1934 Sind 155 (156): 36 Cri L Jour 10 (DB) \* (\*08) 12 Cal W N cccxxvi (cccxxvi) \* (Vol 3) 1916 Bom 49 (51): 18 Cri L Jour 480 (DB).

[9] The deposition should be read as a whole. (\*13) 14 Cri L Jour 280 (281): 16 Oudh Cas 81 \* (1900) 2 Weir 168 (169) (DB) \* (\*71) 6 Mad H C R App xxvii (xxviii): 1 Weir 160 \* (Vol 20) 1933 Sind 412 (415): 35 Cri L Jour 519 (DB).

[10] A complaint should not be filed merely on basis of certain isolated answers in the deposition. (Vol 20) 1933 Cal 606 (608): 34 Cri L Jour 833 (DB).

[11] Contradictory statements by witness—Prosecution ought not to be ordered unless statements are absolutely irreconcilable. (Vol 2) 1915 Mad 876 (877): 16 Cri L Jour 14 \* (\*11) 12 Cri L Jour 545 (546, 547) (DB) (Mad) \* (\*84) 7 All 44 (63, 66) (DB) \* (Vol 16) 1929 Cal 390 (392): 31 Cri L Jour 373 (DB) \* (Vol 15) 1928 Cal 862 (\*863): 55 Cal 1312: 30 Cri L Jour 221 \* (Vol 4) 1917 Pat 639 (639): 18 Cri L Jour 1039 (DB) \* (Vol 4) 1917 Pat 329 (329): 18 Cri L Jour 727 \* (1893-1900) 1893-1900 Low Bur Rul 79 (80) \* (Vol 1) 1914 Sind 116 (117): 7 Sind L R 108: 15 Cri L Jour 488 (DB) \* (Vol 1) 1914 Sind 115 (116): 7 Sind L R 96: 15 Cri L Jour 379 (DB) \* (Vol 3) 1916 All 318 (319): 17 Cri L Jour 93 (94).

[See also (Vol 28) 1941 Pat 165 (165): 42 Cri L Jour 446.]

[12] Alleged contradictory statements admitting of plausible explanation reconciling each other—Complaint should not be preferred. (\*11) 12 Cri L Jour 216 (217) (Lah) \* (Vol 16) 1929 Cal 390 (391): 31 Cri L Jour 373 (DB).

[13] Every presumption should be made in favour of reconciliation of alleged contradictory statements. (\*84) 7 All 44 (63) (DB) \* (\*69) 12 Suth W R Cr 11 (14) (DB). (Overruled on another point in 21 Suth W R Cr 72 (FB).) \* (\*03) 7 Cri L Jour 136 (142) (Kathliwar.) \* (Vol 1) 1914 Sind 116 (117): 7 Sind L R 108: 15 Cri L Jour 488 (DB) \* (\*86) 10 Bom 124 (130) (DB) \* (Vol 3) 1916 Sind 78 (79): 9 Sind L R 202: 17 Cri L Jour 240 (DB).

[14] Where in the later statement the prior statement is admitted to be incorrect and a true statement is made, a prosecution for perjury is not desirable in the interests of justice. (Vol 28) 1941 Pat 591 (592): 42 Cri L Jour 757 \* (Vol 28) 1941 Pat 165 (165, 166): 42 Cri L Jour 446 \* (Vol 11) 1924 Oudh 373 (373): 26 Cri L Jour 10 \* (Vol 19) 1932 Lah 307 (308): 33 Cri L Jour 485 \* (Vol 5) 1918 Mad 1200 (1201): 18 Cri L Jour 143 (DB) (Vol 20) 1932 Nag 179 (182): 34 Cri L Jour 649 \* (Vol 3) 1916 Bom 49 (51): 18 Cri L Jour 480 (DB) \* (\*28) 29 Cri L Jour 1044 (1045) (Lah) \* (\*68) 9 Suth W R Cr 25 (27) (DB). (Overruled on another point in 21 Suth W R Cr 72 (FB).) \* (\*10) 11 Cri L Jour 360 (361): 37 Cal 618 (SB) \* (\*08) 4 Cri L Jour 469 (471): 3 Low Bur Rul 204.



Section 476 — Note 12 (*contd.*)

[See however (Vol 22) 1935 Nag 145 (146) : 31 Nag F. R 308 : 36 Cri L Jour 933. (But in this case first statement was held true and subsequent statement false.)]

[But see ('97) 2 Weir 166 (166, 167) (DB). (Though not as a rule.)]

[15] A statement subsequently retracted and corrected cannot be considered to be intentionally false. ('13) 14 Cri L Jour 280 (281) : 16 Oudh Cas 81.

[16] Alleged false statement made before police-officer holding inquiry under Ss. 161 and 162—Complaint for perjury cannot be made. (1900) 23 Mad 544n (545n) : 1 Weir 166 (D B) \* ('09) 9 Cri L Jour 304 (305) (D B) (Mad) \* ('08) 7 Cri L Jour 3 (4) (All) \* ('94) 18 Bom 377 (379, 380) (F B) \* (Vol 4) 1917 Low Bur 82 (82) : 18 Cri L Jour 98 \* ('93-1900) 1893-1900 Low Bur Rul 187 (188) \* ('13) 14 Cri L Jour 302 (302) : 6 Sind L R 277 (D B) \* ('93) Oudh S C No. 232, p. 461 (462).

[17] A false statement made under S. 164 can be the basis of a prosecution. (Vol 20) 1933 Mad 125 (126) : 34 Cri L Jour 92 \* ('06) 3 Cri L Jour 370 (370) : 29 Mad 89 (D B) \* ('06) 4 Cri L Jour 183 (191) (D B) (Bom) \* ('08) 7 Cri L Jour 302 (302, 303) (All) \* (Vol 22) 1935 All 341 (342) : 36 Cri L Jour 1505 : 57 All 778 (D B).

[18] Statement recorded under S. 164 false — Statement made by witness at trial true—His prosecution is not expedient. (Vol 28) 1941 Bom 408 (409) : 1 L R (1942) Bom 26 : 43 Cri L Jour 167 (D B).

[19] A statement not made on oath or a statement by an accused person to whom no oath can be administered cannot be made the basis of a prosecution under S. 193, Penal Code. ('10) 11 Cri L Jour 445 (445) (All). (Statement not on oath.) \* (Vol 2) 1915 Mad 1193 (1195) : 17 Cri L Jour 42 (D B). (Do.) \* ('02) 2 Weir 169 (169) (D B). (Do.) \* (Vol 8) 1916 Sind 345 (34) : 17 Cri L Jour 368 : 10 Sind L R 64. (Do.) \* ('10) 11 Cri L Jour 537 (537) : 33 All 163 (D B). (Statement by accused to whom no oath could be administered.) \* ('83) 6 Mad 252 (253) : 1 Weir 116 (D B). (Do.) \* ('06) 4 Cri L Jour 165 (167) (D B) (Bom). (Do.)

[20] Defendant in a suit making false statement in written statement, but not going into witness-box to support statement — He can nevertheless be prosecuted for perjury. (Vol 23) 1936 Mad 550 (551, 552) : 37 Cri L Jour 557.

[21] Evidence inadmissible and illegally admitted — Prosecution for perjury should not be ordered. (Vol 6) 1919 Pat 341 (343) : 20 Cri L Jour 826 \* ('11) 12 Cri L Jour 563 (563) : 5 Sind L R 102 (D B) \* ('12) 13 Cri L Jour 769 (770) : 35 All 58.

[22] Evidence given in *ultra vires* and illegal proceeding—Prosecution for perjury should not be ordered. (Vol 29) 1942 All 11 (11) : 1 L R (1942) All 42 : 43 Cri L Jour 319 \* (Vol 5) 1918 Mad 398 (400) : 18 Cri L Jour 785 \* ('11) 12 Cri L Jour 373 (374) (All) \* (Vol 4) 1917 Lah 305 (306) : 18 Cri L Jour 130 \* (1864) 1864 Suth W R Cr 15 (15).

[23] Deposition not recorded in accordance with requirements of S. 360, Criminal P. C., or O. 18, R. 5, Civil P. C.—There should be no prosecution for perjury. (Vol 1) 1914 Cal 739 (790) : 42 Cal 240 : 15 Cri L Jour 483 (D B). (Not in accordance with S. 360.) \* ('12) 18 Cri L Jour 569 (571) : 1 Upp Bur Rul 123. (Do.) \* ('09) 12 Cal W N 845 (847) : 8 Cri L Jour 116. (Do.) \* (Vol 4) 1917 Lah 192 (193) : 1917 Pun Re No. 12 Cr. : 18 Cri L Jour 607. (Non-compliance with O. 18, R. 5, C. P. C.) \* ('04) 28 Mad 308 (310) : 2 Cri L Jour 766. (Do.) \* (Vol 5) 1918 Low Bur 129 (130) : 18 Cri L Jour 966 \* (Vol 11) 1924 Cal 705 (709) : 25 Cri L Jour 1027 : 51 Cal 236 (D B). (Non-compliance with O. 18, R. 5, C. P. C.—Offence under S. 466, Penal Code.)

[But see (Vol 16) 1929 Cal 390 (391, 392) : 31 Cri L Jour 373 (DB) \* ('10) 11 Cri L Jour 482 (482) : 34 Mad 141. (28 Mad 308 : 2 Cri L Jour 756, Disapproved.) \* (Vol 5) 1918 Mad 334 (334, 335) : 19 Cri L Jour 603 (DB) \* (Vol 6) 1919 Low Bur 129 (131) : 10 Low Bur Rul 16 : 20 Cri L Jour 506. (Case under S. 360.) \* (Vol 5) 1918 Cal 239 (291) : 45 Cal 825 : 19 Cri L Jour 498 (D B) \* (Vol 6) 1919 Lah 348 (349) : 1918 Pun Re No. 28 Cr. : 19 Cri L Jour 972 (D B). ((Vol 4) 1917 Lah 192 : 1917 Pun Re No. 12 Cr. : 18 Cri L Jour 607, Dissented from.)]

[24] Court should not order a prosecution for perjury before the close of the proceedings in the case in which the false evidence is given. (Vol 15) 1928 Lah 180 (180) : 29 Cri L Jour 40 \* (Vol 10) 1923 Bom 105 (106, 107) : 24 Cri L Jour 171 (D B) \* (Vol 1) 1914 Bom 21 (22) : 15 Cri L Jour 428 (D B) \* (Vol 5) 1918 Cal 791 (791) : 18 Cri L Jour 735 (D B) \* (Vol 7) 1920 Cal 624 (629) : 21 Cri L Jour 481 (D B) \* ('12) 13 Cri L Jour 144 (144) (Mad) \* ('94) 2 Weir 260 (261) (D B) \* (Vol 12) 1925 Nag 412 (413) : 26 Cri L Jour 1350 \* (Vol 7) 1920 Pat 225 (226) : 21 Cri L Jour 29 \* (Vol 4) 1917 Pat 651 (661) : 18 Cri L Jour 626 \* ('13) 14 Cri L Jour 422 (424) : 1 Upp Bur Rul 166 \* ('11) 12 Cri L Jour 465 (467) (Low Bur) \* (Vol 3) 1916 Sind 8 (8) : 9 Sind L R 176 : 17 Cri L Jour 77 (D B) \* (Vol 21) 1934 All 1017 (1018) : 57 All 403 : 36 Cri L Jour 379 (D B) \* (Vol 1) 1914 Lah 433 (435) : 1914 Pun Re No. 1 Cr. : 15 Cri L Jour 344.

[See however (Vol 4) 1917 Mad 971 (974, 977) : 17 Cri L Jour 515 (F B).]

[25] A complaint for fabrication of false evidence should not be preferred where the evidence is not legally admissible. There must be some satisfactory evidence that the fabrication was for the purpose of being used in proceedings, though actual user in the proceedings is not necessary. (Vol 25) 1938 Cal 677 (680) : 40 Cri L Jour 450 \* ('10) 11 Cri L Jour 601 (602) (DB) (Lah).

[26] Complaint under S. 193, Penal Code, on alternative charge based upon two statements made before different Courts—Complaint of both Courts is necessary. (Vol 8) 1921 Bom 3 (16) : 45 Bom 834 : 22 Cri L Jour 241 (FB) \* ('85) 1885 Rat 224 (225) : 10 Bom 190 (DB) \* (Vol 11) 1924 Sind 1 (3) : 16 Sind L R 285 : 25 Cri L Jour 1195 (DB) \* ('89) 2 Weir 157 (157) (DB) \* ('67) 8 Suth W R Cr 79 (79) (DB).

[27] Eye-witness first making statement incriminating the accused and in Sessions Court turning round and making contrary statement beneficial to accused's case — Prosecution for perjury held desirable. (Vol 34) 1947 Bom 161 (163) (DB).

## 12. Complaint in respect of other offences.

## Section 199, Penal Code.

[1] Person swearing affidavit in support of application for transfer having *prima facie* no real knowledge of facts stated and not indicating source of his knowledge—Inquiry into offence under S. 199, Penal Code should be ordered. (Vol 27) 1940 Pat 631 (633) : 41 Cri L Jour 702 (704).

## Section 206, Penal Code.

[2] Assignment by decree-holder of decree under attachment—In absence of any fraudulent intent, prosecution ought not be launched. ('06) 3 Cri L Jour 92 (93) (All).

[3] Mere harvesting of crops under attachment will not bring the person doing so within S 206, unless he did one of the things mentioned in the section with a fraudulent intent. (Vol 25) 1938 Mad 976 (977) : 40 Cri L Jour 812.

## Sections 209 and 210, Penal Code.

[4] Whether person sought to be prosecuted acted fraudulently, doubtful—complaint should not be filed. (Vol 16) 1929 Lah 676 (677) : 30 Cri L Jour 666.

Section 476 Note 12 (*contd.*)

[5] Over-statement of particular claim due to mistake or negligence—Prosecution should not be launched. (Vol 1) 1914 Lah 254 (255) : 15 Cri L Jour 263.

[6] Plaintiff in civil suit prevented from producing evidence in support of his claim owing to interference of Criminal Investigation Department—Prosecution under this section is not justified. (21) 22 Cri L Jour 689 (690) (Lah).

[7] Person complained against should be given an opportunity to substantiate his claim and to remove any doubt as to its falsity, especially where there is no clear finding by the Court before. (Vol 7) 1920 Pat 518 (550) : 21 Cri L Jour 158.

[8] *Prima facie* case against decree-holder—Fact that decree was *ex parte* and limitation for setting it aside has expired, or that judgment-debtor has not been prejudiced by execution or that payment or adjustment by the judgment-debtor has not been certified under O. 21, R. 2, Civil P. C. is no ground for not preferring complaint. (Vol 5) 1918 Pat 190 (191) : 19 Cri L Jour 146. (Limitation to set aside decree expired.) \* (Vol 4) 1917 Lah 209 (210) : 18 Cri L Jour 619. (Judgment-debtor not prejudiced.) \* (11) 12 Cri L Jour 189 (190) (Lah). (Do.) \* (Vol 18) 1931 Rang 148 (150) : 9 Rang 104. (Payments or adjustment not certified under O. 21 R. 2, Civil P. C.)

[9] False claim in Court having no jurisdiction—Decree obtained for sum not due—Complaint can be filed. (Vol 6) 1919 All 323 (324) : 20 Cri L Jour 698.

## Section 211, Penal Code—

[10] Mere dismissal of complaint does not justify a prosecution under S. 211, unless complaint was filed with the necessary knowledge and intention prescribed in that section. (Vol 28) 1941 Pat 419 (421) : 42 Cri L Jour 332 \* (Vol 26) 1939 Pat 178 (179) : 40 Cri L Jour 157 \* (Vol 23) 1936 Rang. 473 (474) : 38 Cri L Jour 226 \* (Vol 11) 1927 All 107 (108) : 27 Cri L Jour 1345 \* (05) 10 Cal W N xxxviii (xxxviii) (DB) \* (05) 9 Cal W N cxxv (cxxv) \* (90) 1890 Pun Be No. 33 Cr, p. 105 (107) \* (84) Weir 3rd Edn. 866 (867).

[11] Complainant's failure to prove his case is not same thing as institution of maliciously false case so as make him liable for offence under S. 211. (Vol 27) 1940 Pat 97 (99) : 41 Cri L Jour 349.

[12] Person filing petition not amounting to charge or complaint—No intention to set criminal law in motion—Prosecution should not be directed. (Vol 2) 1915 All 457 (458) : 38 All 32 : 16 Cri L Jour 807 \* (Vol 2) 1915 Mad 1120 (1120) : 16 Cri L Jour 252 (DB) \* (1900) 4 Cal W N 347 (348) (DB) \* (13) 14 Cri L Jour 425 (426) (All) \* (Vol 10) 1923 Nag 313 (314) : 24 Cri L Jour 910.

[13] Original complaint not false but merely vexatious—Complaint under S. 211 is not expedient. (99) 1 Bom L R 11 (11) (DB).

[14] Two Courts taking different views as to truth of complaint—Complaint under S. 211 is not expedient. (Vol 9) 1922 Pat 160 (161) : 23 Cri L Jour 272.

[15] Accusation made before tribunal not competent to take action—Order for prosecution is bad. (Vol 19) 1932 Lah 246 (247) : 13 Lah 568 : 33 Cri L Jour 409.

[16] Magistrate holding complaint to be false and making charge for offence under S. 211—Complaint must have been verified and dealt with by Court according to law. (Vol 26) 1939 Sind 78 (78, 79) : 40 Cri L Jour 449 : 11 R (1939) Kar 648.

[17] False charge preferred in Courts outside British India—Prosecution cannot be ordered. (Vol 11) 1924 Bom. 51 (53, 54) : 47 Bom 907 : 25 Cri L Jour 838 (DB).

## Section 226, Penal Code.

[18] No insult offered to public servant in the stage

of a judicial proceeding while discharging his duties—Complaint under this section should not be preferred. (07) 6 Cri L Jour 405 (405, 406) (DB).

[19] Mother of a minor girl getting her married without previous permission of the Court, does not constitute offence under S. 228—No order for prosecution should be passed. (Vol 20) 1933 Pat 142 (143) : 12 Pat 1 : 34 Cri L Jour 770 (DB). (Offence is one under Contempt of Courts Act.)

[20] Contempt of Court committed in Court's presence—Court has option to proceed under S. 480 or under this section—Existence of S. 482 does not take away this option. (Vol 27) 1940 Lah 233 (234, 235) : 41 Cri L Jour 766 : 11 R (1941) Lah 145.

## Section 471, Penal Code.

[21] No dishonest or fraudulent intention—Complaint for forgery should not be filed. (10) 11 Cri L Jour 749 (749) (Low Bur) \* (Vol 5) 1918 Pat 640 (642) : 19 Cri L Jour 236.

[22] Court finding will to be genuine and granting probate—Court cannot institute proceedings under this section for forgery of will. (1900) 4 Cal W N clxxvi (clxxvi).

[23] An order for prosecution should not be passed on the basis of inadmissible and illegal evidence. (Vol 10) 1923 All 601 (602) : 24 Cri L Jour 900. (Report of handwriting expert not examined.)

[24] Court should examine document alleged to be forged before directing prosecution of the offender. (Vol 5) 1918 Pat 621 (622) : 19 Cri L Jour 642. (Prosecution on findings of predecessor.)

[25] Application for filing a complaint for forgery of will—Evidence of forgery is admissible in the same manner as in a criminal case. (Vol 27) 1940 Bom. 131 (135, 136) : 41 Cri L Jour 526 : 11 R (1940) Bom 403.

13. "Record a finding to that effect."—[1] Court proceeding under this section should record a finding that the offence alleged appears to have been committed, and that it is expedient in the interests of justice that an enquiry should be made into it. (Vol 33) 1946 All 156 (158) : 11 R (1946) All 62 (DB) \* (Vol 31) 1944 Nag 359 (360) : 11 R (1945) Nag 438 : 46 Cri L Jour 766 \* (Vol 27) 1940 Nag 227 (228) : 41 Cri L Jour 466 \* (Vol 26) 1939 Pat 178 (179) : 40 Cri L Jour 157 \* (Vol 26) 1939 Sind 170 (171) : 40 Cri L Jour 707 : 11 R (1939) Kar 280 \* (Vol 24) 1937 Lah 867 (868) : 39 Cri L Jour 237 \* (Vol 24) 1937 Pat 534 (537) : 39 Cri L Jour 103 \* (05) 3 Cri L Jour 73 (74) : 1905 Pan L R No. 163 \* \* (Vol 15) 1928 Cal 862 (863) : 55 Cal 1312 : 30 Cri L Jour 221 (DB) \* (Vol 14) 1927 Cal 718 (720) : 28 Cri L Jour 840 (DB) \* (Vol 22) 1935 Oudh 59 (61) : 10 Luck 335 : 36 Cri L Jour 254 (DB) \* (Vol 21) 1934 Oudh 272 (274) : 35 Cri L Jour 908 : 10 Luck 14.

[See however (Vol 17) 1930 Rang 201 (203) : 8 Rang 25 : 31 Cri L Jour 793. (Recording of finding is optional.)]

[2] Several persons sought to be proceeded against—Separate finding against each is necessary. (Vol 15) 1923 All 21 (22) : 28 Cri L Jour 986.

[3] Recording a finding of two alternative and mutually inconsistent offences is not sufficient. A finding that an offence or offences have been committed is necessary. (Vol 14) 1927 All 567 (567) : 28 Cri L Jour 888.

[4] An omission to record a finding as required by the section vitiates an order under this section which is liable to be set aside. (Vol 17) 1930 Cal 705 (705) : 32 Cri L Jour 237 (DB) \* (Vol 15) 1928 Mad 733 (733) : 29 Cri L Jour 732. (Followed in (Vol 20) 1933 Mad 67 : 56 Mad 157 : 33 Cri L Jour 960.)

[But see (Vol 27) 1940 Nag 227 (228) : 41 Cri L Jour 466 \* (Vol 26) 1939 Pat 178 (179) : 40 Cri L Jour 157 \* (Vol 28) 1936 Pat 162 (163) : 37 Cri L Jour 193 \*



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(Vol 17) 1930 Rang 201 (203) : S Rang 25 : 31 Cri L Jour 793.]

[5] The finding required by the section, that it is expedient in the interests of justice, should be express. The provisions of the section are not satisfied by inferences which may or may not be drawn from other findings of facts arrived at by the Court. (Vol 17) 1930 Cal 352 (353) (DB) \* (Vol 20) 1933 Cal 147 (148) : 34 Cri L Jour 684 (DB) \* (Vol 20) 1933 Mad 67 (67) : 56 Mad 157 : 33 Cri L Jour 960 (DB) \* (Vol 16) 1929 Mad 74 (74) : 30 Cri L Jour 370 \* (Vol 21) 1934 Oudh 272 (275, 276) : 10 Luck 14 : 35 Cri L Jour 908.

[But see (Vol 27) 1940 Nag 227 (228) : 41 Cri L Jour 466 \* (Vol 26) 1939 Sind 170 (171) : 40 Cri L Jour 707 : 1 L R (1939) Kar 280 \* (Vol 23) 1936 Pat 162 (164) : 37 Cri L Jour 193 \* (Vol 18) 1931 Cal 190 (192) : 58 Cal 1117 : 32 Cri L Jour 842 (DB) \* (Vol 18) 1931 Cal 760 (761) : 58 Cal 965 : 32 Cri L Jour 1236 (DB) \* (Vol 22) 1935 All 608 (608) : 36 Cri L Jour 781 \* (Vol 17) 1930 Lah 347 (347) : 32 Cri L Jour 60 \* (Vol 18) 1931 Mad 16 (17) : 54 Mad 331 : 32 Cri L Jour 200 (DB). (Following (Vol 14) 1927 Cal 628 : 55 Cal 279 : 28 Cri L Jour 783.) \* (Vol 20) 1933 Pat 713 (715) : 35 Cri L Jour 450 \* (Vol 27) 1940 Nag 227 (227) : 41 Cri L Jour 466.]

[6] Omission to record reasons for the finding will not invalidate the order. (Vol 14) 1927 Sind 89 (90) : 21 Sind L R 43 : 27 Cri L Jour 1249 (DB) \* (Vol 13) 1926 Mad 238 (240) : 27 Cri L Jour 280 (DB).

[7] As a matter of practice, the procedure to be followed by the Court is either (a) to direct that the judgment in the original case in respect of which the offence was committed should be treated as the complaint or (b) to pass a separate order containing the requisite finding, setting out in detail the specific matters and directing a complaint to be made in respect thereof, this being followed by a separate complaint conforming to the terms of the previous order. The latter course should be followed. (Vol 16) 1929 Cal 521 (524) : 56 Cal 932 : 30 Cri L Jour 974 (DB).

[8] Finding required by section recorded in complaint itself — Absence of separate order containing finding is only irregularity not vitiating proceedings. (Vol 14) 1927 Lah 379 (380) : 28 Cri L Jour 410 \* (Vol 18) 1931 Mad 16 (17) : 32 Cri L Jour 200 : 54 Mad 331 (DB).

[See however (Vol 16) 1929 Mad 74 (74) : 30 Cri L Jour 870.]

## 14. "Make a complaint thereof in writing." —

[1] Court satisfied that offence alleged should be inquired into — It should make complaint in writing signed by presiding officer of Court. (Vol 11) 1924 Bom 347 (348) : 48 Bom 401 : 25 Cri L Jour 1123 (DB) \* (Vol 12) 1925 Pat 330 (335) : 4 Pat 24 : 26 Cri L Jour 170 (DB) \* (68) 5 Bom H C R Cr 104 (105) (DB).

[2] The complaint should be such as would enable the Court to proceed according to law under S. 200. (Vol 12) 1925 Mad 609 (611) : 48 Mad 395 : 26 Cri L Jour 801 (DB).

[3] The complaint under this section should be carefully drawn up and the directions in the section should be followed. (Vol 27) 1940 Rang 104 (106) : 41 Cri L Jour 515 : 1940 Rang L R 12 (DB).

[4] The complaint should set forth the offence complained of, the precise facts on which it is based and the evidence available for proving it. (Vol 14) 1927 All 571 (571) : 49 All 752 : 28 Cri L Jour 543 \* (Vol 16) 1929 All 905 (905) : 30 Cri L Jour 1158 \* (Vol 12) 1925 Cal 721 (722) : 52 Cal 478 : 26 Cri L Jour 1507 (DB) \* (Vol 12) 1925 Mad 609 (611) : 28 Cri L Jour 801 : 48

Mad 395 (DB) \* (Vol 1) 1914 Sind 56 (67) : 8 Sind L R 179 : 16 Cri L Jour 104 (DB) \* (Vol 17) 1930 Oudh 404 (405, 406) : 6 Luck 86 : 31 Cri L Jour 938.

[5] Complaint should disclose the Court before which and the time and occasion on which the offence is alleged to have been committed. (Vol 19) 1932 Pat 243 (243) : 33 Cri L Jour 860 \* (Vol 7) 1920 All 217 (217) : 21 Cri L Jour 400.

[6] Complaint for perjury — Statement alleged to be false must be specifically set out. (Vol 19) 1932 Mad 494 (495) : 55 Mad 536 : 33 Cri L Jour 519 (DB) \* (Vol 16) 1929 Mad 510 (511) : 30 Cri L Jour 866 \* (Vol 13) 1926 All 21 (22) : 26 Cri L Jour 1506 \* (Vol 21) 1934 All 385 (386) : 35 Cri L Jour 785 \* (Vol 5) 1918 Pat 448 (450) : 19 Cri L Jour 169 \* (Vol 17) 1930 Rang 153 (155) : 31 Cri L Jour 1060 \* (Vol 12) 1925 Mad 609 (611) : 48 Mad 395 : 26 Cri L Jour 801 (DB).

[7] Complaint for forgery — Particular document or portion of document alleged to be forged must be precisely mentioned. (Vol 4) 1917 All 425 (426) : 38 All 695 : 18 Cri L Jour 4.

[8] The object of requiring the particulars in the complaint is to enable the accused to know definitely the charge against him. (Vol 5) 1918 Pat 448 (450) : 19 Cri L Jour 169 \* (Vol 10) 1923 All 325 (326) : 24 Cri L Jour 197 \* (94) 1894 Rat 693 (693, 694) : 19 Bom 362 (DB).

[9] Omission to state the particular section under which the offence complained falls does not affect validity of the complaint. (Vol 12) 1925 Nag 337 (338) : 26 Cri L Jour 1115.

[But see (Vol 32) 1945 All 397 (399) : 1 L R (1945) All 668 : 47 Cri L Jour 200.]

[10] Witness to be examined by the Magistrate in support of the case should also be named in the complaint. (Vol 16) 1929 All 905 (905) : 30 Cri L Jour 1158 \* (Vol 12) 1925 Mad 609 (611) : 48 Mad 395 : 26 Cri L Jour 801 (DB).

[11] Complaint must omit any reference which might be construed by the Court before which the proceedings are taken as a pressing invitation to record a finding adverse to any one charged with an offence. The Magistrate trying the case must remain completely unaffected by any consideration of its origin. (Vol 27) 1940 Rang 104 (106, 108) : 1940 Rang L R 12 : 41 Cri L Jour 515 (DB).

[12] The complaint should be preferred by the Court, and the function cannot be delegated to the Court to the Public Prosecutor or the Prosecuting Inspector. (Vol 2) 1915 Lah 259 (259) : 1915 Pun Re No. 13 Cr : 16 Cri L Jour 251 \* (Vol 17) 1930 Lah 225 (226) : 31 Cri L Jour 778.

[13] What has to be forwarded to the Magistrate under this section is the complaint and not the order for prosecution under this section. (Vol 20) 1933 Sind 37 (39) : 26 Sind L R 105 : 34 Cri L Jour 305 (DB).

[See however (Vol 12) 1925 Rang 195 (196) : 3 Rang 48 : 26 Cri L Jour 500 (DB).]

[14-15] Officer appointed by High Court filing complaint in consultation with Judges concerned and under their authority — Mere fact that such officer was not authorized in writing will not invalidate complaint. (Vol 27) 1940 Nag 410 (411) : 41 Cri L Jour 697.

[See (Vol 27) 1940 Rang 104 (106) : 41 Cri L Jour 515 : 1940 Rang L R 12 (DB).]

[16] An irregularity in the complaint, as for instance, where heading is incorrect and addressed to the High Court instead of the Magistrate, is cured by S. 537 (a). (Vol 21) 1934 Lah 981 (982) : 36 Cri L Jour 402 : 16 Lah 153.

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15. "Shall forward the same to a Magistrate of the first class having jurisdiction."—[1] Under the present Code, the complaint has to be forwarded to a Magistrate first class having jurisdiction over the offence. (Vol 25) 1938 Cal 463 (464) : I L R (1938) 2 Cal 287 (DB).

[2] The complaint should be forwarded to a Magistrate of the first class and not to any other Magistrate. (84) 7 Mad 189 (190) (DB).

[3] The successor in office of a Magistrate who initiates proceedings under this section is not the Magistrate indicated by the section. (Vol 7) 1920 Pat 225 (227) : 21 Cri L Jour 29.

[4] An order under this section is not illegal but merely irregular if it does not at once direct the accused to be taken to nearest Magistrate. The irregularity is set right by the subsequent order directing him to be taken before such Magistrate. (Vol 2) 1915 Mad 493 (493) : 37 Mad 317 : 16 Cri L Jour 39 (DB).

16. "May take sufficient security," etc.—[1] The power to detain in custody or to put on bail under this section accrues to the complainant Court only when it records its finding and decides to make a complaint. (Vol 31) 1944 Lah 328 (329) : 45 Cri L Jour 768.

17. Effect of complaint under the section—Sub-section (2).—[1] Complaint forwarded to first class Magistrate—Such Magistrate is bound to try case as if upon complaint made and recorded under S. 200. (Vol 30) 1943 Mad 50 (51) : 44 Cri L Jour 177 : I L R (1943) Mad 303 & (194) 1 Cri L Jour 525 (527) : 31 Cal 664 (DB) & (69) 3 Beng L R App Cr 47 (49) (DB).

[2] Magistrate receiving complaint need not examine the complainant (*viz.*, the presiding officer of the Court) on oath as in the case of an ordinary complainant. (Vol 17) 1930 Rang 201 (202) : 31 Cri L Jour 793 : 8 Rang 25 & (85) 7 All 871 (873, 874) (FB).

[3] The Magistrate who tries the complaint made under this section is competent to try and convict for other offences disclosed by the evidence in the case. (Vol 13) 1926 Rang 53 (57, 63) : 27 Cri L Jour 669 (DB) & (Vol 21) 1934 Pat 536 (537) : 36 Cri L Jour 26 & (11) 12 Cri L Jour 320 (321) (Sind) & (76) 25 Suth W R Cr 35 (35) (DB) & (66) 6 Suth W R Cr 20 (21) (DB).

[But see (Vol 5) 1918 Nag 59 (60) : 20 Cri L Jour 770.]

[4] Complaint under this section—Magistrate trying case can issue process against and try other offenders considered by him to have been concerned in the offence though they have not been specially named in the complaint. (Vol 32) 1945 Sind 1 (3) : I L R (1944) Kar 300 : 46 Cri L Jour 192 (DB) & (Vol 31) 1944 Sind 155 (161) : I L R (1944) Kar 133 & (Vol 23) 1936 Cal 147 (149) : 37 Cri L Jour 521 : 63 Cal 819 (DB) & (Vol 23) 1936 Pat 346 (347) : 15 Pat 26 : 37 Cri L Jour 893 (DB) & (Vol 4) 1917 Cal 121 (122) : 18 Cri L Jour 901 (DB). (23 Cal 532, Distinguished.) & (Vol 4) 1917 Lah 267 (269) : 18 Cri L Jour 893 (895) : 1917 Pun Re No. 34 Cr (DB).

[5] Complaint purporting to be made under this section but offence not one to which the section applies—Jurisdiction of Magistrate to take cognizance of offence on a complaint is not affected by any illegality committed by officer who forwarded complaint. (Vol 30) 1943 Lah 208 (209) : 44 Cri L Jour 666.

[But see (Vol 32) 1945 Mad 458 (459).]

[6] It is the Court taking action under this section and not the private party who moved the Court by application for taking action, that is the complainant. The latter is not even an "interested party" within S. 526. (Vol 17) 1930 Lah 873 (874) : 31 Cri L Jour 1174.

[7] Order of Court under sub-s. (1) directing complaint to be filed reversed—Proceeding before Magistrate

under sub-s. (2) should also cease. (12) 13 Cri L Jour 492 (492) : 6 Low Bur Rul 49.

18. Validity of an order directing a complaint to be filed under the section, whether can be questioned in the trial of the case.—[1] The legality of an order under this section directing a complaint to be filed ought to be challenged in appeal under S. 476B and not before Court which inquires into the complaint and tries the case. (Vol 30) 1943 Mad 50 (51) : I L R (1943) Mad 303 : 44 Cri L Jour 177 & (Vol 23) 1936 Pat 346 (347) : 15 Pat 26 : 37 Cri L Jour 893 (DB) & (Vol 23) 1936 Rang 369 (370) : 37 Cri L Jour 1008 & (Vol 16) 1929 Cal 203 (203, 204) : 30 Cri L Jour 656 (DB).

[2] Legality of order directing complaint to be filed cannot be questioned in appeal or revision against conviction by the Magistrate. (Vol 23) 1936 Rang 369 (370) : 37 Cri L Jour 1008. (Appeal.) & (Vol 19) 1932 Cal 545 (546, 547) : 34 Cri L Jour 39 (DB). (Do.) & (Vol 4) 1917 Pat 15 (17) : 18 Cri L Jour 52 : 1 Pat L Jour 553 (DB). (Do.) & (Vol 29) 1942 Oudh 439 (441) : 43 Cri L Jour 668. (Revision.) & (Vol 25) 1938 Nag 487 (490) : I L R (1939) Nag 338 : 40 Cri L Jour 388. (Do.) & (Vol 25) 1938 Pat 99 (103) : 16 Pat 650 : 39 Cri L Jour 353 (DB). (Do.) & (Vol 22) 1935 Pat 515 (517) : 15 Pat 69 : 36 Cri L Jour 1354 (DB). (Do.)

19. Power of Court complaining under this section to try the offence complained of.—[1] A Sessions Judge who makes a complaint under this section is not competent to hear an application under S. 437 where the Magistrate to whom the complaint is sent discharges the accused. (Vol 14) 1927 Bom 35 (36, 37) : 28 Cri L Jour 53 (DB).

20. Power of Magistrate to transfer case forwarded to him under the section.—[1] The first class Magistrate to whom a complaint is forwarded under this section can transfer the case. See (Vol 13) 1926 Cal 470 (477) : 53 Cal 350 : 27 Cri L Jour 385 (FB).

21. Stay of proceedings before the Magistrate pending disposal of appeal in original proceedings—Sub-section (3).—[1] Sub-section (3) gives a discretion to the trying Magistrate to adjourn the hearing of the case pending disposal of the appeal in the original proceedings. The grant of stay depends upon the facts and circumstances of each case. (Vol 24) 1937 Pat 139 (140) : 38 Cri L Jour 476. (What step will best serve the ends of justice without prejudicing either party should be considered.) & (Vol 16) 1929 Pat 500 (501) : 30 Cri L Jour 1101 & (Vol 18) 1931 Lah 49 (50) : 32 Cri L Jour 584 & (Vol 17) 1930 Lah 802 (803) : 31 Cri L Jour 1053. (Documents tampered with after filing them in civil litigation—Criminal trial may not be stayed.)

[2] The High Court will not ordinarily interfere with the discretion of the Magistrate in the matter of stay of the proceedings under sub-s. (3). (Vol 24) 1937 Pat 139 (140) : 38 Cri L Jour 476 & (Vol 16) 1929 Pat 500 (501) : 30 Cri L Jour 1101.

[3] Where important evidence is likely to be lost or destroyed, or there is danger of witnesses being tampered with, in the event of postponement, the Magistrate should hear the evidence in the case but postpone delivery of judgment pending disposal of the appeal. (Vol 14) 1927 Lah 669 (670) : 28 Cri L Jour 778 & (Vol 18) 1931 Lah 49 (50) : 32 Cri L Jour 584.

[4] A Deputy Commissioner has no power to stay criminal proceedings pending before Sub-Divisional Magistrate either in his capacity as a District Magistrate or as a revenue officer. (Vol 18) 1931 Pat 411 (414) : 33 Cri L Jour 147.

22. Stay of proceedings under this section.—

[1] Proceedings under this section by a Court with a view to prefer a complaint are not within the scope of sub-s. (3) and need not be stayed on ground of pendency

**"476A.** The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section 1, may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly.

[a] See foot remark [a] to section 476.

#### Section 476—Note 22 (contd.)

of any appeal. (Vol 17) 1930 Cal 578 (579) : 31 Cri L Jour 1154 (DB) \* (Vol 17) 1930 Pat 194 (194) : 30 Cri L Jour 1144 \* (Vol 14) 1927 Sind 89 (90) : 21 Sind L R 43 : 27 Cri L Jour 1249 (DB).

[But see (Vol 12) 1925 Lah 323 (323) : 26 Cri L Jour 1166 \* (Vol 24) 1937 Pat 139 (140) : 38 Cri L Jour 476.]

#### 23. Transfer of proceedings under this section.

—[1] The proceedings under this section cannot be transferred under S. 24, Civil P. C. (Vol 14) 1927 All 469 (469, 470) : 49 All 460.

[2] Where the offence is alleged to have been committed before A, when he was the presiding officer of Court *x* at the time, the fact that A is subsequently transferred to Court *y* is no ground for transferring the application under this section to Court *y*. (Vol 26) 1939 Sind 181 (181, 182) : 40 Cri L Jour 750.

#### 24. Nature of proceedings under the section.—

[1] A civil Court taking action under this section does not act as a criminal Court. (Vol 29) 1942 Nag 73 (74) : 1 L R (1942) Nag 667 \* (Vol 28) 1941 Rang 163 (164) : 1941 Rang L R 90 : 42 Cri L Jour 735 (DB).

[2] The person against whom proceedings are taken under this section is not an accused person. (11) 12 Cri L Jour 231 (232) (All) \* (Vol 5) 1918 Pat 590 (592) : 19 Cri L Jour 217.

[See also (Vol 27) 1940 Mad 465 (469) : 1 L R (1940) Mad 762 : 41 Cri L Jour 769 (FB). ((Vol 26) 1939 Mad 472 : 1 L R (1939) Mad 439 : 41 Cri L Jour 705, Overruled.)]

[But see (Vol 4) 1917 Bow Bur 137 (139) : 17 Cri L Jour 316.]

[3] Proceedings under this section constitute a prosecution for the purpose of founding an action for malicious prosecution. (Vol 20) 1933 Cal 909 (911) : 60 Cal 1022 : 35 Cri L Jour 925. (Though taken by civil Court; (Vol 9) 1922 Cal 145 : 49 Cal 1095 and (Vol 15) 1928 Cal 691 : 56 Cal 432, Relied on.) \* (Vol 26) 1939 All 554 (557) : 1 L R (1939) All 424 (DB).

[See however (Vol 22) 1935 Sind 10 (11).]

[4] The Court whether civil, revenue or criminal acting under this section has, no jurisdiction to award costs. (Vol 30) 1943 Fah 26 (27) : 43 Cri L Jour 904 \* (Vol 39) 1948 All 245 (246). (Appeal under S. 476B in civil Court—No costs can be awarded.)

[But see (Vol 34) 1947 Pat 106 (107) : 47 Cri L Jour 741. (Civil Court can award costs—Appellate Court under S. 476B also has same power.) \* (Vol 27) 1940 Bom 131 (136) : 40 Cri L Jour 526 : 1 L R (1940) Bom 403. (Where parties are same as those in civil litigation civil Court can award costs.) \* (Vol 15) 1928 All 588 (590) : 51 All 338. (Do.)]

**25. Abatement.**—[1] Person applying under this section for complaint being made by Court dying pending disposal of application—Court can make complaint under this section although legal representatives of deceased applicant do not desire to take part in proceedings under the section. (Vol 23) 1936 Mad 350 (352) : 37 Cri L Jour 557.

**26. Review.**—[1] A complaint under this section can only be withdrawn by the order of the superior Court under S. 476B. The Court making the complaint cannot itself reconsider it. (Vol 24) 1937 All 305 (313) : 38 Cri L Jour 561 : 1 L R (1937) All 517 (FB).

[But see (Vol 24) 1937 All 76 (77) : 38 Cri L Jour 518. (Court making complaint can review or alter it.)]

#### Section 476A -- Note 1

[1] The superior Court has jurisdiction to act under the section only where the subordinate Court has neither made a complaint under S. 476, nor rejected an application for such complaint. (Vol 28) 1941 Pat 592 (593) : 42 Cri L Jour 748 \* (Vol 25) 1938 Lah 429 (430) : 39 Cri L Jour 698 \* (Vol 12) 1925 Mad 1181 (1182) : 26 Cri L Jour 1125 (1125) \* (Vol 12) 1925 Cal 1228 (1230) : 52 Cal 1009 : 26 Cri L Jour 1569 (DB) \* (Vol 16) 1929 Sind 50 (50) : 23 Sind L R 37 : 29 Cri L Jour 1051 (DB).

[2] Where the Subordinate Court has made a complaint, or rejected an application to make a complaint under S. 476, the remedy is by way of an appeal under S. 476B. (Vol 31) 1941 All 40 (40) : 1 L R (1944) All 18 : 45 Cri L Jour 403 \* (Vol 12) 1925 Cal 1228 (1230) : 52 Cal 1009 : 26 Cri L Jour 1569 (DB) \* (Vol 13) 1926 Pat 81 (84) : 5 Pat 262 : 27 Cri L Jour 641 (DB). (Overruled on another point in (Vol 25) 1938 Pat 19 : 17 Pat 9 : 39 Cri L Jour 181 (FB).)

[See also (Vol 32) 1945 Sind 1 (2) : 1 L R (1944) Kar 300 : 46 Cri L Jour 192 (DB).]

[3] Complaint made by subordinate Court—Complaint invalid and *ultra vires*—Held that the superior Court can take action under the section. (Vol 12) 1925 All 667 (667, 668) : 26 Cri L Jour 923.

[4] Where an application is made to the subordinate Court and remains pending without being rejected, the superior Court is competent to make a complaint. (Vol 11) 1924 Bom 511 (512) : 25 Cri L Jour 1287 (DB).

[5] Where the subordinate Court has merely allowed an application to be withdrawn without considering it on the merits, the superior Court is not deprived of its power to act under the section. (Vol 16) 1929 Sind 50 (50) : 23 Sind L R 37 : 29 Cri L Jour 1051 (DB).

[6] A dismissal in default does not amount to a rejection of the application. (Vol 31) 1941 All 40 (40) : 1 L R (1944) All 18 : 45 Cri L Jour 403. (Revision lies to the High Court—There can be no appeal under S. 476B.)

[See however (Vol 25) 1938 Lah 423 (430) : 39 Cri L Jour 698. ("Rejection" may be one on the ground that complainant did not appear to prosecute the application as he ought to have done.)]

[7] The superior Court can make a complaint only if there is some *prima facie* ground for doing so; where the lower Court is still considering the matter, the superior Court cannot be said to have such ground. (Vol 14) 1927 All 469 (470) : 49 All 460.

[8] Offence of abetting offence under S. 193, Penal Code, committed by Subordinate Judge in course of suit—District Judge transferring suit to senior Subordinate Judge while retaining proceeding under S. 476 with himself—Held, that the power of senior

**\*476B.** Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly.

[a] See foot-remark [a] to section 476.

#### Section 476A--Note 1 (contd.)

Subordinate Judge to make complaint is taken away. (Vol 27) 1940 Lah 292 (298) : 41 Cri L Jour 843 (DB).

[9] The power of making a complaint which a Subordinate Judge could have exercised as Election Commissioner, *held*, could be exercised by the District Court. (Vol 22) 1935 Mad 673 (679) : 58 Mad 954 : 36 Cri L Jour 895 (DB).

#### SECTION 476B — SYNOPSIS.

1. Scope of the section.
2. Second appeal.
3. Duty of appellate Court.
4. Powers of appellate Court.
5. Appeal preferred to proper officer but wrong designation given—Effect.
6. Transfer of appeals under section.
7. Notice.
8. Death of appellant pending disposal of appeal.
9. Power of attorney, if necessary in appeal.
10. Appeal against order of single Judge of High Court.
11. Appeal to the Privy Council under Cl. 39, Letters Patent.
12. Revision.
13. Reference to High Court.

1. Scope of the section. — [1] This section gives a right of appeal against orders passed under Ss. 476 and 476A. (Vol 21) 1931 Oudh 344 (347) : 8 Luck 638 : 35 Cri L Jour 824 \* (Vol 22) 1935 Mad 673 (679) : 36 Cri L Jour 895 : 58 Mad 954 (DB).

[2] The fact that there is no finding as required by S. 476, does not make the order a non-appealable one. (Vol 17) 1930 Rang 201 (202, 203) : 31 Cri L Jour 793 : 8 Rang 25.

[3] Where separate and distinct complaints have been directed to be preferred against several persons, such persons should file separate appeals against the complaints made against them. (Vol 20) 1933 Mad 125 (126) : 34 Cri L Jour 92.

[4] No appeal lies in respect of offences mentioned in cl. (a) of S. 195 (1). (Vol 26) 1939 Mad 336 (336) : 40 Cri L Jour 568 \* (Vol 24) 1937 Pat 31 (33) : 38 Cri L Jour 292 \* (Vol 14) 1927 All 828 (828) : 28 Cri L Jour 547 \* (Vol 15) 1928 Rang 296 (296) : 6 Rang 529 : 29 Cri L Jour 912.

[5] There is a right of appeal under this section even though the lower Court has erroneously assumed jurisdiction and passed the order. (Vol 12) 1925 All 737 (737) : 47 All 934.

[See however (Vol 30) 1943 Cal 103 (104) : I L R (1942) 2 Cal 456 : 14 Cri L Jour 332 (DB).]

[6] The section gives a right of appeal although the lower Court has taken action *suo motu* and not on the application of a private person. (Vol 26) 1939 All 79 (80) \* (Vol 23) 1936 Lah 828 (829) : 37 Cri L Jour 1043 \* (Vol 16) 1929 All 899 (899) : 52 All 79 (DB) \* (Vol 18) 1931 Mad 16 (16) : 32 Cri L Jour 200 : 54 Mad 331 (DB) \* (Vol 16) 1929 Lah 641 (644, 645) : 11 Lah 55 : 30 Cri L Jour 1019 (DB).

[But see (Vol 16) 1929 Lah 9(9):30 Cri L Jour 163.]

[7] No appeal lies under this section against an order of a District Judge, sitting in insolvency, passed under S. 70 of the Provincial Insolvency Act. (Vol 26) 1939 Cal 264 (265) : I L R (1938) 2 Cal 478 : 40 Cri L Jour 335 (DB).

[8] Where the lower Court refuses to make a complaint it is only a person on whose application the Court has refused to make the complaint that can appeal. (Vol 32) 1945 Sind 1 (2) : I L R (1944) Kar 300 : 46 Cri L Jour 192 (DB) \* (Vol 28) 1941 Pat 592 (593) : 42 Cri L Jour 748 \* (Vol 28) 1941 Pat 591 (592) : 42 Cri L Jour 757 \* (Vol 26) 1939 All 79 (80).

[9] This section gives no right of appeal against the dismissal in default of an application under S. 476. (Vol 31) 1944 All 40 (40) : I L R (1944) All 18 : 45 Cri L Jour 403 \* (Vol 27) 1940 Lah 526 (526) : 42 Cri L Jour 324.

[10] Once an order has been passed by the trial Magistrate declining to make a complaint under S. 476, the trial Magistrate will be acting contrary to law if he makes a complaint at the wishes of a superior executive officer. (Vol 25) 1938 Pat 145 (146) : 39 Cri L Jour 358.

[11] An appeal lies under this section even from the order of a Small Cause Court. (Vol 24) 1937 Rang 526 (526).

2. Second appeal. — [1] This section contemplates only one appeal and there is no further or second appeal allowed. (43) 1943 Pat IV N 139 (139) \* (Vol 25) 1938 Pat 19 (20, 21) : 17 Pat 9 : 39 Cri L Jour 181 (FB). (Vol 13) 1926 Pat 81 : 5 Pat 262 : 27 Cri L Jour 641 (DB) and (Vol 18) 1931 Pat 343 : 10 Pat 446 : 32 Cri L Jour 1065 (DB). Overruled — Observations to the contrary in (Vol 13) 1926 Pat 25 : 26 Cri L Jour 1565 and (Vol 14) 1927 Pat 87 : 27 Cri L Jour 1263 (DB) are no longer correct. \* (Vol 18) 1931 All 805 (305, 306) : 53 All 416 : 32 Cri L Jour 367 (DB) \* (Vol 22) 1935 Bom 157 (158) : 59 Bom 340 : 36 Cri L Jour 981 (DB) \* (Vol 15) 1928 Cal 281 (284) : 55 Cal 765 : 29 Cri L Jour 119 (DB) \* (Vol 16) 1929 Cal 172 (173) : 56 Cal 824 : 30 Cri L Jour 653 (DB) \* (Vol 12) 1925 Lah 322 (322) : 6 Lah 56 : 26 Cri L Jour 1168 (DB) \* (Vol 15) 1928 Mad 506 (508) : 51 Mad 777 : 29 Cri L Jour 786 (DB) \* (Vol 14) 1927 Rang 313 (313) : 5 Rang 523 : 28 Cri L Jour 937 \* (Vol 16) 1929 Nag 281 (282) : 25 Nag L R 192 : 30 Cri L Jour 1098 \* (Vol 15) 1928 Oudh 494 (495) : 30 Cri L Jour 382 : 4 Luck 155 (DB) \* (Vol 18) 1931 Sind 115 (115) : 33 Cri L Jour 43 : 25 Sind L R 68 (DB).

3. Duty of appellate Court. — [1] If the appellate Court is not satisfied that a *prima facie* case has been made out, the order for making a complaint must be set aside. (Vol 12) 1925 All 544 (545) : 26 Cri L Jour 1126 \* (Vol 16) 1929 Cal 480 (480) : 57 Cal 500 : 31 Cri L Jour 612 (D B).

[2] In reversing the order of the first Court, it must give sufficient reasons as to why it considers that the discretion has not been properly exercised by that Court. (Vol 12) 1925 Cal 721 (722) : 52 Cal 478 : 26 Cri L Jour 1307 (D B).

[3] The appellate Court cannot require the lower Court to answer objections to the complaint which are raised in the appeal. (Vol 14) 1927 Cal 284 (284, 285) : 54 Cal 355 (D B).

Section 476—Note 3 (*contd.*)

(Vol 33) 1946 Nag 38 (39, 40) : I L R (1945) Nag 788. (Special Judge is a Court only when he holds his sitting at the place prescribed by the notification. Complaint filed by him while sitting at any other place is without jurisdiction.)

4. "Offence referred to in section 195, sub-section (1), clause (b) or clause (c)." — [1] Under the old Code, prior to the amendment in 1923, it was held that the Court could prefer a complaint even in respect of offences mentioned in cl. (a) of S. 195, sub-s. (1). (Vol 1) 1914 Sind 66 (66) : 8 Sind L R 179 : 16 Cri L Jour 104 (DB) \* (Vol 5) 2 Cri L Jour 110 (112) : 32 Cal 367 (SB) \* (Vol 9) 10 Cri L Jour 564 (566) (DB) (Cal) \* (Vol 4) 1917 Mad 182 (182) : 17 Cri L Jour 71 (DB).

[2] Under S. 476, as amended in 1923, Court can complain only in respect of offence mentioned in S. 195 (1) (b) and (c). A complaint for an offence referred to in S. 195 (1) (a) is not competent. (Vol 29) 1942 Cal 434 (435) : I L R (1942) 2 Cal 108 : 43 Cri L Jour 410 (DB) \* (Vol 24) 1937 Pat 31 (31) : 38 Cri L Jour 292 \* (Vol 23) 1936 Pat 74 (75) : 37 Cri L Jour 104 \* (Vol 14) 1927 Oudh 326 (327) : 2 Luck 646 : 28 Cri L Jour 681 (DB) \* (Vol 16) 1929 Lah 378 (379) : 10 Lah 231 : 29 Cri L Jour 877.

[See (Vol 28) 1941 All 100 (100) : 42 Cri L Jour 323 \* (Vol 21) 1934 Oudh 277 (278) : 35 Cri L Jour 590.]

[3] Where the offence is not one referred to in S. 195 at all the Court cannot make a complaint in respect of it under this section. ('39) 1939 Mad W N 886 (887). (Ss. 186, 379, 424.) \* (Vol 4) 1917 Mad 686 (686) : 17 Cri L Jour 388 (S. 161.) \* (Vol 12) 1925 All 318 (319) : 47 All 409 : 26 Cri L Jour 865 (S. 225B.) \* (Vol 5) 1918 Cal 967 (967) : 18 Cri L Jour 117 (DB). (Do.) \* (Vol 11) 1924 Cal 501 (501) (DB). (Ss. 353, 341 and 147.) \* (Vol 9) 1922 Sind 9 (11) : 15 Sind L R 119 : 23 Cri L Jour 97 (DB). (S. 392.) \* (Vol 14) 1927 Oudh 210 (211) : 1 Luck 527 : 27 Cri L Jour 974. (S. 409.) \* (Vol 90) 1890 Rat 515 (516). (S. 411.) \* (Vol 6) 1919 All 59 (60) : 21 Cri L Jour 56. (S. 421.)

[4] In making a complaint as to an offence falling under S. 195, the Court can include other offences which form part of the same transaction. (Vol 27) 1940 Sind 133 (134) : 41 Cri L Jour 821 : I L R (1940) Kar 500 (DB).

[5] Offence not covered by S. 195 forming part and parcel of same transaction as offence coming under S. 195 — Former offence also cannot be taken cognizance of in absence of complaint under S. 476. (Vol 27) 1940 Sind 133 (134) : 41 Cri L Jour 821 : I L R (1940) Kar 500 (DB).

[6] Under this section a Civil Court can make a complaint not only as regards any offence specifically mentioned in S. 195 (1) (b) but also as regards the abatement of any such offence. (Vol 27) 1940 Rang 104 (105) : 1940 Rang L R 12 : 41 Cri L Jour 515 (DB).

[7] So far as the offences referred to in S. 195 (1), cl. (b) are concerned, it is not necessary that the offender should be a party to the proceeding in Court for purposes of S. 476. (Vol 24) 1937 Sind 193 (195) : 38 Cri L Jour 1002 (DB) \* (Vol 23) 1936 Rang 369 (372, 373) : 37 Cri L Jour 1008.

[8] With regard to the offences referred to in S. 195 (1) (c) the Court has power to complain under S. 476 even against a person who is not a party to the proceeding in Court. (Vol 18) 1931 Bom 305 (306) : 55 Bom 461 : 32 Cri L Jour 1017 (DB) \* (Vol 13) 1928 Lah 848 (848) (DB) (Bom) \* (Vol 15) 1928 Lah 510 (512, 513) : 9 Lah 678 : 29 Cri L Jour 652 (DB). (It is not clear, whether it is held that the complaint can be made under S. 476 or under the general law.) \* (Vol 15) 1928

Lah 787 (791) : 10 Lah 443 : 30 Cri L Jour 485 (DB) \* (Vol 5) 1918 Pat 251 (252) : 20 Cri L Jour 94 (DB) \* (Vol 6) 1919 Pat 551 (553) : 20 Cri L Jour 630 \* (Vol 26) 1939 Nag 85 (87) : 40 Cri L Jour 572 : I L R (1940) Nag 652 (DB) \* (Vol 14) 1927 Nag 14 (15) : 28 Cri L Jour 305 (DB) \* (Vol 5) 1918 All 382 (383) : 40 All 24 : 19 Cri L Jour 15 \* (Vol 25) 1938 Cal 677 (680) : 40 Cri L Jour 450 \* (Vol 9) 1922 Oudh 220 (221) : 24 Oudh Cas 367 : 23 Cri L Jour 228.

[But see (Vol 13) 1926 All 21 (22) : 26 Cri L Jour 1506 \* (Vol 18) 1931 All 413 (417) : 53 All 804 : 32 Cri L Jour 1105 (SB) \* (Vol 18) 1931 Cal 438 (441) : 58 Cal 727 : 32 Cri L Jour 383 (DB) \* (Vol 22) 1935 Mad 1044 (1044) : 37 Cri L Jour 15 \* (Vol 19) 1932 Mad 129 (129) : 33 Cri L Jour 218 \* (Vol 23) 1936 Rang 369 (372, 373) : 37 Cri L Jour 1008 \* (Vol 12) 1925 Rang 195 (196) : 3 Rang 48 : 26 Cri L Jour 500 (DB) \* (Vol 17) 1930 Oudh 404 (405) : 6 Luck 86 : 31 Cri L Jour 938 \* (Vol 15) 1928 Sind 69 (71) : 22 Sind L R 201 : 28 Cri L Jour 978 (DB) \* (Vol 21) 1934 Pesh 81 (82) (DB) \* (Vol 32) 1945 Pat 362 (363, 366) : 24 Pat 174 : 47 Cri L Jour 183 (DB) \* (Vol 4) 1917 Lah 333 (335) : 18 Cri L Jour 544 : 1917 Pun Re No 10 Cr.]

5. "In or in relation to a proceeding in that Court." — [1] Under this section the Court gets jurisdiction to enquire and make a complaint only where the offence appears to have been committed in or in relation to any proceeding in that Court. (Vol 24) 1937 Pat 534 (536) : 39 Cri L Jour 103. (Accused suborning evidence before Sub-divisional Magistrate in committal proceedings — Trial by Sessions Judge — Sub-divisional Magistrate can file complaint.) \* (Vol 19) 1932 Mad 363 (367) : 55 Mad 611 : 33 Cri L Jour 479 (FB) \* (Vol 4) 1917 Pat 339 (340) : 18 Cri L Jour 640.

[2] A Sub-divisional Magistrate to whom papers are sent under Police Standing Order No. 157, and who makes an inquiry and finds a *prima facie* case has been made out, is not competent to file a complaint of the offence as he has been acting throughout as a "Court" — Section 476 is exhaustive of powers of Courts to make complaints. (Vol 32) 1945 Mad 458 (459).

[3] Warrant entrusted to constable for execution — Constable reporting at thana that arrested person was rescued — Police not submitting charge-sheet against alleged rescuers — Case by one of them against constable under S. 211, Penal Code — Complaint by Court is necessary as offence was committed in relation to the proceeding in the Court. (Vol 28) 1941 Cal 263 (264) : 42 Cri L Jour 626 (DB).

[4] This section does not apply to a departmental enquiry held by the presiding officer of a Court and he cannot order the filing of a complaint against the witnesses in the enquiry for giving false evidence. (Vol 27) 1940 Mad 892 (892) : 42 Cri L Jour 224.

6. "Whether on application made to it in this behalf or otherwise." — [1] The Court can take action under this section either *suo motu* or upon application made to it by a private person. (Vol 17) 1930 Cal 721 (724) : 32 Cri L Jour 377 : 58 Cal 374 (DB). (*Suo motu.*) \* (Vol 1) 1914 Sind 159 (159) : 8 Sind L R 21 : 15 Cri L Jour 662. (Do.) \* (Vol 18) 1931 Pat 81 (86) : 5 Pat 262 : 27 Cri L Jour 641 (DB). (Application by private person.)

[2] The application under this section need not necessarily be made by a party to the proceeding in respect of which the offence is committed. (Vol 27) 1940 Bom 131 (133) : 41 Cri L Jour 526 : I L R (1940) Bom 403. (Stranger to proceedings out of which application arises can apply.) \* (Vol 27) 1940 Lah 292 (298) : 41 Cri L Jour 843 (DB). (Application not necessary — Court can be moved otherwise.) \* (Vol 16) 1929 Pat 242 (243) : 8 Pat 736 : 31 Cri L Jour 143 (DB).

Section 476B—Note 3 (*contd.*)

[4] Section 367 of the Code of Criminal Procedure in the case of appeals from subordinate Criminal Courts, or of O. 41, R. 31 of the Code of Civil Procedure in the case of appeals from civil Courts should be followed for judgments, as the case may be. (Vol 18) 1931 Cal 454 (454, 455) ; 32 Cri L Jour 1045 (D B).

[5] Where the appellate Court reverses an order of the lower Court directing a complaint to be made, it should direct the withdrawal of the complaint and should not simply set aside the order of the lower Court. (Vol 23) 1936 Pat 382 (382) ; 37 Cri L Jour 838 (Vol 11) 1924 Bom 347 (348) ; 48 Bom 401 ; 25 Cri L Jour 1123 (D B).

[6] Where it reverses an order of the subordinate Court refusing to make a complaint, it must itself prefer the complaint under this section and not direct the subordinate Court to do so. (Vol 29) 1942 Rang 64 (64) ; 1941 Rang L R 764 ; 43 Cri L Jour 569 (Vol 16) 1929 Cal 195 (195) ; 55 Cal 1277 (D B).

[7] A Sessions Judge cannot in appeal under this section direct the Additional District Magistrate to prefer the complaint. (Vol 18) 1931 Mad 768 (768) ; 33 Cri L Jour 51.

[8] Where the Court prefers a complaint under this section it should follow the procedure prescribed by S. 476. (Vol 24) 1937 All 305 (312) ; I L R (1937) All 517 ; 38 Cri L Jour 561 (F B) (Vol 18) 1931 Sind 115 (115) ; 33 Cri L Jour 43 ; 25 Sind L R 68 (D B).

[9] In case of appeals against the complaint itself, though it is necessary that a copy of the complaint itself should be upon the record, it does not justify a Court in summarily dismissing an appeal when no certified copy of the complaint is on the record, without giving the appellant a reasonable opportunity for making good this defect, when there is already on the record a certified copy of the order finding that it was expedient in the interests of justice, that a complaint should be made. (Vol 30) 1943 Sind 96 (97) ; I L R (1942) Kar 371 ; 44 Cri L Jour 521 (D B).

4. Powers of appellate Court.—[1] The following views have been expressed on the question whether this section is exhaustive of the powers of the appellate Court in dealing with appeals.

(a) The section is exhaustive, and the appellate Court cannot, for example, call upon the lower Court to take additional evidence or remand the case to the lower Court for further inquiry. (Vol 18) 1931 Lah 761 (762) ; 33 Cri L Jour 178 ; 13 Lah 342 (F B) (Vol 22) 1935 Oudh 59 (60, 61) ; 10 Luck 335 ; 36 Cri L Jour 254 (D B). (No remand) (Vol 17) 1930 Sind 315 (315, 316) ; 24 Sind L R 446 ; 32 Cri L Jour 521 (D B). (Illegal remand is, however, curable.) (Vol 18) 1931 Sind 115 (115) ; 33 Cri L Jour 43 ; 25 Sind L R 68 (D B).

(b) A Court hearing an appeal under this section has no power to remand the case to the lower Court for further inquiry and reconsideration but has power to take additional evidence for a proper decision of the appeal before it. (Vol 24) 1937 All 305 (313) ; I L R (1937) All 517 ; 38 Cri L Jour 561 (F B) (Vol 24) 1937 Rang 526 (528).

(c) The section is not exhaustive of the powers of the appellate Court. (Vol 18) 1931 Cal 604 (605, 606) ; 33 Cri L Jour 38 ; 59 Cal 68 (D B) (Vol 18) 1931 Cal 3 (4) ; 32 Cri L Jour 325 ; 58 Cal 402 (D B). (Appeal can be summarily dismissed.) (Vol 20) 1933 Mad 767 (767) ; 35 Cri L Jour 503 (D B). (Do.) (Vol 21) 1934 Mad 52 (55) ; 57 Mad 177 ; 35 Cri L Jour 392 (F B). (Except S. 428.) (Vol 25) 1938 Pat 99 (102) ; 16 Pat 650 ; 39 Cri L Jour 353 (D B) (Vol 18) 1931 Pat 411 (413) ; 33 Cri L Jour 147 (Vol 21) 1934 Mad 473 (474) ; 35 Cri L Jour 1184 ; 57 Mad 1101. (Appeal can be summarily dismissed.)

[See however (Vol 17) 1930 Cal 282 (284) (D B).]

(d) Where the order under S. 476 was passed by a civil or revenue Court, the appellate Court can make a remand to the lower Court under O. 41, R. 23 or dismiss the appeal for default under O. 41, R. 11 (2) Civil P. C. (Vol 18) 1931 Cal 604 (605) ; 33 Cri L Jour 38 ; 59 Cal 68 (D B) (Vol 16) 1929 Cal 428 (429) ; 31 Cri L Jour 750 (D B) (Vol 14) 1927 Cal 98 (100) ; 53 Cal 827 ; 28 Cri L Jour 92 (D B).

[But see (Vol 21) 1934 Mad 52 (54, 55) ; 57 Mad 177 ; 35 Cri L Jour 392 (F B) (Vol 25) 1938 Pat 99 (102) ; 16 Pat 650 ; 39 Cri L Jour 353 (D B).]

*Power to take or call for additional evidence.*—[2] In an appeal under S. 476B the appellate Court cannot, under that section, either take additional evidence or direct it to be taken by the lower Court. (Vol 21) 1934 Mad 52 (55) ; 57 Mad 177 ; 35 Cri L Jour 392 (F B) (Vol 15) 1928 Mad 391 (392) ; 51 Mad 603 ; 29 Cri L Jour 445.

[3] According to the High Courts of Lahore and Rangoon, it can take all evidence and complete the enquiry, independent of S. 428. (Vol 18) 1931 Lah 761 (762) ; 33 Cri L Jour 178 ; 13 Lah 342 (F B) (Vol 24) 1937 Rang 526 (528).

[4] The Judicial Commissioner's Court of Sind has held that the appellate Court can, under its inherent powers, take additional evidence. (Vol 18) 1931 Sind 115 (115) ; 25 Sind L R 68 ; 33 Cri L Jour 43 (D B).

[5] According to the Allahabad High Court, though S. 428 does not apply, yet when the Court dealing with a case under this section acts in the exercise of its criminal jurisdiction, S. 540 confers on it a wide discretion in the matter of summoning and examining witnesses, and when the Court is acting as a civil Court hearing an appeal arising out of a civil case, S. 107, Civil P. C., confers on it power to take additional evidence. (Vol 24) 1937 All 305 (313) ; I L R (1937) All 517 ; 38 Cri L Jour 561 (F B).

[6] According to the Nagpur High Court, an appeal under this section from the order of a civil Court is governed by the Civil Procedure Code and hence the appellate Court is, under O. 41, R. 27, Civil Procedure Code, entitled to take additional evidence. (Vol 31) 1944 Nag 359 (360) ; I L R (1945) Nag 438 ; 46 Cri L Jour 760 (Vol 24) 1937 Nag 91 (92) ; I L R (1938) Nag 298.

*Power to correct the complaint.*—[7] The appellate Court has power to alter the complaint preferred by the lower Court by substituting a different offence from that stated by the lower Court. (Vol 15) 1928 All 706 (707) ; 29 Cri L Jour 794.

5. Appeal preferred to proper officer but wrong designation given—Effect.—[1] An appeal meant to be sent to the Collector was presented to him, but he was described as a District Magistrate as he combined in himself both the powers of a Collector and of a District Magistrate. It was held that the proper procedure was to return the appeal for correcting the mistake though purely formal. (Vol 13) 1926 All 402 (402) ; 27 Cri L Jour 523.

6. Transfer of appeals under section.—[1] The High Court has power to transfer an appeal under this section pending before the District Judge:

(a) To its own file under S. 24 of the Code of Civil Procedure. (Vol 12) 1925 All 737 (738) ; 47 All 934 (D B).

(b) To the file of another District Judge under S. 526 of the Code. (Vol 12) 1925 Nag 358 (358, 359) ; 26 Cri L Jour 796.

[2] The District Judge himself can, under S. 526 transfer an appeal to an Additional District Judge who is empowered to discharge the functions of the District Judge. (Vol 23) 1936 Pat 382 (384) ; 37 Cri L Jour 838 (Vol 14) 1927 All 555 (555) ; 49 All 792 ; 28 Cri L



Section 476B—Note 6 (*contd.*)

Jour 549 \* (Vol 17) 1930 Cal 361 (362) : 57 Cal 831 : 31 Cri L Jour 921 (D B).

[See however (Vol 32) 1945 Pat 322 (325, 326) : 24 Pat 1 (D B).]

[3] The District Judge cannot transfer the case to a subordinate Judge. (Vol 22) 1935 All 696 (697) : 58 All 85 (D B) \* (Vol 22) 1935 All 440 (441) : 57 All 785 : 36 Cri L Jour 1231 \* (Vol 20) 1933 Pat 179 (180) : 34 Cri L Jour 410 \* (12) 13 Cri L Jour 296 (296) : 40 Cal 37 (D B) \* (12) 13 Cri L Jour 191 (191) : 39 Cal 774 (D B) \* (Vol 15) 1928 Oudh 494 (495) : 4 Luck 155 : 30 Cri L Jour 382 (DB). (Section 40, Oudh Courts Act, 1925.)

[See also (Vol 30) 1943 Mad 50 (51) : I L R (1943) Mad 303 : 44 Cri L Jour 177.]

[But see (Vol 25) 1938 Cal 463 (464) : I L R (1938) 2 Cal 287 (D B) \* (Vol 16) 1929 All 774 (775) : 51 All 344.]

7. Notice. — [1] If the appeal is by the person against whom a complaint has been made, the opposite party is the Crown, and no notice to the person who moved for the making of a complaint is necessary. (28) 29 Cri L Jour 72 (72) (Lab).

[See (Vol 28) 1941 Mad 574 (574) : 42 Cri L Jour 817.]

8. Death of appellant pending disposal of appeal. — [1] Where, after preferring an appeal against an order refusing to make a complaint, the appellant dies, it has been held that there is no question of any survival of the right of appeal, and that although sections 404 and 431 of the Code do not apply, the present section does not indicate that any legal representative of the deceased appellant may, on the death of the appellant, file an appeal or support it. (Vol 12) 1925 All 620 (620, 621) : 47 All 359 : 26 Cri L Jour 1008.

9. Power of attorney, if necessary in appeal. — [1] According to the Lahore High Court, no power of attorney is necessary for filing the appeal. (Vol 22) 1935 Lah 677 (678) : 36 Cri L Jour 1485. ((Vol 18) 1931 Lah 761 : 13 Lah 342 : 33 Cri L Jour 178 (F B), Relied on.)

10. Appeal against order of single Judge of High Court. — [1] Under this section, an appeal lies to a Division Bench of the High Court from an order made by a single Judge on the original side of the High Court. (Vol 16) 1929 Cal 521 (523) : 56 Cal 932 : 30 Cri L Jour 974 (D B).

[See (Vol 27) 1940 Rang 104 (105, 106) : 1940 Rang I R 12 : 41 Cri L Jour 515 (D B).]

[See also (Vol 31) 1944 Mad 181 (183) : I L R (1944) Mad 643 : 45 Cri L Jour 464 (D B).]

[2] Appellate Bench will not interfere with the exercise of his discretion by a single Judge unless it can be shown that the discretion has been exercised under some misapprehension or error which is plain on the face of the record. (Vol 27) 1940 Rang 104 (105, 106) : 41 Cri L Jour 515 : 1940 Rang L R 12 (D B).

11. Appeal to the Privy Council under Clause 39, Letters Patent. — [1] No appeal lies under clause 39 of the Letters Patent to the Privy Council against an order of the High Court refusing to quash, by a writ of *certiorari*, the order made by a Deputy Collector as an Income-tax Officer directing the prosecution of the petitioner under S. 476. (13) 14 Cri L Jour 656 (657) (D B) (Mad).

12. Revision. — [1] A party against whom an order under S. 476 is made cannot without appealing under S. 476B, come up in revision under S. 439. (Vol 29) 1942 Oudh 439 (441) : 43 Cri L Jour 668 \* (Vol 13) 1926 Sind 215 (216) : 20 Sind L R 90 : 27 Cri L Jour 780 (D B) \* (Vol 15) 1928 All 588 (589) : 51 All 338.

[See also (Vol 30) 1943 Sind 149 (151) : I L R (1943) Kar 105 : 44 Cri L Jour 728 (D B).]

[2] Where the order is that of a civil or revenue Court, following conflicting opinions have been expressed on the question whether a revision lies under the Criminal Procedure Code or under any other provision.

(a) The High Court can revise such orders under S. 439. (Vol 18 1931 Lah 761 (762) : 13 Lah 342 : 33 Cri L Jour 178 (F B) \* (Vol 16) 1929 Lah 676 (677) : 30 Cri L Jour 666. (Following (1906) 7 Cri L Jour 281 : 1908 Pun Re No. 5 (F B).) \* (Vol 25) 1938 Bom 225 (227) : 39 Cri L Jour 495 : I L R (1938) Bom 331 (F B) \* (Vol 28) 1941 Sind 217 (220) : I L R (1941) Kar 422 : 43 Cri L Jour 259 (D B) \* (Vol 13) 1926 Sind 215 (216) : 20 Sind L R 90 : 27 Cri L Jour 780 (D B) \* (Vol 24) 1937 Rang 526 (528).

(b) The High Court can interfere under S. 115 of the Code of Civil Procedure. (Vol 27) 1940 Mad 465 (469) : 41 Cri L Jour 769 : I L R (1940) Mad 762 (F B). ((Vol 26) 1939 Mad 472 : I L R (1939) Mad 439 : 41 Cri L Jour 705, Overruled.) \* (Vol 33) 1946 All 245 (246) \* (Vol 24) 1937 All 305 (313) : 38 Cri L Jour 561 : I L R (1937) All 517 (F B). ((1904) 1 Cri L Jour 73 : 26 All 249 (F B), Followed.) \* (187) 1937 All L Jour 10 (11) \* (Vol 23) 1936 Pesh 87 (88) \* (Vol 22) 1935 All 696 (696) : 58 All 85 (D B) \* (Vol 15) 1928 Oudh 494 (495) : 4 Luck 155 : 30 Cri L Jour 382 (D B) \* (Vol 14) 1927 Oudh 14 (15) : 28 Cri L Jour 16 \* (Vol 21) 1934 Pat 55 (55) : 35 Cri L Jour 432 \* (Vol 18) 1931 Cal 760 (761) : 58 Cal 965 : 32 Cri L Jour 1236 (D B) \* (Vol 17) 1930 Cal 721 (722) : 32 Cri L Jour 377 : 58 Cal 374 (D B) \* (13) 14 Cri L Jour 197 (204) : 40 Cal 477 (F B) \* (Vol 18) 1931 Cal 604 (605) : 59 Cal 68 : 33 Cri L Jour 38 (D B) \* (Vol 13) 1926 Pat 25 (25) : 26 Cri L Jour 1565. (Revenue Court's order.) \* (Vol 17) 1930 Lah 802 (803) : 31 Cri L Jour 1053.

[See (Vol 31) 1944 Oudh 23 (25) : 44 Cri L Jour 757 : 19 Luck 245.]

(c) Where the order is passed by a subordinate Provincial Small Cause Court, the High Court can interfere under S. 25, Provincial Small Cause Court's Act, 1887. (13) 14 Cri L Jour 496 (496) : 7 Low Bur Rul 76 \* (Vol 11) 1924 Rang 54 (54) : 1 Rang 372 : 26 Cri L Jour 523 \* (Vol 33) 1946 All 245 (246).

*Distinction between revisions under Civil P. C. and Criminal P. C. :*

[3] In revision under S. 115, Civil P. C., the High Court cannot interfere if there is neither want of jurisdiction nor any irregularity nor illegality in the exercise of jurisdiction while under S. 439, it could interfere whenever it is necessary in the interests of justice to do so. (Vol 28) 1941 Nag 155 (157) : I L R (1942) Nag 388 \* (137) 1937 All L Jour 10 (11) \* (Vol 13) 1926 All 229 (229) : 27 Cri L Jour 278 \* (Vol 17) 1930 Cal 721 (722) : 58 Cal 374 : 32 Cri L Jour 377 (D B) \* (Vol 18) 1931 Cal 604 (605) : 59 Cal 68 : 33 Cri L Jour 38 (D B) \* (1905) 2 Cri L Jour 54 (55) (DB) (Bom) \* (Vol 14) 1927 Oudh 14 (15) : 28 Cri L Jour 16 \* (Vol 21) 1934 Pat 55 (55) : 35 Cri L Jour 432.

[4] The following cannot afford sufficient ground for interference under S. 115, Civil P. C., in the absence of any material irregularity or illegality in the exercise of jurisdiction by the subordinate Court :

(a) The mere fact that an order for prosecution is based upon insufficient or improper grounds. (Vol 14) 1927 All 334 (335) : 49 All 536 : 28 Cri L Jour 296 \* (Vol 21) 1934 All 1065 (1066) : 57 All 351.

(b) A mistake or misdescription in the proceedings of the lower Court. (Vol 18) 1931 All 305 (306) : 53 All 416 : 32 Cri L Jour 367 (D B).

[5] Where a revision has been held to lie under S. 439 of the Code, it does not necessarily follow that

477. [Power of Court of Session as to such offences committed before itself.] *Repealed by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XV] of 1923), S. 129.*

478. (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purposes of an inquiry under this section the Civil or Revenue Court may \* [ \* \* \* ] exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII, <sup>b</sup>[and of Chapter XXXIII in cases where that Chapter applies] and shall be deemed to have been held by a Magistrate.

[1892—S. 478; 1872—Ss. 474, 476; 1861—Ss. 173, 176.]

[a] The words and figures "subject to the provisions of section 443" were *repealed* by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S. 28. [b] *Inserted ibid.*

#### Section 476B—Note 12 (*contd.*)

the High Court would interfere in every case. In order to justify interference in revision under S. 439, there must be an error of law. (Vol 26) 1939 Lah 529 (531) : 41 Cri L Jour 204.

[6] An order under S. 476B is in the judicial discretion of the Court and the High Court will find it difficult to interfere with such discretion save in exceptional cases. (Vol 31) 1944 Sind 170 (171) : 1 L R (1944) Kar 7 : 45 Cri L Jour 813 (DB) ✕, (Vol 11) 1924 Bom 347 (348) : 48 Bom 401 : 25 Cri L Jour 1123 (DB) ✕ (Vol 3) 1916 Oudh 121 (122) : 19 Oudh Cas 91 : 18 Cri L Jour 3 ✕ ('26) 27 Cri L Jour 1011 (1011) (Lah) ✕ (Vol 19) 1932 Pat 243 (248) : 33 Cri L Jour 860 ✕ (Vol 13) 1926 Lah 305 (306) : 7 Lah 108 : 27 Cri L Jour 776.

[7] Revision is proper if the lower Court acts on grounds merely fanciful, grounds so empty and so obviously wrong that the Court cannot be said to have formed a judicial opinion. ('36) 37 Cri L Jour 16 (17) (Nag) ✕ (Vol 10) 1923 Bom 201 (201) : 24 Cri L Jour 359 (DB) ✕ (Vol 1) 1914 Nag 1 (2) : 9 Nag L R 134 : 15 Cri L Jour 33 ✕ ('02) 1902 Pun Re No. 18 Cr, p. 48 (49) ✕ (Vol 16) 1929 Lah 676 (678) : 30 Cri L Jour 666. (Failure to exercise proper judicial discretion — Good ground for interference.) ✕ ('01) 23 All 249 (250).

[8] Where the lower Court has arrived at a judicial opinion on the materials before it, the High Court will not interfere simply because it disagrees with that opinion. (Vol 7) 1920 Nag 264 (264) : 21 Cri L Jour 846 ✕ ('02) 1902 Pun Re No. 18 Cr, p. 48 (49) ✕ (Vol 4) 1917 Nag 136 (136) : 14 Nag L R 16 : 18 Cri L Jour 1015 ✕ (Vol 6) 1919 Pat 321 (322) : 20 Cri L Jour 821.

[9] When two Courts have concurred in holding that a prosecution is in the interests of public policy, the High Court will not generally interfere in revision. (Vol 26) 1939 Lah 529 (531) : 41 Cri L Jour 204 ✕ (Vol 13) 1926 Lah 305 (306) : 27 Cri L Jour 776 : 7 Lah 108.

[10] A mere irregularity in the procedure of the lower Court, as for instance, where it uses its knowledge derived from some other case, will not be a ground for interference in revision, where the lower Court is fully conversant with all the facts of the case and the High Court is satisfied from the materials before it that the case is one where there ought to be a prosecution. (Vol 27) 1940 Nag 227 (227, 228) : 41 Cri L Jour 466 ✕ (Vol 18) 1931 Cal 3 (4, 5) : 58 Cal 402 : 32 Cri L Jour 325 (DB).

[11] As a Court of revision, the High Court has

power to correct the erroneous form of the lower Court's order. (Vol 13) 1926 All 402 (403) : 27 Cri L Jour 523.

[12] The High Court can in revision direct another section of the Penal Code to be added to the complaint preferred by the lower Court. (Vol 18) 1931 All 305 (306) : 53 All 416 : 32 Cri L Jour 367.

13. Reference to High Court. — [1] When the Sessions Judge thinks that injustice has been committed by an order made by him or by his Assistant Sessions Judge, the Sessions Judge can refer the matter to the High Court and once the matter has been brought to the attention of the High Court, the latter can act in revision under S. 439, whatever the method adopted in bringing the matter to its attention. (Vol 25) 1938 Bom 225 (227) : 39 Cri L Jour 495 : 1 L R (1938) Bom 331 (F B).

[2] When the Assistant Sessions Judge has made an order in appeal directing a prosecution, it is doubtful if the Sessions Judge has any power under S. 435 to call for the record of the case and proceedings before the Assistant Sessions Judge when the latter was exercising a jurisdiction concurrent with that of the Sessions Judge. See (Vol 25) 1938 Bom 225 (227) : 39 Cri L Jour 495 : 1 L R (1938) Bom 331 (F B).

#### SECTION 478 — SYNOPSIS.

##### 1. Scope.

##### 2. "Any such offence."

##### 3. "Committed before . . . or brought under the notice . . . in the course of a judicial proceeding."

##### 4. Mode of inquiry—Sub-section (2).

##### 5. Appeal.

1. Scope.—[1] Proceedings started under S. 476—Court has option to commit accused to Sessions under S. 478. (Vol 14) 1927 All 571 (572) : 49 All 898 : 28 Cri L Jour 668.

[2] Proceedings under this section are alternative and cannot be followed after the Court has acted under S. 476, and the Magistrate has either illegally returned the case to it or discharged the accused. ('69) 12 Suth W R Cr 41 (42) (DB) ✕ ('98) 1898 Rat 959 (959, 960) (DB) ✕ ('04) 6 Bom L R 578 (580) (DB). (*Held*, Court cannot hold a dual enquiry under S. 195 and this section.)

[3] The dismissal by the Magistrate of a complaint by a private person in respect of the offence is no bar to a proceeding under this section. ('89) 13 Bom 384 (387) (DB) ✕ ('09) 10 Cri L Jour 431 (432) : 34 Bom 88



**479.** When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

[1882 — Ss. 479 ; 1872 — S. 475 ; 1861 — S. 174.]

**480. (1)** When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) Nothing in [section 29A or in Chapter XXXIII] shall be deemed to apply to proceedings under this section.

[1882 — S. 180 ; 1872 — S. 435 para. 1 ; 1861 — S. 163.]

[a] The words "whether he is a European British subject or not" were *repealed* by the Criminal Law Amendment Act, 1923, (12 [XII] of 1923), S. 29. [b] *Substituted, ibid.*, for "section 443 or section 444."

Section 478.—Note 1 (*contd.*)

(DB). (The grant of sanction not availed of held to be no bar to proceeding under the section.)

[4.] Complaint under S. 476 by Small Cause Court Judge — Complaint sent to first class Magistrate — On direction of District Magistrate, Judge making commitment order under S. 178 — Held that he had power to do so. (Vol 24) 1937 All 76 (77) : 38 Cri L Jour 318.

[5.] Where a Judge is both a civil Court Judge and a Magistrate, and the offence is committed before the Court in its former capacity it should take action as a civil Court and not as a Magistrate. (Vol 12) 1925 Oudh 158 (160, 161) : 25 Cri L Jour 1162 (DB).

[See however (Vol 5) 1918 All 415 (416, 417) : 40 All 32 : 19 Cri L Jour 40.]

[2.] "Any such offence." — [1] The words "any such offence" mean an offence referred to in clauses (b) and (c) of S. 195 (1) and not an offence committed under the circumstances mentioned in those clauses. ('95) 22 Cal 1004 (1006) (DB).

[But see ('92) 15 Mad 221 (225) (DB).]

3. "Committed before . . . or brought under the notice . . . in the course of a judicial proceeding."

[1] Where the offence is committed before the civil or revenue Court, it is not also necessary that the Court should have, at that time, been holding judicial proceedings, though where the offence is brought under its notice, it must be in the course of judicial proceedings. (Vol 17) 1930 Oudh 58 (59) : 31 Cri L Jour 679 : 5 Luck 435.

[2] The words "brought under the notice" are wide enough to cover an offence which may have been committed in another form and on some previous occasion. ('09) 9 Cri L Jour 219 (222) (DB) (All).

[3] Munsif at Agra can take action under S. 478 in respect of offences committed in Bengal but brought to his notice. (Vol 5) 1918 All 129 (130) : 40 All 116 : 19 Cri L Jour 148.

[4] Offence brought to notice of Court in mutation proceedings — Action under this section can be taken. (Vol 17) 1930 Oudh 58 (59) : 5 Luck 435 : 31 Cri L Jour 679.

4. Mode of inquiry.—Sub-section (2).—[1] Civil Court making inquiry under S. 478 should proceed as Magistrate proceeds in inquiry into case before commitment. (Vol 5) 1918 All 415 (416, 417) : 40 All 32 : 19 Cri L Jour 40.

[2] The Court is, in fact, converted for the time

being, into a criminal Court. ('06) 3 Cri L Jour 400 (405) : 28 All 554 (SB).

[3] Where the Court frames no charge, and makes an inquiry in a perfunctory manner, the trial is irregular. (Vol 10) 1923 All 610 (611) : 25 Cri L Jour 483.

[4] Where the prosecution witnesses were not examined, nor evidence taken in the presence of the accused, and there was no examination of the accused, framing of charge, or explaining it to the accused, the commitment was quashed by the High Court. (Vol 5) 1918 All 415 (416, 417) : 40 All 32 : 19 Cri L Jour 40.

[5] In an enquiry under the section the accused is entitled to know under what section of the Penal Code he is sought to be proceeded against. ('04) 6 Bom L R 578 (580) (DB).

[6] After completing the enquiry, the Court should either commit or hold the accused person to bail. (1864) 1 Suth W R Cr 5 (5) (DB).

5. Appeal.—[1] Order under this section is not appealable. (Vol 17) 1930 Oudh 58 (60) : 31 Cri L Jour 679 : 5 Luck 435 (Vol 7) 1920 Mad 144 (145) : 43 Mad 361 : 21 Cri L Jour 28 (DB).

[2] An order of committal under the section can be quashed under S. 215 of the Code on a point of law. (Vol 7) 1920 Mad 144 (145) : 43 Mad 361 : 21 Cri L Jour 28 (DB).

[3] Suit filed to establish genuineness of transaction — This is no ground to quash commitment or to order stay of trial. ('94) 18 Bom 581 (584) (DB).

#### SECTION 480—SYNOPSIS.

1. Scope.
2. Interference with due administration of justice.
3. Contempt by intentionally insulting or interrupting the Court.
4. In the view or presence of the Court.
5. Civil, Criminal or Revenue Court.
6. Jurisdiction to try the offences mentioned.
7. "To be detained in custody."
8. "At any time before the rising of the Court on the same day."
9. "Take cognizance of the offence."
10. "Sentence the offender."
11. Revision.

1. Scope.—[1] Section deals with what is known as direct contempt of Court and empowers all Courts, whether civil, criminal or revenue, to punish an offender

*When Registrar or Sub-Registrar to be deemed a Civil Court within sections 480 and 482.*

[1882 — S. 433.]

[a] Substituted by A. O. for "Local Government". [b] See now the Indian Registration Act, 1908 (I [XVI] of 1908.)

**484.** When any Court has under section 480 <sup>a</sup>[or section 482] adjudged an offender to punish *Discharge of offender on submission or apology.* <sup>a</sup>[or forwarded him to a Magistrate for trial] for refusing or omitting to do anything which he was lawfully required to do or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

[1882 — S. 484; 1872 — S. 437; 1861 — S. 164.]

[a] Inserted by the Repealing and Amending Act, 1914 (10 [X] of 1914), S. 2 and Sch. I.

**485.** If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provision of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

[1882 — S. 485; 1872 — Ss. 356, 364; 1861 — Ss. 192, 365.]

**486.** (1) Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

**Section 482 — Note 1** (*contd.*)  
(XVIII of 1940) is a civil Court within the meaning of this section.

[8] Under this section the Court does not dispose of the offence but it merely makes a complaint. (Vol 23) 1936 All 762 (763) : 38 Cri L Jour 54.

[9] Court chooses to act under this section, instead of under S. 480, in respect of offence mentioned in latter section — It must give reasons for not taking cognizance of offence under that section. (Vol 11) 1924 Oudh 402 (402, 403) : 25 Cri L Jour 1127 & ('08) 7 Cri L Jour 208 (210) : 1 Upp Bur Rul 9.

[10] This section does not require the Magistrate to draw up proceedings on the same day that the offence is committed. (Vol 23) 1936 All 762 (763) : 38 Cri L Jour 54 & ('08) 7 Cri L Jour 95 (98) : 35 Cal 161 (DB).

[11] Under this section the accused can be tried by a Magistrate of the third class and the words "a Magistrate having jurisdiction to try the same" can be interpreted as meaning "any Magistrate with local jurisdiction." (Vol 27) 1940 Lah 233 (235) : 41 Cri L Jour 766 : ILR (1941) Lah 145. (Magistrate to whom complaint is sent under this section must hear it but if sent under S. 476 may dismiss it under S. 203.).

#### Section 483 — Note 1

[1] By implication this section lays down, that a Registrar or a Sub-Registrar is not ordinarily to be considered a Court within the meaning of Ss. 480 and 482. ('87) 13 Bom 36 (42) (DB).

[2] In the absence of a direction by the Provincial

Government under this section, an offence mentioned S. 480, if committed before a Registrar or Sub-Registrar cannot be dealt with by him under that section. (Vol 1) 1930 Cal 366 (368) : 57 Cal 1007 : 31 Cr. T. J. 942 (DI)

#### Section 484 — Note 1

[1] Apology need not be expressed in words. ('12) Cri L Jour 567 (567) (Lah).

[2] Assurance from a gentleman of standing that insult was not intended for the Court, when given earnestness should be accepted by the Court as a sufficient ground for discharging the offender under this section. ('13) 14 Cri L Jour 687 (688) (All).

#### Section 485 — Note 1

[1] Complainant is not a witness punishable under this section for refusing to answer questions. ('89) Bom 600 (604) (DB). (Question, irrelevant to issue need not be answered by witness.)

[2] Witness is not bound to answer any question asked by the Court under S. 165 of the Evidence Act with a view to criminal proceedings being taken against him. ('85) 10 Bom 185 (186) (DB).

#### Section 486 — Note 1

[1] Appeal lies to the High Court against an order of a Sessions Judge imposing a fine upon an offender under S. 480. ('68) 4 Mad H C R 146 (148) (DB).

[2] Appeal against the sentence by a second or third class Magistrate lies to the District Magistrate. (Vol 1) 1942 Mad 181 (182) : 1 L R (1942) Mad 587 : 43 Cri Jour 397.

(3) An appeal from such conviction by a Court of Small Causes in a presidency-town shall lie to the High Court, and

an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or, in the presidency towns, to the High Court.

[1882 — S. 486; 1872 — S. 268; 1861 — S. 413.]

*Certain Judges and Magistrates not to try offences referred to in section 195 when committed before themselves.*

of a judicial proceeding.

**487. (1)** Except as provided in sections "[ \* \* ] 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court [ \* \* ] shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt<sup>o</sup> of his authority, or is brought under his notice as such Judge or Magistrate in the course

(2) Nothing in section 476 or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

[1882 — S. 187; 1872 — S. 473.]

[a] The figures "477" were *repealed* by the Code of Criminal Procedure (Amendment) Act, 1928 (18 [XVIII] of 1923), S. 130. [b] The words "and the Recorder of Rangoon" were *repealed* by the Lower Burma Courts Act, 1900 (6 [VI] of 1900). [c] For Provincial Amendment, see the British Baluchistan Criminal Justice Regulation, 1896 (8 [VIII] of 1896), Sec., Art. 16.

## CHAPTER XXXVI.

### OF THE MAINTENANCE OF WIVES AND CHILDREN.

**488. (1)** If any person having sufficient means neglects or refuses to maintain his wife or his

*Order for maintenance of wives and children.*

legitimate or illegitimate child unable to maintain himself, the District Magistrate, a Presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to

Section 486.—Note 1 (*contd.*)

[3] Sessions Judge must hear the appeal and come to a finding on the question whether the conviction is legal or illegal. (98) 1898 Rat 978 (978) (DB).

[4] This section does not apply to an order of a Conciliation Board constituted under the Punjab Relief of Indebtedness Act, 1934, fining a person for contempt of Court but under S. 489, the High Court can exercise any of the powers conferred on a Court of appeal in such cases. (Vol 25) 1938 Lah 366 (367) : 39 Cri L Jour 658.

[5] Although an appeal against a sentence imposed under S. 480 may lie to the District Magistrate, it cannot be transferred to a Magistrate of the first class subordinate to him under S. 407 (2). (Vol 29) 1942 Mad 181 (183) : 11 R (1942) Mad 587 : 43 Cri L Jour 397.

[6] Provisions of S. 413 of the Code apply to an appeal under this section and a person sentenced under S. 480, by a first class Magistrate to pay a fine not exceeding Rs. 50 has no right of appeal. (Vol 31) 1944 Cal 382 (383) : 11 R (1944) 1 Cal 31 : 46 Cri L Jour 17 (19).

#### Section 487 — Note 1

[1] Prohibition in this section is limited to the trial of an offence referred to in S. 195. (1900) 27 Cal 452 (453) (DB) \* (13) 14 Cri L Jour 385 (386) : 9 Nag L R 81 \* (96) 1896 All W N 181 (181) \* (97-01) 1 Upp Bur Rul 127 (130).

[2] Word "Magistrate" in the section includes a Presidency Magistrate. (98) 7 Cri L Jour 103 (104) (DB) (Cal).

[3] Offence referred to in S. 195 not committed before

no bar to trial of offender. (1900) 27 Cal 452 (453) (DB) \* (13) 14 Cri L Jour 385 (386) : 9 Nag L R 81 \* (96) 2 Cri L Jour 66 (69) : 1905 Pun Re No. 12 Cr \* (82) 1882 Pun Re No. 30 Cr. p. 37 (38) (DB).

[But see (76) 1876 Pun Re No. 4 Cr p. 5 (6) (DB).]

[4] Magistrate making an order under S. 144 or S. 133 cannot try a person for an alleged offence under S. 188 of the Penal Code for disobedience of such order. (36) 37 Cri L Jour 936 (937) (DB) (Cal) \* (1900) 24 Mad 262 (264) (DB) \* (92-96) 1 Upp Bur Rul 178 (178) \* (Vol 3) 1916 Cal 69 (70) : 17 Cri L Jour 464 (DB).

[5] Provision in this section with reference to offences named in S. 195 applies to the abetment of such offences. (73) 7 Mad H CR App xxviii (xxix) \* (Vol 11) 1924 Rang 35 (36) : 1 Rang 549 : 25 Cri L Jour 229.

[6] Prohibition in this section is absolute. (Vol 21) 1934 Lah 545 (545) : 36 Cri L Jour 407.

[But see (Vol 11) 1924 Rang 35 (36) : 1 Rang 549 : 25 Cri L Jour 229.]

[7] Under the section a Judge whether of civil, revenue or criminal Court, becomes, except for the purpose of Chapter XXXIII (S. 444), a *de facto* complainant and by virtue of S. 556, such Judge cannot try the case. (Vol 9) 1922 Lah 30 (31) : 23 Cri L Jour 446.

[8] Before committing the accused under sub-section (2) Magistrate must make an enquiry into the offence in accordance with Chapter XVIII. (96) 4 Cri L Jour 418 (420) (Low Bur).

#### SECTION 488 — SYNOPSIS.

1. Scope.
2. Statutory liability under this chapter and personal law of parties.

make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding <sup>a</sup>[one hundred] rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered <sup>b</sup>[fails without sufficient cause] to comply with the order, any <sup>Enforcement of order.</sup> such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that, if such person offers to maintain his wife on condition of her living with him and she refuses to live with him, such Magistrate may consider any grounds of refusal stated to her, and may make an order under this section notwithstanding such offer, if he is satisfied there is just ground for so doing :

<sup>c</sup>[Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.]

(4) No wife shall be entitled to receive an allowance from her husband under this section she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section living in adultery, or that without sufficient reason she refuses to live with her husband, or if they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father as the case may be, or, when his personal attendance is dispensed with, in the presence of a pleader, and shall be recorded in the manner prescribed in the case of summons-cases :

Provided that if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any orders so made may be set aside for good cause shown on application made within three months from the date thereof.

d[ \* \* \* \* \* ]

<sup>d</sup>[(7)] The Court in dealing with applications under this section shall have power to make an order as to costs as may be just.

<sup>d</sup>[(8)] <sup>e</sup>[Proceedings under this section may be taken against any person] in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

[1882—S. 488; 1872—S. 536; 1861—S. 316.]

[a] Substituted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), S. 1: "fifty." [b] Substituted, *ibid.*, for "wilfully neglects." [c] Inserted, *ibid.* [d] The original sub-s was repealed and sub-s. (8) and (9) were re-numbered (7) and (8) respectively, *ibid.* [e] Substituted, for "The accused may be proceeded against."

#### Section 488—SYNOPSIS (*contd.*)

4. Nature of proceedings under the section.
5. Who can be ordered to pay maintenance.
6. "Having sufficient means."
7. Wife's right to maintenance.
8. Right of child to maintenance.
9. Child unable to maintain itself.
10. Neglect or refusal.
11. Nature of the order that can be passed.
12. Amount of maintenance.
13. Sub-section (2).
14. Enforcement of order.
15. When order cannot be enforced.
16. Warrant.
17. Imprisonment.
18. Offer to maintain.
19. proviso 4 to sub-section (3).
20. Grounds of wife's refusal to live with husband.

21. Wife living in adultery.
22. Living separately by mutual consent.
23. Cancellation of order.
24. Evidence and procedure.
25. Presence of parties.
26. Order as to costs.
27. Sub-section (8)—Forum.
28. Second application.
29. Whether a civil suit lies.
30. Further inquiry.
31. Insanity of the respondent.
32. Limitation.
33. Appeal.
34. Revision.

1. Scope.—[1] The object of the proceedings is to prevent vagrancy by compelling husband or father to support his wife or child or support itself. (Vol 28) 1941 Bom 267 (268) : 42

Section 488—Note 1 (*contd.*)

Jour 839 (DB) \* (Vol 12) 1925 All 73 (75) : 25 Cri L Jour 1249.

[2] The provisions of this chapter are only intended for the enforcement of a duty, a default in which may lead to vagrancy. (Vol 4) 1917 Lah 213 (215) : 18 Cri L Jour 811 : 1917 Pun Re No. 22 Cr. (Object of maintenance proceedings is not to punish a parent for his past neglect.)

[3] The powers of the criminal Courts under this chapter are limited in scope and orders passed thereunder are subject to any final adjudication that may be made by civil Court between the parties respecting their civil rights and status. (Vol 6) 1919 Bom 140 (140) : 43 Bom 885 : 20 Cri L Jour 687 (DB).

[4] The chapter applies also to European British subjects. (71) 1871 Pun Re No. 10 Cr. p. 11 (14) (DB).

[5] This section applies only to the wife or child of a person. (Vol 30) 1943 Sind 156 (156) : I L R (1943) Kar 102 : 44 Cri L Jour 787 (DB) \* (68) 1968 Pun Re No. 20 Cr. p. 50 (50) (DB).

[6] The power to make an order under this section is discretionary and the Magistrate is not bound to make such an order, even if the husband cannot establish any of the defences indicated by sub-s. (4) of this section. (Vol 31) 1944 Lah 392 (394) : 45 Cri L Jour 254.

2. Statutory liability under this Chapter and personal law of parties. — [1] The right to maintenance is a distinct statutory right, which the Legislature has recognized irrespective of the nationality or the creed of the parties. The only condition precedent is the existence of conjugal relationship in the case of a wife, which will have to be ascertained with reference to the personal law of the parties. (82) 5 All 226 (230) \* (Vol 17) 1930 Bom 178 (179) : 31 Cri L Jour 1110 (DB) \* (Vol 1) 1914 Low Bur 266 (266, 267) : 7 Low Bur Rul 270 : 16 Cri L Jour 39 \* (Vol 1) 1914 Upp Bur 30 (30) : 15 Cri L Jour 484.

[2] A right to maintenance, dependent on the personal law of the individual, is a right capable of being enforced in a civil suit. But that right is different from the statutory right to maintenance conferred by this section in every case in which a person having sufficient means neglects or refuses to maintain his wife or child. (Vol 31) 1944 Lah 392 (394) : 45 Cri L Jour 254.

[3] A woman married under the muta form of marriage governing the Mahomedans of the Shia sect is not entitled to maintenance under the Mahomedan law. But she is entitled to maintenance under S. 488 of the Code so long as she is the wife. (82) 8 Cal 736 (737, 738) (DB).

[4] Though according to Murumakkattayam law of Malabar, a child may be entitled in civil law to be maintained by the karnavan from the property of the tarwad or tawazi, the father is not absolutely absolved from the statutory liability under this section. (96) 19 Mad 461 (463) (DB) \* (99) 22 Mad 246 (247) (DB).

[5] A son of a Hindu by a Christian woman may not be entitled to maintenance under the Hindu law. But this section nevertheless, applies to the case. (08) 27 Mad 13 (15) (DB).

[6] A Buddhist monk may, under his personal law, be exempt from maintaining his child. But he is bound to maintain it under the Code. (Vol 10) 1923 Rang 131 (132) : 4 Upp Bur Rul 138 : 24 Cri L Jour 368.

[7] The non-payment of prompt dower to a Mahomedan wife may be a sufficient ground for her, under the Mahomedan law, to refuse her person to the husband, but is not, under the Code, a sufficient ground to refuse to live with her husband. (Vol 22) 1935 Oudh 285 (286) : 36 Cri L Jour 524.

[8] The right under the Code will not take away any

existing civil right. (08) 27 Mad 13 (15) \* (07) 7 L Jour 235 (235) : 30 Mad 493 (DB).

3. Who can pass an order under this section. — [1] Only the Magistrates specified in the section have jurisdiction to pass an order under it. A first Magistrate cannot send the case under S. 202 enquiry and report by a subordinate Magistrate of second class and pass orders on his report. (Vc 1946 Pat 104 (105) : 47 Cri L Jour 821 \* (05) 2 C Jour 421 (422) : 1905 Pun Re No. 29 Cr \* (88) 11 192 (200) (DB) \* (87) 2 Weir 617 (617).

4. Nature of proceedings under the section. [1] An application to take action under this section is not a complaint under S. 4 (1) (b) of the Code. (V. 1946 Pat 104 (105) \* (Vol 21) 1934 Lah 946 (946), Cri L Jour 792 \* (93) 16 Mad 234 (234) (DB) \* 7 Suth W R Cr 10 (11) (SB) \* (10) 11 Cri L Jour (157) (Mad) \* (Vol 18) 1929 Lah 82 (82) : 10 Lah 28 Cri L Jour 1002 (DB).

[See (Vol 12) 1925 Rang 140 (140) : 4 Upp Bur 138 : 25 Cri L Jour 111 \* (Vol 22) 1935 Rang (278) : 36 Cri L Jour 1391.]

[But see (91) 13 All 348 (350).]

[2] A person proceeded against under this section can be examined on oath as a witness as in a civil (Vol 15) 1928 Bom 347 (348) : 52 Bom 768 Cri L Jour 1051 (DB) \* (95) 18 All 107 (107) (Vol 16) 1929 Lah 32 (33, 34) : 10 Lah 406 : 29 Jour 1002 (DB) \* (Vol 5) 1918 Low Bur 116 (117) Cri L Jour 1019.

[3] A Magistrate has not got the powers of Court, such as that of the appointment of a guardian ad litem for a lunatic. (Vol 12) 1925 Mad 440 (444) Mad 388 : 26 Cri L Jour 701.

[4] The section provides a speedy and surer remedy against starvation of a deserted wife or when other substantial issues are raised as between parties, their remedy lies only in a civil Court. (V. 1944 Lah 392 (394) : 45 Cri L Jour 254 \* (1926) Mad 346 (346) : 27 Cri L Jour 350.

[See (Vol 30) 1943 Lah 59 (60) : 44 Cri L Jour (DB) \* (37) 1937 Mad W N 1127 (1129) \* (Vol 22) Rang 192 (194) : 36 Cri L Jour 1044.]

[5] The proceedings under the section are judicial proceedings of a criminal Court and are governed by the Code as such. (Vol 4) 1917 Cal 799 (799, 80 Cri L Jour 556 (DB) \* (68) 5 Bom H C R Cr 8 (DB).

5. Who can be ordered to pay maintenance. [1] The section does not contemplate proceeding against a whole family merely because the husband against whom the proceedings are taken is a member of a joint Hindu family. (Vol 27) 1940 Sind 222 (222) I L R (1941) Kar 58 : 42 Cri L Jour 278 (DB).

[2] A father-in-law is not liable under the section to maintain the daughter-in-law. (Vol 18) 1931 I (532) : 32 Cri L Jour 1175 \* (Vol 1) 1914 Lah (339) : 1914 Pun Re No. 12 Cr : 15 Cri L Jour (68) 5 Bom H C R Cr 81 (82) (DB).

[3] A person is not liable for the maintenance of child of another man. (Vol 13) 1926 Lah 532 (532) 7 Lah 365 : 27 Cri L Jour 610.

[4] The liability does not survive after the death of the father or husband and cannot be enforced against his assets even for arrears due during his life. (Vol 31) 1944 Pesh 6 (6) : 45 Cri L Jour 399 (Vol 1) 1914 Cal 172 (173) : 41 Cal 88 : 14 Cri 378 (DB) \* (04) 27 Mad 13 (15, 16) (DB).

[5] An undivided son in a joint Hindu family is exempt from liability on the ground that his interest in the family property is only a joint one. (Vol 2) Sind 222 (224) : I L R (1941) Kar 58 : 42 Cri 278 (DB) \* (90) 13 Mad 17 (17) (DB).

Section 498 (*contd.*)

6. "Having sufficient means". — [1] The word 'means' in S. 488 does not signify only visible means. It includes the capacity to earn money. (Vol 26) 1939 Lah 24 (24) \* (36) 37 Cri L Jour 86 (87) (Nag) \* (Vol 20) 1933 Rang 135 (140) : 11 Rang 226 : 34 Cri L Jour 415 (415B).

[2] If a man is healthy and able-bodied he must be taken to have the means to support his wife or child. (Vol 22) 1935 Lah 758 (759) : 37 Cri L Jour 207 \* (12) 13 Cri L Jour 162 (163, 164) : 1 Upp Bur Rul 90 \* (Vol 13) 1926 Mad 346 (346) : 27 Cri L Jour 350 \* (Vol 19) 1932 Bom 285 (286) : 56 Bom 260 : 33 Cri L Jour 625 (DB).

[See (Vol 31) 1944 Lah 392 (394) : 45 Cri L Jour 254.]

[3] Where a person has the capacity to earn, none of the following circumstances will, by itself, relieve him of his liability under the section.

[a] That he is an insolvent. (Vol 27) 1940 Bom 344 (345) : 42 Cri L Jour 101 (DB) \* (Vol 25) 1938 All 253 (254) : 39 Cri L Jour 553 : 1 L R (1938) All 486 \* (Vol 17) 1930 Bom 144 (145) : 31 Cri L Jour 609 (DB).

[b] That he is still young and unemployed. (Vol 13) 1926 Mad 346 (346) : 27 Cri L Jour 350.

[c] That he is indebted. (Vol 28) 1941 Mad 762 (762).

[d] That he has renounced the world and become a sadhu or a monk. (Vol 19) 1932 Bom 285 (286) : 56 Bom 260 : 33 Cri L Jour 625 (DB).

[4] A monk is liable to provide for maintenance if he is able-bodied and capable of earning money. (Vol 20) 1933 Rang 138 (141) : 11 Rang 226 : 34 Cri L Jour 815 (415B) \* (Vol 10) 1923 Rang 131 (132) : 4 Upp Bur Rul 138 : 24 Cri L Jour 363.

[5] Before an order for payment of maintenance allowance can be passed it must be proved that the person to be so ordered has sufficient means within the meaning of this section. ('82) 1892 All W N 179 (179).

[6] In the case of an able-bodied man the onus is on him to show that by accident, disease or the conditions of the labour market or the like he is not capable of earning anything. (Vol 10) 1923 Rang 131 (132) : 4 Upp Bur Rul 138 : 24 Cri L Jour 363 \* (Vol 19) 1932 Bom 285 (286) : 56 Bom 260 : 33 Cri L Jour 625 (DB) \* ('12) 13 Cri L Jour 162 (164) : 1 Upp Bur Rul 90.

7. Wife's right to maintenance. — [1] The right of a wife to maintenance is based upon the existence and continuance of the conjugal relation. It is a condition precedent to a claim under this section. ('82) 5 All 226 (229, 230).

[2] The factum of marriage is to be ascertained by reference to the personal law of the parties. (Vol 26) 1939 Rang 207 (208) : 40 Cri L Jour 653 \* ('87) 1937 Mad W N 735 (736) \* (Vol 12) 1925 Rang 280 (282) : 3 Rang 455 : 26 Cri L Jour 1613 (FB) \* ('72) 4 N W P H C R 128 (129) \* (Vol 18) 1926 All 426 (427) : 27 Cri L Jour 550 \* ('92-96) 1 Upp Bur Rul 54 (54). (Buddhist law—Re-marriage between divorced parties—Essentials.)

[3] The cessation of marriage is to be ascertained by reference to the personal law of the parties. ('82) 5 All 226 (229, 230) \* ('87) 14 Cal 276 (287, 289) (DB) \* (Vol 5) 1918 Low Bur 121 (122) : 9 Low Bur Rul 44 : 18 Cri L Jour 767 \* (Vol 20) 1933 Bom 21 (22, 23) : 34 Cri L Jour 140 (DB) \* (Vol 19) 1932 Bom 285 (285, 286) : 56 Bom 260 : 33 Cri L Jour 625 (DB) \* ('80) 5 Cal 558 (562) (DB).

[See (Vol 28) 1941 Mad 940 (941) \* ('04) 1 Cri L Jour 395 (997) (Low Bur).]

[4] Factum of marriage denied.—It must be proved satisfactorily that there was a valid marriage. (Vol 26) 1939 Lah 24 (24) \* (Vol 25) 1938 Mad 66 (66, 67) : 39 Cri L Jour 228 \* (Vol 21) 1934 Mad 323 (324) : 35 Cri L Jour 552 \* ('92) 16 Bom 269 (276) (DB) \* ('10) 11 Cri L Jour 384 (655) (Low Bur).

[5] The onus of proving factum of marriage is on the wife applying for an order under this section. (Vol 1) 1914 Upp Bur 30 (30) : 15 Cri L Jour 484.

[6] No order for maintenance can be made subsequent to the date of a valid divorce. (Vol 31) 1944 Mad 227 (227) : 45 Cri L Jour 672 \* (Vol 17) 1930 Bom 173 (179) : 31 Cri L Jour 1110 (DB) \* (Vol 26) 1939 Sind 179 (179, 180) : 1 L R (1939) Kar 659 : 40 Cri L Jour 814 (DB) \* (Vol 24) 1937 Rang 246 (247) : 38 Cri L Jour 913 \* (Vol 16) 1929 Oudh 527 (527) : 5 Luck 442 : 31 Cri L Jour 478 \* ('05) 2 Cri L Jour 40 (41) : 1905 Pun Re No. 5 Cr \* ('96) 19 All 50 (59, 60) (SB).

[7] Divorce subsequent to order for maintenance — Order becomes inoperative and unenforceable. ('47) 1947-1 Mad L Jour 70 (71) \* ('97) 19 All 50 (59, 60) (SB) \* ('11) 12 Cri L Jour 82 (83) (DB) (Low Bur) \* ('80) 5 Cal 558 (561) (DB) \* (Vol 1) 1914 Oudh 367 (368) : 17 Oudh Cas 260 : 15 Cri L Jour 646 (DB) \* ('83) 7 Bom 180 (182) (DB) \* ('82) 5 All 226 (232).

[8] The Magistrate is bound to inquire into a plea of divorce, if taken, in proceedings in enforcement of order for maintenance. (Vol 15) 1928 Bom 224 (225) : 29 Cri L Jour 908 (DB) \* ('80) 5 Cal 558 (562) (DB) \* ('96) 19 All 50 (59, 60) (DB) \* ('09) 10 Cri L Jour 502 (503) (DB) (Mad) \* (Vol 8) 1921 Nag 7 (9) : 17 Nag L R 92 : 22 Cri L Jour 633 \* ('94) 1894 Pun Re No. 21 Cr, p. 69 (74) (DB) \* ('93) Oudh S C No. 229, p. 485 (487).

[But see ('93) 15 All 143 (146, 147).]

[9] The wife's separate or independent means of support is not an element of consideration against her right of maintenance from the husband. Inability to support oneself is a condition attached by the section only to the child. ('04) 1 Cri L Jour 883 (886) (Low Bur) \* (Vol 22) 1935 Lah 24 (24) : 37 Cri L Jour 68 \* ('87) 1887 All W N 107 (107).

[See also (Vol 28) 1941 Mad 940 (941).]

[But see (Vol 31) 1944 Lah 392 (394) : 45 Cri L Jour 254.]

[10] The right of a wife is not affected by the fact that she has relations and friends to support her. (Vol 3) 1916 Mad 567 (568) : 16 Cri L Jour 80.

8. Right of child to maintenance.—[1] A child whether legitimate or illegitimate is entitled to maintenance from the father. A finding as to the factum of marriage between the alleged father and the mother of the child is not, therefore, absolutely necessary, though the fact of marriage may raise a strong presumption of paternity which is the sole question for decision. ('89) 16 Cal 781 (786) (DB).

[2] Mother validly married to another person.—This will not deprive the child of the right of maintenance from the putative father. ('94) 18 Bom 468 (471, 472) (DB) \* ('86) 2 Weir 619 (619).

[3] The right of the child to maintenance is not affected either by reason of the mother's bad character or divorce or by reason of her claim for maintenance being refused by a civil Court. (Vol 30) 1943 Mad 768 (768) : ILR (1944) Mad 392 : 45 Cri L Jour 266. (Bad character.) \* ('95) 18 All 107 (108) (Do.) \* ('06) 10 Cal W N cxii (cxii) (Do.) \* ('72-92) 1872-1892 Low Bur Rul 145 (146). (Divorce.) \* ('72-92) 1872-1892 Low Bur Rul 362 (363) (Do.) \* ('71) 17 Suth W R Cr 49 (49) (DB) (Claim refused by civil Court.)

[4] Maintenance order jointly passed in favour of child and its mother.—Considerations which would deprive mother of her right to maintenance would not prevent child from asking and recovering it. (Vol 25) 1938 Sind 151 (152) : 39 Cri L Jour 847 (DB) \* (Vol 25) 1939 Rang 314 (314) : 1939 Rang L R 741 : 40 Cri L Jour 827.

[5] An adopted child is not entitled to maintenance under this section. (Vol 24) 1937 Rang 370 (372) :

## Section 488—Note 8 (contd.)

39 Cri L Jour 14 \* (Vol 24) 1937 Mad 547 (547): ILR (1937) Mad 775: 38 Cri L Jour 602.

[6] The first proviso to sub-s. (3), relating to an offer to maintain, has reference only to wife and not to child and sub-ss. (4) and (5) disentitle only wife for maintenance if she refuses to live with her husband. (Vol 32) 1945 Bom 390 (393) (DB)\*('13) 14 Cri L Jour 597 (598) (Mad)\* (Vol 24) 1937 Rang 205 (206): 38 Cri L Jour 782\* (Vol 24) 1937 Mad 809 (809): 39 Cri L Jour 22 \* (Vol 19) 1932 Rang 183 (183, 184): 10 Rang 486: 33 Cri L Jour 918\* (Vol 12) 1925 Bom 259 (260): 49 Bom 562: 26 Cri L Jour 975 (DB).

[7] Offer by father to maintain child or fact that child is not left in his custody is not a valid ground for refusing maintenance. (Vol 32) 1945 Bom 390 (394) (111)\* (Vol 29) 1942 Mad 705 (706): 44 Cri L Jour 125 \* (Vol 28) 1941 Bom 267 (268): 42 Cri L Jour 639 (DB)\* (Vol 24) 1937 Lah 236 (236): 38 Cri L Jour 672\*('13) 14 Cri L Jour 597 (598) (Mad)\* (Vol 19) 1932 Rang 183 (183): 10 Rang 486: 33 Cri L Jour 918.

[8] Question as to whether father or mother or any other person is proper guardian of the person of the child is a matter for civil and not for criminal Courts. (Vol 32) 1945 Bom 390 (394) (DB)\* (Vol 29) 1942 Mad 705 (706): 44 Cri L Jour 125 \* (Vol 24) 1937 Lah 236 (236): 38 Cri L Jour 672 \* ('78) 4 Cal 374 (375) (DB). [See (Vol 28) 1941 Bom 267 (268): 42 Cri L Jour 639 (DB).]

[9] Offer by father to maintain child if it is left in his custody, will be relevant in considering question of refusal or neglect to maintain, and the Court will have to consider *bona fides* of such offer in its entirety. (Vol 12) 1925 Bom 259 (260, 261): 49 Bom 562: 26 Cri L Jour 975 (DB)\* (Vol 4) 1917 Lah 213 (215): 18 Cri L Jour 811: 1917 Pun Re No. 22 Cr.

[10] Application for maintenance of child made by mother who had custody of child — At hearing, father made offer to maintain child provided it was left with him — *Held* that such offer would not replace the inference of refusal or neglect on the part of father. ('05) 2 Cri L Jour 830 (832): 1905 Upp Bur Rul Cr P C 39.

[See however (Vol 4) 1917 Lah 213 (215): 18 Cri L Jour 811: 1917 Pun Re No. 22 Cr.]

[11] Child in the custody of its mother — Father demanding custody of the child as condition precedent to his giving maintenance to child — Father's conduct amounts to neglect or refusal under the section. ('36) 37 Cri L Jour 86 (87) (Nag)\* (Vol 20) 1933 Lah 969 (971): 14 Lah 770: 35 Cri L Jour 844 (DB) \* ('04) 1 Cri L Jour 599 (600) (DB) (Bom) \* (Vol 17) 1930 Lah 1043 (1044): 32 Cri L Jour 247\*('13) 14 Cri L Jour 597 (598) (Mad) \* (Vol 19) 1932 Rang 183 (183): 10 Rang 486: 33 Cri L Jour 918.

[But see ('94) 1894 Pun Re No. 18 Cr, p. 64 (65, 66) (DB)\*('71) 8 Beng L R App 19 (20) (DB).]

[12] Father having custody of his minor children whom he has been maintaining properly — Children going and living with their mother — Father wishing to have them and maintain them — There is no neglect or refusal on part of father. (Vol 2) 1915 Low Bur 133 (134): 16 Cri L Jour 217: 8 Low Bur Rul 105.

[13] Where it is in the best interests of the child that it should continue to remain with the mother, the father's demand for the custody of the child in a maintenance application is tantamount to refusal or neglect. (Vol 15) 1923 Bom 418 (419): 52 Bom 763: 28 Cri L Jour 1049 (DB)\* (Vol 12) 1925 Bom 259 (260, 261): 49 Bom 562: 26 Cri L Jour 975 (DB).

[But see (Vol 17) 1930 Lah 886 (889): 32 Cri L Jour 196.]

[14] *Bona fide* offer made by father to maintain child in case the child is given in his custody — He cannot be ordered to pay separate maintenance notwithstanding that child is a minor. ('94) 1894 Pun Re No. 18 Cr, p. 64 (65) (DB) \* (Vol 1) 1914 Lah 417 (417): 15 Cri L Jour 529 \* (Vol 13) 1926 Lah 536 (537): 27 Cri L Jour 1319.

[15] An application on behalf of child can be made by a guardian or mother — Mother describing herself in the application as mistress of the respondent — She can be allowed to amend the application into one by guardian or mother. (Vol 12) 1925 All 73 (74): 25 Cri L Jour 1249.

9. Child unable to maintain itself. — [1] A "child" means, without reference to the age of majority, a son or daughter, who is unable to maintain himself or herself, owing to his or her tender year. (Vol 30) 1943 Bom 48 (49): 1 L R (1943) Bom 38: 44 Cri L Jour 334 (DB) \* (Vol 26) 1939 Rang 67 (69): 40 Cri L Jour 241 \* (Vol 24) 1937 Rang 370 (372): 39 Cri L Jour 14 \* ('10) 11 Cri L Jour 427 (428) (Lah) \* (Vol 8) 1921 Pat 379 (379): 22 Cri L Jour 336.

[See (Vol 28) 1941 Mad 685 (685): 42 Cri L Jour 338.]

[2] The following cases hold that a person is a child for the purposes of this section till he attains the age of majority. (Vol 22) 1935 Cal 488 (489): 62 Ca 639: 36 Cri L Jour 1114 \* (Vol 1) 1914 Mad 594 (594) 595: 14 Cri L Jour 525: 37 Mad 565 \* (Vol 19) 193 Rang 94 (95): 33 Cri L Jour 495: 10 Rang 194 (DB) (Vol 9) 1922 Nag 249 (249): 23 Cri L Jour 167.

[3] Inability to maintain has reference to absence of sufficient physical and mental development in the child rendering it unable to earn its living by its own effort (Vol 28) 1941 Lah 92 (94): 42 Cri L Jour 439 (DB) ('13) 14 Cri L Jour 597 (598) (Mad).

[4] A son or a daughter aged 16, 17 or 18 years with some education cannot claim maintenance order to continue education unless, from the circumstances and status of the family, a reasonable course education is indispensable in order to earn a living (Vol 5) 1918 Low Bur 28 (28): 19 Cri L Jour 160 (Vol 10) 1923 Rang 45 (45): 24 Cri L Jour 590\* (Vol 1933 Lah 1026 (1028): 35 Cri L Jour 473 \* (Vol 1941 Sind 214 (215): 1 L R (1941) Kar 417: 43 Cr Jour 290 (DB).

[5] Capacity of the child to earn a complete livelihood by itself must be established. (Vol 12) 1925 R 197 (198): 2 Rang 682: 26 Cri L Jour 535.

[6] A child, possessing an independent and a legally enforceable right to maintenance from another family is able to maintain itself. (Vol 11) 1924 Mad 549 (549) 25 Cri L Jour 370 \* (Vol 20) 1933 Mad 794 (795): Cri L Jour 1159.

[See (Vol 28) 1941 Mad 940 (941).]

[But see ('13) 14 Cri L Jour 597 (598) (Mad).]

[7] Ability of mother to maintain the child is reason to refuse maintenance to the child. (Vol 1) 1 Upp Bur 1 (1): 15 Cri L Jour 278.

[8] Prior valid provision made in regard to maintenance of a child — Court ought to consider how far benefit of prior arrangement is actually available to child at the time of the order. ('97-1901) 1 Upp Bur 106 (106).

[9] A daughter does not, on marriage, *ipso facto* lose her right of maintenance from the father; if husband is too poor to maintain her or for any reason she is unable to maintain herself, the father continues liable. (Vol 12) 1925 Mad 491 (492): 48 503: 26 Cri L Jour 732.

[10] In deciding on the ability of a daughter to maintain herself, prostitution as a means of livelihood



**Section 488—Note 3 (contd.)**

will not be taken into consideration. (Vol 1) 1914 Mad 594 (395) : 37 Mad 565 : 14 Cri L Jour 525.

[11] Child labour ought not to be encouraged — Child aged eleven years capable of earning by its own labour about Rs. 2 a month — This should not weigh against the child in deciding liability of father to pay for its maintenance. (Vol 12) 1925 Rang 197 (198) : 2 Rang 682 : 26 Cri L Jour 535.

10. Neglect or refusal. — [1] No order for maintenance can be passed unless neglect or refusal to maintain is proved. (Vol 30) 1943 Lah 59 (60) : 44 Cri L Jour 425 (DB) \* (Vol 28) 1941 Pat 444 (446) : 42 Cri L Jour 347 \* (41) 1941 Nag L Jour 622 (623) \* (Vol 24) 1937 Rang 246 (248) : 38 Cri L Jour 913 \* (92) 16 Bom 269 (276) (DB) \* (Vol 12) 1925 Oudh 294 (294) : 27 Oudh Cas 271 : 26 Cri L Jour 128 \* (Vol 12) 1925 Rang 205 (206) : 26 Cri L Jour 831 \* (74) 22 Suth W R Cr 30 (31) (DB) \* (35) 36 Cri L Jour 1457 (1458) (DB) (Sind) \* (Vol 1) 1914 Lah 590 (590, 591) : 16 Cri L Jour 86. (No conclusive proof of neglect or refusal.)

[2] Order directing payment of maintenance if there should be neglect or refusal in the future is illegal. (Vol 13) 1926 Lah 480 (480) : 7 Lah 313 : 27 Cri L Jour 556.

[3] Neglect to maintain is sufficient to justify an order—Formal refusal to maintain is not necessary. (Vol 1) 1914 Upp Bur 1 (1) : 15 Cri L Jour 278 \* (Vol 11) 1924 Mad 624 (624) : 25 Cri L Jour 94.

[4] Wife leaving husband of her own accord — Husband issuing notice forbidding her to return to his house — Such notice is sufficient refusal to maintain. (Vol 5) 1918 Sind 25 (26) : 12 Sind L R 90 : 20 Cri L Jour 98 (D B).

[5] Neglect or refusal may be inferred from words or conduct. (707) 5 Cri L Jour 334 (336) (D B) (Bom).

[See (Vol 27) 1940 Sind 222 (223) : I L R (1941) Kar 58 : 42 Cri L Jour 278 (D B).]

[6] Neglect or refusal may be implied in the denial by father of his paternity of a child. (13) 14 Cri L Jour 303 (304) : 6 Sind L R 208 (D B).

[7] Order for alimony or a decree of a civil Court directing a certain sum to be paid for maintenance is not equivalent to maintaining the wife. (Vol 13) 1926 Mad 59 (61) : 26 Cri L Jour 1597 : 49 Mad 891 \* (Vol 25) 1938 Bom 499 (499, 500) : 40 Cri L Jour 91 (D B).

[8] Mere agreement to maintain wife does not amount to actual maintenance — Agreement not acted upon—Magistrate finding actual neglect or refusal at the time of application must make order for maintenance. (Vol 19) 1932 Cal 698 (699) : 59 Cal 1229 : 33 Cri L Jour 684.

[9] A compromise by parties agreeing as to the rate of maintenance may, by itself, be sufficient proof of neglect or refusal. (Vol 19) 1932 Lah 349 (351) : 33 Cri L Jour 488 (D B).

[10] Language of this section is inconsistent with capacity of a wife to make a contract absolving husband from the statutory liability which arises immediately on proof of neglect or refusal to maintain at the time of the application. (05) 3 Cri L Jour 428 (430) : 1905 Upp Bur Rul Cr P C 45.

[11] Agreement or compromise between husband and wife pending disposal of applications under the section — Petition must be dismissed — Magistrate cannot pass order in terms of compromise. (Vol 32) 1945 Pesh 20 (20, 21) \* (Vol 30) 1943 Lah 59 (60) : 44 Cri L Jour 425 (D B) \* (Vol 17) 1930 Lah 524 (525) : 31 Cri L Jour 1179 \* (Vol 20) 1933 Cal 776 (777) : 35 Cri L Jour 501. [See (Vol 5) 1918 Mad 481 (484) : 18 Cri L Jour 474 (D B).]

[12] Compromise relating only to rate of maintenance and nothing else — Power of the Magistrate to

pass order in terms of such compromise is not taken away. (Vol 28) 1941 Cal 558 (558, 559) : 42 Cri L Jour 894 (D B) \* (Vol 28) 1941 Rang 46 (48) : 1940 Rang L R 151 : 42 Cri L Jour 312 \* (37) 1937 Mad W N 640 (640) \* (Vol 22) 1935 All 294 (295) : 37 Cri L Jour 9 \* (Vol 20) 1933 Oudh 119 (121) : 34 Cri L Jour 744 \* (Vol 18) 1931 Lah 574 (575) : 32 Cri L Jour 993 : 13 Lah 313. [See also (Vol 27) 1940 Cal 398 (399) : 41 Cri L Jour 789 (D B).]

[13] Essential part of the compromise should be that an order must be passed recognizing and awarding the rate agreed to. (Vol 18) 1931 Mad 185 (185) : 32 Cri L Jour 688.

[14] Compromise embodying matters beyond the scope of this section — It cannot be given effect to by Magistrate—Proper remedy of the party lies in civil Court for enforcement of terms of the compromise. (Vol 28) 1941 Rang 46 (48) : 42 Cri L Jour 312 : 1940 Rang L R 151 \* (Vol 19) 1932 Lah 349 (351) : 33 Cri L Jour 488.

[15] Compromise cannot be given effect to by the Magistrate even so far as the rate of the maintenance is concerned, if that part of the compromise is such as cannot be enforced separately and without regard to the other conditions of the compromise which lie outside the scope of this section. (Vol 28) 1941 Rang 46 (48) : 1940 Rang L R 151 : 42 Cri L Jour 312 \* (Vol 21) 1934 Lah 864 (865) : 16 Lah 420 : 36 Cri L Jour 193.

[See also (Vol 23) 1936 Nag 228 (230) : 38 Cri L Jour 170 : I L R (1937) Nag 230.]

[But see (Vol 20) 1933 Cal 675 (675, 676) : 35 Cri L Jour 606 (D B).]

[16] Order for maintenance passed by Magistrate with consent of husband and wife on certain conditions — Conditions obeyed—Order can be enforced by criminal Court—Conditions not obeyed—Magistrate may refuse to enforce order for maintenance. (Vol 24) 1937 All 115 (117) : 38 Cri L Jour 312 : I L R (1937) All 430.

[17] Other conditions amounting to no more than expression of a wish or a desire — Part relating to rate of maintenance may form the basis of enforceable order. (Vol 20) 1933 Oudh 122 (123) : 34 Cri L Jour 238.

[18] Where a husband who has neglected his wife for a number of years succeeds by means of a subterfuge in making her live in his house for a short-while during the pendency of an application for maintenance, this is no ground for rejecting her application. (Vol 26) 1939 Lah 533 (533, 534) : 41 Cri L Jour 107.

[19] The obligation of a father to maintain his child is a statutory obligation and the parties cannot contract themselves out of it. (Vol 24) 1937 Rang 246 (247) : 38 Cri L Jour 913 \* (01-02) 1 Low Bur Rul 126 (126) \* (88) 2 Weir 648 (649).

[20] Present neglect or refusal to maintain the child made out — Liability thereupon arising against father cannot be resisted on mere ground that, under a prior agreement or compromise between the father and the mother or guardian of the child a provision had been made for the maintenance of the child. (37) 1937 Mad W N 985 (986) \* (85) 1885 Pun Re No. 13 Cr, p. 26 (26, 27) (D B).

[21] A compromise entered into by a mother or lawful guardian of the child, acting *bona fide* and for the child's benefit, is not conclusive against the child, where it has ceased at the time of the application to be available for the child's maintenance. (97-01) 1 Upp Bur Rul 108 (109) \* (92-96) 1 Upp Bur Rul 62 (63).

[But see (85) 2 Weir 631 (632).]

[22] Lump sum paid for maintenance of a child—Mother finding that she has nothing left of this sum — She can apply to Court for fresh order of maintenance. (Vol 24) 1937 Rang 246 (248) : 38 Cri L Jour 913.



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[23] It is for the Magistrate to consider and make inquiry into the present circumstances of the child and need for its present maintenance. ('92-96) 1 Upp Bur Rul 55 (57, 58).

[24] The section enforces a continuing obligation on the father to maintain his child. (1900-02) 1 Low Bur Rul 189 (189).

## 11. Nature of the order that can be passed.—

[1] Orders of the following descriptions are illegal as offending the terms of the section:

(a) An order directing annual payments or payment in kind, in whole or in part. (Vol 11) 1924 Bom 332 (332) : 25 Cri L Jour 965. (Mixed payment in kind and in cash every year.) (Vol 19) 1932 Nag 183 (184) : 28 Nag L R 284. (Cash and grain—Allowance in grain is bad.) (Vol 7) 1920 Lah 223 (223, 224) : 21 Cri L Jour 612. (Do.) (84) 2 Weir 627 (627). (Payment of maintenance in grain.) (Vol 12) 1925 Lah 142 (142) : 25 Cri L Jour 1271. (Grains at each harvest and a separate house.) (97) 2 Weir 634 (634). (Where price of cloth was fixed in the *rasi*, Court gave effect to it by adding it to the amount of maintenance.)

(b) Order providing for anything other than maintenance, such as a house. (Vol 30) 1943 Lah 59 (60) : 44 Cri L Jour 425 (DB) (28) 29 Cri L Jour 909 (910) (Lah) (83) 6 Mad 283 (284) (SB).

(c) An order demanding security for due performance or making an anticipatory provision for imprisonment in case of default. ('75) 24 Suth W R Cr 72 (72) (DB) (70) 5 Mad H C R App xxxiv (xxxiv).

(d) An order directing surrender of the custody of the child from one person to another. ('79) 4 Cal 374 (375) (DB).

(e) A conditional or qualified order. (Vol 16) 1929 Lah 56 (57) : 29 Cri L Jour 895 (29) 30 Cri L Jour 51 (51) (Lah) (01) 2 Weir 634 (634) (92-96) 1 Upp Bur Rul 59 (59).

(f) An order directing payment of the allowance into the public treasury. ('82) 2 Weir 627 (627).

(g) An order directing attachment of moveables of husband's joint Hindu family and holding joint property liable for maintenance. (Vol 27) 1940 Sind 222 (224) : 42 Cri L Jour 278 : 1 L R (1941) Kar 58 (DB).

12. Amount of maintenance.—[1] In fixing the rate of maintenance, no luxury should be allowed; but the necessities should be provided for according to the status in life of the applicant and the means of the respondent. (Vol 31) 1944 Lah 392 (394) : 45 Cri L Jour 254 (Vol 28) 1941 Sind 214 (216) : 1 L R (1941) Kar 417 : 43 Cri L Jour 290 (DB) (Vol 17) 1930 Bom 348 (350) : 54 Bom 548 : 31 Cri L Jour 1157 (DB) (Vol 13) 1926 Rang 88 (88) : 27 Cri L Jour 725 (86) 1866 Pun Re No. 55 Cr, p. 62 (62).

[See however (Vol 30) 1943 Mad 342 (343) : 44 Cri L Jour 522 (Vol 24) 1937 Rang 370 (372) : 39 Cri L Jour 14.]

[2] In the case of a child maintenance includes education of the child, that is to say, the minimum amount of education which the conventions of the country call for. (Vol 26) 1939 Rang 95 (95, 96) : 1938 Rang L R 673 : 40 Cri L Jour 440. (11 Cr L Jour 40 : 1 Upp Bur Rul Cr 17, Dissent.) (Vol 28) 1941 Sind 214 (215) : 1 L R (1941) Kar 417 : 43 Cri L Jour 290 (DB).

[But see (Vol 12) 1925 All 73 (75) : 25 Cri L Jour 1249 : 46 All 924.]

[3] Maintenance under this section does not include college education. (Vol 20) 1933 Lah 1026 (1028, 1029) : 35 Cri L Jour 473.

[4] The Court can order a maximum sum of Rs. 100, for all admissible items of maintenance. No specific or other payment in the shape of fees or medical expenses

or the like should be ordered. (Vol 5) 1918 Low Bur 96 (97) (Vol 13) 1926 Mad 59 (61) : 49 Mad 891 : 26 Cri L Jour 1597 (Vol 20) 1933 Oudh 122 (123) : 34 Cri L Jour 238.

[5] The maximum of Rs. 100 is allowable in respect of each person entitled to maintenance. The words "in the whole" do not mean that the maximum fixed in the section is for all the dependents of a person put together. (Vol 25) 1938 Mad 721 (721, 722) : 1 L R (1938) Mad 729 : 39 Cri L Jour 865 (DB). (1937 Mad W N 1127, Reversed.) (Vol 26) 1939 Rang 151 (151) : 40 Cri L Jour 537 (11) 12 Cri L Jour 583 (584) (Low Bur) (Vol 20) 1933 Cal 406 (406) : 34 Cri L Jour 590 (DB) (Vol 13) 1926 Mad 59 (61) : 49 Mad 891 : 26 Cri L Jour 1597.

[But see (Vol 14) 1927 Bom 46 (47) : 28 Cri L Jour 51 (DB).]

[6] Wife applying for order to direct her husband to pay more than Rs. 100 a month as maintenance for herself—Magistrate is bound to deal with the application on its merits, though he cannot make an order for payment of more than Rs. 100 a month. ('37) 1937 Mad W N 1127 (1129). (Reversed on another point in (Vol 25) 1938 Mad 721 : 1 L R (1938) Mad 729 : 39 Cri L Jour 865.)

[7] The monthly allowance must be a fixed amount. An order granting a prospective or a progressively increasing rate of maintenance is illegal. ('85) 12 Cal 535 (335) (DB) (90) 14 Mad 398 (399) (DB) (70) 2 N W P H C R 454 (455).

[8] The Maintenance Orders Enforcement Act of 1921 (English Act) confers no jurisdiction on Magistrates in India to award any sum they think fit as maintenance payable to wives and children who are in India but whose husbands and fathers are in England. The jurisdiction of the Magistrate is that conferred on him by this section and his power is limited by this section. ('37) 1937 Mad W N 1127 (1128, 1129). (Reversed on another point in (Vol 25) 1938 Mad 721 : 1 L R (1938) Mad 729 : 39 Cri L Jour 865.)

13. Sub-section (2). — [1] Under the section the Court can grant maintenance even from the date of the application if it thinks fit. (Vol 27) 1940 Sind 222 (224) : 42 Cri L Jour 278 : 1 L R (1941) Kar 58 (DB).

[2] In no case can the Court grant maintenance for a period prior to the date of application. (Vol 15) 1928 Mad 899 (900) : 29 Cri L Jour 453 (Vol 13) 1926 Lah 532 (532, 533) : 7 Lah 365 : 27 Cri L Jour 610 (70) 1870 Pun Re No. 5, Cr, p. 10 (10) (DB) (92-96) 1 Upp Bur Rul 61 (61). (Maintenance order from the date of child's birth — Illegal.)

[3] An order to pay allowance in advance from the date of order is not illegal. ('83) 1883 Rat 189 (189) (DB).

14. Enforcement of order. — [1] The words "sufficient cause" cover all possible considerations. (Vol 30) 1943 Mad 416 (417) : 1 L R (1944) Mad 69 : 44 Cri L Jour 540 (Vol 23) 1936 Nag 228 (231) : 38 Cri L Jour 170 : 1 L R (1937) Nag 230 (Vol 19) 1925 Mad 715 (716) : 26 Cri L Jour 953 (Vol 19) 1932 Rang 94 (95) : 10 Rang 194 : 33 Cri L Jour 495 (DB).

[2] The Magistrate must enquire and come to a judicial finding about any cause shown before ordering execution. (Vol 27) 1940 Mad 697 (698) : 1 L R (1940) Mad 692 : 41 Cri L Jour 735 (DB) (Vol 23) 1936 Nag 228 (231) : 38 Cri L Jour 170 : 1 L R (1937) Nag 230 (70) 1902 Pun Re No. 86 Cr, p. 109 (110) (DB) (Vol 12) 1925 Mad 715 (716) : 26 Cri L Jour 953.

[3] Sub-section (8) contains no restriction that order for payment of maintenance should be enforced only in the district where the person ordered to pay lives. (Vol 22) 1935 Rang 407 (407) : 13 Rang 289 : 37 Cri L Jour 91

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(DB) \* (Vol 2) 1915 Low Bur 58 (59) : 7 Low Bur Rul 116 : 15 Cri L Jour 701.

[4] An order lawfully made by a Magistrate under this section, whether on compromise or otherwise, must be deemed to be enforceable in the manner provided by sub-s. (3). (Vol 28) 1941 Cal 553 (559) : 42 Cri L Jour 894 (DL).

[5] On default, only the husband or the father can be compelled to pay the amount ordered. A mortgagee of his property cannot be ordered to pay out of the income of the property. (Vol 18) 1931 Cal 644 (645) : 33 Cri L Jour 93.

[6] An application for the enforcement of the order under this section is chargeable with a court-fee of eight annas under Article 1 (b), Sch. II of the Court-fees Act, 1870. ('99) 1899 Rat 488 (488).

[7] The amount due in cases under this section can be realized in the same manner as fines and if immovable property is to be attached, the warrant should be sent to the Collector in accordance with S. 386. (Vol 28) 1941 Lah 360 (361) : 43 Cri L Jour 61.

15. When order cannot be enforced. — [1] On divorce the marital relationship is at an end. The prior order for payment of maintenance cannot be enforced. ('82) 5 All 226 (230, 231) \* (Vol 24) 1937 Rang 246 (247) : 33 Cri L Jour 913 \* ('33) 1933 Mad W N 734 (735) \* ('73) 10 Beng L R App 33 (35) (DB).

[2] On apostasy of wife, marriage dissolved — Order for maintenance can no longer be enforced. See (Vol 6) 1919 Low Bur 150 (150) : 9 Low Bur Rul 206 : 19 Cri L Jour 799.

[3] When a child for whose support an order has been made under the section is declared by a civil Court not to be the child of the person ordered against, further effect should not be given to the order for maintenance. (Vol 10) 1923 Mad 707 (707) : 46 Mad 721 : 24 Cri L Jour 720.

[4] Order for maintenance of two or more children — One of the children who attains majority proved to maintain himself — Order can be enforced in respect of the remaining children. (Vol 26) 1939 Rang 67 (69) : 40 Cri L Jour 241.

[5] Order of adjudication as an insolvent of a husband against whom an order for maintenance has been passed is not a complete bar to realisation of maintenance under this section. (Vol 27) 1940 Cal 569 (569) : 42 Cri L Jour 250 : I L R (1940) 2 Cal 525 (DB) \* (Vol 27) 1940 Bom 344 (345) : 42 Cri L Jour 101 (DB) \* (Vol 27) 1940 Mad 697 (698) : I L R (1940) Mad 692 : 41 Cri L Jour 785 (DB) \* (Vol 22) 1935 Lah 758 (759) : 37 Cri L Jour 207.

[But see (Vol 11) 1924 Cal 230 (231) : 50 Cal 867 : 25 Cri L Jour 1088 (DB).]

[6] Protection order given to an insolvent husband under the Presidency Towns Insolvency Act or the Provincial Insolvency Act does not protect him from being proceeded against under sub-section (3) of this section. (Vol 27) 1940 Bom 344 (344, 345) : 42 Cri L Jour 101 (DB) \* (Vol 27) 1940 Mad 697 (697, 699) : I L R (1940) Mad 692 : 41 Cri L Jour 785 (DB) \* (Vol 25) 1938 All 258 (254) : I L R (1938) All 486 : 39 Cri L Jour 553.

[See however (Vol 28) 1936 Mad 793 (794) : 37 Cri L Jour 1129 : I L R (1937) Mad 90.]

[7] The illegality of an order awarding maintenance is not a valid ground against its execution so long as the order is not duly set aside. (Vol 18) 1931 Lah 574 (575) : 32 Cri L Jour 993 : 13 Lah 313 \* (Vol 13) 1926 Bom 109 (108) : 49 Bom 906 : 37 Cri L Jour 652 (DB).

[See also (Vol 27) 1940 Cal 898 (899) : 41 Cri L Jour 799 (DB).]

[8] Compromise between the parties after the order for maintenance is passed is a sufficient ground for the Magistrate to refuse to enforce the order if moved to do so. (Vol 24) 1937 Pesh 45 (46) : 38 Cri L Jour 614.

[But see (Vol 19) 1932 Lah 115 (116) : 33 Cri L Jour 121.]

16. Warrant. — [1] Single application for recovery of arrears for several months — Single warrant in respect of the whole of arrears due at the time of the issue of the warrant is contemplated and not a separate warrant for the arrears due for each month. ('98) 25 Cal 291 (293) (DB) \* ('80) 1880 Pun Re No. 31 Cr, p. 79 (79) (DB) \* ('74) 7 Mad H C R App xxxvii (xxxviii).

[See however ('71) 6 Mad H C R App xxii (xxiii).]

[2] The officer entrusted with the execution of a warrant for levying the amount due can open an inner door of the house of the person proceeded against. ('89) 1889 Rat 481 (482) (DB).

[3] Exemption available under S. 135, Civil P. C. in favour of certain persons from arrest under a civil process is not applicable to a process under this section. (Vol 16) 1929 Lah 785 (785) : 30 Cri L Jour 788.

[4] The provisions as to exemption from attachment under S. 60, Civil P. C. do not apply to a process under this section. (Vol 24) 1937 Lah 367 (367).

17. Imprisonment. — [1] When execution is to be levied in respect of an accumulated arrears due for more than one month, the Court can pass a sentence of one month's imprisonment in respect of each month's arrears remaining unpaid; in other words, a cumulative punishment of more than one month's imprisonment is within the meaning of this section. (Vol 28) 1941 Rang 247 (248) : 1941 Rang L R 403 : 43 Cri L Jour 30 \* (Vol 28) 1941 Rang 135 (137) : 1941 Rang L R 65 : 42 Cri L Jour 690 (DB) \* (Vol 25) 1938 All 386 (387, 388) : 39 Cri L Jour 720 : I L R (1938) All 750 (FB). (9 All 240, Overruled.) \* ('97) 20 Mad 3 (5) (DB) \* ('98) 25 Cal 291 (293) (DB) \* ('77) 1877 Pun Re No. 12 Cr, p. 27 (28) (FB) \* (Vol 22) 1935 Lah 758 (760) : 37 Cri L Jour 207.

[2] The imprisonment under the section may be simple or rigorous. ('87) 9 All 240 (243) (S B). (Overruled on another point in (Vol 25) 1938 All 386 : I L R (1938) All 750 : 39 Cri L Jour 720 (F B).) \* (Vol 22) 1935 Lah 758 (761) : 37 Cri L Jour 207.

[3] The person sentenced under this section is not a civil debtor and the person at whose instance he is sentenced cannot be ordered to pay subsistence allowance. (Vol 22) 1935 Lah 758 (760, 761) : 37 Cri L Jour 207.

[4] The imprisonment awardable under the section is not intended as a punishment but for the enforcement of the order for the realization of the allowance. Therefore, on payment of arrears into Court the defaulter is entitled to a release. ('95) 22 Cal 291 (296, 297) (DB).

[5] On application by wife to the Court for recovery of the arrears of maintenance, husband depositing amount into Court — He cannot be imprisoned for having wilfully neglected or failed without sufficient cause to comply with the order. ('81) 1881 All W N 19 (20).

[6] An order for imprisonment can be passed only when a warrant had been previously issued for the recovery of the arrears due and the amount remains unpaid after the execution of the warrant. (Vol 28) 1941 Rang 247 (248) : 1941 Rang L R 403 : 43 Cri L Jour 30 \* ('97-01) 1 Upp Bur Rul 111 (111).

[7] A person cannot be sentenced a second time with imprisonment for a default for which he has already undergone imprisonment. (Vol 28) 1941 Rang 247 (249).

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1941 Rang L R 403 : 43 Cri L Jour 30 \* (Vol 19)  
1932 Rang 93 (94) : 10 Rang 176 : 33 Cri L Jour 554.

[8] A second class Magistrate cannot pass a sentence of imprisonment for breach of an order under this section. (Vol 22) 1935 Mad 572(572) : 36 Cri L Jour 830.

[But see (Vol 28) 1941 Rang 247 (249) : 1941 Rang L R 403 : 43 Cri L Jour 30.]

18. Offer to maintain. — [1] An offer by the husband to maintain his wife might be made in the course of the proceedings before an order for maintenance is passed. ('09) 9 Cri L Jour 25 (31, 32) : 4 Low Bur Rul 340 (SB).

[2] The Magistrate must ask for the reasons of the wife's refusal and an omission to enquire into her reasons vitiates the order. (Vol 30) 1943 Mad 647 (647) : 45 Cri L Jour 91 \* (Vol 20) 1933 Pesh 101 (101) : 35 Cri L Jour 491 \* (Vol 21) 1934 Lah 946 (946, 947) : 36 Cri L Jour 792 \* (Vol 17) 1930 Lah 464 (465) : 32 Cri L Jour 469 \* ('83) 1883 All W N 233 (233) \* ('09) 9 Cri L Jour 501 (501, 502) (Mad) \* ('67) 8 Suth W R Cr 67 (67) (DB).

[3] An application by the wife cannot be dismissed on the mere offer of the husband to maintain her without taking any evidence or giving any finding as to the neglect or refusal to maintain the wife or as to the sufficiency or otherwise of the wife's refusal to live with the husband. (Vol 26) 1939 Sind 80 (80) : 40 Cri L Jour 496 : I L R (1939) Kar 383 (DB) \* (Vol 7) 1920 Lah 201 (202) : 22 Cri L Jour 149.

[4] The following cases hold that though the word "section" is used in the first proviso under sub-s. (3), it is a proviso only to that sub-section and not to sub-s. (1) and that an order for maintenance under sub-s. (1) is valid though the Magistrate has not given a specific finding that the wife's reasons for refusing the husband's offer to take her back are sufficient. (Vol 30) 1943 Lah 59 (60) : 44 Cri L Jour 425 (DB) \* (Vol 30) 1943 Lah 223 (224) : 44 Cri L Jour 802.

[5] An offer by the husband to maintain his wife must be *bona fide*. (Vol 17) 1930 Bom 348 (350) : 54 Bom 548 : 31 Cri L Jour 1157 (DB) \* (Vol 12) 1925 Lah 142 (142) : 25 Cri L Jour 1271.

[6] An offer made with the object of escaping the obligation is not *bona fide*. (Vol 18) 1931 Lah 561 (562) : 32 Cri L Jour 1251 \* (Vol 13) 1926 Lah 353 (353, 354) : 27 Cri L Jour 507 \* ('05) 2 Cri L Jour 249 (251) (Kathiawar).

[7] An offer made with a view merely to resist the claim for maintenance cannot be *bona fide*. (Vol 25) 1938 Rang 25 (26) : 39 Cri L Jour 287 (DB) \* ('12) 13 Cri L Jour 55 (56) (Upp Bur) \* (Vol 19) 1932 Nag 183 (184) : 28 Nag L R 284.

[8] Husband marrying a second wife though not a just ground for first wife's refusal to live with him is a factor to be taken into account in considering whether the husband's offer to maintain the wife is really *bona fide* or not. (Vol 27) 1940 Mad 292 (292) : 41 Cr L J 532.

[9] The Code does not seek to enforce conjugal rights; the husband is, therefore, not bound to maintain the wife as a wife. (Vol 20) 1933 Mad 688 (688) : 56 Mad 913 : 34 Cri L Jour 950 \* ('72) 16 Bom 269 (274, 275) (DB).

[See also (Vol 12) 1925 All 73 (75) : 25 Cri L Jour 1249.]

[10] The wife cannot exact a promise of sexual fidelity before she returns to live with the husband. (Vol 24) 1937 Mad 794 (794) : 39 Cri L Jour 24.

[11] The husband cannot be compelled to cohabit with his wife. (Vol 9) 1922 Mad 209 (209) : 23 Cri L Jour 336.

[12] The following cases hold that the wife must be

part of the family. ('53) 6 Mad 371 (372) (DB) \* (Vol 1928 Bom 418 (419) : 52 Bom 763 : 29 Cri L Jour 1 (DB).

[13] Offer to give separate residence to the wife is not to be offered within the section. (Vol 11) 1924 I 207 (298) : 25 Cri L Jour 453.

19. Proviso 2 to sub-section (3). — [1] Application made before the end of a year from the date which the amount fell due—Application closed—If application made after the expiry of the year — If that Court could issue process for the amount for whole period. (Vol 22) 1935 Rang 407 (408) : 13 R 289 : 37 Cri L Jour 91.

[See also (Vol 25) 1938 Sind 151 (152) : 39 Cri L J 347 (DB).]

[2] A wife retains the right to maintenance under the order though she has not applied for maintenance within one year of the order of maintenance. (Vol 1939 Sind 180 (180) : 40 Cri L Jour 776 : I L R (19 Kar 674 (DB).

20. Grounds of wife's refusal to live with husband. — [1] A wife has no right to refuse an offer by the husband to allow her to live with him and claim separate maintenance unless she can make out proper grounds in that behalf. (Vol 30) 1943 Lah 59 (60) : 44 Cri L Jour 425 (DB) \* (Vol 28) 1941 Nag 175 (17 I L R (1941) Nag 262 : 42 Cri L Jour 647 \* ('29) Cri L Jour 861 (862) (Lah).

[2] The section empowers the Magistrate to order maintenance to a wife refusing to live with her husband if there is just ground for doing so. ('07) 5 Cri L J 334 (336) (DB) (Bom) \* ('12) 13 Cri L Jour 55 (Upp Bur).

[But see ('28) 29 Cri L Jour 909 (910) (Lah).]

[3] Ill-treatment by husband is a good ground for refusal by wife. (Vol 27) 1940 Mad 292 (292) : 41 Cri L Jour \* (Vol 27) 1940 Pat 242 (243) : 41 Cri L Jour 718 \* (Vol 1920 Lah 201 (201, 202) : 22 Cri L Jour 149 \* (Vol 1926 Lah 353 (353) : 27 Cr L Jour 507 \* (Vol 22) 1 Rang 192 (194) : 36 Cri L Jour 1044 \* (Vol 20) 1 Nag 3 (3) : 34 Cri L Jour 123 : 28 Nag L R 28. (Vol 11) 1924 All 784 (785) : 46 All 877 : 25 Cri L J 1246. (Notwithstanding that the husband has a defence for restitution of conjugal rights.)

[4] Irremediable breach between husband and wife making it impossible for wife to remain with the husband, after a separation for several years, without further trouble and disputes — Held a good ground for wife's refusal. (Vol 18) 1931 Lah 561 (562) : 32 Cri L J 1251 \* (Vol 1) 1914 Lah 185 (186) : 15 Cri L Jour 56.

[See (Vol 11) 1924 All 391 (392) : 46 All 210 (DE

[5] Cruelty is not by itself a ground for wife to claim separate maintenance in the absence of neglect or refusal to maintain. ('74) 6 N W P H C R 205 (206) ('94) 9 C P L R Cr 21 (22).

[6] Cruelty can be a just ground for wife's refusal to stay with her husband. ('07) 5 Cri L Jour 334 (336) (DB) (Bom).

[7] A systematic course of ill-treatment and oppression is a good ground for the wife's refusal. (Vol 1929 All 950 (952) : 31 Cri L Jour 3.

[8] Husband having venereal disease insisting upon his wife sharing his bed with him — This is cruel. (Vol 30) 1943 Mad 647 (647) : 45 Cri L Jour 91.

[9] Husband's concubinage by itself is no good ground for wife's refusal — Husband's conduct must render unsuitable for wife to remain with him. (Vol 24) I All 115 (117) : 38 Cri L Jour 312 : I L R (1937) All \* ('87) 1937 Mad W N 984 (984) \* ('36) 37 Cri L J 86 (86, 87) (Nag) \* ('97) 20 Mad 470 (475, 476) (FB).

[10] Marriage of a Mahomedan husband with

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[11] Husband leaving wife in the house of her mother after assaulting her and living apart from her for a long period—*Held* there was ground for wife's refusal. (Vol 25) 1938 Cal 322 (624) : 39 Cri L Jour 966.

[12] Husband having another wife is, by itself, not a valid ground for refusal. (Vol 32) 1945 Mad 44 (45) : 46 Cri L Jour 248 (Vol 27) 1940 Mad 292 (292) : 41 Cri L Jour 532 (Vol 14) 1927 Lah 168 (169) : 28 Cri L Jour 236 (87) 1887 Rat 7 (7) (Vol 16) 1929 Lah 56 (57) : 29 Cri L Jour 895 (Vol 11) 1924 Nag 297 (298) : 25 Cri L Jour 453.

[13] Burmese Buddhist taking lesser wife without the consent of chief wife—Chief wife can refuse to live and cohabit with her husband unless he provides for her separate residence—Such refusal will be valid under the first proviso to S. 488. ('09) 9 Cri L Jour 25 (31, 32) : 4 Low Bur Rul 340 (FD). (Overruling 7 Cri L Jour 444: 4 Low Bur Rul 146.)

[14] Lesser wife of Burmese Buddhist can refuse to live with husband whose previous marriage with another woman was not known to her at the time of her marriage. ('10) 11 Cri L Jour 750 (751) (Low Bur).

[See also (Vol 26) 1939 Rang 210 (210) : 40 Cri L Jour 202.]

[15] On refusal of chief wife of Burmese Buddhist to live with him he married a second wife — *Held* there was no good ground for refusal of chief wife. (Vol 5) 1918 Low Bur 9 (10) : 19 Cri L Jour 966.

[16] Wife requiring husband to live with her separately and not along with his own relations—This is no ground for wife's refusal. ('29) 30 Cri L Jour 861 (861, 862) (Lah).

[See however ('12) 13 Cri L Jour 55 (56) (Upp Bur).]

[17] Minority of wife is not a sufficient ground for her refusal. ('82) 1882 Pun Re No. 1 Cr, p. 1 (1) (DB).

[See however ('69) 1869 Pun Re No. 22 Cr, p. 45 (47) (DB).]

[18] Non-payment of prompt dower by a Mahomedan husband — No ground for wife's refusal. (Vol 22) 1935 Oudh 285 (286, 287) : 36 Cri L Jour 524 (80) 1880 Pun Re No. 15 Cr, p. 27 (28) (DB) (88) 1888 Pun Re No. 6 Cr, p. 10 (10) (DB).

[19] Mere disagreement between the husband and wife in living together is not sufficient for wife's refusal. ('66) 6 Suth W R Cr 59 (59) (DB).

[See (Vol 22) 1935 Rang 359 (361) : 37 Cri L Jour 6.]

[20] Religious conversion of Christian husband to Judaism is not by itself valid ground of refusal—Husband interfering with practice of her religion by the wife or bringing Jewish woman to his house to live with him with intent to marry her is sufficient to justify wife in withdrawing her conjugal domicile. (Vol 13) 1926 Sind 278 (279) : 19 Sind L R 128 : 27 Cri L Jour 1177 (DB).

[21] The wife's maintenance cannot be refused merely because she is unable to analyse and state fully her reasons for refusing to go back to her husband. Court ought to examine the circumstances and see if those circumstances are or are not sufficient to justify the wife's refusal to accept the husband's offer. (Vol 30) 1943 Lah 223 (225) : 44 Cri L Jour 802.

[22] *Prima facie* case of neglect by husband to maintain wife — If an order is not to be passed on account of this sub-section, it is for husband to show that the sub-section is applicable and that either the wife is guilty of adultery, or that she is unreasonably refusing to live with him or that they are living separately by mutual consent. (Vol 30) 1943 Lah 223 (224, 225) : 44 Cri L Jour 802.

21. Wife living in adultery. — [1] The word 'adultery' in the section is not used in the sense of S. 497 of the Penal Code. The term is to be understood in the light of the social ideas of the community as

being a serious breach of the matrimonial tie. ('97) 20 Mad 470 (473, 476) (FB).

[2] The expression 'living in adultery' connotes neither a single act of adultery nor several such isolated acts, but the following of a course of continuous adulterous conduct. (Vol 24) 1937 Rang 67 (68) : 38 Cri L Jour 646. (Single act.) (Vol 16) 1929 Nag 238 (238) : 30 Cri L Jour 403. (Do.) (Vol 20) 1933 Bom 21 (22) : 34 Cri L Jour 140 (DB). (Do.) (81) 1881 All W N 37 (37). (Do.) (9) 9 Cri L Jour 390 (392) : 5 Nag L R 19. (Several isolated acts.) (Vol 25) 1938 Mad 833 (834) : 39 Cri L Jour 951 : I L R (1938) Mad 1100. (Course of continuous adulterous acts.) (Vol 23) 1936 Rang 446 (447) : 37 Cri L Jour 1115 (1937 Rang L R 86. (Do.) (Vol 15) 1928 Bom 59 (60) : 52 Bom 160 : 29 Cri L Jour 314 (DB). (Do.) (7) 5 Cri L Jour 359 (359) : 30 Mad 332 (DB). (Do).

[3] Giving birth to illegitimate child — No inference that wife has lived in adultery can be necessarily drawn. (Vol 12) 1925 Cal 794 (795) : 26 Cri L Jour 1184 (DB). ('09) 9 Cri L Jour 390 (392) : 5 Nag L R 19.

[See also (Vol 25) 1938 Mad 66 (67) : 39 Cri L Jour 228.]

[See however (Vol 24) 1937 Rang 67 (68) : 38 Cri L Jour 646.]

[4] Living in adultery need not be in the house of the adulterer. (Vol 25) 1938 Mad 833 (834) : 39 Cri L Jour 951 : I L R (1938) Mad 1100.

[5] Wife must be living in adultery on the date of the application and not be guilty of mere past misconduct. ('04) 1 Cri L Jour 84 (85) : 26 All 326.

[6] Wife guilty of adultery with a low-caste man which adultery has led to her expulsion from caste—Though this is not a case of wife 'living in adultery', yet under the circumstances an order refusing maintenance will not be wrong. ('08) 7 Cri L Jour 346 (347) : 31 Mad 135 (DB) (Vol 13) 1926 Oudh 604 (604, 605) : 27 Cri L Jour 1190.

[See however (Vol 20) 1933 Bom 21 (22) : 34 Cri L Jour 140 (DB).]

[7] Wife deserting her husband for several years and also guilty of adultery and making no attempt to obtain pardon of husband for her misconduct—Court may refuse to grant maintenance though, at the time of application, she may not be living in adultery. ('90) 1890 Rat 506 (507) (DB).

[8] Husband applying for cancellation of order for maintenance already made — 'Living in adultery' subsequent to the date of the order must be strictly proved and not merely past misconduct coupled with other circumstances — In such cases, maintenance must be paid till the date of the first proved act of adultery. ('83) 1883 All W N 180 (181) (9) 9 Cri L Jour 390 (392) : 5 Nag L R 19.

[See (Vol 25) 1938 Sind 151 (152) : 39 Cri L Jour 847 (DB).]

[9] Allegation of adultery made against the wife—Court must enquire into it—The husband ought to begin his case and the wife must be given an opportunity of adducing rebutting evidence. ('82) 1882 All W N 168 (168) (Vol 25) 1938 Mad 833 (834) : 39 Cri L Jour 951 : I L R (1938) Mad 1100.

[10] Court cannot refuse maintenance to the wife on the ground that she was excommunicated for refusing to attend a panchayat convened to consider a charge of adultery against her. (Vol 1) 1914 Mad 137 (137) : 15 Cri L Jour 52 (DB) (81) 1881 All W N 62 (63).

[11] Conduct of wife considered open to suspicion—This is no sufficient ground for refusing maintenance. ('83) 2 Weir 647 (648).

[See ('93) 1893 All W N 56 (57).]

[12] Court holding that with reference to a particular period the wife was not living in adultery—It

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cannot come to a contrary finding with reference to the same period in a subsequent application in the case. ('82) 5 All 224 (226).

[13] Application for maintenance by wife against the husband—Marriage between parties proved—Wife is not bound to prove that she had been chaste from the date when the husband abandoned her. (Vol 30) 1943 Mad 509 (509) : 44 Cri L Jour 642.

22. Living separately by mutual consent.—[1] Husband, in the course of a quarrel, manoeuvring for a consent from a wife—Hasty rejoinder to him by wife is not a consent within the meaning of the section. (Vol 10) 1923 Rang 100 (101).

[2] Living separately under an arrangement settled by panchayat to whom disputes between husband and wife had been referred is not living separately by mutual consent. (Vol 23) 1941 Sind 214 (215) : 1 ILR (1941) Kar 417 : 43 Cri L Jour 290 (DB) (Vol 6) 1919 Pat 339 (341) : 4 Pat L Jour 109 : 20 Cri L Jour 154 (DB).

[3] Wife refusing to live with husband on some specific ground such as cruelty, or that he is keeping another woman—Husband and wife are not living apart by mutual consent if the husband does not insist that the wife should live with him. (Vol 24) 1937 All 115 (116) : 38 Cri L Jour 312 : ILR (1937) All 480.

[4] Wife not prepared to live in a separate house—Husband starting living separately—They are not living separately by mutual consent. (Vol 25) 1938 Cal 623 (624) : 39 Cri L Jour 969.

[5] Husband having option to live with his wife choosing to live separate—They are not living separately by mutual consent. (Vol 26) 1939 Lah 209 (210) : 40 Cri L Jour 794.

[6] Each party finding it impossible to live amicably and comfortably with the other and each party being content that they should live separately—Separate living is by mutual consent. (Vol 22) 1935 Rang 359 (361) : 37 Cri L Jour 6.

[7] Husband and wife living separately by mutual consent—No order can be passed under the section. ('96) 1896 Rat 870 (870) (DB) (Vol 2) Weir 648 (648) (Vol 88) 1888 Pun Re No. 42 Cr, p. 107 (108) (DB) (1900-02) 1 Low Bur Rul 19 (20).

23. Cancellation of order.—[1] Order of cancellation does not affect the arrears due up to the date of the order. (Vol 25) 1938 Cal 144 (144) : 39 Cri L Jour 357 : ILR (1938) 1 Cal 509 (Vol 17) 1930 Lah 99 (99) : 30 Cri L Jour 719.

[See (Vol 23) 1936 Pesh 32 (33) : 37 Cri L Jour 347.]

[But see (Vol 29) 1942 Bom 258 (259, 260) : 1 ILR (1942) Bom 776 : 43 Cri L Jour 826 (DB).]

[2] Any change of circumstances in the case of a child must be dealt with under S. 489 and not under this section. (Vol 24) 1937 Rang 239 (240) : 38 Cri L Jour 910 (Vol 85) 1885 Pun Re No. 17 Cr, p. 38 (38) (DB).

[3] After order for maintenance is passed against him, a husband finding that the marriage was void—Proper course is not to apply for cancellation of the order but to apply to the matrimonial Court for a proper order. (Vol 14) 1927 Bom 46 (47) : 28 Cri L Jour 51 (DB).

[4] An application for the cancellation of the order must be made to the Magistrate who passed the order or to his successor in office and not to any other Magistrate. ('03) 25 All 545 (546).

[5] Magistrate who has passed an order by mistake subsequently comes to know of it—He cannot cancel the order but should submit the proceedings to the Sessions Judge for submission to High Court for rectification. (Vol 27) 1940 Rang 222 (223) : 41 Cri L Jour 833.

[6] An order for maintenance once passed remains in

but on temporary re-union the operation of the order only remains suspended to be revived into operation any future time on separation. (Vol 22) 1935 All (978) : 38 All 379 : 37 Cri L Jour 62 (Vol 10) 1 Cal 456 (457) : 24 Cri L Jour 945 (DB) (Vol 17) 1 Lah 1043 (1043, 1044) : 32 Cri L Jour 247 (Vol 19) 1927 Mad 276 (377) : 50 Mad 663 : 28 Cri L Jour 2 (Vol 14) 1927 Mad 1148 (1148, 1149) : 28 Cri L Jour 237 (Vol 23) 1936 Nag 228 (230) : 38 Cri L Jour 1 ILR (1937) Nag 230.

[See however ('06) 4 Cri L Jour 73 (75) : 1 Pun Re No. 4 Cr.]

[But see ('88) 1888 All W N 217 (217) (Vol 10) 1946 Mad 222 (223) (Vol 18) 1931 Rang 89 (89, 90) Rang 460 : 32 Cri L Jour 114 (Vol 1) 1 Cri L Jour 870 (871) (Upp Bur) (Vol 47) 1947-1 Mad L Jour 34 (35).

24. Evidence and procedure.—[1] Proceed under this Chapter are judicial and not ministerial. Magistrate must come to distinct findings of fact making a proper enquiry and taking evidence in accordance with law. ('82) 5 All 224 (226) (Vol 37) 1 Mad W N 336 (336) (Vol 89) 11 All 480 (482) (Vol 1920 Oudh 307 (307, 308) : 23 Oudh Cas 237 : 25 C Jour 302 (Vol 82) 2 Weir 628 (628) (Vol 92-96) 1 Upp Rul 68 (68, 69) (Vol 7) 1920 Lah 201 (202) : 22 C Jour 149.

[See (Vol 27) 1940 Pat 242 (243) : 41 Cri L Jour 718 (Vol 03) 5 Bom L R 614 (615) (DB).]

[2] A final order passed on the basis of the allegation of a party without any evidence in support thereof is illegal. (Vol 17) 1930 Nag 59 (59) : 31 C Jour 110. (Without asking parties whether they to adduce evidence.) (Vol 19) 1932 Lah 301 (303) : 33 Cri L Jour 447.

[3] An order must be based upon proof in the proceedings and not upon the knowledge of the Magistrate acquired outside the case. ('89) 16 Cal 781 (DB).

[4] The issue of relationship of the parties can be raised and decided in proceedings under this section (Vol 33) 1946 Pat 176 (176) : 24 Pat 692 (693, 694) : 48 Cri L Jour 111 (DB).

[5] Marriage of the wife denied—Relationship of husband and wife must be strictly proved. See ('11) All 233 (234).

[See however (Vol 19) 1932 Cal 866 (867) : 51 1257 : 34 Cri L Jour 108.]

[6] It is the duty of the Magistrate to go into question of the relationship of husband and wife decide it himself without leaving it to a civil Court decision. (Vol 19) 1932 Lah 301 (302) : 33 Cri L Jour 447 (Vol 81) 1881 Pun Re No. 11 Cr, p. 11 (12) (DB).

[7] Question of divorce raised—It must be tried and decided by the Magistrate. ('87) 2 Weir 620 (620).

[8] In illegitimacy cases it must be found that one else could have been the father. ('89) 2 Weir (621) (Vol 29) 1942 Mad 251 (252) : 43 Cri L Jour 383. (Especially where the mother is woman married to another man.) (Vol 32) 1932 Mad W N 1217 (1218).

[9] The uncorroborated assurance of the mother alone is inadequate in illegitimacy cases. (Vol 28) 1942 Pat 444 (446) : 42 Cri L Jour 347 (Vol 13) 1926 1130 (1130) : 27 Cri L Jour 1095.

[10] Evidence as to non-access to husband is admissible in illegitimacy cases. ('94) 18 Bom 468 (472).

[11] Under sub-s. (6) the procedure to be followed in recording the evidence is not the procedure of summary trials, but is the procedure prescribed in the rules for summons cases. ('93) 20 Cal 351 (352) (DB) (Vol 7) 1927 Suth W R Cr 61 (62) (DB).

[12] Presidency Magistrate has a discretion to

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(Vol 19) 1932 Bom 179 (179): 33 Cri L Jour 461 (DB) & (Vol 18) 1931 Bom 142 (143): 32 Cri L Jour 276 (DB).

[13] The Magistrate is not bound to examine the person proceeded against as he is not an accused person; an omission to examine him does not vitiate the order. (Vol 16) 1929 Lah 32 (34): 10 Lah 406: 29 Cri L Jour 1002 (DB) & (Vol 19) 1932 Cal 488 (489): 33 Cri L Jour 640 & (Vol 14) 1927 Lah 435 (435): 28 Cri L Jour 478.

25. Presence of parties. — [1] The trial and the taking of evidence in a case under the chapter must be in the presence of the respondent. The Magistrate cannot proceed to hear the case *ex parte* except on being satisfied that the respondent has either wilfully avoided service of summons or has wilfully neglected to attend the hearing. (Vol 26) 1939 Rang 151 (151): 40 Cri L Jour 537.

[See (Vol 19) 1932 Cal 488 (489): 33 Cri L Jour 640 & (Vol 17) 1930 Lah 524 (524): 31 Cri L Jour 1179.]

[2] The direction in sub-s. (6) is peremptory. (Vol 29) 1942 Sind 32 (33): I L R (1941) Kar 415: 43 Cri L Jour 551 (DB).

[3] Respondent not duly served — *Ex parte* order is illegal. ('05) 2 Cri L Jour 159 (161) (DB) (Cal).

[4] No proof of refusal of summons — *Ex parte* order is illegal. (Vol 15) 1928 Lah 853 (854): 29 Cri L Jour 637.

[5] Summons not showing clearly that his personal appearance is not dispensed with — An order *ex parte* is illegal. (1900) 2 Bom L R 700 (701) (DB).

[6] An order passed *ex parte* may be set aside within three months for good cause even by a succeeding Magistrate. (Vol 10) 1923 Rang 159 (160): 24 Cri L Jour 928.

[7] Petitioner absent at the hearing — Petition dismissed for default — Petition cannot be restored. ('05) 2 Cri L Jour 213 (214) (DB) (Cal).

[8] Magistrate dispensing with personal appearance of the petitioner — Her counsel prevented by reasonable cause from being present at the hearing — *Held*, it would be in the interests of justice to order rehearing of the petition. (Vol 21) 1934 Lah 195 (196): 35 Cri L Jour 1504.

[9] It is within the discretion of the Magistrate to exempt a pardanashin lady petitioner from personal appearance. ('03) 1903 Pun Re No. 19 Cr, p. 49 (52, 53) (DB).

[10] Husband willing to take wife to live with him — At the hearing wife is absent and Magistrate is unable to ascertain her willingness to live with him or her reasons for refusal to do so — A dismissal of the application itself for her absence will not be illegal. ('05) 2 Cri L Jour 213 (214) (DB) (Cal).

26. Order as to costs. — [1] Courts cannot order costs in criminal matters except in cases specifically provided for by the Code. (Vol 9) 1922 Mad 502 (504): 45 Mad 913: 28 Cri L Jour 563 (FB).

[2] Sub-section (7) of the present section confers power to order costs in maintenance cases. (Vol 20) 1933 Bom 21 (23): 34 Cri L Jour 140 (DB).

[3] In an application under this section no compensation under S. 250 can be awarded. ('10) 11 Cri L Jour 156 (157) (Mad).

[4] In deciding the question of costs, the Court should consider the responsibility of each party in regard to the proceedings and how far each party has put its case frankly before the Court. (Vol 12) 1925 All 73 (76): 25 Cri L Jour 1249.

[5] The High Court can under sub-s. (7) make such order as to costs as it considers just when dealing with an application under this section in revision. (Vol 28) 1941 Rang 135 (136): 1941 Rang L R 65: 42 Cri L Jour 346 (DB).

[6] The recovery of costs awarded can be made only by distress warrant and not by imprisonment. (Vol 28) 1941 Rang 247 (248): 1941 Rang L R 403: 43 Cri L Jour 30.

27. Sub-section (8) — Forum. — [1] The word 'resides' is an ambiguous word and its meaning varies according to the statute or the context in which it is used. (Vol 16) 1929 Bom 410 (411): 53 Bom 781: 31 Cri L Jour 331 (DB) & ('12) 13 Cri L Jour 522 (522): 5 Sind L R 220 (DB).

[2] The word 'reside' means to live or to have a dwelling place or an abode. It cannot be treated as equivalent to something in the nature of having a domicile in a particular place or the place where the person's family used to live. (Vol 34) 1947 All 4 (4, 5) (DB).

[3] A place of temporary residence is within the sub-section. (Vol 25) 1938 Sind 223 (223): 40 Cri L Jour 117: I L R (1939) Kar 196 (DB) & (Vol 14) 1927 All 291 (291): 28 Cri L Jour 494: 49 All 479 & (Vol 5) 1918 Cal 785 (786): 18 Cri L Jour 706.

[4] A person can be taken to 'reside' at a place even if he lives in a rented house. (Vol 29) 1942 Mad 666 (668): 44 Cri L Jour 741.

[5] Husband and wife having no fixed abode — Last place where they stayed together, however short or casual the stay may be, is the place where they 'last resided together'. (Vol 16) 1929 Bom 410 (412): 53 Bom 781: 31 Cri L Jour 331 (DB).

[6] Even where the husband has a permanent place of residence, the place where he temporarily resided last with his wife gives jurisdiction. ('39) 1939 Oudh W N 190 (190) & (Vol 25) 1938 Sind 223 (223): 40 Cri L Jour 117: I L R (1939) Kar 196 (DB) & (Vol 19) 1932 Nag 85 (86): 34 Cri L Jour 32 & (Vol 17) 1930 Bom 349 (349): 54 Bom 548: 31 Cri L Jour 1157 (DB).

[7] Husband having a permanent residence at A took his wife to B and left her there in her brother's house declaring that he would maintain her no longer — Husband not last residing with wife at B. (Vol 18) 1926 Oudh 268 (269): 1 Luck 343: 27 Cri L Jour 820.

[See also (Vol 29) 1942 Mad 666 (668): 44 Cri L Jour 741 & (Vol 28) 1941 Nag 175 (175, 176): I L R (1941) Nag 262: 42 Cri L Jour 647 & (Vol 8) 1921 Oudh 168 (168): 24 Oudh Cas 249: 22 Cri L Jour 710.]

[8] Husband having permanent residence at place A paying wife occasional visits at B where she was living separately from him — Husband cannot be said to have last resided with wife at B. (Vol 27) 1940 Lah 449 (450): 42 Cri L Jour 105: I L R (1940) Lah 755 (DB). (Overruling (Vol 15) 1928 Lah 853: 29 Cri L Jour 687) & (Vol 25) 1938 Sind 223 (223): 40 Cri L Jour 117: I L R (1939) Kar 196 (DB) & ('04) 1 Cri L Jour 545 (546): 1904 Upp Bur Rul 10.

[9] Husband having permanent residence at A hired a house at B for storing his kit and his wife left him and took up her residence there — *Held* that it could not be said that he last resided at B with his wife. (Vol 24) 1937 Bom 35 (37): 38 Cri L Jour 248 (DB).

[10] Mistress having no settled abode last residing at A for two months — Paramour visiting her there occasionally with the intention of continuing his visits — Application on behalf of their illegitimate child lay in the Court having jurisdiction at A. ('12) 18 Cri L Jour 522 (522, 523): 5 Sind L R 220 (DB).

[11] Proceedings can be taken in a Court within whose jurisdiction the opposite party is employed or works for gain, even though he may have a permanent residence within the jurisdiction of another Court. (Vol 26) 1939 Cal 333 (333): 40 Cri L Jour 598: I L R (1939) 1 Cal 345.

[12] Residence of husband and not of his father determines the local jurisdiction. (Vol 20) 1933 Lah 387



Section 488 — Note 27 (*contd.*)

[13] Marriage of parties taking place within the local limits of jurisdiction of a Magistrate.—This does not give him jurisdiction under this section. (Vol 13) 1926 Lah 663 (663, 664) : 27 Cri L Jour 1009.

[14] Proceedings taken in a wrong district where the husband did not live — This does not vitiate an order under the section provided the Magistrate was competent to exercise power under the section and the respondent had notice of the proceeding. (Vol 26) 1939 Rang 210 (210) : 40 Cri L Jour 702 \* (Vol 16) 1929 Cal 336 (336) : 30 Cri L Jour 525 (DB) \* (88) 1883 Pun Re No. 9 Cr, p. 11 (11) (DB).

[15] Husband residing in an Indian State — An order of a Magistrate in British India is vitiated — S. 531 will not cure the defect of want of jurisdiction. (Vol 29) 1942 Mad 666 (666) : 41 Cri L Jour 711.

28. Second application.—[1] Application under the section heard and adjudicated upon — Subsequent application on the same facts should not be entertained. (82) 5 All 221 (226) \* (Vol 4) 1917 Cal 608 (608) : 17 Cri L Jour 106 (107) (DB) \* (Vol 4) 1917 Lah 154 (155) : 18 Cri L Jour 326 (327) : 1916 Pun Re No. 24 Cr \* (77) 1 Cal L Rep 89 (90) (DB).

[See also (Vol 22) 1935 Rang 277 (278) : 36 Cri L Jour 191.]

[See however (09) 9 Cri L Jour 21 (22) : 4 Low Bur Rul 337.]

[2] A prior application does not bar a subsequent application under the following circumstances :

(a) Prior application dismissed for default and no adjudication on merits. (Vol 14) 1927 Rang 328 (328) : 5 Rang 697 : 28 Cri L Jour 912 \* (Vol 7) 1920 Cal 34 (39) : 21 Cri L Jour 3 (DB).

[But see ('92-96) 1 Upp Bur Rul 64 (65).]

(b) Subsequent application based on fresh facts. ('87) 2 Weir 633 (633) \* ('92-96) 1 Upp Bur Rul 64 (65).

(c) Prior order disclosing an obvious misconception. ('09) 9 Cri L Jour 21 (22) : 4 Low Bur Rul 337.

(d) Prior order based on unauthorised representation by the counsel. ('93-1900) 1893-1900 Low Bur Rul 662 (664).

(e) Prior order becoming unenforceable for uncertainty. (Vol 28) 1941 Rang 46 (48) : 1940 Rang L R 151 : 42 Cri L Jour 312 \* (Vol 4) 1917 Low Bur 84 (85) : 18 Cri L Jour 103 : 9 Low Bur Rul 49.

(f) Subsequent application for execution of the order being for a different period. (Vol 20) 1938 Rang 138 (139) : 11 Rang 226 : 34 Cri L Jour 815 (F B).

[3] Wife's application for maintenance for herself dismissed — Subsequently she applies for maintenance for the child — Magistrate must be careful to see whether she is evading the law and trying to get her own maintenance by a side wind — Order must make it clear on whose account the maintenance is being granted. (92-96) 1 Upp Bur Rul 67 (67).

29. Whether a civil suit lies.— [1] When an order of a Magistrate has been made providing for maintenance a civil Court cannot set the order aside or issue an injunction restraining proceedings under S. 488 or the enforcement of an order thereunder. ('77) 2 Weir 614 (614) \* ('97-01) 1 Upp Bur Rul 112 (113) \* ('95) 18 All 29 (30) (DB) \* (Vol 17) 1930 Cal 753 (754) : 32 Cri L Jour 232. (Injunction.) \* ('08) 7 Cri L Jour 235 (236) : 30 Mad 400 (DB). (Do.) \* (Vol 5) 1918 Mad 431 (434) : 18 Cri L Jour 971 (DB). (Do.)

[2] Notwithstanding the existence of an order of a Magistrate under this section, a civil Court can entertain suits for the adjudication of disputed questions of marriage, conjugal rights, or divorce between the husband and wife or the paternity of the child. (Vol 18) 1931 Mad 482 (483) : 54 Mad 558 (DB) \* ('03) 1903

Oudh 374 (375) : 17 Oudh Cas 381. (Paternity of child.) \* (1905) 32 Cal 479 (481). (Do.)

[But see ('97) 11 C P L R 72 (74).]

[3] The Magistrate is bound to cancel or modify his order or decline to make an order or to enforce it in the light of decrees of the civil Courts with reference to disputed questions. (Vol 26) 1939 Rang 314 (314) : 4 Cri L Jour 827 : 1939 Rang L R 741 \* (Vol 5) 191 Mad 431 (434) : 18 Cri L Jour 971 (DB) \* (Vol 2) 191 Oudh 113 (114) : 16 Cri L Jour 609 \* (Vol 6) 1919 Lo Bur 7 (8) \* ('06) 3 Cri L Jour 229 (232) : 9 Oudh Cas 49 (DB).

[See (Vol 9) 1922 Upp Bur 20 (21) : 4 Upp Bur Rul 120.]

[4] The jurisdiction of a Magistrate under this chapter is limited in scope and auxiliary to that of civil Court. (Vol 6) 1919 Bom 140 (140) : 43 Bom 895 20 Cri L Jour 687 (DB) \* (Vol 2) 1915 Oudh 113 (114) 16 Cri L Jour 609 (609, 610) \* ('99) 2 Weir 615 (615)

[5] The decision of the criminal Court under this section on questions of marriage, divorce or paternity of children are not binding on the parties in other litigations in the civil Court. ('06) 3 Cri L Jour 229 (231) : Oudh Cas 49 (DB).

[See (Vol 2) 1915 Oudh 113 (114) : 16 Cri L Jour 609

[6] The principles guiding the civil Courts in granting or refusing maintenance are not identical with those which ought to guide criminal Courts in dealing with applications under this section. ('09) 9 Cri L Jour 25 (31) : 4 Low Bur Rul 340 (FB).

[7] Magistrate under this section has to see that wives and children are not left to starve by their natural protectors while function of civil Courts is to decree that a man should pay his wife and children maintenance : rate strictly adapted to his circumstances and the necessities. ('87) 1937 Mad W N 1127 (1129).

[8] A civil Court can grant residence to the wife, or charge over husband's properties for the maintenance amount or decree a rate of maintenance exceeding the maximum fixed by the Code. ('12) 15 Ind Cas 603 (603) (DB). (Cal.)

30. Further inquiry.— [1] Magistrate passing order on an application under this section — District Magistrate cannot make further inquiry into the case. ('01) 1 Cri L Jour 864 (865) : 17 C P L R 127 \* (Vol 1) 1914 All 368 (368) : 15 Cri L Jour 575.

[2] District Magistrate can withdraw a pending case to his own file under S. 528 of the Code. ('05) 2 Cri Jour 40 (41) : 1905 Pun Re No. 5 Cr.

[3] Magistrate passing order without taking any evidence.—In revision District Magistrate observing an irregularity of proceeding of the Magistrate — Magistrate taking up case *suo motu*, taking evidence and modifying his order.—This is illegal. ('82) 2 Weir 628 (628).

[4] A subsequent order by a Magistrate ignoring the prior order in the case is nugatory. ('11) 12 Cri L Jour 82 (83, 84) (Low Bur).

31. Insanity of the respondent. — [1] Responder alleged to be insane.—Magistrate cannot appoint a guardian *ad litem* for him and proceed with case.—Procedure of Chap. XXXIV should be followed and proceeding postponed. (Vol 12) 1925 Mad 440 (441) : 48 Mad 388 26 Cri L Jour 701.

32. Limitation.—[1] There is no limitation of time for an application for maintenance. Delay on the part of the applicant in complaining of neglect or refusal to maintain is no ground for dismissing the application ('83) 2 Weir 616 (616) \* ('82) 2 Weir 615 (615).

33. Appeal. — [1] From an order for payment of maintenance allowance no appeal lies. ('67) 7 Suth W. Cr 10 (11) (SB) \* ('66) 1866 Pun Re No. 50 Cr, p. 5 (58) \* ('68) 5 Bom H C R Cr 81 (82) (DB) \* ('75) 2

“489. (1) On proof of a change in the circumstance of any person receiving under *Alteration* in section 488 a monthly allowance, or ordered under the same section to pay a *allowance*, monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit : Provided that if he increases the allowance the monthly rate f [one hundred] rupees in the whole be not exceeded.

“(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.]

[1882—S. 489; 1872 — S. 537; 1861 — S. 317.]

[a] *Re-numbered* for S. 489 by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923), 132. [b] *Substituted, ibid.*, for “fifty”. [c] *Inserted, ibid.*

section 488 — Note 33 (*contd.*)

[2] No appeal lies under cl. 15 of the Letters Patent from an order of a Judge of a High Court in revision of an order of a Magistrate under the section. (Vol 3) 1916 Mad 632 (632) : 16 Cri L Jour 326 : 39 Mad 472 (DB).

34. Revision.—[1] The High Court will not interfere in revision in a case pending before a Magistrate unless exceptional circumstances justify interference. (Vol 17) 1930 Lah 881 (882) : 32 Cri L Jour 145.

[2] The High Court will interfere in cases under the chapter when the lower Court has not exercised its discretion judicially. (Vol 13) 1926 Sind 270 (271, 272) : 20 Sind L R 145 : 27 Cri L Jour 876 (DB).

[3] Substantial justice done — High Court will not interfere in revision. (1909) 9 Cri L Jour 21 (22) : 4 Low Bur Rul 337.

[4] Magistrate awarding maintenance to a woman without coming to a definite finding that she is the wife of the person ordered to pay her maintenance — High Court will interfere. (Vol 25) 1938 Mad 66 (66, 67) : 39 Cri L Jour 228.

[5] When proceedings of the Magistrate are in order and he has estimated the evidence, his decision should not be disturbed, even if the revision Court would have come to another conclusion on the evidence. (Vol 29) 1942 Mad 666 (667) : 44 Cri L Jour 741 (Vol 22) 1935 Rang 192 (193) : 36 Cri L Jour 1044 (Vol 22) 1935 Rang 359 (360) : 37 Cri L Jour 6.

[6] No revision lies on the question of the amount of maintenance. (66) 1866 Pun Re No. 55 Cr, p. 62 (62).

[7] Rate of maintenance palpably beyond the means of respondent. Revision lies. (86) 2 Weir 575 (575) (F B).

[8] Rate of maintenance grossly inadequate—Revision lies. (Vol 24) 1937 Rang 370 (372) : 39 Cri L Jour 14.

#### SECTION 489 — SYNOPSIS.

1. Scope.
2. Application to Court.
3. Change of circumstances and alteration of allowance.
4. Alteration of order — When operates.
5. Original order, if and how affected.
6. Civil Court decision, effect of — Sub-section (2).
7. Revision.

1. Scope. — [1] Fact that the prior order was corrected by the High Court in revision is no reason to ask the party to go to the High Court for having the order modified under section 489. (Vol 19) 1932 Sind 59 (59) : 33 Cri L Jour 646 (DB).

[See (Vol 21) 1934 Rang 39 (40) : 35 Cri L Jour 813.]

[2] Original allowance not granted under S. 488 but under private arrangement between parties — This section will not apply. (41) 1941 Nag L Jour 622 (623).

2. Application to Court.—[1] Application for alteration is necessary before a Magistrate can legally revise a prior order. (82) 2 Weir 628 (628).

[See (Vol 23) 1936 Pesh 32 (33) : 37 Cri L Jour 347 (DB) (Vol 22) 1935 Lah 24 (24) : 37 Cri L Jour 68.]

[2] On an application for alteration, Magistrate presiding over that Court which passed the prior order may act under S. 489. (73) 1973 Pun Re No. 5 Cr, p. 5 (6) (D B).

[3] Arbitrator decided that there was no ground for reducing rate of maintenance but subsequently reviewed his decision and held that rate of maintenance should be reduced—Arbitrator, held, had no power to review his decision. (Vol 21) 1934 All 940 (941) : 36 Cri L Jour 186.

[4] Wife lunatic — Brother as manager of her estate can state case of lunatic wife against husband's application for reduction of maintenance. (Vol 24) 1937 Bom 454 (455) : 1 L R (1937) Bom 674 : 39 Cri L Jour 58 (DB).

3. Change of circumstances and alteration of allowance. — [1] Expression ‘alteration in the allowance’ does not contemplate a total discontinuance of the maintenance allowance, but refers only to orders decreasing or increasing the allowance. (82) 5 All 226 (228).

[But see (Vol 12) 1925 Mad 491 (492) : 48 Mad 503 : 26 Cri L Jour 732 (Vol 8) 1921 Nag 7 (9) : 17 Nag L R 92 : 22 Cri L Jour 633.]

[2] Words “change in the circumstances” imply a change in the pecuniary circumstances and not a change in the status of the parties entailing a stoppage of the allowance. (Vol 30) 1943 Mad 416 (417) : 1 L R (1944) Mad 69 : 44 Cri L Jour 540 (Vol 15) 1928 Bom 224 (224, 225) : 29 Cri L Jour 908 (DB) (33) 1933 Mad W N 734 (735) (96) 19 All 50 (52, 55) (FB).

[But see (47) (1947) 1 Mad L Jour 70 (72, 73) (Vol 8) 1921 Nag 7 (9) : 17 Nag L R 92 : 22 Cri L Jour 633 (Vol 12) 1925 Mad 491 (492) : 48 Mad 503 : 26 Cri L Jour 732 (80) 1880 Pun Re No. 28 Cr, p. 65 (66) (DB).

[3] Husband divorcing wife on her obtaining maintenance order for herself and the child—Reduction in amount of maintenance not granted regarding circumstances in which divorce was given. (Vol 7) 1920 Bom 101 (102) : 44 Bom 44.

[4] Before an original order of maintenance can be altered, it must be shown that there has been a change in the circumstances of the husband or of the wife. (Vol 25) 1938 Rang 42 (42) : 39 Cri L Jour 274.

[5] Following changes in the circumstances may be urged under the section :—

(a) Fall in the husband's income. (Vol 1) 1914 Lah 185 (186) : 15 Cri L Jour 554.

(b) Funds of a Malabar *tarwad* becoming insufficient for maintenance of the child. (Vol 6) 1919 Mad 198 (195) : 20 Cri L Jour 733 (DB).

(c) Child growing older. (41) 1941 Nag L Jour 622 (623) (Vol 26) 1939 Rang 95 (96) : 40 Cri L Jour 440 : 1938 Rang L R 673 (91) 14 Mad 399 (399) (DB) (93-1900) 1893-1900 Low Bur Rul 393 (394).



**490.** A copy of the order of maintenance shall be given with the order to the person in whose favour it is made, or to his guardian.

(d) Child becoming able to maintain itself. (Vol 5)  
1918 Low Bur 28 (28) ; 19 Cri L Jour 160.

[6] Following are not sufficient changes:—

(b) Change being not an appreciable one. (10) 11 Cri  
L Jour 40 (41) : 1 Upp Bur Rul 17.

(d) Fact that the second husband of a divorced Mahomedan wife agrees to maintain her child by the first husband. ('04) 1 Ori L Jour 595 (595, 596) : 27 All 11.

(f) Fact that the husband has chosen to take a mistress and has to maintain such mistress and children. (Vol 25) 1938 Rang 42 (42) : 39 Cri L Jour 1179.

[7] Pending proceedings under S. 488 parties compromised their disputes and order for maintenance passed in accordance with compromise — Such order is not enforceable by criminal Courts and application under this section for variation of this order is not maintainable. (Vol 17) 1930 Lah 524 (525) : 31 Cri L Jour 1179.

4. Alteration of order—When operates. — [1] Order of alteration cannot operate to affect the arrears claimed under the original order. (Vol 22) 1935 Lah 24 (24) : 37 Cri L Jour 68.

[2] In proper cases plea of alteration of circumstances may amount to "sufficient cause" under sub-s. (3) of S. 488. (Vol 4) 1917 Low Bur 84 (85) : 18 Cri L Jour 103 : 9 Low Bur Rul 49 \* (Vol 19) 1932 Rang 94 (95) : 10 Rang 194 : 33 Cri L Jour 495 (DB).

[3] Magistrate can provide in the order of alteration that it should take effect from the date of the application for alteration. (Vol 13) 1926 Bom 419 (420) ; 27 Cri L Jour 940 (DB).

5. Original order, if and how affected. — [1] No modification of an order passed under S. 488 can be made except under circumstances mentioned in S. 489. (1904) 1 Cri L Jour 595 (595, 596) : 27 All 11.

[2] Magistrate acting under S. 489 cannot go into the propriety or otherwise of the order originally made under S. 488. ('02) 2 Weir 650 (650).

[3] Order of cancellation of an order of maintenance obtained by practising fraud on the Court is to be treated as a nullity and the previous order for maintenance will stand. (Vol 24) 1987 Cal 334 (335) : 39 Cri L Jour 381.

6. Civil Court decision, effect of — Sub-section (2). — [1] Order granting maintenance to child under S. 488 passed — Father obtaining declaration of non-paternity in civil Court — Suit for injunction restraining defendant from drawing maintenance is not necessary — Proper course for father is to proceed under S. 489 (2). (Vol 27) 1940 Rang 298 (300) : 1940 Rang L R 668 (DB).

[2] Decree for restitution of conjugal rights in favour of husband produced—Magistrate is not bound to cancel order passed under S. 488 — He must consider it along with other circumstances. (Vol 31) 1944 Bom 11 (12) : 45 Cri L Jour 271 (DB) & (Vol 12) 1935 Rang 268 (270) : 3 Rang 150 : 26 Cri L Jour 1341 & (Vol 21) 1937 : 26 Rang 150 : 25 Cri L Jour 813

[See however (Vol 6) 1919 Bom 140 (140  
885 : 20 Cri L Jour 687. (Before the am.  
1923).]

[3] Husband *bona fide* wishes to execute restitution of conjugal rights, but wife refuses — Prior order for maintenance may be (Vol 31) 1944 Bom 11 (12) : 45 Cri L Jour (Vol 26) 1939 Rang 314 (314) : 1939 Rang L Cri L Jour 827 (Vol 13) 1926 Sind 270 (27 L R 145 : 27 Cri L Jour 876 (DB).

[4] Magistrate satisfied that object of husband's decree was to get maintenance order and not to take his wife back—He may decline order. (Vol 31) 1944 Bom 11 (12) : 45 Cri (DB) ✱ (Vol 26) 1939 Rang 314 (315) : 1938 741 : 40 Cri L Jour 827 ✱ (Vol 12) 1925 (1218, 1219) : 27 Cri L Jour 30.

[5] Decree for restitution of conjugal rig by husband subsequent to order for mainter in favour of both wife and child—Order for maintenance to the child cannot be cancell  
1939 Rang 314 (315) : 1939 Rang L R 741  
Jour 827.

[6] Civil Court decree that the relationship and wife does not exist would be a proper cancellation of an order for maintenance. 276 (289, 290) (DB).

[7] Civil Court decree that the relation and child does not exist would be a proper cancellation of an order for maintenance. Oudh 113 (114) : 16 Cri L Jour 609.

[8] Mere pendency of a civil suit in maintenance is no ground against the order for maintenance. (Vol 17) 1930 I 31 Cri L Jour 770.

[9] Proceedings under S. 488 may be a mode of disposal of the civil suit. (Vol 19) 1932 Sind L R 1 : 34 Cri L Jour 548 (DB).

[10] Magistrate who has passed a se-  
 prisonment under S. 483 (3) cannot cancel  
 merely because the Insolvency Court has i-  
 of protection. (Vol 27) 1940 Mad 967 (968  
 Mad 692 : 41 Cri L Jour 735 (DB)).

[11] Decree against wife for restitution-should normally be refused but where subsequent to decree justifying not returned are proved, order for maintenance made. (Vol 32) 1945 Pesh 53 (54, 55) : 47 Cri L

[12] Previous decree for restitution husband against a claim for maintenance. Rang 111 (111) \* (Vol 7) 1920 Bom 203 / 972 (DB) \* ('10) 11 Cri L Jour 662 (663 Rul 34).

[13] Ill-treatment subsequent to decr  
tion — Maintenance need not be denied.  
All 784 (785) : 25 Cri L Jour 1246 : 45 A

[14] Decree for restitution is no bar  
33 Cri L Jour 748 (749) (Lah).

[15] Decree for maintenance becomes for insolvency of husband—Order under passed. (Vol 17) 1930 Bom 144 (145) : 609 (DB).

7. Revision.— [1] Wrong order p section can be corrected by the High Co (Vol 13) 1926 Sind 270 (271, 272) : 20 27 Cri L Jour 876 (DB).

## Section 490 — Note 1

[1] Different views are held as to  
trate enforcing order of maintenance ca  
grounds besides those specified in the s

or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance, due.

[1882—S. 490: 1872—S. 538.]

Section 490 (*contd.*)

(a) Magistrate must consider whether the order has become unenforceable for any reason. ('47) 1947-1 Mad L Jour 70 (74) & ('97) 19 All 50 (59, 60) (FB). (Overruling (1893) 15 All 143.) & (1900-02) 1 Low Bur Rul 19 (20) & (Vol 8) 1921 Nag 7 (9): 17 Nag L R 92: 22 Cri L Jour 633.

(b) Magistrate can consider unenforceability of the order but not other grounds. (Vol 28) 1941 Rang 247 (249): 1941 Rang L R 403: 43 Cri L Jour 30 & ('03) 25 All 165 (166) & ('97-01) 1 Upp Bur Rul 112 (113).

(c) Magistrate can consider any grounds of objection open to respondent under S. 488 or S. 489. ('94) 1894 Pun Re No. 21 Cr, p. 69 (75) (DB).

[2] It is the duty of the Magistrate to consider any objection raised in the course of the proceedings for enforcement under S. 490. ('06) 3 Cri L Jour 229 (231): 9 Oudh Cas 49 (DB).

[3] This section allows Magistrate who passes order for maintenance to enforce it — Residence of person liable to pay is immaterial. (Vol 22) 1935 Rang 407 (407): 37 Cri L Jour 91: 13 Rang 289.

[4] Party to be proceeded against found within local jurisdiction of another Magistrate—S. 490 gives option to applicant to apply to that Magistrate for enforcement of order. (Vol 28) 1941 Rang 247 (249): 1941 Rang L R 403: 43 Cri L Jour 30 & (Vol 2) 1915 Low Bur 88 (89): 15 Cri L Jour 701: 7 Low Bur Rul 116.

[5] Court making an order for maintenance cannot refuse to enforce it on the ground that the party is outside its jurisdiction. (Vol 15) 1928 Mad 1171 (1172): 52 Mad 77: 29 Cri L Jour 932 (DB).

[6] Second class Magistrate can enforce an order for maintenance though passed by a first class Magistrate, provided the person sought to be proceeded against is found within the jurisdiction of such Magistrate. (Vol 28) 1941 Rang 247 (249): 1941 Rang L R 403: 43 Cri L Jour 30. (It is incorrect to say that the power to enforce an order of maintenance does not necessarily include the power to sentence to imprisonment. ((Vol 22) 1935 Mad 572: 36 Cri L Jour 830, dissented from.)

[7] Magistrate cannot pass an order requiring a party to pay costs. (Vol 26) 1939 Rang 67 (69): 40 Cri L Jour 241.









